tions. For those of us, however, who view the Constitution as more than an empty vessel into which personal preferences are to be poured—for those of us who join with Joseph Story in regarding the Constitution "as the truest security of the Union, and the only solid basis, on which to rest the private rights, the public liberties, and the substantial prosperity of the people composing the American Republic,"[24] their understanding is profoundly mistaken.

REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS. By Samuel Estreicher[1] and John Sexton.[2] New Haven, Ct. and London: Yale University Press. 1986. Pp. x, 201. $20.00.

Thomas D. Rowe, Jr.[3]

If Benjamin Franklin knew about modern policy analysis, he might amend his famous maxim to say that in this world nothing is certain but death, taxes, and unanticipated consequences. One of the substantial legacies of Chief Justice Warren Burger's tenure is an unanticipated (and to Chief Justice Burger probably unwelcome) consequence of his frequent contentions that our courts are overburdened.[4] Professor Marc Galanter and others have responded with substantial empirical evidence that America really is not experiencing a "litigation explosion" with extraordinary caseloads, cost, and delay in the lower courts.[5]

Chief Justice Burger's view that the courts are overloaded may have begun at home, for he consistently pointed to the Supreme

24. 1 J. STORY, *supra* note 5, at 2.

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4. *See, e.g.*, W. Burger, *Opening Remarks*, in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 63RD ANNUAL MEETING 3, 6-7 (1986).

5. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes; What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). *See also, e.g.*, Daniels, *We're Not a Litigious Society*, 24:2 JUDGES' J. 18 (Spring 1985); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981, AND 1984 (1986). The questioning of the "litigation explosion" view has produced its own counter-literature. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 63-65, 76 (1985); Marvell, *There Is a Litigation Explosion*, NAT'L L.J., May 19, 1986, at 13.

Court's docket growth[6] and called for measures to reduce the burden on the Justices.[7] As with the "litigation explosion" controversy, his assertions have helped to inspire empirical work that strongly questions his premises. In *Redefining the Supreme Court's Role*,[8] which is for the most part a revised version of an earlier article,[9] Professors Samuel Estreicher and John Sexton (the latter a former Burger law clerk) argue that the Justices should begin by taking a cue from Pogo—"we have met the enemy, and it is us." Much of the difficulty, say Estreicher and Sexton, is that the Court simply takes too many cases; the workload crunch is primarily "a symptom of a different underlying problem—the lack of clearly defined criteria to guide the Supreme Court's case selection." The authors propose guidelines and reforms, most of which could be put into effect without legislation, to control the intake.

The book develops a framework for analysis of the Court's current problems and possible solutions, drawing on an extensive study of the Supreme Court's docket for the 1982 Term. The authors summarized their own argument so well in their earlier article that it seems better to quote than to attempt paraphrase:

> The problem, in our view, is not the Court's docket, but the unrealistic expectations that many, including the Justices, have for the Court in our society. . . . [G]iven the volume of litigation in our society today, and the pervasive role of federal law, the Supreme Court cannot act . . . as the court of last resort in every case. The vision of the Court as an error corrector breeds frustration among those who are denied access to the Court despite their perception that error requiring review occurred. Furthermore, this vision burdens the Court with responsibilities and a projected caseload that it can never successfully shoulder, whether or not new courts are created.
>
> The creation of a new national court will not add to the capacity of the Supreme Court to decide cases because there is no reason to believe that litigants will accept the proposed court's resolution of their controversy. Indeed, a new layer of national review may exacerbate the problem by undermining the finality of the rulings of the existing circuit courts and by placing increasing pressure on the Supreme Court to review the nonfinal judgments of a court that purportedly speaks for the nation.
>
> In our view, the Court should act as the manager of the federal judicial system, overseeing the work of the federal and state courts, and intervening only when necessary to resolve fundamental interbranch or federal-state clashes or to render a

6. *See, e.g.*, W. BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 6 (1985).

7. *See, e.g., id.* at 9-10; Burger, *The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J. 86 (1985).

8. The title and some other rhetoric, such as a subheading ("Recasting the Marbury v. Madison Model"), could misleadingly make some readers expect that the authors are addressing questions of the theory of constitutional decisionmaking. Rather, their focus is on docket handling and case selection, important problems in their own right but quite different and less cosmic.

9. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984).

> final resolution of a question that has ripened for decision after percolation in the lower courts.
>
> . . . .
>
> Once one moves from the model of the Supreme Court as error corrector to a vision of the Court as manager, it becomes clear that the Court has the capacity to perform its essential functions, and more. What is needed is not an additional layer of nonfinal appellate review, but conscious management of the Court's docket and a managerial conception of the Court's responsibilities in the federal system.

The authors' major premise, rejection of the individual-case "error correction" role for the Supreme Court, is—as they admit—neither novel nor controversial, but it is in their view still insufficiently observed. From this premise they construct their "managerial" theory[10] and specific criteria for Supreme Court case selection. Using their approach, a simple two-circuit conflict usually would not mean review; more experience may be valuable when the Court ultimately resolves the conflict, or when a trend develops the maverick circuit may rejoin the herd.

Estreicher and Sexton develop a three-tier scheme, to whose details it is hard to do justice in a brief summary, distinguishing among cases whose review they regard as "priority," "discretionary," or "improvident." The first category includes three-circuit and some other "intolerable" conflicts, but only if the petitioner has brought the conflict to the attention of the court below; cases involving disregard of governing Supreme Court precedent; and major federalism, separation of powers, and interstate disputes. The "discretionary" category includes cases presenting opportunities for advancing the development of federal law, some emergencies, occasional correction of egregious error to keep lower courts in line, and some "structural" problems of federal court invalidation or state court upholding of state law. For the remaining cases, including most lesser conflicts or state court invalidation of state law on federal grounds, the authors argue that Supreme Court intervention is normally "improvident" as an unwarranted use of the Court's scarce law-making resources.

Drawing on extensive reading of cases and materials from the Court's 1982 Term, the authors then evaluate the Court's performance by their criteria and find that nearly one fourth of the cases granted review were in the "improvident" category.[11] Law student

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10. Again, the authors' terminology might mislead some readers. Apart from being a response to caseload problems, their focus on case selection criteria and methods has little in common with the controversy over "managerial judging," which revolves around such matters as the sappropriate levels of pretrial involvement and settlement pressure by trial judges. *See, e.g.*, Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

11. Significantly, they found apparent indulgence in mere error correction not to be a factor that seemed to explain a large number of their "improvident" grants, although it ac-

researchers working on the project surveyed cases in which review was denied and found only about a third as many that qualified as "priority." These findings lead the authors to conclude that the Court has the capacity to fulfill its role and that a new tribunal is not the solution to the Court's workload problems.[12] Instead, they suggest more careful case selection according to refined criteria, which would not only reduce improvident grants but also alleviate the Court's screening burden as attorneys learn which petitions for review are hopeless.[13]

The book is an important contribution to the debate over how to deal with the Supreme Court's workload. It particularly deserves attention for its careful argument for the unconventional view that at least at present levels of case flow, what the judicial system needs is not an additional level of review in some form but changes that the Court can implement by itself. The authors support their position both by challenging the widely accepted premise that the Court's present workload requires additions to existing case-handling capacity, and by pointing to some of the likely side effects of other proposals. For example, rather than reducing the Supreme Court's burdens by producing uniform rulings the Court would rarely review, more specialized courts or an Intercircuit Tribunal to

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counted for more than any other single source. Other major explanatory factors appeared to be mandatory review, correction of state courts' federal constitutional invalidation of state law, deference to the Solicitor General, and premature action to resolve conflicts.

12. For a contrary view on the number and significance of unresolved circuit conflicts, see Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1406-07 (1987). In large part, whether one accepts Estreicher and Sexton's evaluation of their data seems to turn on an assessment of the costs and benefits of "percolation" via disagreement in the lower courts. The authors argue that most two-circuit conflicts are tolerable because they are part of a process that produces more information upon which the Court can base a wise final resolution on the issue. Baker and McFarland reply, "Tolerating numerous conflicts under the rubric of percolation creates an incoherence and uncertainty in national law that results in serious inequities." *Id.* at 1409. In turn, one's view on the benefits of percolation is likely to depend on a judgment about whether conflicts tend to pose the kind of issues that it is most important to have simply decided—or if it is especially important that they be decided right. *Cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("in most matters it is more important that the applicable rule of law be settled than that it be settled right").

In this connection there is a good case for a distinction between constitutional and statutory conflicts; Congress can readily eliminate the latter or correct what it views as a mistaken resolution by the Court. The importance and relative irreversibility of the Court's constitutional interpretations, by contrast, suggest that some short-term nonuniformity may be a price more worth paying for a fully informed decision. After his often-quoted comment in *Burnet, supra*, Justice Brandeis excepted "cases involving the Federal Constitution, where correction through legislative action is practically impossible." *Id.* at 406-07.

13. The authors also support the long-advocated abolition of the Supreme Court's mandatory jurisdiction, which my senior Senator (Jesse Helms) keeps blocking by attaching riders restricting jurisdiction over abortion, busing, or school prayer. Significantly, however, their research indicated that the mandatory jurisdiction is not a source of a large number of cases that they regard as unsuitable for the Court to review.

resolve conflicts might reduce the benefits of "percolation" and even require greater supervision by the high court.

Estreicher and Sexton develop their own proposals with, for the most part, admirable thoroughness and care, especially in a book that remains quite concise (almost the last third of its 201 pages consists of appendices and notes). Their extensive study of an entire Term's docket reflects an empiricism that is often rare in legal research. Yet some of their suggestions seem rather casual, ill-considered, or perhaps self-defeating. The proposal for a Supreme Court counterpart of new Federal Rule of Civil Procedure 11, with Court-imposed sanctions for frivolous petitions, would probably create much work and strife; the Justices should not have to spend time deciding (and writing dissenting opinions about!) whether cases not worthy of review are frivolous or merely weak. The idea that the Court should establish an internal staff to take a "second look" at its own grants of review has been criticized, perhaps too stridently but with some justification, as "bizarre" and unlikely to work.[14] And the inclusion of "egregious error" as a ground for discretionary review could invite precisely the kind of individual-case error correction the authors criticize.

Such unavoidable play in the joints and room to revert to present problems raise a difficulty with one of the distinctive strengths of the book: the authors' primary reliance on action by the Justices themselves, rather than legislation, to carry out most of the suggested measures. Disagreement over the particular form that a solution should take can stymie Congress, even in the face of agreed need. Yet if, as the authors concede, the individual Justices' doctrinal agendas are a significant cause of "overgranting," the Justices themselves may be unlikely to reach (and maintain) an unstable equilibrium of mutual self-restraint. Successful abuse in the pursuit of ideological goals by one faction could lead to retaliation and breakdown. Estreicher and Sexton's own proposal is admirably lacking in political one-sidedness. In present circumstances it calls on "liberals" to accept some reduction in access to the Supreme Court, while also expecting "conservative" Justices to reach out less to correct "liberal" error in lower court decisions. But ineradicable ideological tensions could readily cause the deal to come unstuck.

Ideology and resulting decisional trends may also collide with the authors' seemingly nonpartisan emphasis on getting the Supreme Court out of the business of routine error correction. That effort, however worthy in its own right, should not be pursued without regard to how well the judicial system as a whole performs that

14. Baker & McFarland, *supra* note 12, at 1411-12.

function. As Professor Preble Stolz has argued, there are good reasons for being concerned about the state courts when it comes to correcting errors of federal law:

> 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 . . . . Numerous intangible factors tend to make federal judges loyal to the influence as well as the command of the Supreme Court. . . . 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.[15]

Yet in the name of federalism, the Court in recent decades has often cut back on the extent to which federal lower courts can review or forestall state court error on matters of federal law.[16] When the Court construes narrowly federal habeas corpus and civil rights statutes allowing federal trial courts to enforce vital federal rights, it often leaves itself as the only available federal forum for the correction of possible state court error. Before the Justices or the rest of us accept any proposal to reduce further the extent to which the Supreme Court can correct error in individual cases, we should take into account how well the rest of the system protects litigants against error and injustice.

THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA. By Lee C. Bollinger[1] New York, N.Y.: Oxford University Press. 1986. Pp. 295. $19.95.

James Magee[2]

Nearly a decade ago, the highly publicized *Skokie* case presented one of the most dramatic and controversial free speech issues ever to arise in American courts. It involved an attempt by a few dozen members of the National Socialist Party to march through the streets of Skokie, Illinois, a suburb of Chicago inhabited by some forty thousand Jews of whom several thousand were

15. Stolz, *Federal Review of State Court Decisions on Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976) (footnotes omitted).

16. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (excluding fourth amendment claims from federal habeas review of state convictions in most cases); Younger v. Harris, 401 U.S. 37 (1971) (requiring more than irreparable harm for federal court to enjoin pending state criminal prosecution).

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