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Book Review: Trashing Federal Jurisdiction

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Book Review

Trashing Federal Jurisdiction

FEDERAL JURISDICTION: POLICY AND PRACTICE. By Howard Fink* and Mark V. Tushnet.** Charlottesville, Va.: The Michie Co. 1984. Pp. xx, 907. $32.50.

*Reviewed by Michael E. Solimine****

INTRODUCTION

With several prominent textbooks on the market covering federal jurisdiction,[1] the publication of yet another book seems to call for express justification. Professors Howard Fink and Mark V. Tushnet weigh in with the latest treatise, *Federal Jurisdiction: Policy and Practice*, without providing such an explanation. Nevertheless, their effort is welcome. As the title implies, Fink and Tushnet employ common case analysis of jurisdictional questions. What is more, they provocatively discuss the policies expressly or implicitly underlying federal jurisdiction doctrine.

Especially remarkable, however, is the pedigree of this work. Professor Fink teaches and publishes on traditional legal topics.[2] Professor Tushnet, however, is one of the "leading members"[3] of the controversial Critical Legal Studies (CLS) school. CLS writers, though difficult to characterize as a group, take steps beyond their

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1. *E.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER]; D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS (3d ed. 1982); W. MCCORMACK, FEDERAL COURTS (1984). *See also* C. WRIGHT, THE LAW OF FEDERAL COURTS (4th ed. 1983) (hornbook); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980) (essays).

2. *See, e.g.*, Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965).

3. Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 201 (1984).

ideological ancestors in the Legal Realism movement of the early twentieth century; they irreverently "trash" the legal concepts and thinking that the vast majority of practitioners and law teachers in this country employ. In particular, the CLS movement focuses on the contradictions in modern liberal thought that it finds embodied in our judicial system, and seeks to expose many liberal notions as merely rationalizations for the illegitimate social and economic hierarchies of modern capitalist society.[4] According to CLS scholars, the ruling order shapes supposedly neutral rules and procedures to preserve its hegemony. "Thus," one CLS writer argues, "the course on federal courts is best seen as the purest of contentless legalist rituals . . . ."[5]

Tushnet's collaboration with Fink in a traditional legal text undoubtedly will perplex and disappoint his CLS colleagues. Tushnet's seeming apostasy does not, however, warrant a reaction of alarm within CLS, inasmuch as his past publications include several traditional analyses of federal jurisdiction as well as some of the most important CLS work.[6] After considering Fink and Tushnet's analytical viewpoint and the substance of their work, I will return to the apparent contradiction of a CLS writer authoring a text about the "purest of contentless legalist rituals."[7]

I.

Law school courses and textbooks treating federal jurisdiction and procedure generally lack unifying themes, perhaps because they address procedural rather than substantive issues. The leading casebook, *Hart and Wechsler's The Federal Courts and the Federal System*,[8] simply states that it will explore problems arising from the distribution of power in a federal system of government.[9] More recent writers emphasize the tensions in allocating jurisdiction between federal and state courts, and in federal court deference to

4. A helpful sampling of articles on the controversial CLS school appears in *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

5. Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 n.65 (1984).

6. *Compare* Tushnet, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts is Unending*, 72 GEO. L.J. 1311 (1984) *and* Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980) [hereinafter cited as Tushnet, *Sociology*] *and* Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301 (1978) [hereinafter cited as Tushnet, *Constitutional and Statutory Analyses*] (traditional approaches) *with* Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978) (nontraditional approach).

7. Kelman, *supra* note 5, at 319 n.65.

8. *Supra* note 1.

9. *Id.* at xix-xx.

state courts or state law.[10]

Fink and Tushnet expand on the latter theme. They state that their "point of view" is that "[t]he words of article III [of the Constitution], providing for the jurisdiction of the federal courts, are opaque" (p. vii). Thus, it is impossible to find the " 'true meaning' " of the words; "[r]ather the search is for the *choices* that were open to the drafters" of article III (p. vii). The authors explain that the scope of federal jurisdiction is shaped by continual tensions, those between "localist" and "centralist" tendencies, and those embodied in the separation of powers "between the federal courts and the other branches of government" (p. vii). Rather than advocate the primacy of any particular viewpoint, the authors call for a "dialogue" on the issues (p. 7).

Most scholars, I suspect, will have little difficulty with these statements. Regardless of what else may be said about interpretivist, structural, doctrinal, or ethical approaches to constitutional interpretation,[11] Fink and Tushnet correctly observe that the Constitution does not "specify the allocation of [jurisdiction] between lower federal and state courts" (p. 3). Article III, they contend, "embraced a compromise between" the competing tendencies, leaving it to Congress, judges, and lawyers—the "policymakers"—to crystallize and decide particular jurisdictional disputes, either

10. *See, e.g.*, M. REDISH, *supra* note 1.

11. For examples of the renaissance in constitutional studies and divergent viewpoints, see R. BERGER, GOVERNMENT BY JUDICIARY (1977); P. BOBBITT, CONSTITUTIONAL FATE (1982); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); *Judicial Review and the Constitution — The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260 (1981); *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981). With the exception of Raoul Berger, most writers reject the strictly historical or interpretivist approach. *See, e.g.*, Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). Even Berger questions whether the history of article III is accessible. *See* McAffee, *Berger v. The Supreme Court — The Implications of His Exceptions Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984).

On the other hand, courts and commentators agree that drafters' intent is critical to proper statutory analysis. *See* Oliver v. United States, 104 S. Ct. 1735, 1745-46 & n.5 (1984) (Marshall, J., dissenting) ("We do not construe constitutional provisions . . . the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control. . . ."); Solimine, *Adjudication of Federal Civil Rights Actions in Ohio Courts*, 9 U. DAYTON L. REV. 39, 50 n.62 (1983) ("Of course, the extent to which the intent of the Framers . . . can or should be relevant to the interpretation of the amendment is the subject of the current debate . . . . On the other hand, there seems to be much less controversy in divining the intent of the Framers to determine if exclusive jurisdiction of a certain statute lies in the federal courts."). Though Fink and Tushnet do not expressly address the point, they seem to be willing to rely on the intent of the drafters of statutes, to the extent it may be discovered (*e.g.*, p. 109) (discussing 42 U.S.C. § 1983 (1982)).

through legislation or litigation (p. 5).[12] Thus, Fink and Tushnet essentially adopt a structural or doctrinal view of article III that is not bounded by the history or the "opaque" language of the Constitution.

They also do not hide their ideology. The authors give lengthy quotations to support their premises from articles by Abram Chayes (p. 663)[13] and Burt Neuborne (p. 9),[14] which, respectively, contend that federal court litigation does and should address broad, institutional issues usually left for resolution to other branches of government, and that state courts are unwilling or incapable of adequately adjudicating federal constitutional questions. Likewise, the authors also adopt traditional liberal positions when criticizing proposals to curtail diversity jurisdiction (p. 403).

The objective manner in which Fink and Tushnet present these issues is compelling. For example, the authors clearly sympathize with Neuborne, but rather than uncritically endorse his views, they question some of his assumptions and argue that "[t]he question [of state court competence] is closer than Neuborne suggests" (p. 16). Similarly, while they endorse the retention of diversity jurisdiction and present empirical studies of lawyers to support their position, they also present opposing views (pp. 403-06).[15] Although the au-

12. I have described elsewhere the intent of the article III drafters regarding the obligation of state tribunals to consider federal constitutional questions, popularly known as the "Madisonian Compromise." Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 215, 221 n.50 (1983). Article III's language also reflects that the Framers, with very limited exceptions, never considered many common jurisdictional questions, such as abstention, concurrent jurisdiction, and federal common law. *See* Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

13. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

14. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). I previously have questioned the social science evidence upon which Neuborne bases his assumptions. Solimine & Walker, *supra* note 12. *See also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (arguing that Neuborne's arguments for federal court superiority ignore the institutional reality of state and federal issues arising together, particularly in state enforcement proceedings involving a federal question, and do not justify federal intervention); Tushnet, *Constitutional and Statutory Analyses*, *supra* note 6, at 1307 n.35 ("[S]tate hostility to federal law . . . may not be as great as some fear.").

15. The authors support other important points with empirical evidence. They argue that judges interpreting 42 U.S.C. § 1983 (1982) should not fear opening the floodgates of § 1983 litigation, inasmuch as plaintiffs rarely win § 1983 actions (p. 698). *See* Briscoe v. Lahue, 103 S. Ct. 1108, 1122-23 (1983) (Marshall, J., dissenting); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 522 (1982).

They also point out that the paucity of successful habeas corpus suits undermines the "floodgates" argument in that context (pp. 815-16). Without disputing this data, I do not

thors oppose using historical evidence to interpret article III, they present a concise and accurate summary of the history of the federal court system (pp. 5-7). Even when history supports their argument, as with the indisputable intent of the Reconstruction Congress to expand the power of federal courts, they question whether such intent can or should be controlling a century later (p. 95).[16]

Fink and Tushnet thus emphasize the policies underlying jurisdictional questions while considering history and empirical evidence as well. Their perspective is unabashedly liberal, but they fairly present opposing viewpoints. They create an appropriate framework for presenting the issues of federal jurisdiction and procedure.

II.

The authors of any casebook are constrained by the skeleton of cases they choose to reproduce. Even so, different approaches are possible. Professor Robert Sedler has identified three options: "(1) 'cases, cases and more cases'; (2) 'cases and substantive commentary'; and (3) 'cases and commentary with direction and probing.' "[17]

Fink and Tushnet have chosen the third option. While the cases they reprint are edited "less tightly" (p. viii) than usual, the text is a lean 900 pages. Moreover, the authors use a wide variety of lower court cases and secondary sources to augment the traditional, "leading" Supreme Court decisions. Rather than simply citing masses of cases and law review articles,[18] the authors summarize the commentators' views and the holdings of the cases. Further,

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necessarily agree with the implications drawn by Fink and Tushnet. For example, even meritless suits tie up the courts and litigants, and many civil suits settle out of court. Nevertheless, I applaud their use of empirical evidence, as I did when evaluating Neuborne's article. *See* Solimine & Walker, *supra* note 12, at 225. Their use of such evidence demonstrates a sharp contrast with the many CLS writers who loathe empirical or social science studies. *See* Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). *See also* Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1400 (critiquing "Anglo-American tradition of empiricism" and advocating application of contemporary European social theory to American law).

16. Professor Redish, by comparison, believes that modern courts should examine the intent of the Reconstruction Congress as the overriding factor in deciding jurisdictional questions. *See* Solimine & Walker, *supra* note 12, at 223-25 (discussion of Redish's views). *Cf.* Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57 (1984) ("Critical legal writers pay a lot of attention to history."); *supra* note 11 (discussing use of history in constitutional and statutory interpretation).

17. Sedler, Book Review, 79 MICH. L. REV. 1020, 1026 (1981) (reviewing seven constitutional law textbooks).

18. Despite its general usefulness and depth of treatment, certain portions of HART & WECHSLER, *supra* note 1, suffer from too much citation and too little analysis.

Fink and Tushnet include many detailed hypothetical questions. This useful pedagogical tool enables students to apply jurisdictional principles outside the context of the reprinted cases. While not as lengthy, their postcase notes rival the quality of those in *Hart & Wechsler*.[19]

The "policy" approach of Fink and Tushnet, however, does not distort the substantive format of the text. As in most federal jurisdiction casebooks, the authors cover familiar ground in chapters on the definition of a "federal question" under article III and the corresponding jurisdictional statute,[20] the scope of the civil rights statutes, particularly section 1983,[21] the eleventh amendment,[22] *Erie* questions, standing, and limitations on the exercise of federal court jurisdiction.

Reserving discussion of article III standing questions, which often are the starting point of constitutional law textbooks, until the eighth chapter does not detract from the text's organization. The authors first address the "tensions" between federal and state law and between federal courts and Congress. They then devote an entire chapter to federal civil rights actions. In later chapters procedure in federal courts is extensively discussed; these chapters examine the intricacies of diversity jurisdiction, various provisions of the Rules of Civil Procedure, and appellate review. This organization is superior to *Hart & Wechsler*, which covers all of these themes in a somewhat disjointed fashion.[23]

The usefulness of Fink and Tushnet's text is illustrated by their treatment of congressionally or judicially created barriers to the power of federal courts, the most controversial topic in federal jurisdiction today. This issue is approached in a number of ways. In

19. *See* Monaghan, Book Review, 87 HARV. L. REV. 889, 890 n.10 (1974) (reviewing HART & WECHSLER).

20. 28 U.S.C. § 1331 (1982).

21. 42 U.S.C. § 1983 (1982).

22. The authors observe that the "[c]ase law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions" (p. 137).

23. For example, HART & WECHSLER treats civil rights matters throughout the book, and its discussion of the eleventh amendment is truncated. Moreover, its sequence of chapters lacks a logical order; chapters on the original jurisdiction of the Supreme Court and Supreme Court review of state court decisions are presented early in the book. *See* Monaghan, *supra* note 19, at 895. Fink and Tushnet only briefly mention original jurisdiction (p. 818), and discuss appellate review in their last chapter. Aside from the logic of treating these matters last, it seems sensible to limit discussion of such issues in a text primarily directed toward students, who rarely will use such materials in practice. The authors say that they only present these topics to guide practitioners on preserving issues for Supreme Court review and because they raise federalism and separation of powers problems (p. 826).

addition to discussing the ability of Congress to restrict federal court jurisdiction, the authors address how the often vague jurisdictional statutes should be construed and what presumptions should govern their interpretation. The authors reject the "clear statement" rules that require an express indication that Congress intended to grant federal courts power over the litigation in question (p. 142), inasmuch as a "clear statement" rule generally will restrict federal court jurisdiction.[24] Fink and Tushnet suggest an approach that most closely implements congressional intent; usually this means that broader jurisdiction is warranted (pp. 22, 30-31, 55, 476).[25]

Equally stimulating is the authors' discussion of the Supreme Court's "political question" doctrine. They acknowledge that the Court uses this device to avoid addressing "hot issues," but criticize the doctrine as being "fuzzy," believing that the Court uses the doctrine to cloak the actual reason for avoidance of the issue in a "more typical legal concern" (p. 214). As an alternative, Fink and Tushnet propose a formulation in which federal courts would "find an issue to be committed to the political branches only where the political constraints on their actions make it unlikely that they will decide the issue in a way that threatens individual liberty" (p. 220). This definition, they argue, "has the advantage of linking the primarily structural concerns of the separation of powers to the goal that separation of powers serves" (p. 220). They candidly acknowledge, however, that it would introduce the complexities of an in-depth analysis into a currently "manageable" test, that essentially examines whether the text of the Constitution commits the question to resolution by either the President or Congress (p. 220).[26]

24. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 674-77 & n.17 (1974) (eleventh amendment held to preserve state immunity from suit in federal court in the absence of express abridgement by Congress). Justice William H. Rehnquist, a pariah to liberal academicians, e.g., Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976), authored the *Edelman* opinion. It is a measure of Fink and Tushnet's objectivity that they give prominent and at times favorable treatment to Rehnquist opinions (pp. 56-57, 67-73, 273-74, 793-810, 829-34) despite Tushnet's characterization of Rehnquist as the court's "most reactionary member." Hutchinson & Monahan, *supra* note 3, at 218 (quoting Tushnet, *Corporations and Free Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 253 (D. Kairys ed. 1982)).

25. *See also* Tushnet, *Constitutional and Statutory Analyses, supra* note 6 (elaborating broader jurisdiction ideas).

26. *See* Goldwater v. Carter, 444 U.S. 996, 997 (1979); Baker v. Carr, 369 U.S. 186, 217 (1962). Fink and Tushnet are not alone in calling for the abolition of the political question doctrine. *See, e.g.*, De Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc) (the uncertainty of the doctrine makes it susceptible to indiscriminate and overbroad application).

Likewise, Fink and Tushnet trace the somewhat inscrutable law of standing from the liberal rule of *Flast v. Cohen*[27] to "*Flast*'s demise" (p. 304) in more recent cases. They are clearly unsympathetic to the Court's most recent approach to the strict "injury" and "causation in fact" requirements, exemplified in *Allen v. Wright*,[28] in which the Court held that the parents of black school children had no standing to challenge the granting of tax credits to schools with racially exclusionary practices. While they argue that these decisions are not "directly linked to a 'conservative-liberal' dimension," they find the current Court "conservative . . . on all the issues raised in its standing cases" (p. 319). The authors argue that the Court should have reached the merits of these cases,[29] and imply that if the Court had done so it would have reached a conservative result (p. 323).[30]

Similar themes emerge in the authors' discussion of limitations on the power of federal courts "to assure adherence to norms of national law" (p. 615). Considered are the *Younger*[31] and *Pullman*[32] abstention doctrines and the Court's recent restrictive approach to the availability of habeas corpus in federal courts. While conceding that *Younger* was probably decided correctly on its facts (p. 625), they contend that "nothing very powerful emerges, aside from the rhetoric" (p. 638) when the *Younger* line of cases is taken as a unit. The authors do, however, make appropriate reference to the federalism arguments that support such limitations (e.g., pp. 616, 673, 695, 744). One way to resolve the dispute over some of these issues, as the authors suggest elsewhere,[33] is to defer to congressional intent embodied in the jurisdictional and habeas corpus statutes (pp. 693-94, 781). Consideration of this intent, they argue, would usually result in a less restrictive abstention doctrine and a

27. 392 U.S. 83 (1968).

28. 104 S. Ct. 3315 (1984).

29. However, the authors are restrained in their critique of Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), in which the court took a liberal standing approach to reach the merits and uphold the constitutionality of the Price-Anderson Act (pp. 321-22). This approach to standing parallels the authors' advocacy of dialogue on the substantive issues raised by particular cases (p. 7).

30. Some political scientists have documented a link between the Justices' votes on standing, similar cases, or on certiorari petitions and their generally conservative or liberal voting records. *See* D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); Rathjen & Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979).

31. Younger v. Harris, 401 U.S. 37 (1971).

32. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

33. *See supra* notes 24-25 and accompanying text.

broader habeas corpus approach. Although such an approach is outwardly reasonable, it is constrained by the difficulty in ascertaining congressional intent.[34] Perhaps the presumptions used for interpreting such statutes would operate here.[35]

Finally, Fink and Tushnet's discussions of the Rules of Civil Procedure, res judicata, and collateral estoppel must be mentioned. Such a lengthy discussion, over 200 pages, is usually left to texts on those specific topics. The authors justify the inclusion on the basis that procedural devices are intimately connected to the usual real-world jurisdictional questions (p. vii). This position is quite defensible. An instructor can disregard these passages in the text should he find them unimportant.

III.

There may be several reasons why Professor Tushnet did not take an opportunity to "trash" federal jurisdiction in this textbook. One that immediately comes to mind is money. It is extremely doubtful that a CLS tract on federal jurisdiction would find a market.[36] Another possible explanation is the moderating influence of Professor Fink, who apparently has been impervious to the CLS influence of his coauthor.

More specifically, Tushnet has managed to integrate his CLS work with more traditional analyses of jurisdictional issues. In a recent article, Tushnet justified an extensive analysis of the Supreme Court's decisions in *Engle v. Isaac*[37] and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[38] both also treated in the textbook, as a "descriptive project . . . to discover the unexpressed assumptions on which the entire Supreme Court and most commentators are agreed."[39] Tushnet identifies these assumptions as embodiments and products of the inherently contradictory norms in a

34. *See, e.g.*, Patsy v. Florida Bd. of Regents, 457 U.S. 496, 501-02 (1982) (discussing difficulty in discerning congressional intent regarding whether exhaustion of state administrative remedies is a prerequisite to a § 1983 action); *see also supra* note 11 (contrasting importance of drafters' intent in interpreting Constitution and statutes).

35. *See supra* note 25 and accompanying text.

36. *See* Sedler, *supra* note 17, at 1021 ("Casebooks that will not sell will not be published, regardless of their academic quality. Authors must, therefore, package their casebooks so as to enhance marketability.").

37. 456 U.S. 107 (1982) (habeas corpus case).

38. 458 U.S. 50 (1982) (holding portions of the 1978 Bankruptcy Reform Act unconstitutional).

39. Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 627 (1984).

liberal, capitalist culture.[40] Elsewhere, he has criticized the Supreme Court's article III standing doctrines, arguing that they fail to reflect the sociological realities of litigation.[41]

I have some doubt whether other CLS writers will be comfortable with this writing.[42] But the loss to CLS is a gain to the more traditional American practitioners and law teachers. This well-written text deserves a place alongside *Hart & Wechsler* on our bookshelves.

40. *Id.* at 635-39, 646.

41. Tushnet, *Sociology, supra* note 6, at 1708-21; *see* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Wasby, *How Planned is "Planned Litigation?"*, 1984 AM. B. FOUND. RESEARCH J. 83.

42. *See supra* note 5 and accompanying text.