Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*

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Professor Stolz suggests that the proposed National Court of Appeals be given obligatory jurisdiction to review state court judgments in federal question cases. The Article briefly describes the history of federal review of state court judgments and presents statistical data on the present workloads of federal courts. Professor Stolz argues that the creation of effective direct review of state court judgments will allow a reduction in collateral attacks of state criminal convictions, provide flexibility in allocating business between the state and federal courts, and promote a healthier federalism.

In response to the increasing problems of the federal courts, scholars and other observers of the judiciary have recently called for revisions in the structure of the federal appellate courts.[1] Last year the Commission on Revision of the Federal Court Appellate System recommended that Congress establish a National Court of Appeals with jurisdiction to hear cases referred to it by the United States Supreme Court or cases transferred to it from the present courts of appeals.[2] Included within the group of cases that could be referred by the Supreme Court were appeals from and petitions for certiorari to the state supreme courts.[3] Under the Commission's proposal the new court

* This Article is based upon a memorandum prepared by the author for the Commission on Revision of the Federal Court Appellate System in January, 1975. The enterprise started as a joint one with Professor Paul Mishkin and the analysis has throughout benefited from his help as well as from the staff of the Commission. The author wishes to acknowledge the assistance of Charles F. Gorder, Jr. in revising the memorandum for publication.

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1. *See, e.g.*, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as THE COMMISSION REPORT]; FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as THE FREUND REPORT]. Much of the pressure for these reforms derives from the Supreme Court's increasing inability to provide adequate guidance to the overburdened courts of appeals. *See, e.g.*, THE COMMISSION REPORT, *supra* at 7-14.

2. THE COMMISSION REPORT, *supra* note 1, at 32-38.

3. *Id.* at 32.

would be required to hear state appeals and render decisions on the merits, but the Supreme Court could authorize the new court to dismiss petitions for certiorari to the state courts,[4] thus terminating the litigation.

This Article assumes that reform will include the creation of a new National Court of Appeals, below the Supreme Court but above the present circuit courts of appeals.[5] Unlike the Commission, however, this Article argues that the new court's jurisdiction with respect to state courts should be similar to the present jurisdiction of the Supreme Court. Its authority to review state court decisions would be limited to cases involving federal questions and would extend only to those decisions that do not rest upon an adequate and independent state ground.[6] This Article proposes, however, that the new court's jurisdiction differ from that of the Supreme Court in one important respect. It should be *obligated* to hear *all* state cases raising a properly presented federal question.[7] Appeal to the Supreme Court would remain available at that Court's discretion.

The role of state courts has not been extensively noticed in proposals to revise the appellate structure of the federal courts. If a new, national court of appeals is created, however, it would be a mistake not to give that court power to review properly presented federal issues

4. *Id.* at 32-33.

5. The literature is substantial and growing, much of it stimulated by THE FREUND REPORT, *supra* note 1. Some of the articles responsive to that proposal are collected in Note, *The National Court of Appeals: A Constitutional "Inferior Court"?*, 72 MICH. L. REV. 290, 291 n.6 (1973). More recently the Advisory Council for Appellate Justice and a special committee of the A.B.A. have also made proposals. *See* Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974). The creation and work of the Commission on Revision of the Federal Court Appellate System have also provoked interest in these problems. THE COMMISSION REPORT, *supra* note 1. There is also a very useful symposium on the subject in 59 CORNELL L. REV. 571-657 (1974), with contributions from Dean Cramton, Professor Rosenberg, Judge Haynsworth, Professor Kurland and Judge Friendly. *See also* the Irvine Lecture recenlty delivered by former Solicitor General Griswold at Cornell University, *Rationing Justice—The Supreme Court's Caseload and What the Courts Do Not Do*, 60 CORNELL L. REV. 335 (1975); H. HART & H. WECHSLER, FEDERAL COURTS 526-73 (2d ed. P. Bator, et al 1973) [hereinafter cited as HART & WECHSLER 2d].

6. The Freund Commission plan iucluded screening of state court decisions for possible resolution by the Supreme Court, apparently without any other authority to review decisions of the state courts. THE FREUND REPORT, *supra* note 1. Judge Haynsworth has proposed a new federal appellate court with jurisdiction over both federal and state criminal cases. Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. (1975). The Rosenberg-Carrington plan also calls for a "searching" review of state criminal convictions and, apparently, a recommendation as to certiorari by a proposed Central Division of the Court of Appeals. *See* Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974).

7. At present the Supreme Court's jurisdiction is largely discretionary. *See* 28 U.S.C. § 1257 (1970).

in the decisions of state courts. Failure to do so would perpetuate the rigidity and wastefulness of the present system of post-conviction review, reduce the flexibility of the judicial system as a whole to apportion work between the federal and state courts, and needlessly reduce the role of the state courts as adjudicators of federal issues.

I

CONSTITUTIONALITY

Before canvassing the merits of giving an intermediate federal appellate court jurisdiction over the state courts, it should be established that it is constitutionally possible to do so. One possible objection might be based on the phrase in article III that there should be "one supreme Court."[8] The Freund Commission's proposal to create a National Court of Appeals to screen cases for the Supreme Court arguably violates this concept, because in substance the lower court would be able to cut off review of its decisions by the Supreme Court.[9] Thus, because there would be more than one court that could have the final word in certain cases, there would be more than "one supreme Court." Whether the Freund Commission intended this is not altogether clear,[10] but the problem could be finessed by providing that the Supreme Court could, in its discretion, review the new court's decisions. In any event, as a matter of history the "one supreme Court" argument is of questionable merit since the first Judiciary Act did not vest appellate jurisdiction in the Supreme Court over all cases that could be heard by the federal courts.[11]

Another objection might be that lower federal courts cannot constitutionally review state court judgments. Congress has never attempted to vest a general appellate jurisdiction over the state courts in any court lower than the Supreme Court.[12] But nothing in article

8. U.S. CONST. art. III, §§ 1-2.

9. *See* Warren, *The Proposed New "National Court of Appeals"*, 28 RECORD OF N.Y.C.B.A. 627-29 (1973). The arguments are developed with full citations in Note, *The National Court of Appeals: A Constitutional "Inferior Court"?*, 72 MICH. L. REV. 290 (1973).

10. Judge Friendly found the Freund Commission Report ambiguous on this point. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 49 (1973) [hereinafter cited as H. FRIENDLY].

11. The big gaps in the first Judiciary Act were created by (1) the escalating jurisdictional amount for appellate review in the Supreme Court ($2,000 in civil actions although the district courts and circuit courts had jurisdiction over cases with a jurisdictional minimum ranging from $50 to $500), Act of Sept. 24, 1789, ch. 20, §§ 12, 21-22, 1 Stat. 79-80, 83-84; and (2) the absence of any provision for appeal from federal courts in criminal cases although there was limited review through habeas. *Id.* at § 14, 1 Stat. 82.

12. *But see* note 22 *infra.*

III suggests that Congress could not do so; indeed, the language of that article plainly suggests that Congress could vest appellate jurisdiction in the "inferior" federal courts.[13] Undoubtedly the Framers did not contemplate a workload that would necessitate the creation of an intermediate appellate court between the state courts and the Supreme Court, but they did contemplate that Congress might use inferior federal courts as appellate tribunals with jurisdiction to review state court decisions on federal questions. Alexander Hamilton suggested that this was perhaps the best alternative open to Congress:

> I perceive at present no impediment to the establishment of an appeal from the State courts, to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the union.[14]

Congress did not adopt this suggestion in the first Judiciary Act. Section 25 vested appellate jurisdiction over the state courts only in the Supreme Court.[15] That power was, of course, challenged in *Martin*

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13. The article provides, in part:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish.
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> . . .
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> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

U.S. CONST. art. III, §§ 1-2. See note 14 *infra.*

14. THE FEDERALIST No. 82, at 516 (H. Lodge ed. 1888) (A. Hamilton). Hamilton reasoned that lower federal court review of state court judgments was constitutional:

> The plan of the convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the Supreme Court." It declares in the next place, that "the JUDICIAL POWER of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish"; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The ouly outlines described for them are, that they shall be "inferior to the Supreme Court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature.

Id.

15. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85-87.

v. Hunter's Lessee[16] by a broad argument that it was inconsistent with the independence of state courts to subject their judgments to appellate review by any federal court, including the Supreme Court. Rejecting that argument, Justice Story found no limitation (apart from the original jurisdiction of the Supreme Court) on the power of Congress to vest appellate jurisdiction in inferior courts over cases within the constitutional grant of federal jurisdiction.[17] The first Judiciary Act did contain a mechanism for lower federal court intervention in state court proceedings for which the Constitution did not expressly provide: removal of specified causes before trial in the state courts to an inferior federal court for trial.[18] Although counsel in *Martin v. Hunter's Lessee* conceded the validity of removal before trial,[19] removal is in many ways more violative of the authority of state courts than is appellate review since it deprives the state trial machinery of the power to make initial fact determinations.[20] Removal to an inferior federal court was nonetheless unchallenged until after the Civil War[21] and has remained a part of the federal judicial structure.[22]

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16. 14 U.S. (1 Wheat.) 304 (1816).

17. We have already seen that appellate jurisdiction is given by the constitution to the supreme court, in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as congress may prescribe.

. . .

But the exercise of appellate jurisdiction is far from being limited, by the terms of the constitution, to the supreme court. There can be no doubt, that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution, in the most general terms, and may, therefore, be exercised by congress, under every variety of form, of appellate or original jurisdiction.

. . .

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court, it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals, in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend *to all cases*," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends." [Emphasis supplied]

Id. at 337-38.

18. *See generally* HART & WECHSLER 2d, *supra* note 5, at 422-23, 1192-94.

19. 14 U.S. (1 Wheat.) at 319-21 (1816).

20. *E.g.*, Tennessee v. Davis, 100 U.S. 257, 295 (1879). As the Court noted in that case, Justice Story treated removal as a form of appellate jurisdiction in Martin v. Hunter's Lessee.

21. Tennessee v. Davis, 100 U.S. 257 (1879).

22. In 1863 Congress provided for removal in certain cases to a circuit court before *or after* judgment in a state court with explicit provision for retrial of the facts and law in the circuit court. Act of March 3, 1863, ch. 81, § 5, 12 Stat. 756-57. That was properly held unconstitutional as violating the seventh amendment with respect to facts tried before a state court jury. The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869). *See also* HART & WECHSLER 2d, *supra* note 5, at 422-23. Although the statute

Lower federal court review of state court judgments by way of habeas corpus has also come to be accepted as routine. As is true of removal, federal habeas corpus is not, in form, appellate review of state court judgments, but the formal distinction between a prerogative writ and appellate review does not hide the obvious truth that a lower federal court reviews and occasionally reverses the decisions of state supreme courts.[23] In sum, lower federal courts are authorized by Congress both to sweep cases out of the state system altogether and to reverse decisions finally reached by even the highest court of a state. In this context, a statute authorizing a new intermediate federal appellate court to review state court decisions in which federal issues are properly presented does not seem so to diminish the inherent dignity of the state courts as to be unconstitutional. Judge Friendly has said that the constitutionality of appellate review of state court decisions by inferior federal courts "has never been doubted."[24] There seems to be no reason to start now.

II

THE ROLE OF STATE COURTS IN FEDERAL QUESTION CASES

It is not easy to review in a few paragraphs the role of state courts as the primary (if not the exclusive) articulators of federal law.[25] This section attempts such a summary as a predicate for the proposition that the crowded docket of the Supreme Court threatens, if it has not already gravely damaged, the Court's capacity to supervise properly the state courts in their performance of this important federal function. It is perhaps easiest to look at the role of the state courts as enunciators of federal law at three historic points: (1) at the time of the first Judiciary Act; (2) in the post-Civil War period; and (3) over the last decade.

A. The First Judiciary Act

The Constitution gave Congress discretion not to create any inferior courts, so that the courts of first instance on all federal questions

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was also applicable to non-jury cases, the Supreme Court declared it "void" and it apparently was not utilized thereafter.

23. The following statement of the Utah Supreme Court indicates that no one is fooled: "However, permission was given to Mr. Pope to renew his petition in the Federal Court after the Utah Supreme Court had made its determination on the matter. In other words, we are given the satisfaction of knowing that that which we do in this matter is of no consequence whatsoever and that the ruling of the Supreme Court of a sovereign state of the Union is subject to the whim of the inferior courts in the Federal system." Pope v. Turner, 30 Utah 2d 286, 289, 517 P.2d 536, 537 (1973).

24. H. FRIENDLY, *supra* note 10, at 11 n.47.

25. HART & WECHSLER 2d, *supra* note 5, at 32-63. *See also* F. FRANKFURTER & J.M. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) [hereinafter cited as FRANKFURTER & LANDIS].

(except those within the original jurisdiction of the Supreme Court) would be state courts. The first Congress, however, chose another approach. In the first Judiciary Act it created a system of lower federal courts. Despite that "transcendent achievement,"[26] however, Congress did not grant the federal trial courts jurisdiction in cases "arising under" federal law, and with few exceptions did not make federal trial court jurisdiction exclusive.[27]

Although Congress did not rely exclusively on state courts as the initial expositors of federal law, it created a scheme that contemplated a heavy role for the state courts. Appeal from the state courts to the Supreme Court was by no means generally available. Apart from the physical difficulty of hearing a Massachusetts case in Washington, section 25 of the first Judiciary Act was not a comprehensive grant of appellate jurisdiction in the Supreme Court over all state court cases involving federal issues. There was no appeal if the state court judgment was in *favor* of the claim of a federal right.[28] The Act reflected primary concern about provincialism in the state courts; hence, it provided for an alternative federal forum for diversity cases,[29] the right of a nonresident defendant to remove a case from a state to a federal court,[30] and access to the Supreme Court if the claim of federal right was denied by the state court.[31] Restricting federal jurisdiction to those instances, however, plainly left an enormous area in which state courts were thought fully competent to articulate federal law.

B. The Post-Civil War Period

The Civil War brought some changes, as did the Circuit Court of Appeals Act in 1891,[32] but the role of the state courts remained large. In 1875 the state courts lost their monopoly of federal question cases as a result of a statute giving federal trial courts general federal question jurisdiction,[33] but the state courts retained competence in such cases since federal question jurisdiction was not made exclusive in the federal courts. The 1875 act vastly enlarged the role of the federal trial courts, which

> [c]eased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for

26. FRANKFURTER & LANDIS, *supra* note 25, at 4.

27. Perhaps the most important grant of exclusive jurisdiction was in federal criminal matters. The history and development of the still relatively few grants of exclusive jurisdiction can be found in HART & WECHSLER 2d, *supra* note 5, at 418-20.

28. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85.

29. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

30. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 79.

31. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85.

32. Act of March 3, 1891, ch. 517, 26 Stat. 826.

33. Act of March 3, 1875, ch. 137, 18 Stat. 470.

> vindicating every right given by the Constitution, the laws, and treaties of the United States. Thereafter, any suit asserting such a right could be begun in the federal courts; any such action begun in the state court could be removed to the federal courts for disposition.[34]

Nevertheless, state court articulation of federal law remained important. The contemporaneous adoption of the fourteenth amendment vastly enlarged the "defensive" use of federal law, particularly against state economic regulatory legislation. Most claims that a state statute violated the fourteenth amendment could be heard only in a state court. The fourteenth amendment's potential for providing minimum procedural guarantees in state criminal cases, although largely undeveloped until recently, was also enforced in the first instance only by the state courts.

The Supreme Court's jurisdiction over state courts remained substantially unchanged until 1914, when Congress enlarged it by granting the Court discretionary jurisdiction to review state court decisions sustaining a claim of a federal right.[35] Obligatory jurisdiction over state court judgments denying a claim of a federal right was sharply restricted in 1916[36] —and it remains restricted today, although the Court has made it clear that plenary review is not obligatory.[37] Discretionary jurisdiction by writ of certiorari over state court judgments in federal question cases, however, remains unchanged.[38]

C. The Last Decade

The statutory structure establishing the Supreme Court's jurisdiction has not changed significantly since the Judges Act of 1925.[39] What has changed (and dramatically) is the workload of the judicial system. Table I attempts to gather such figures as are available with respect to the Supreme Court from 1916 through 1972. As might be supposed, the Court has been fairly constant in its production of full opinions. The number of cases coming before the Court was also fairly constant through World War II, but since then the Court's docket has nearly quadrupled. The causes of this increase are, of course, multiple and need not be discussed here at length.[40] Much is attributable to

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34. FRANKFURTER & LANDIS, *supra* note 25, at 65.

35. The background of the 1914 Act, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, is discussed in FRANKFURTER & LANDIS, *supra* note 25, at 190-98.

36. The Webb Act of 1916, Act of Sept. 6, 1916, ch. 448, 39 Stat. 726, is discussed in FRANKFURTER & LANDIS, *supra* note 25, at 210-14.

37. Today there seems to be little difference between the way the Court handles appeals and petitions for certiorari. HART & WECHSLER 2d, *supra* note 5, at 631-62.

38. 28 U.S.C. § 1257 (1970).

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

40. *See* authorities cited note 1 *supra*.

Table I

U.S. Supreme Court Workload by Source of Case— Federal or State Court

	Docket						Opinions				
Oct. Term	Disposi-tions	State Court	Federal Court	Total	% State Court		State Court[f]	Federal Court	Total[g]	% State Court	
1916							157	180	337	46.6	b
1919							113	171	284	39.8	
1922							103	265	368	28.0	
1925							100	247	347	28.8	
1928											
1931											
**											
1933							Full Opinion				
1936	942	a									
1939	946										
1942	997						34	136	170	20.0	d
1945	1292						25	110	135	18.5	
1948	1424		526	656	1182	44.5 c	37	88	125	29.6	
1951	1207		436	671	1107	39.4	22(10)	68	90	24.4	
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1953	1293		585	616	1201	48.7	19(4)	57	76	25.0	e
1956	1670		634	880	1514	41.9	25(9)	88	113	22.1	
1959	1787		726	915	1641	44.2	17(7)	87	104	16.3	
1962	2327		1069	1092	2161	49.5	38(15)	78	116	32.8	
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1966	2890		1072	1647	2719	39.4	39(31)	80	119	32.8	
1969	3379		1102	2020	3122	35.3	16(10)	76	92	17.4	
1972	3824		904	2557	3461	26.1	23(10)	113	136	16.9	

a. This is the only figure available which probably counts the same thing over time. The figures are from Table I of THE FREUND REPORT which gives as the source the Clerk of the Supreme Court. The numbers represent cases finally acted on during the term. For some unexplained reason the figures are not quite identical with those reported by Law Week in its annual statistical review, although Law Week also gives the Clerk's office as its source. The figure for 1972 is compiled from *Review of the Supreme Court's Work*, 44 U.S.L.W. 3060 (July 29, 1975).

b. These figures are derived from a tablel in FRANKFURTER AND LANDIS, *supra* note 16, Table I at 295. They are *not* directly comparable to the figures below since they include dispositions on the merits without full opinions. They are included here because they are the only available figures on the distribution of the Court's workload in the earlier period based on the court below.

c. These figures come from the Appendix *infra*. From 1948 to 1962 they are based on the yearly notes "The Supreme Court" of the HARVARD LAW REVIEW.

d. These figures come from the statistical summary of the Court's work published in Law Week. *Review of Supreme Court's Work*, 11 U.S.L.W. 3395, 3396 (June 29, 1943), 14 U.S.L.W. 3443, 3444 (June 18, 1946), 18 U.S.L.W. 3019, 3020 (July 5, 1948). Law Week collected them for the purpose of computing a reversal-affirmance average for the court below. That leads to some double counting where one full opinion disposes of several cases from more than one court. Thus the total number of full opinions is somewhat overstated in contrast to the figures below.

e. These figures are from the annual Supreme Court Note of the HARVARD LAW REVIEW for the years represented. What is a "full" opinion is a somewhat arbitrary classification; it is more than a summary disposition on the merits but it includes per curiam opinions of a few pages.

f. The numbers in parentheses represent the number of criminal cases and are included in the state court total.

g. Excluded are cases on the original docket.

the provision of counsel at government expense in criminal cases. There also seems to be a general willingness to appeal cases that was unknown before World War II.[41] Furthermore, there are more people and more complex forms of regulation protective of interests that were less valued earlier, such as civil rights and the environment.

The state court workload has also been increasing, although at a less rapid rate than that of the federal courts. Table II presents figures from the California and the federal courts over the last decade. Both systems show a steady growth at the trial court level, but there has been a much faster growth in recent years in the business of the federal district courts. Even more rapid growth has been taking place in the business of the intermediate appellate courts in both systems. The growth rate of the California and federal courts of appeals were roughly parallel for much of the decade. In the last few years, however, the dockets of the California courts of appeals seem to have stabilized, whereas those of the federal courts of appeals have continued to grow at a rapid rate. The United States Supreme Court's docket (to be distinguished from its opinions) has grown steadily, but at a rate lower than that of the federal courts of appeals. The California Supreme Court's docket, however, peaked in 1969-70 and has been trending downward slightly. It is not known whether the California situation represents the trend in other states[42] nor whether this decline presages a similar slow-down in the federal system.

The inability of the Supreme Court to maintain uniformity among the circuits because of the increase in its workload has been widely noticed in recent years. Obviously, as the universe of cases that might be heard increases while the ability of the Supreme Court to decide cases on the merits remains constant, the capacity of the Supreme Court to control the lower courts—both state and federal—declines. A similar effect has been observed within the larger circuits. As the caseload and the number of judges increase, the "law of the circuit" becomes harder to discern.[43]

41. Carrington, *Crowded Dockets and the Courts of Appeal*, 82 HARV. L. REV. 542, 544-47 (1969).

42. The decline in the absolute number of cases from state courts on the Supreme Court's docket might suggest that the phenomenon is national. But that is a very hazardous projection. The tables in the Appendix *infra*, showing the state from which the appeal (or certiorari) was taken, indicate that the problem is much more complex. Litigants in some states seem peculiarly prone to seek Supreme Court review, while litigants in other states seems peculiarly disinterested. This suggests that the Supreme Court's docket is a very unreliable index of the volume of federal business in state courts.

Nonetheless, the steadiness of the California Supreme Court's docket over the last five years, despite the continued growth of the intermediate appellate courts' business, is puzzling and possibly important.

43. Carrington, *Crowded Dockets and the Courts of Appeal*, 82 HARV. L. REV. 542, 580-96 (1969).

Table II

Business of the Federal and California Courts 1962-63 through 1973-74*

Oct. Term	Fiscal Year	U.S. S. Ct. Dispositions[h]	Federal CA Terminations[i]	U.S. 9th CA Terminations[i]	Calif. S. Ct. Filings[j]	Calif. C.A. Filings[j]	U.S. Dist. Court Terminations[i]	Calif. Superior Ct. Filings[j]
1962 -	63	2,327	5,011	587	1,562**	3,295	93,925	373,190
1963 -	64	2,401	5,700		1,872**	3,872	95,391	396,649
1964 -	65	2,173	5,771		2,569**	4,572	97,556	416,338
1965 -	66	2,665	6,571		2,522**	5,013	96,828	435,895
1966 -	67	2,890	7,527		2,716	5,538	100,522	446,500
1967 -	68	2,946	8,264	919	2,959	6,411	100,222	467,560
1968 -	69	3,117	9,014	1,110	3,322	6,874	105,760	493,631
1969 -	70	3,379	10,699	1,524	3,400	8,039	117,254	507,163
1970 -	71	3,315	12,368	1,725	3,179	8,684	126,145	527,488
1971 -	72	3,651	13,828	1,968	3,238	8,548	143,282	522,256
1972 -	73	3,824	15,112	2,140	3,139	9,186	141,715	532,563
1973 -	74	3,965	15,422	2,551	3,513	9,805	139,159	562,062

Index of Growth Using 1967-68 as the Base Year

Oct. Term	Fiscal Year	U.S. S. Ct. Dispositions	Federal CA Terminations	U.S. 9th CA Terminations	Calif. S. Ct. Filings	Calif. C.A. Filings	U.S. Dist. Court Terminations	Calif. Superior Ct. Filings
1962 -	63	79	61	64	53	51	94	80
1963 -	64	82	69		63	60	95	85
1964 -	65	74	70		87	71	97	89
1965 -	66	90	80		85	78	97	93
1966 -	67	98	91		92	86	100	95
1967 -	68	100	100	100	100	100	100	100
1968 -	69	106	109	121	112	107	106	106
1969 -	70	115	129	166	115	125	117	108
1970 -	71	113	150	188	107	135	126	113
1971 -	72	124	167	214	109	133	143	112
1972 -	73	130	183	233	106	143	141	114
1973 -	74	135	187	278	119	153	139	120

* Notice that the figures for the two court systems are not quite comparable. The figures for the federal courts count dispositions or terminations (file closings). In contrast, the California court figures are for filings and thus represent the opening of a file. The difference should not be material in reflecting relative change over time.

h. These are the number of cases disposed of or terminated during that term of Court as reported by the Clerk of the Supreme Court. See the note to Table III *infra*. The figures reported here are those from Table I *supra*.

i. These figures are from the Annual Report of the Administrative Office of the United States Courts. Note that they are reported on a fiscal year basis. *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 179, 183, 202, 277 (1974); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 177 (1968); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 185 (1963).

j. These figures are from the ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 69, 72, 82 (1975) and ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 11, 15, 21 (1966).

** The figures for these years inflate somewhat the workload of the California Supreme Court. Before a constitutional amendment in 1966, cases could be appealed directly to the Supreme Court, but that Court routinely transferred all but a few cases for initial appellate consideration by a court of appeals. Cases so transferred nonetheless show up as filings for the California Supreme Court.

Table III

U.S. Supreme Court Dispositions

Oct. Term	Fiscal Year	Supreme Court Dispositions[k]	Fed. CA Certiorari Petitions Disposed of[l]	Non-Fed. CA Dispositions	% Non CA Dispositions	State Court Percent[m]
1951	52	1207	610	597	49.5	39.4
1952	53	1278				
1953	54	1293	563	730	56.5	48.7
1954	55	1352				
1955	56	1630				
1956	57	1670	819	851	51.0	41.9
1957	58	1765				
1958	59	1763				
1959	60	1787	838	949	53.1	44.2
1960	61	1911				
1961	62	2142				
1962	63	2327	999	1328	57.1	49.5
1963	64	2401				
1964	65	2173				
1965	66	2665				
1966	67	2890	1369	1521	52.6	39.4
1967	68	2946				
1968	69	3117				
1969	70	3379	1966	1413	41.8	35.3
1970	71	3315				
1971	72	3651	2163	1482	40.6	31.2
1972	73	3824	2451	1370	35.8	26.1

Footnotes to Table III

The Supreme Court keeps its records based on the term of Court which starts October 1 and usually ends in June. Cases filed after the conclusion of the term are reported as filed in the October term of that year which may result in some discontinuity with the Administrative Office which keeps records on a Fiscal year basis, July 1 to June 30.

k. These are the number of cases disposed of or terminated during that term of Court as reported by the Clerk of the Supreme Court. The figures reported here are those from the sources cited in Table I *supra*.

l. These are the total of certiorari petitions from the courts of appeals disposed of during the fiscal year (i.e., granted, denied, or dismissed) as reported in DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Table B-2, for the term cited.

m. These figures are from the Appendix *infra*.

Because this Article deals with the function of state courts as deciders of federal questions, it would be helpful to know whether the number of cases involving federal questions that state courts (at any level) are deciding is increasing. Unfortunately, that kind of statistic seems to be unavailable.[44] One might suppose that inferences could be drawn from shifts in the state court workload of the Supreme Court. But even that statistic has not been officially counted[45] and has to be painfully reconstructed from published docket entries. Recently Professors Casper and Posner have gone through that sort of process using as their source for analysis the one-paragraph descriptions of cases published in *Law Week*. *Law Week*, however, covers only the cases in which the filing fee at the Supreme Court was paid; it excludes the in forma pauperis cases.[46]

Table IV uses the data Professors Casper and Posner collected. It shows that the percentage of state court cases on the paid docket has increased slightly from 1957 and 1958 to 1971 and 1972, from roughly 25 percent of the docket to 30 percent. The growth has been concentrated in the state criminal cases; state civil litigation as a percentage of the paid docket has held steady or declined slightly. In contrast, the data presented in the Appendix, based on the total docket (both paid and in forma pauperis cases) for four terms, indicate that both the absolute number and the percentage of state cases have actually declined. Most of that decline is attributable to a decrease in the

44. State court authorities do not, at either the trial or appellate level, count separately cases in which a federal issue is raised. The range of federal claims that might be asserted in a state court, especially in criminal cases, has undoubtedly increased in the last 10 to 20 years. Of course it does not follow that they are in fact asserted or that a large number survive the appellate process in a form in which the federal issue is potentially decisive. The number of FELA and Jones Act cases in the state courts are probably stable or declining since these cases are declining in the federal courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 173, at 128. Preemption claims are perhaps more frequent as substantive federal law has grown into areas formerly left solely to state control. The latter may be counterbalanced by increasing assertion of federal rights through declaratory actions in the federal courts and by the growth of cases under 42 U.S.C. § 1983 (1970) in the federal district courts.

What does seem certain is that the business of the state courts has grown substantially, although probably not as rapidly as that of the federal courts. It is also clear that the heavy volume of litigation remains in the state courts. Each year the superior courts of California (which handle felony cases and civil cases over $5,000) do three to four times the business of *all* the federal district courts. See Table II *supra*.

45. Table III *supra* confirms the data summarized in the Appendix *infra*. It is extraordinary that no reliable figures exist that break down the docket of the Supreme Court based on the court below. For some years the HARVARD LAW REVIEW did this, but they stopped in 1962. The author is advised that the Clerk of the Supreme Court is now starting to count cases in this manner. For the October Term 1973, the percentage of state cases was 26.5 (1111 cases out of a total of 4178), which also confirms the data in the Appendix.

46. Now the 5000 series; formerly the Miscellaneous docket.

Table IV

Analysis of the Appellate ("Paid") Docket of the Supreme Court

	Terms of Court[n]							
	1957 & 1958	1959 & 1960	1961 & 1962	1963 & 1964	1965 & 1966	1967 & 1968	1969 & 1970	1971 & 1972
Total Appellate ("paid") Docket	1746	1757	1900	2060	2427	2644	3097	3474
Total Federal Cases	1298	1274	1357	1472	1679	1799	2168	2431
Total State Cases	448	483	543	588	748	845	929	1043
State Criminal Cases	117	170	198	217	334	393	444	496
State Civil Cases	331	313	345	371	414	452	485	547
State/Local gov.	194	191	195	228	258	273	295	354
State Private	137	122	149	143	155	178	188	193
Federal Cases as % of Total Appellate Docket	74.3	72.5	71.4	71.5	69.2	68.0	70.0	70.0
State Cases as % of Total	25.7	27.5	28.6	28.5	30.8	32.0	30.0	30.0
State Crim. as % of Total	6.7	9.7	10.4	10.5	13.8	14.9	14.3	14.3
State Civil as % of Total	19.0	17.8	18.2	18.0	17.1	17.1	15.7	15.7
State/Local gov. as % of Total	11.1	10.9	10.3	11.1	10.6	10.3	9.5	10.2
State Private as % of Total	7.8	6.9	7.8	6.9	6.4	6.7	6.1	5.6
	Using 1963-4 as Index							
Total Appellate Docket	85	85	92	100	118	128	150	169
Total Federal Cases	88	87	92	100	114	122	147	165
Total State Cases	76	82	92	100	127	144	158	177
State Criminal Cases	54	78	91	100	154	181	205	229
State Civil Cases	89	84	93	100	112	122	131	147
State/Local gov.	85	84	86	100	113	120	129	155
State Private	96	85	104	100	108	124	131	135

Source: Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 350-51, Tables 6, 7 and 8 (1974).
n. Pairs of Terms

Table V

Analysis of the Supreme Court's Docket By the State Court of Origin

STATE

	Term	CA	NY	PA	TX	IL	OH	MI	NJ	FL	MA	IN	NC	MO	VA	GA	WI	TN	MD	MN	LA	Remaining 30	Total
Total	1966	243	144	25	58	60	44	13	28	58	8	11	10	16	19	18	23	15	20	9	17	233	1072
State	1969	256	123	27	35	80	53	26	40	55	7	13	9	14	23	22	14	8	26	12	24	237	1104
Cases	1971	165	111	22	44	63	71	29	42	41	14	9	26	19	31	31	18	20	43	4	31	251	1085
	1972	153	70	28	43	69	65	5	28	39	9	12	29	14	26	13	7	20	36	5	24	209	904
Total	1966	157	95	11	31	38	20	6	15	34	3	9	6	3	12	10	13	12	8	5	8	128	616
State	1969	158	85	13	21	49	24	12	28	27	5	7	7	12	12	4	6	3	13	6	7	120	619
Crim.	1971	98	67	16	25	27	44	19	29	23	11	5	21	9	23	16	9	17	28	2	20	153	662
Cases	1972	79	39	12	25	42	33	4	19	20	4	8	23	7	17	4	4	14	25	2	12	95	488
Total	1966	86	49	14	27	22	24	7	13	24	5	2	4	13	7	8	10	3	12	4	9	113	456
State	1969	98	38	14	14	31	29	14	12	28	2	6	2	2	11	18	8	5	13	6	17	117	485
Civil	1971	67	44	6	19	36	27	10	13	18	3	4	5	10	8	15	9	3	15	2	11	98	423
Cases	1972	74	31	16	18	27	32	1	9	19	5	4	6	7	9	9	3	6	11	3	12	114	416
	Percent of 1970 pop.	10	9	6	6	5	5	4	4	3	3	3	2	2	2	2	2	2	2	2	2	24	100
Percent	1966	23	13	2	5	6	4	1	3	5	1	1	1	1	2	2	2	1	3	1	2	21*	100
of	1969	23	11	2	3	7	5	2	4	5	1	1	1	1	2	2	1	1	2	1	2	23	100
Total	1971	15	10	2	4	6	7	3	4	4	1	1	2	2	3	3	2	2	4	0	3	22	100
	1972	17	8	3	5	8	7	1	3	4	1	1	3	2	3	1	1	2	4	1	3	23	100
Percent	1966	26	15	2	4	6	3	1	2	6	0	1	1	1	1	1	2	2	2	1	1	22	100
of	1969	26	14	2	3	8	4	2	5	4	1	1	1	2	2	1	1	0	2	1	1	19	100
Total	1971	15	10	2	4	4	7	3	4	3	2	1	3	1	3	2	1	3	4	0	3	5	100
Crim.	1972	16	8	2	5	8	7	1	4	4	1	2	5	1	3	1	1	3	5	0	2	21	100
Percent	1966	19	11	3	6	5	5	1	3	5	1	0	1	3	1	2	2	1	3	1	2	24	100
of	1969	20	8	3	3	6	6	3	2	6	0	1	0	0	2	4	2	1	3	1	4	25	100
Total	1971	16	10	1	4	9	6	2	3	4	1	1	1	2	2	4	2	1	4	0	3	24	100
Civil	1972	18	7	4	4	6	8	0	2	5	1	1	1	2	2	2	1	1	3	1	3	28	100

* Percentage rounding adjusted on "Remaining 30."

number of criminal cases. The obvious explanation for these divergences is that the size and composition of the in forma pauperis docket has been shifting in the opposite direction from the paid docket. One possible explanation for the increase in state criminal cases on the paid docket is that some of the people who formerly filed in propria persona are now paying the filing fee.

Further analysis of the data in the Appendix, however, makes the matter a good deal more mysterious. Table V shows what the courts of the 20 most populous states contributed to the total docket of the Supreme Court. Almost all of the decline noted above is attributable to two states, California and New York. Furthermore, there is a profound difference in the productivity of the various states. California and Florida produce Supreme Court litigation far in excess of their representation in the population; Pennsylvania, Michigan and Minnesota are even more dramatically underrepresented. No one has suggested a plausible explanation for this phenomenon. It does suggest the need for extreme caution in treating state courts as essentially fungible contributors to the Supreme Court's docket; there may well be as much difference between the various state courts as there is between the state and federal courts. Moreover, state courts can be moving in opposite directions at the same time (for example, as California's contribution declines, Ohio's increases), so that generalization from total figures is very hazardous. The one generalization that seems safe is that shifts in the criminal docket are not the controlling element; a state productive of criminal cases will be about equally productive of civil cases.

Lacking figures that can be regarded as much more than suggestive, one is reduced to operating on unprovable but at least plausible assumptions. That the business of the state courts has grown over the last 10 to 15 years at a rate at least as rapid as that for the population would seem to be a conservative estimate since the forms of legal regulation have increased faster than the population has grown. It would also seem conservative to suppose that the percentage of cases in the state courts presenting a potentially dispositive federal issue has at least remained constant. If those two assumptions are accepted, it follows that the universe of cases that might reach the Supreme Court for decision has been growing although, especially in recent years, the number of state cases on the docket has not.[47] The most probable explanation for this development is that lawyers are not filing cases with the Court because they recognize that the Court is so unlikely to hear the case that the effort is unprofitable. For the same reason it may be true that lawyers are no longer shaping cases from the outset to present a dispositive federal issue.

47. See the Appendix *infra*.

In any event, what is clear is that the Supreme Court is far less likely than it was 10 or 20 years ago to decide a case begun in the state courts. This situation is scarcely surprising given the steady and substantial increase in the volume of federal court cases appearing on the Court's docket. State court cases represented substantially more than 40 percent of the Supreme Court's docket during most of the terms between 1950 and the early 1960's;[48] the proportion dropped below 40 percent at the end of the 1960's and in the most recent years (October terms 1972 and 1973) it fell to 26 percent.[49] Looking at full opinions by the Court, a comparable decline in cases begun in a state court can be observed, especially in civil cases. The effect is unmistakable: federal questions in state courts are being finally resolved by state courts. It is not possible today for the United States Supreme Court to maintain more than token supervision of the resolution of federal law questions by the state courts.[50]

D. Responses to the Lack of Supreme Court Supervision

The lack of effective supervision over state courts in their enforcement of federal law is much riskier than is the de facto final lawmaking power of the federal courts of appeals, which has also derived from the increase in the Supreme Court's docket. Numerous intangible forces tend to make federal judges loyal to the influence as well as the command of the Supreme Court.[51] For example, federal judges hold lifetime tenure, rotate among each other on panels,[52] meet annu-

48. See Table III *supra.*

49. *Id.*

50. In an attempt to verify this statement, a questionnaire was sent to approximately 12 judges of the high courts of various states. The judges were selected because they had served at least a decade on an important state court. In general, most thought the assumptions stated in the preceding paragraph were plausible (although they had no statistical data to support that impression), but a few felt that their court was being inadequately supervised on federal questions by the United States Supreme Court. A number of the judges made the important point that their court was increasingly tending to make constitutional decisions turn on cognate provisions of the state constitution rather than on the federal constitution, thus cutting off federal review in those cases where the decision supported a claim of right under both the state and federal constitutions. To the extent that this is a new development it operates to reduce the need for federal appellate review of state court decisions. The questionnaire was sent out by the Commission on Revision of the Federal Court Appellate System; the results were explicitly made confidential and have not been published.

51. *Cf.* Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525 (1958).

52. Intercircuit visiting is common, especially by senior circuit judges; also, district judges often sit on assignment at the court of appeals level. Current figures measuring the frequency of visiting judges are seemingly unavailable. Earlier data are available in Shafroth, *Survey of the United States Courts of Appeals,* 42 F.R.D. 243 (1967). Three-judge district courts, although their continuation in the statutes seems threatened, also serve to bring judges into contact with each other outside of their normal working pattern.

ally at circuit conferences, and many serve on committees of the Judicial Conference. Furthermore, despite the recent increase in their number, there are still fewer than 100 authorized positions on the courts of appeals.[53] In contrast, there is relatively little beyond the constitutionally required oath that binds the more than 200 state supreme court judges to the United States Supreme Court.[54] Most state judges do not have lifetime tenure and many must rely on local political forces for continuation in office. Their professional contacts focus inward toward their own state court colleagues, although some organizations that bring judges of different states into contact have recently emerged.[55]

If every decision of the United States Supreme Court were politically popular, this problem would not be so serious, but the reality is inevitably otherwise. At times political advantage can be obtained by resisting the Supreme Court, either with respect to a specific case or doctrine or through a generalized lashing-out at the Court. It is to the credit of the professionalism of state court judges that they have so infrequently indulged in insubordination, but one would be blind not to recognize their power to subvert, a power enormously compounded in this context by the ease with which a result can be made to turn on some issue of state law rather than on the federal question that was presented.

The inability of the Supreme Court to review more than a handful of state court decisions presenting a federal question and the ease with which a federal issue can be protected from appellate review by a hostile state judiciary are, at least in part, responsible for the development of federal habeaus corpus for state prisoners. The story is long and complex and need not be developed here at length.[56] It can be summarized somewhat pragmatically. Starting early in the 1950's and through at least the 1960's, the Supreme Court established standards of fair criminal procedure applicable to the states through the fourteenth amendment. The decisions were broadly applicable to many

53. There were 97 authorized court of appeals judgeships and 400 authorized district court judgeships in fiscal year 1972. There are always, of course, a few unfilled positions, but this is more than compensated for by senior judges who carry a substantial workload. Altogether, there were 652 federal judges on the rolls in fiscal year 1972 (presumably including active and retired Justices of the Supreme Court as well as judges on specialized courts such as the Court of Claims). ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1972, at 217.

54. U.S. CONST. art. VI.

55. *See, e.g.*, THE COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES (1968).

56. *See generally* HART & WECHSLER 2d, *supra* note 5, at 1424-514.

kinds of criminal cases;[57] compliance was frequently expensive to local government and, if effected in some notorious cases, was likely to engage the emotions of a society already preoccupied with crime. Direct review by the Supreme Court of the criminal conviction in a state court was a tolerably effective mechanism for declaring new constitutional doctrine; but, for essentially two reasons, it would not do as a means for enforcing the new law on a sometimes reluctant state judiciary: (1) there were too many cases; and (2) it was too easy to hide rejection of the constitutional claim behind state procedural law.

Building slowly out of some questionable history,[58] the Court evolved the current system of federal post-conviction review of state criminal convictions. Reduced to essentials, the system may be described as follows: a state prisoner who thinks his trial was infected with federal constitutional error may seek certiorari from his state conviction.[59] The Supreme Court will almost certainly deny the petition. If the prisoner presented the constitutional issue through the appellate courts of the state on direct review,[60] he may proceed immediately to the federal district court on habeas corpus. That court may, and in some circumstances must,[61] afford him an evidentiary hearing on his constitutional claim. The fact, if such it be, that the state supreme court did not consider the prisoner's claim on direct review because of an intervening state procedural issue does not bar the federal district court from considering the claim.[62] However the federal district court resolves the matter, the case may then be appealed to the appropriate court of appeals, and from there by certiorari to the Supreme Court.[63]

This system meets many of the problems created by the inability of the Supreme Court adequately to review state judgments. The problem of volume is handled by using federal district judges as a screen with power to upset a state criminal conviction. The problem of an adequate, independent ground of state law is circumvented through a doctrinal tour de force that somehow invests a district court

57. Some decisions applied generally to criminal trials (*e.g.*, the right to counsel). Others related only to specific kinds of evidence (*e.g.*, confessions) or were applicable only to certain kinds of cases (*e.g.*, cases involving the death penalty).

58. *See* Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

59. At one point an effort to seek certiorari was required, Darr v. Burford, 339 U.S. 200 (1950), but the Court removed that requirement in Fay v. Noia, 372 U.S. 391 (1963).

60. If he did not, he must first present that issue through such post-conviction procedures as state law provides. This requirement for the exhaustion of state remedies is now reflected in 28 U.S.C. § 2254 (1970).

61. Townsend v. Sain, 372 U.S. 293 (1963). *Townsend* has since been codified in 28 U.S.C. § 2254(d) (1970).

62. Fay v. Noia, 372 U.S. 391, 399 (1963).

63. 28 U.S.C. §§ 2253, 1254(1) (1970).

with more power than the Supreme Court would have on direct review.[64] But the system has costs as well, costs that today strike many as exorbitant.[65] In addition to creating intolerable delays in the finality of criminal convictions, it adds a substantial burden to the business of the inferior federal courts whose overcrowded dockets are already a cause for alarm.

This process reveals the essential truth of Hamilton's observation that the state and federal courts are parts of "ONE WHOLE" system.[66] As the volume of business in the federal trial courts increases, the capacity of the Supreme Court to review state court judgments declines, and that renders less effective the Supreme Court's appellate review of state courts. The result of these developments is expansion of federal trial court jurisdiction to protect the federal interests involved, and that expansion leads to an increase in the workload of the inferior federal courts.

The Supreme Court is the only federal court whose jurisdiction has ever been significantly *reduced*. The Judges Act of 1925[67] openly recognized the reality that the Justices' time and energy was a limited resource that had to be conserved if it was to be used effectively.[68] It is being recognized that there are also limits on the growth of the lower federal courts; simply adding judges to handle an increased workload has costs that many think unacceptable.[69] One obvious way to deal with this problem is to reduce the jurisdiction of the district courts, in effect, by transferring part of the workload to the state courts. This proposal is not just borrowing from Peter to pay Paul because state court systems have always carried a much larger volume of cases than have the federal courts. Filings in the federal district courts in California, for example, are about 3.8 percent of the filings in the California superior courts[70]—and the superior court does not handle misdemeanors, parking offenses, or civil cases below $5,000. Moving even half of the load of the federal courts to the state courts would not add

64. *See* HART & WECHSLER 2d, *supra* note 5, at 1482-87.

65. The collected literature and a useful empirical study of the effect on one district court can be found in Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973). Professor Shapiro's study suggests that the raw number of cases vastly overstates the workload, but it also indicates there are serious uniformity problems in using district judges to perform an essentially appellate role.

66. THE FEDERALIST No. 82 (A. Hamilton) (his capitals).

67. Act of Feb. 13, 1925, ch. 229, §§ 237-40, 43 Stat. 936.

68. *See* HART & WECHSLER 2d, *supra* note 5, at 41.

69. *See* THE COMMISSION REPORT, *supra* note 1, at 2.

70. *Compare* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE FEDERAL COURTS 1973, at 122, 195, *with* JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 185 (1973).

significantly to the workload of the state courts—and, in any event, a shift of that dimension is not contemplated.

Most of the reform proposals that have been seriously pushed have involved removing from federal court jurisdiction (thus transferring to the state courts) matters other than federal question litigation, most notably cases based upon diversity of citizenship.[71] The implicit assumption, apparently, is that if a subject is important enough to be the object of congressional legislation it is automatically important enough to justify inclusion in the workload of the federal courts. Given the historical fact that state courts have always decided federal questions, it may be worth asking why it has been so easily assumed that federal rights must be triable in the first instance in federal trial courts. Probably this reflects a persistent doubt that state court judges can be trusted with power over matters that are, virtually by constitutional definition, of national concern. In the early days the chief concern was bias against out-of-staters; more recently, the concern has been that state court judges lack sympathy for the substantive content of federal law.

Two mechanisms have been used as checks against uneven application of federal law by state court judges: (1) giving some described class of litigants the alternative or choice of trying their cause from the outset before a federal judge;[72] or (2) providing for appellate review of the state court judgment by the Supreme Court.[73] It should not be supposed that the two are equivalent; providing a federal trial forum is more protective of the federal interest and, though vastly more expensive, it is more effective in assuring the even-handed and uniform application of federal law. Appellate review by the Supreme Court is a weak substitute. It leaves the critical function of fact-determination largely in the hands of state court judges (or juries) whose supposed bias or predisposition is the cause for concern; it is only available to those litigants who can afford the expense of the full gamut of appeals; and it works only when the state court rests its decision on the federal question. Nonetheless, appellate review by the Supreme Court

71. The most elaborate, of course, was the ALI study, ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter cited as ALI STUDY]. One of its major proposals, and probably its most controversial, was to restrict the diversity jurisdiction of the federal courts. That proposal would remit many cases for trial in the state courts but, unlike restrictions on federal question jurisdiction, would not leave open the possibility of appeal to the Supreme Court if no federal question were presented. Judge Friendly's recent book, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973), makes several proposals to meet the problems of the courts of appeals by restricting district court jurisdiction. In addition to eliminating diversity, he would remit seamen and railway workers to an administrative remedy.

72. *See, e.g.*, 28 U.S.C. §§ 1441-51 (1970).

73. 28 U.S.C. § 1257 (1970).

was a meaningful check until recently because the Court was able to review the application of federal law by state courts in a systematic manner. Today, given the pressure on the Court's docket of cases from federal courts, there is no longer room for supervising the application of federal law in state courts except in an occasional and almost random manner. Thus, it is impossible to argue, as might have been done earlier, that discretionary appellate review by the Supreme Court will protect the federal interest in uniform application of federal law by state courts. If that be accepted, and the federal interest is genuine (as it must be for Congress to have acted), the pressure seems irresistible to maintain the present scope of federal trial court jurisdiction. Hence, those who would relieve the overload of the inferior federal courts by restricting district court jurisdiction are embarrassed by an inability to answer critics who see legitimate federal interests and doubt the willingness of state courts to recognize these interests in the absence of realistic supervision.

If this analysis is correct, the key to reform (or at least an important prerequisite) is the creation of federal appellate review of state court decisions in federal question cases which provides a real check. That cannot be done at the Supreme Court level because the Court lacks the capacity to handle such a load. But it would be possible to give a lower federal appellate court jurisdiction over state decisions, thereby reducing the pressure to maintain and expand federal trial court jurisdiction.[74] Appellate review by a federal court is a poor second to initial trial before a federal judge as a means for insuring the even-handed and uniform application of federal law. Continued reliance on full-scale trials before federal courts is an unrealistic alternative, however, because it would inevitably lead to pressures for a dramatic increase in the number of federal district court judges.

III

THE ADVANTAGES OF REVIEW OF STATE COURT DECISIONS BY A NEW FEDERAL APPELLATE COURT

However the structure of the federal appellate courts is reformed, the plan will be shaped principally by the needs of the federal courts. Thus, whether the existing circuits should be merged into a single court with multiple divisions or a new court created above the existing regional court of appeals is outside the scope of this Article. Nevertheless, it is proper to canvass the advantages and disadvantages of including appellate review of state courts within the new system. Two advantages are obvious and, in substantial part, are the reciprocal of what

74. See text accompanying notes 58-66 *supra*.

has already been discussed: (1) revision of collateral attack of state criminal convictions; and (2) flexibility in the distribution of business between state and federal courts. A third benefit, more subtle and perhaps questionable, is the promotion of a more vigorous concept of federalism.

A. Reform of Habeas Corpus

Judge Haynsworth has proposed the creation of a new federal appellate court with power to review state criminal convictions for conformity with federal law, principally, of course, in the area of constitutional standards of due process.[75] The Haynsworth plan is essentially identical to that proposed here: by making direct review meaningful, it should be possible to restrict the scope of collateral attack to those claims that could not have been presented on appeal. Since the Supreme Court cannot provide meaningful direct review, a new court with an obligatory jurisdiction would be inserted, with the Supreme Court retaining power to review cases heard by the new court in order to insure that doctrine remains consistent with the Court's conceptions. A new court—with new judges and jurisdiction—would be expensive, but there would be substantial benefits since the district courts and the courts of appeals would be relieved of nearly equivalent burdens on their dockets. Furthermore, matters would come to an end much sooner, a value of immense importance to the fair and possibly constructive administration of punishment.

Providing federal appellate review of state convictions would not solve all problems immediately, and is not without costs. It would continue and perhaps aggravate what some regard as an excessive preoccupation with procedural niceties and police regularity at the expense of concern for innocence or guilt.[76] The doctrinal development of federal habeas corpus since *Brown v. Allen*[77] has been complex, and statutory revision must be guided by the constitutional provision against suspension of the Great Writ.[78] Nonetheless, obligatory federal appellate re-

75. Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974). An earlier proposal along similar lines was suggested by Mayers, *Federal Review of State Convictions: The Need for Procedural Reappraisal*, 34 GEO. WASH. L. REV. 615 (1966).

76. *See* Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142 (1970). Judge Friendly's title is more supportive of the statement in the text than the content of his article. There is, nonetheless, something odd about a system of post-conviction review that will not entertain what, to laymen, must seem the most powerful of all possible grounds: namely, that the conviction is wrong because the petitioner in fact committed no crime.

77. 344 U.S. 443 (1953).

78. U.S. CONST. art. I, § 9. *See* HART & WECHSLER 2d, *supra* note 5, at 1510-14.

view of state convictions would undoubtedly permit development of rules tending to foreclose repetitive petitions for habeas by applying doctrines analogous to res judicata to issues that were or might have been raised on direct review.

What is perhaps more important is that the law has changed since 1953 and *Brown v. Allen*. Because state defendants now have counsel at their trials, and because a lawyer and a transcript of the testimony are provided at public expense for purposes of appeal, the number of colorable claims of constitutional error that cannot be established (or refuted) by examination of the record should have fallen sharply. Thus, the need for an independent federal evidentiary hearing is now a relative rarity in most states. Moreover, many states provide a fully adequate post-conviction procedure to establish claims that can only be proved outside the record.

The adequate and independent state ground problem would remain troublesome; there is an unclear number of federal claims which cannot be reached on direct review but which are cognizable upon habeas corpus.[79] The problem would be a major one for the new court, but one that might very well diminish over time as state courts became accustomed to more than an episodic review of their criminal decisions.

B. Flexibility in the Reallocation of Business Between State and Federal Courts

There are differing views as to whether the problems of the courts of appeals can be solved without a substantial restriction on the jurisdiction of the district courts.[80] It is beyond the scope of this Article to enter into that debate. Clearly reduction of the federal question jurisdiction of the district courts will not come easily without a new level of appellate review of state court decisions.[81] It may be useful to list, without necessarily advocating, some possible reforms in order to illustrate the range of alternatives that a new level of appellate review might make politically acceptable.

Judge Friendly has urged that FELA actions be taken out of the federal courts and that a workmen's compensation scheme be substituted.[82] Much can be said both for and against a compensation scheme instead of tort recovery as a means of protecting against industrial acci-

79. Henry v. Williams, 299 F. Supp. 36 (N.D. Miss. 1969), seems to prove the existence of the gap. *See generally* HART & WECHSLER 2d, *supra* note 5, at 557-62.

80. *Compare* Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974), *with* Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

81. See text accompanying notes 71-74 *supra*.

82. H. FRIENDLY, *supra* note 10, at 129-31.

dents.[83] But it does not follow that if railroad unions are opposed to a compensation scheme they should be able to insist that their members be allowed to sue in the federal courts. FELA plaintiffs are now permitted to sue in state court,[84] and no *legal* barrier stands in the way of making that state court jurisdiction exclusive.[85] There is a good *political* argument against exclusive state jurisdiction, however, because state court enforcement may be uneven. No practical method exists by which the Supreme Court can effectively monitor all state courts via appellate review.[86] This political argument would fall, or at least be greatly diminished, if a new federal court could and would review state court decisions in FELA actions.

FELA actions are obvious targets for reform because Congress has not only given state courts jurisdiction of suits under that act, but has also prohibited removal of such suits to the federal courts.[87] Thus, if the plaintiff chooses a state court, the defendant is compelled to accept a state court trial. Making state court jurisdiction exclusive would limit the plaintiff's choice as the defendant's power is now limited. What is more important, however, is that the prohibition on removal demonstrates the weakness of the federal interest in FELA actions. There is no reason to suppose that state courts will be systematically biased in the trial of FELA actions that resemble routine personal injury trials in the state courts; and should any such bias exist, it can probably be corrected by appellate review.

There are other kinds of federal claims that might be shifted for trial to the state courts. The Fair Labor Standards Act authorizes suits in the state courts to recover damages for failure to pay the minimum wage.[88] Injunctive suits brought by the Secretary of Labor to compel future compliance may be brought only in the federal courts,[89] but civil suits brought either by employees themselves or in the name of the Secretary for their benefit may be brought in state courts.[90] Why not make state court jurisdiction of damages actions exclusive? The major concern today is to insure that judgments in the state courts are correct

83. *See* Frank, Book Review, 59 A.B.A.J. 466 (1973).

84. 45 U.S.C. § 56 (1948).

85. *See* Testa v. Katt, 330 U.S. 386 (1947).

86. This is the burden of Justice Frankfurter's dissent in Rogers v. Missouri Pacific R.R., 352 U.S. 500, 527 (1957); the Court's departure from that practice in that case, if such it was, evoked considerable protest. *See* HART & WECHSLER 2d, *supra* note 5, at 1625-29.

87. 28 U.S.C. § 144-5(a) (1970). The same argument can be made as to suits against common carriers under the Carmack Amendment, 49 U.S.C. § 20(11) (1970), which also may not be removed if less than $3,000 is involved. 28 U.S.C. § 1445(b) (1970).

88. 29 U.S.C. § 216(b) (1970).

89. *Id.* at § 217 (1970).

90. *Id.* at § 216(c) (1970).

and uniform. That concern would largely be met by creation of an appellate review system that would reach and decide cases in which error was claimed.[91]

A more radical suggestion would be to transfer some of the federal criminal load of the district courts to the states. The observation that much of the criminal jurisdiction of the federal courts is duplicative of the states is scarcely original,[92] and one way to transfer the load of Dyer Act[93] cases, prosecution of crimes on federal enclaves,[94] or bank robbery prosecutions would be to encourage by rule or otherwise the nonprosecution of some of those cases by the United States Attorney.[95] A transfer of federal criminal cases could be accomplished more directly by providing either by statute or at the discretion of the United States Attorney for federal prosecution of federal crimes in the state courts. Although the idea sounds strange, it is not unknown historically; since *Testa v. Katt*[96] its constitutionality seems clear.[97]

There are serious arguments against each of these proposals. The point here is not to urge their adoption, but rather to encourage their consideration as viable policy alternatives. For the most part they are unacceptable today because of the absence of any realistic check on the uniform and fair application of federal law. As to any one of them appellate review might seem inadequate, so that the only satisfactory method of protecting the federal interest involved remains initial trial before a federal judge. As to those for which appellate review would seem sufficient, however, if the change were made a substantial burden could be lifted from the workload of the inferior federal courts.

C. *Toward a More Vigorous Federalism*

1. *Abstention*

The abstention doctrine is inordinately complex.[98] The essential

91. Appellate review from the state courts to the existing courts of appeals is, of course, a possibility today. The best argument against that plan is that those appellate courts are already overwhelmed.

92. *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948).

93. 18 U.S.C. § 2312 (1970) (interstate auto theft).

94. Trial in state courts here is peculiarly attractive to the extent that the prosecution charges a crime under the Assimilative Crimes Act, 18 U.S.C. § 13 (1970), because the law to be applied in those cases is state law.

95. *See* Schwartz, *supra* note 92. *See also* H. FRIENDLY, *supra* note 10, at 55-61.

96. 330 U.S. 386 (1947).

97. Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966 (1947); *see also* HART & WECHSLER 2d, *supra* note 5, at 437-38. Note, however, that Testa v. Katt only dealt with what one might call a *private* claim for *civil* damages rather than *criminal* prosecution by a federal *officer*.

98. *See* HART & WECHSLER 2d, *supra* note 5, at 985-1050; ALI STUDY, *supra* note 71, at 282-98.

idea, however, is simply that there are situations where it would be best if a lawsuit were tried first in the state courts. For example, often state law is unclear and a claim of unconstitutionality of a state statute depends on how the statute is interpreted. Unnecessary constitutional decisonmaking can be avoided by resolving the state issue in the state courts in such a way as to finesse the constitutional issue altogether. Consequently, the many interests involved in the concept of comity are promoted whenever a federal court abstains from decision in favor of a state court determination of the state law.

Unfortunately, certain problems inhere in the concept of abstention. For example, at the time the decision to abstain must be made, it is impossible to tell how the state court will respond. It is inescapably a dilatory maneuver (sometimes costing years of delay[99]) and it is questionable whether comity is promoted if the Supreme Court ultimately reverses a state supreme court decision sustaining the constitutionality of a statute. Indeed, tensions might well be less if a lower federal court invalidated the state statute in the first instance without ever engaging the attention and pride of the state court system.[100]

The abstention doctrine achieved a new level of complexity in *England v. Louisiana State Board of Medical Examiners.*[101] That case began in a federal court, which invoked the abstention doctrine;[102] the litigation then moved over to the state courts where the state law was ultimately sustained by the Louisiana appellate courts. Rather than appeal that decision to the United States Supreme Court, the plaintiffs went back to the district court where they were met by the not implausible argument that the Louisiana decision was res judicata of their federal claim. The plaintiffs responded that they had been more or less required to present the constitutional claim to the state court in order to litigate the state issue. This argument was sufficient to preserve their right to proceed to trial in the federal court; the court explained, however, that in the future parties must reserve the right to relitigate in the federal court if they wish to do so. The court was explicit in its reasoning: Congress had given the parties the right to proceed before a federal court and abstention would be inconsistent with that entitlement if it meant that the federal matter was left for final decision in the state courts.

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99. The ALI STUDY, *supra* note 71, collects some notable examples.

100. *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793 (1965).

101. 375 U.S. 411 (1964).

102. Initially a one-judge district court dismissed the actiou, but that decision was reversed by the court of appeals. 259 F.2d 626 (5th Cir. 1958). A three-judge district court then determined to abstain. 180 F. Supp. 121 (E.D. La. 1960).

There are two aspects of the right to be heard by a federal judge: (1) the right to have a case tried before, and the facts found by, a federal judge; and (2) the right to have federal judges decide federal questions. Although appellate review by the Supreme Court theoretically satisfies the latter, its crowded docket prevents the Court from providing effective review. A new court with appellate jurisdiction over state court judgments would meet this problem insofar as abstention was confined to cases not involving critical problems of fact determination. Where the case presented only legal issues the parties could be remitted for trial before a state court, with review of the issues of law before a federal court on appellate review. Sensitive cases could thus be transferred to the state courts for trial (at least if the state courts provided a reasonably swift and adequate remedy[103]) without depriving the person relying on a federal claim of his right to have the case ultimately decided by federal judges. There would, of course, remain the difficult problem of deciding at a very early stage whether appellate review sufficiently protected the national interest or whether the fact-finding power was sufficiently important to require trial as well as appellate review before a federal judge. This problem may not be too serious, however, because the kind of cases usually requiring abstention often do not turn upon findings of fact.[104]

Abstention is now a deeply troublesome procedure which is applied erratically. Justice Douglas apparently decided that its costs outweigh the occasional benefits.[105] The drafters of the ALI proposal for reform thought it worth the effort to preserve[106] and Judge Friendly, although differing with the ALI formulation, also thinks abstention has a role to play.[107] Assuming that it does have a place in the federal system, the utility and rationality of abstention would be greatly enhanced by review of the state court decision by a federal appellate court. Since only one state statute is normally involved in an abstention case, obligatory review by the Supreme Court seems too costly in terms of the displacement of other potential cases on the Court's calendar. This cost could be reduced by providing for review by a new federal appellate court.

103. This is a part of the problem presented by Dombrowski v. Pfister, 380 U.S. 479 (1965).

104. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371, Comment at 211 (Tent. Draft No. 6, 1968); *cf.* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 229-30 (1948).

105. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964) (Douglas, J., concurring).

106. ALI STUDY, *supra* note 71, at 282.

107. H. FRIENDLY, *supra* note 10, at 94-96.

2. *Federalism and the Protection of Federal Interests*

Concern over the use of state courts to administer federal law derives from an apprehension that some state courts will treat unsympathetically certain kinds of federal claims; civil rights and the rights of criminal defendants come first to mind. This Article has argued that a new court with the capacity to provide appellate review of state court decisions would better protect federal interests from hostile state judiciaries. The difficulty today is not with appellate review, but with the inability of the Supreme Court to decide more than a handful of cases. Thus, by providing the supervision now lacking, the creation of a new federal appellate court below the Supreme Court, with jurisdiction over state courts, will permit an enlarged role for state courts in the articulation of federal law.

There is, however, another aspect of using state courts for federal questions—in a sense the reciprocal of the churlish and narrow reading of federal law that many observers expect from state courts. Occasionally a state court will over-read Supreme Court precedents and invalidate state statutes or official action on federal grounds when the Supreme Court itself would not do so. By definition, no federal interest is damaged by such a decision, but it does needlessly restrict state power and thus damages the values inherent in a federalism which presupposes that state governments should be free to act as they wish within constitutional boundaries. When a state court draws those boundaries too narrowly it impinges upon the freedom of choice of co-ordinate branches of state government (typically the legislature); although the injury may be regarded as self-inflicted, it is nonethless real.

This problem has not always been regarded as important. Until 1914 the Supreme Court had jurisdiction over state cases only where the claim of federal right had been denied by the state court.[108] Supreme Court review had been meant simply to insure that federal interests were protected. The case that stimulated a change in this policy illustrates how Supreme Court review may be used to protect federalism rather than federal interests. In *Ives v. South Buffalo Railway Co.*,[109] the New York Court of Appeals held the first American workmen's compensation act unconstitutional under the fourteenth amend-

108. See text accompanying note 28 *supra*.

109. 201 N.Y. 271, 94 N.E. 431 (1911). Subsequently, New York amended its constitution to eliminate the state due process ground of *Ives*. N.Y. CONST. art. I, § 18 (McKinney 1969). *See also* Arizona Employers' Liability Cases, 250 U.S. 400 (1918), *interpreted in* Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933) (interpreted as vitiating much of the *Ives* rationale); Bauman v. Town of Irondequoit, 122 N.Y.S. 2d 47, 204 Misc. 494 (Sup. Ct. 1953).

ment.[110] There was good reason to suspect that the United States Supreme Court would not so hold, but there was then no way to bring the case to the Court. Of course, the Court could and did soon hear cases involving workmen's compensation statutes that had been sustained by the courts of other states.[111] The 1914 Act[112] was designed to avoid this problem by empowering the Supreme Court to hear cases sustaining claims of federal right; thus, a state legislature would not be inhibited in experimentation by an erroneous view of what the federal constitution required.

A recent Oregon case, however, demonstrates that the 1914 Act did not eliminate the problem entirely. *Lenrich Associates v. Heyda*[113] was an action by the owners of a shopping center to enjoin a group of Hare Krishna monks from proselytizing on the shopping center mall. The monks' defense asserted rights under both the Oregon Constitution and the fourteenth amendment. The trial court sustained the claim that their religious freedom was being impaired. Before the case was heard by the Oregon Supreme Court, the United States Supreme Court decided *Lloyd Corp. v. Tanner*,[114] a case involving the distribution of handbills expressing opposition to the Vietnam war within the confines of another shopping center. The majority opinion in *Lloyd* is not a model of clarity. Although the opinion clearly holds that there is no first amendment right to handbill on subjects unrelated to the business of the shopping center,[115] it also contains language indicating that the shopping center owners would be deprived of their constitutionally protected property interests if they did not have the power to prohibit handbilling.[116]

Three justices of the Oregon Supreme Court read *Lloyd* as holding that the shopping center owner had a constitutionally protected property right to prohibit leafletting.[117] Accordingly, these justices refused to consider the monks' claim that they had a constitutional right under the Oregon Constitution to proselytize in the shopping center.[118] Two justices thought that *Lloyd* only defined the scope of the first amendment protection of handbilling, but they divided on the Oregon

110. The New York Court of Appeals also rested its decision on the New York Constitution which, as Professor Wright has pointed out, would have effectively prevented Supreme Court review even under the 1914 Act because it would have been an adequate and independent state ground for the decision. C. WRIGHT, LAW OF FEDERAL COURTS § 107 (1970). See note 124 *infra*.

111. FRANKFURTER & LANDIS, *supra* note 25, at 190-98.

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

113. 264 Ore. 122, 504 P.2d 112 (1972).

114. 407 U.S. 551 (1972).

115. *Id.* at 563-66.

116. *Id.* at 567-70.

117. 264 Ore. at 122-29, 504 P.2d at 112-16 (plurality opinion by McAllister, J.).

118. *Id.*

constitutional issue—one thinking that religious liberty was improperly impaired,[119] the other that it was not.[120] The other justice (one did not participate) was uncertain as to the meaning of *Lloyd* but was confident that the Oregon Constitution did not help the monks.[121]

Although *Lloyd* was correctly applied as to the first amendment issue, there is substantial reason to think that the Oregon court gave far too much weight to the property interest claim of the shopping center owners. Suppose that the plurality of the Oregon Supreme Court was wrong in its reading of *Lloyd* and that the United States Supreme Court would have had no difficulty in sustaining a decision resting on the Oregon Constitution that protected the right of the Hare Krishna monks to sell tracts on private property used for public purposes. This would mean that a majority of the Oregon Court failed to reach the state constitutional issue because it misperceived the reach of federal law. It seems unlikely that the Supreme Court would have taken the case had certiorari been sought.[122] No federal interest as such was impaired by the Oregon Court's decision; rather what was damaged was the lawmaking capacity of the Oregon Supreme Court. To be sure, it was a self-inflicted wound, but in comparable situations the United States Supreme Court has sought to protect the autonomy of state lawmaking institutions from even indirect and subtle forms of federal interference.[123] Although it is impossible to count the cases in which this kind of problem is presented, these cases undoubtedly do arise[124] and they are inevitably being crowded out of possible con-

119. *Id.* at 135, 504 P.2d at 119 (O'Connell, C.J., dissenting).

120. *Id.* at 129, 504 P.2d at 116-18 (Denecke, J., specially concurring).

121. *Id.* at 135, 504 P.2d at 118-19 (Holman, J., concurring).

122. There is a more recent, almost precisely parallel California case, Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974), *cert. denied*, 419 U.S. 885 (1974). The fact that two state supreme courts misread *Lloyd* might induce the Supreme Court to take the case. Three members of the California Supreme Court thought the California Constitution protected the right of plaintiffs in that case to solicit signatures and distribute literature in a shopping center. Four members of the Court, however, reserved that question, believing themselves bound by *Lloyd* to respect what they perceived as the federally protected property interest of the shopping center owner.

123. In part, that is the concern behind Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See* HART & WECHSLER 2d, *supra* note 5, at 694-708; C. WRIGHT, LAW OF FEDERAL COURTS § 56 (1970).

124. Such cases do not arise as often as might be supposed because of the restriction on the Supreme Court's jurisdiction to cases not resting on an independent and adequate state ground and the tendency of most states to construe their state constitutions as identical to the federal constitution. The Supreme Court has recently led in developing constitutional rights—except for those states that continue to apply substantive due process restraints on economic regulation, a practice that the Supreme Court has (or at least had) abandoned. The recent turn, if such it be, away from the decisions of the Warren Court may lead to a resurgence of interest in state constitutional law, a generally moribund source of law. *See generally* Linde, *Without "Due Process"*, 49 ORE. L. REV. 125 (1970); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973).

sideration for review because of the pressure on the Supreme Court's docket. A new federal appellate court would not be so incapacitated and thus would be able to protect against over-broad interpretations of federal law that improperly inhibit legitimate lawmaking efforts by state legislatures and courts.

IV

THE DISADVANTAGES OF REVIEW OF STATE COURTS BY A NEW FEDERAL APPELLATE COURT

A. Increasing the Workload of Inferior Appellate Courts

The current interest in reforming the structure of the federal appellate court system was stimulated by the swollen dockets of most of the courts of appeals and the growing conviction that their problems could no longer be met by improvements in methodology or by the appointment of additional judges. Adding a jurisdiction that does not presently exist would seem only to make an already intolerable condition worse. This Article, however, is premised on the creation of a new court above the courts of appeals—a court with nationwide jurisdiction whose decisions would be binding on all inferior federal courts as well as on state tribunals. Such a court would hear only cases that had already passed through the screen of one appellate review.[125] Its principal contribution to the federal system would be to assist the Supreme Court in resolving inter- and intra-circuit conflicts and in exercising its law-making function by relieving the Court of some of its present supervisory burden. Giving an additional jurisdiction over state courts to a new court with such a mandate would be entirely consistent with the new court's purpose and would substantially ameliorate the workload of other inferior federal courts and the Supreme Court. For example, quick relief would be realized when the burden of reviewing habeas corpus petitions in the district courts and courts of appeals was reduced by substitution of a system in which state convictions were directly reviewed by the new court.[126] Habeas corpus would not go away altogether[127] and there would remain the current rash of prisoner complaints under the Civil Rights Act,[128] but the problem would be signifi-

125. The Rosenberg-Carrington plan contemplates a Central Division which, as to criminal cases, would engage in a "searching" review for possible errors of constitutional magnitude even if the parties did not raise those issues. Apparently the Central Division would not review on the merits civil cases from state courts, but would only make a recommendation to the Supreme Court as to whether certiorari should be granted. See note 6 *supra.*

126. See text accompanying notes 75-79 *supra.*

127. See text accompanying note 79 *supra.*

128. 42 U.S.C. § 1983 (1970). State prisoners filed 218 civil rights petitions in federal district courts in 1966; by 1973 the number had jumped to 4,174, an increase of

cantly reduced. Further relief could be accomplished by shifting to the state courts some kinds of cases now heard by the district courts.[129]

The number of state cases raising a federal question is unknown, as is the number of federal question cases that go through the state appellate system; there seems to be no way of estimating the universe of potential cases.[130] The Supreme Court's state court burden has been about 1,000 cases a year for the last decade, just over one-half of those being criminal cases.[131] Presumably, the new court's workload would be somewhat larger than this, since the certainty of review that would accompany the new court's obligatory jurisdiction would probably encourage lawyers to appeal state court decisions that they otherwise would not (because a petition for certiorari or appeal is almost certain to be unsuccessful). Thus, it is most realistic to assume that the state court workload of the new court will be larger than the Supreme Court's present state court workload, though the magnitude of the increase cannot be estimated.[132]

What can be said with confidence is that the new court could readily adopt practices that would make its workload much less onerous than what is normally associated with appellate review. Unlike the courts of appeals, the new court would only take cases that had already been through an appellate process; to the extent that a state court correctly disposed of a federal issue the new court's opinion need say little more than that. Cases that rest on an adequate and independent state ground could also be disposed of summarily. The remainder would require a reasoned opinion, but only on federal issues; the new court's decisions in those cases should significantly assist the Supreme Court, at least to the extent that the new court correctly anticipates or interprets the Supreme Court's thinking.

A decision by the new court should be helpful to the Supreme Court in its effort to control its own docket. Unlike cases from the courts of appeals, cases from the state courts come within the Supreme

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over 1,814 percent. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1973, at 130.

129. See text accompanying notes 82-97 *supra*.

130. It would be hard to find even the total number of state cases since there are no national figures on the business of the state courts. So far as is known, no state attempts to count the number of cases in which a federal issue is presented and, short of elaborate sampling techniques, even estimation is impossible. Furthermore, the presence of a right of appeal to the new court might stimulate the assertion of federal claims in state cases.

131. See the Appendix *infra*. In the October term of 1972 there were 904 cases from state courts filed in the Supreme Court of which 488 (or 53.8 percent) were criminal.

132. Indeed, to the extent that the decision whether to litigate is influenced by the availability of final federal review, one might expect an increase in the workload of state trial courts.

Court's jurisdiction only to the extent that they present a federal issue. At present, however, no court below the Supreme Court has looked at the cases with that limitation in mind. The Court's decision whether to hear any particular case should be assisted by the fact that every case from a state court will have been reviewed and decided by the new federal court, whose judges will be as constrained as the Supreme Court is on which issues may be considered.

B. Elongating the Appellate Process

Every level of appeal involves costs; for the litigant, each level of appeal costs money and consumes time, and for the government, each level involves the expense of operating a court. Inserting a court above the state courts but below the Supreme Court adds a new level of appeal and potentially elongates the appellate process. This problem is much less severe with respect to state courts than it is with the courts of appeals, however, because the Supreme Court hears relatively few state court cases. Giving a new court appellate jurisdiction over state courts is rather more like restoring a level of appeal that used to exist than creating a new level.

This Article has argued that using state courts to decide federal questions is a necessary and useful procedure but the procedure is also dangerous without some form of supervision. Since the Supreme Court is incapable, given its workload, of adequately performing a supervisory function,[133] a new court with appellate jurisdiction over state courts is necessary. Restoring federal review of federal questions decided by state courts is essential to a system that uses state courts to decide federal questions.

The cost to litigants in the new court should not be overwhelming. Only federal issues will be open, and they will ordinarily have been briefed once before. A brief is, of course, a more elaborate document than is a petition for certiorari or a jurisdictional statement; but to the extent that parties accept the decision of the new court and do not seek Supreme Court review, the cost of preparing papers for the Supreme Court will be saved.

Delay is a more serious problem. The new court will enable those who use the appellate process to postpone the inevitable to postpone it even further. Some relief would be provided if the Supreme Court shortened the time allowed for filing papers from the new court; also there should be no delay in transmitting the state record since it will already be on file with the new court. Nevertheless, establishing a new obligatory appellate review will permit those who wish to do so to ob-

133. See text accompanying notes 48-50 *supra*.

tain more delay than they presently can obtain by requesting discretionary review. The abuse of the appellate process for purposes of delay is scarcely unique to this proposal, however, and seems to be an inescapable concomitant of granting the right to appeal.

C. *Diminishing the Dignity of State Courts*

The proposal that state courts be given an enlarged responsibility in the administration of federal law ought to be understood as expressing confidence in the capabilities of the state judiciaries. Nonetheless, the judges of state supreme courts will doubtless resent being reversed by an "inferior" federal court rather more than they resent being reversed by the Supreme Court. To the extent that state court decisions are subject to review by judges slightly less lofty than Justices of the Supreme Court, the dignity of state courts will indeed suffer. Such a reduction will be minor, however, beeause the state supreme courts will remain the final and ultimate expositors of all matters of state law which, despite the nationalization of the law in general, remains an extremely important area. Furthermore, to the extent that direct review of criminal cases is substituted for collateral attack via habeas corpus, there will be an increase in dignity since fewer state criminal convictions will be subject to reversal by a single federal district court judge.

CONCLUSION

The increasingly burdensome workload of the federal courts has led to a number of major proposals for federal court reform. Appellate structures similar to those proposed by the Commission on Revision of the Federal Appellate System[134] do not attack the entire problem, however, because they retain the basically discretionary nature of direct federal review of state court decisions which obtains today.[135] If a new National Court of Appeals is established, it should be required to review all state court decisions concerning federal questions. Such a reform would facilitate the transfer of federal question cases to state courts, thus relieving the workload of the federal courts, while avoiding the danger of having state courts as de facto final deciders of federal questions, since the new court would provide meaningful federal appellate review. It would enable the judicial system to streamline the present system of post-conviction review, increase the ability of Congress to apportion work between the federal and state judicial systems, and enhance the contribution of the state courts to the development of federal law.

134. See text accompanying notes 2-4 *supra.*

135. See text accompanying notes 35-38 *supra.*

APPENDIX

SOURCE OF SUPREME COURT CASES

Term[1]	DC	CA	State Ct.	O Fed	Total	% State
1948	26	607	526 (58)	23	1182	44.5
1949	42	645	470 (50)	38	1195	39.3
1950	31	566	447 (49)	32	1076	41.5
1951	49	582	436 (52)	40	1107	39.4
1952	49	606	475 (38)	44	1174	40.5
1953	33	558	585 (56)	25	1201	48.7
1954	23	595	569 (56)	39	1226	46.4
1955	38	773	624 (75)	33	1468	42.5
1956	44	791	634 (71)	45	1514	41.9
1957	54	876	673 (78)	42	1645	40.9
1958	40	862	701 (95)	34	1637	42.8
1959	38	845	726 (72)	32	1641	44.2
1960	38	923	791 (99)	33	1785	44.3
1961	39	973	971 (87)	38	2021	48.0
1962	88	965	1069 (96)	39	2161	49.5
1966*	74	1450	1072 (107)	123	2719	39.4
1969*	121	1876	1102 (114)	23	3122	35.3
1971*	104	2254	1085 (115)	32	3475	31.2
1971**	104	2239	967 (114)	32	3342	28.9
1972*	198	2335	904 (144)	24	3461	26.1

1. Statistics for 1948-1962 are taken from yearly notes "The Supreme Court—19___ Term," in volumes 63 through 77 of the HARVARD LAW REVIEW. The totals represent all cases from inferior courts disposed of on the merits and on petition for certiorari. The figures in parentheses are the numbers of state cases brought by appeal and are included in the total figure given for the states each term. "O Fed" stands for other federal courts from which cases reach the Supreme Court Docket. The DC figure includes both three-judge and single-judge district court cases appealed directly to the Supreme Court.

* The figure for these years were compiled from THE UNITED STATES SUPREME COURT JOURNAL by noting the source of each case, as its petition for certiorari or appeal was initially acted upon by the Court. The figures are therefore slightly out of synchronization with the figures for 1948-1962, based on final dispositions. This marginal difference results from the method of noting the cases in the Journal; it is equally representative of the composition of the docket as a break-down by final disposition.

** This is the composition of the 1971 docket without 133 cases—118 from state courts and 15 from the courts of appeal—summarily disposed of following the Court's determination that the death penalty, as presently administered, was violative of the Constitution. Many of these cases had been pending for several terms and their inclusion gives a somewhat inflated picture of the caseloads normally flowing from the state courts.

STATE CASES SUPREME COURT DOCKET

State	Pop.[1]	R[2]	Lawyers[3]	R	1966[4]	R	1969[4]	R	1971[4]	R	1972[4]	R
Alabama	3,444	21	3,537	28	14	18	20	13	11	17	21	13
Alaska	302	50	466	50	5	27	8	23	1	26	2	26
Arizona	1,772	33	2,769	30	21	11	24	10	18	15	13	17
Arkansas	1,923	32	2,107	34	8	24	1	30	7	21	0	28
California	19,963	1	34,248	2	243	1	256	1	165	1	153	1
Colorado	2,207	30	4,665	23	6	26	8	23	6	22	7	21
Connecticut	3,032	24	5,583	18	4	28	9	22	8	20	9	19
Delaware	548	46	736	47	2	30	3	28	6	22	3	25
Florida	6,789	9	11,510	10	58	4	55	4	41	8	39	6
Georgia	4,590	15	6,140	15	18	14	22	12	31	9	13	17
Hawaii	770	40	906	41	1	31	5	26	6	22	4	24
Idaho	713	42	848	42	0	32	3	28	3	25	1	27
Illinois	11,114	5	22,036	3	60	3	80	3	63	4	69	3
Indiana	5,194	11	5,778	17	11	21	13	18	9	19	12	18
Iowa	2,825	25	4,020	25	5	27	16	16	8	20	6	22
Kansas	2,249	28	3,458	28	10	22	10	21	7	21	9	19
Kentucky	3,219	23	3,875	26	36	7	9	22	22	12	18	15
Louisiana	3,643	20	5,502	19	17	15	24	10	31	9	24	11
Maine	994	38	1,130	39	0	32	2	29	3	25	2	26
Maryland	3,922	18	7,447	12	20	12	26	9	43	6	36	7
Massachusetts	6,689	10	12,905	7	8	24	7	24	14	16	9	19
Michigan	8,875	7	11,753	9	13	19	26	9	29	10	5	23
Minnesota	3,805	19	5,844	16	9	23	12	19	4	24	5	23
Mississippi	2,217	29	2,766	31	12	20	11	20	11	17	13	17
Missouri	4,677	13	7,962	11	16	16	14	17	19	14	14	16
Montana	694	43	1,072	40	4	28	3	28	3	25	3	25
Nebraska	1,484	35	2,679	32	6	26	11	20	11	17	6	22
Nevada	489	47	773	46	7	25	8	23	5	23	3	25
New Hampshire	738	41	823	44	1	31	4	27	5	23	2	26
New Jersey	7,168	8	11,999	8	28	8	40	6	42	7	28	9
New Mexico	1,016	37	1,319	38	9	23	8	23	8	20	6	22
New York	18,191	2	55,946	1	144	2	123	2	111	2	70	2
North Carolina	5,082	12	4,638	24	10	22	9	22	26	11	29	8
North Dakota	618	45	809	45	0	32	2	29	1	26	1	27
Ohio	10,652	6	17,001	5	44	5	53	5	71	3	65	4
Oklahoma	2,559	27	5,056	21	6	26	19	14	10	18	12	18
Oregon	2,081	31	3,207	29	17	15	9	22	26	11	14	16
Pennsylvania	11,794	3	14,418	6	25	9	27	8	22	12	28	9
Rhode Island	950	39	1,390	36	3	29	2	29	4	24	5	23
South Carolina	2,591	26	2,379	33	4	28	9	22	14	16	9	19
South Dakota	666	44	826	43	0	32	0	31	4	24	2	26
Tennessee	3,924	17	5,184	20	15	17	8	23	20	13	20	14
Texas	11,197	4	19,074	4	58	4	35	7	44	5	43	5
Utah	1,059	36	1,367	37	13	19	5	26	4	24	4	24
Vermont	445	48	611	48	0	32	2	29	1	26	0	28
Virginia	4,648	14	6,893	13	19	13	23	11	31	9	26	10
Washington	3,409	22	4,671	22	37	6	18	15	26	11	22	12
West Virginia	1,744	34	1,820	35	1	31	6	25	6	22	4	24
Wisconsin	4,418	16	6,697	14	23	10	14	17	18	15	7	21
Wyoming	332	49	475	49	1	31	2	29	6	22	8	20
TOTALS	203,425		339,118		1072		1104		1085		904	

1. Population is given in thousands, and is based on the 1970 Decennial Census of the United States, as provided in AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT, Table 10 at 26.

2. Rank.

3. AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT, Table 10 at 26.

4. These figures were compiled from THE UNITED STATES SUPREME COURT JOURNAL by noting the source of each case, as listed when its application for certiorari or appeal was initially acted upon by the Court. They reflect only those cases in which direct review is sought by certiorari or appeal.

STATE CASES SUPREME COURT DOCKET 1966 TERM

STATE	CIVIL	CRIMINAL	TOTAL	RANK
Alabama	5	9	14	18
Alaska	4	1	5	27
Arizona	9	12	21	11
Arkansas	2	6	8	24
California	86	157	243	1
Colorado	2	4	6	26
Connecticut	3	1	4	28
Delaware	1	1	2	30
Florida	24	34	58	4
Georgia	8	10	18	14
Hawaii	1	0	1	31
Idaho	0	0	0	32
Illinois	22	38	60	3
Indiana	2	9	11	21
Iowa	4	1	5	27
Kansas	5	5	10	22
Kentucky	4	32	36	7
Louisiana	9	8	17	15
Maine	0	0	0	32
Maryland	12	8	20	12
Massachusetts	5	3	8	24
Michigan	7	6	13	19
Minnesota	4	5	9	23
Mississippi	8	4	12	20
Missouri	13	3	16	16
Montana	2	2	4	28
Nebraska	2	4	6	26
Nevada	4	3	7	25
New Hampshire	0	1	1	31
New Jersey	13	15	28	8
New Mexico	5	4	9	23
New York	49	95	144	2
North Carolina	4	6	10	22
North Dakota	0	0	0	32
Ohio	24	20	44	5
Oklahoma	4	2	6	26
Oregon	8	9	17	15
Pennsylvania	14	11	25	9
Rhode Island	3	0	3	29
South Carolina	3	1	4	28
South Dakota	0	0	0	32
Tennessee	3	12	15	17
Texas	27	31	58	4
Utah	5	8	13	19
Vermont	0	0	0	32
Virginia	7	12	19	13
Washington	27	10	37	6
West Virginia	1	0	1	31
Wisconsin	10	13	23	10
Wyoming	1	0	1	31
TOTAL	456	616	1072	
	42.5%	57.5%		

Compiled from THE UNITED STATES SUPREME COURT JOURNAL, 1966 TERM.

STATE CASES SUPREME COURT DOCKET 1969 TERM

STATE	CIVIL	CRIMINAL	TOTAL	RANK
Alabama	11	9	20	13
Alaska	1	7	8	23
Arizona	7	17	24	10
Arkansas	0	1	1	30
California	98	158	256	1
Colorado	7	1	8	23
Connecticut	5	4	9	22
Delaware	3	0	3	28
Florida	28	27	55	4
Georgia	18	4	22	12
Hawaii	3	2	5	26
Idaho	3	0	3	28
Illinois	31	49	80	3
Indiana	6	7	13	18
Iowa	10	6	16	16
Kansas	3	7	10	21
Kentucky	5	4	9	22
Louisiana	17	7	24	10
Maine	1	1	2	29
Maryland	13	13	26	9
Massachusetts	2	5	7	24
Michigan	14	12	26	9
Minnesota	6	6	12	19
Mississippi	4	7	11	20
Missouri	2	12	14	17
Montana	2	1	3	28
Nebraska	3	8	11	20
Nevada	5	3	8	23
New Hampshire	1	3	4	27
New Jersey	12	28	40	6
New Mexico	3	5	8	23
New York	38	85	123	2
North Carolina	2	7	9	22
North Dakota	2	0	2	29
Ohio	29	24	53	5
Oklahoma	2	17	19	14
Oregon	8	1	9	22
Pennsylvania	14	13	27	8
Rhode Island	2	0	2	29
South Carolina	2	7	9	22
South Dakota	0	0	0	31
Tennessee	5	3	8	23
Texas	14	21	35	7
Utah	4	1	5	26
Vermont	2	0	2	29
Virginia	11	12	23	11
Washington	11	7	18	15
West Virginia	5	1	6	25
Wisconsin	8	6	14	17
Wyoming	2	0	2	29
TOTAL	485	619	1104	
	43.9%	56.1%		

Compiled from THE UNITED STATES SUPREME COURT JOURNAL, 1969 TERM.

STATE CASES SUPREME COURT DOCKET 1971 TERM

STATE	CIVIL	CRIMINAL	TOTAL	RANK
Alabama	1	10	11	17
Alaska	0	1	1	26
Arizona	9	9	18	15
Arkansas	1	6	7	21
California	67	98	165	1
Colorado	3	3	6	22
Connecticut	4	4	8	20
Delaware	3	3	6	22
Florida	18	23	41	8
Georgia	15	16	31	9
Hawaii	6	0	6	22
Idaho	1	2	3	25
Illinois	36	27	63	4
Indiana	4	5	9	19
Iowa	2	6	8	20
Kansas	4	3	7	21
Kentucky	7	15	22	12
Louisiana	11	20	31	9
Maine	0	3	3	25
Maryland	15	28	43	6
Massachusetts	3	11	14	16
Michigan	10	19	29	10
Minnesota	2	2	4	24
Mississippi	2	9	11	17
Missouri	10	9	19	14
Montana	2	1	3	25
Nebraska	3	8	11	17
Nevada	2	3	5	23
New Hampshire	4	1	5	23
New Jersey	13	29	42	7
New Mexico	5	3	8	20
New York	44	67	111	2
North Carolina	5	21	26	11
North Dakota	0	1	1	26
Ohio	27	44	71	3
Oklahoma	3	7	10	18
Oregon	3	23	26	11
Pennsylvania	6	16	22	12
Rhode Island	3	1	4	24
South Carolina	2	12	14	16
South Dakota	3	1	4	24
Tennessee	3	17	20	13
Texas	19	25	44	5
Utah	4	0	4	24
Vermont	0	1	1	26
Virginia	8	23	31	9
Washington	11	15	26	11
West Virginia	6	0	6	22
Wisconsin	9	9	18	15
Wyoming	4	2	6	22
TOTAL	423	662	1085	
	39.0%	61.0%		

Compiled from THE UNITED STATES SUPREME COURT JOURNAL, 1971 TERM.

STATE CASES SUPREME COURT DOCKET 1972 TERM

STATE	CIVIL	CRIMINAL	TOTAL	RANK
Alabama	4	17	21	13
Alaska	1	1	2	26
Arizona	8	5	13	17
Arkansas	0	0	0	28
California	74	79	153	1
Colorado	5	2	7	21
Connecticut	6	3	9	19
Delaware	1	2	3	25
Florida	19	20	39	6
Georgia	9	4	13	17
Hawaii	2	2	4	24
Idaho	1	0	1	27
Illinois	27	42	69	3
Indiana	4	8	12	18
Iowa	1	5	6	22
Kansas	5	4	9	19
Kentucky	10	8	18	15
Louisiana	12	12	24	11
Maine	1	1	2	26
Maryland	11	25	36	7
Massachusetts	5	4	9	19
Michigan	1	4	5	23
Minnesota	3	2	5	23
Mississippi	3	10	13	17
Missouri	7	7	14	16
Montana	3	0	3	25
Nebraska	4	2	6	22
Nevada	3	0	3	25
New Hampshire	2	0	2	26
New Jersey	9	19	28	9
New Mexico	3	3	6	22
New York	31	39	70	2
North Carolina	6	23	29	8
North Dakota	1	0	1	27
Ohio	32	33	65	4
Oklahoma	4	8	12	18
Oregon	9	5	14	16
Pennsylvania	16	12	28	9
Rhode Island	5	0	5	23
South Carolina	5	4	9	19
South Dakota	0	2	2	26
Tennessee	6	14	20	14
Texas	18	25	43	5
Utah	4	0	4	24
Vermont	0	0	0	28
Virginia	9	17	26	10
Washington	17	5	22	12
West Virginia	2	2	4	24
Wisconsin	3	4	7	21
Wyoming	4	4	8	20
TOTAL	416	488	904	
	46.0%	54.0%		

Compiled from THE UNITED STATES SUPREME COURT JOURNAL, 1972 TERM.