# Legal Scholarship and Law Reform

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Herbert Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216 (1948).

Perhaps Herbert Wechsler needs no introduction, no expression of appreciation. He did, after all, leave an indelible mark on three bodies of law: criminal law, constitutional law, and the law of federal jurisdiction. He served as the third director of the American Law Institute, shepherding an important collection of Restatements through the process of drafting and approval. Also in his director's role, he played a central role in the ALI Study of the Division of Jurisdiction Between State and Federal Courts (1969), which occupies a place on my federal courts bookshelf alongside the 1953 casebook Wechsler wrote with Henry Hart.

But despite his many contributions to legal scholarship, Wechsler's reputation these days might appear to depend on two articles: 1959's *Toward Neutral Principles of Constitutional Law* and 1953's *The Political Safeguards of Federalism*. The first has suffered from its criticism of the Supreme Court's decision in *Brown v. Board of Education*, which comes as close as one can these days to academic apostasy. The second contributed an enduring idea to the canon of constitutional law, but one that may have fallen temporarily from grace with the rise of the judicially enforced federalism of the Rehnquist Court.

I want to focus instead on Wechsler's 1948 article, *Federal Jurisdiction and the Revision of the Judicial Code*. I find myself returning to the article for a number of reasons. To begin with, the choices of the 1948 revisers and codifiers remain very much a part of our jurisdictional law over sixty years on, as do Wechsler's criticisms of those choices. In addition, the article has the remarkable Wechslerian ability to identify doctrinal and statutory rough patches and foresee new departures in jurisdictional law. Indeed, a surprising number of Wechsler's suggestions have been written into the law of federal jurisdiction, either by Congress or the Supreme Court, thus underscoring the power of scholarship as a tool of effective law reform. Wechsler managed to accomplish all this in thirty pages, deploying a gift for concision we should all envy.

Finally, the article offers a glimpse backward to the middle years of the twentieth century, when Congress was placing the government on a more responsible footing in relation to the citizens hurt by the conduct of government business. Congress had just adopted the Administrative Procedure Act and the Federal Tort Claims Act, both aimed at facilitating litigation to remedy illegal federal government action. Rather than something that courts and commentators cherished or sought to defend, sovereign immunity was rightly regarded as a relic of a less enlightened age.

Wechsler began with a simple statement of principle: in general, federal courts should focus on the litigation of federal questions and should steer clear of matters of state law. In this approach, Wechsler was part of a broad group of scholars and jurists (including Felix Frankfurter and Henry Friendly) who thought of the business of the federal courts from a post-*Erie* perspective that cast doubt on the wisdom of expending federal judicial resources to resolve state law matters in diversity. Not only did the cases burden the federal courts, but they presented in its most "aggravated form" the worrisome possibility that federal courts would misapply state law. Curiously, recent legislation (including the Class Action Fairness Act and the Multi-Party Multi-Forum Trial Jurisdiction Act) seems to have lost touch with that simple principle, expanding the scope of minimal diversity jurisdiction without attending to the accompanying problems of choice of law.

In proposing to simplify jurisdiction over claims against the federal government, Wechsler began with the view that sovereign immunity should be limited in favor of a principle of government accountability. A similar principle emerged

in a 1976 amendment to the APA, although immunity remains a stumbling block far too often. Second, he advocated the elimination of any amount-in-controversy requirement, not only for claims against the government but for all claims based upon federal law. Eventually, Congress came to agree, although not for thirty years. Third, he offered a series of useful suggestions to address venue issues in mandamus proceedings, something Congress fixed in 1962. Fourth, he called for recognition of a general principle that challenges to the legality of federal official action belong in federal court, not only to be implemented through the government's right to remove (which first appeared in the 1948 codification) but also as a plaintiff's right to lodge the case in federal court in the first instance. In thus anticipating the *Bivens* action, albeit on a much wider scale than it occupies today, Wechsler suggested that federal common law should provide the measure of official liability. Finally, Wechsler criticized the derivative jurisdiction removal doctrine, which holds that removal jurisdiction attaches only where the state court could have asserted jurisdiction had the action remained there. Congress eliminated this rule from general removal law, although the federal government continues to invoke it, unfortunately with some success, for its own special benefit.

Other comments in the article, large and small, anticipate and challenge jurisdictional developments. For example, Wechsler dealt quite pithily with the problems of federal-state relations presented by the *Ex parte Young* doctrine. He noted the rise of equitable abstention doctrines, and called for a more general approach: federal courts should stay their hands when states offer a plain, speedy, and adequate remedy. Wechsler recognized that by casting the burden on the states to demonstrate the existence of an adequate remedy, federal law would go far to ensure its ready availability. Yet he would have created an exception for actions brought under the civil rights statutes, thus recognizing that state-federal tension in the coming years was likely to center on such equality claims, rather than the substantive due process claims brought to federal court in *Ex parte Young* itself. Apart from abstention, Wechsler sketched a clever solution to the problem of supplemental jurisdiction, suggesting presciently that jurisdiction should attach to transactionally-related pendent state claims subject to discretion in the district court to send state law matters back to state court. He even called for the tolling of the limitations period while the later-dismissed state claims were pending in federal court.

As for the problem of choice of law, Wechsler endorsed the *Erie* doctrine but called for wide recognition of the power of federal courts to fill gaps and enforce federal rights through the development of federal common law. Wechsler would have dealt with the problem by amending the Rules of Decision Act to provide that, for the enforcement of all federal rights and duties, "the federal courts are authorized to grant all remedies afforded by the principles of law, unless an Act of Congress otherwise requires or provides." Under such a statute, the power of the federal courts to give effect to federal rights, either through rights of actions or remedies, would have been clearly acknowledged, and much of today's sturm and drang over implied rights of action might have been avoided. Wechsler also anticipated Friendly's famous paper, *In Praise of Erie—And of the New Federal Common Law* and the future course of decisional law by arguing that all such federal judge-made law should be regarded as binding in state court.

Wechsler may have overreached on one question. Offering a broad view of Congress's power to expand the jurisdiction of the federal courts, Wechsler argued that a grant of jurisdiction within a field of congressional competence might operate as a legitimate form of federal regulation, even where state law was to apply. While the Court has been unwilling to embrace this conception of protective jurisdiction, its approach to federal ingredient jurisdiction allows Congress to achieve similar goals with relatively modest federal substantive law provisions (as it has done under the Federal Tort Claims Act and the Foreign Sovereign Immunities Act). Protective jurisdiction of Wechslerian breadth thus remains but a glimmer in the scholar's eye.

Although 63 years have passed, Wechsler's article still rings true and continues to offer a reform program of surprising relevance today. Let's think for a moment about what Wechsler brought to this lasting piece of scholarship: a sure-handed command of existing law; an understanding of how the legislative and judicial processes work; an imaginative conception of the potential range of doctrinal growth; and a keen eye for the changes that would require legislative involvement. Apart from these gifts, Wechsler believed in the importance of law reform as a positive program for change led by legal scholars. In a world increasingly devoted to the work of scholars who care little for the content of law, Wechsler's commitment to a scholarship of law reform may, ironically, be the feature of the article least likely to

survive.

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