

AL HILL: A GRANDMASTER HAS PASSED

*Henry Paul Monaghan**

“Al Hill is the legal scholar’s scholar.”¹

Al Hill died on December 5, 2015 at the age of 98, outlasting most of his contemporaries. Al had taken senior status when I came to Columbia Law School, and I succeeded him in the course on federal courts. The little I saw of Al left me with the firm impression of a warm, gentle, affable, caring human being. I did, however, know Al’s work quite thoroughly. And while a memorial is no occasion for an extended review of Al’s long and distinguished academic career, I would like to draw attention to a particularly shining period: Al’s contributions to federal courts scholarship during the decades between the late 1950s and early 1980s. Al’s writings during that period solidified his reputation as a federal courts grandmaster.

The 1953 publication of Hart & Wechsler, *The Federal Courts and the Federal System*,² was the heart and soul of the federal courts tradition. Professor Akhil Amar’s splendid 1988 review (ostensibly of the third edition) put the matter nicely: “What can you say about a thirty-five-year-old casebook that still lives? That its first edition was beautiful and brilliant—probably the most important and influential casebook ever written.”³ Amar collected the many glowing tributes paid to the first edition.⁴

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1. Faculty Resolution, Professor Alfred Hill, 91 Colum. L. Rev. 227, 227 (1991) (quoting Arthur John Keeffe, *Current Legal Literature*, 59 A.B.A. J. 1193, 1193 (1973)).

2. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (1953).

3. Akhil Amar, Book Review, 102 Harv. L. Rev. 688, 688 (1988).

4. See *id.* at 689–91 (“This extraordinary work is perhaps the most influential casebook ever written.” (quoting Philip Bobbitt, *Constitutional Fate* 43 (1982))). The book is now in its seventh edition. Recently, one of its current editors wrote that he could “claim no credit for the book’s most extraordinary influence, which flows predominantly from the first edition . . . and from the first edition’s success in defining the field as we now conceive it.” Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 St. Louis U. L.J. 693, 696 (2009). The genesis of the book is worth recording. On April 8, 1948, Herbert Wechsler sent the following typewritten memorandum:

To: Henry M. Hart, Harvard University Law School
Paul Freund, Harvard University Law School
Harry Shulman, Yale University Law School

As one who has been driven to use . . . [name omitted] . . . because Frankfurter and Shulman is ancient and unavailable, I urge that something should be done to bring the latter up to date and reissue it. I made

Hart & Wechsler has had an enormous grip in shaping the thinking of law students, professors, and judges. They became the “People of the Book,” as one observer wittily noted.⁵ Al Hill was a towering figure in this tradition, a tradition that was particularly vibrant here and at Harvard.⁶ Much of Al’s agenda was an attempt to work out the implications of the Supreme Court’s then none-too-distant decision in *Erie v. Tompkins*.⁷ Hill wrote essays on *Erie* and the constitution,⁸ and *Erie* and bankruptcy.⁹ The former was an effort to ground *Erie* in the constitution (a view which I share) and not in some unmoored, judicially fashioned conception of choice of law.¹⁰ In his bankruptcy essay, Hill demonstrated that bankruptcy provided no occasion for a freestanding federal judicial authority to disregard interests created by state law.¹¹ And in an article on Federal Employers’ Liability Act suits in the state courts—a rather burning topic back then—Hill argued (contrary to Henry Hart) that Congress could properly impose federally derived remedial provisions on the state courts.¹²

Al also wrote an extremely influential article on federal preemption of state law.¹³ There he argued that, except with respect to certain federal

my plea orally last week to F.F. and venture to think that he was somewhat responsive—though he maintained judicial impassivity throughout. The truth is this is not a difficult or very time-consuming job and you, or some combination of you, ought to get it done. If you will take it on, I’ll be happy to make my suggestions for whatever you may think them worth.

In sum, we need a decent book if we are to continue teaching Federal Jurisdiction; for sentimental and for practical reasons, the way to get it is to revise the book that we have all used in the past.

WHEREFORE, etc.

Herbert Wechsler

copy to Mr. Justice Frankfurter.

Memorandum from Herbert Wechsler, Professor, Columbia Law Sch., to Henry M. Hart, Professor, Harvard Law Sch. et al. (Apr. 28, 1946) (on file with the *Columbia Law Review*).

This letter, a copy of which is in my files, was discovered among Wechsler’s papers by my former colleague and now N.Y.U. Law Dean, Chief Detective Inspector Trevor Morrison.

5. The “wit” was, of course, yours truly. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 716 (2012).

6. See Amar, *supra* note 3, at 691–93.

7. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

8. Alfred Hill, *The Erie Doctrine and the Constitution*, 53 *Nw. U. L. Rev.* 427 (1958) [hereinafter Hill, *Erie and Constitution*].

9. Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 *Harv. L. Rev.* 1013 (1953) [hereinafter Hill, *Erie and Bankruptcy*].

10. Hill, *Erie and Constitution*, *supra* note 8, at 437.

11. Hill, *Erie and Bankruptcy*, *supra* note 9, at 1050.

12. Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 *Ohio St. L.J.* 384, 386–88 (1956).

13. Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 *Colum. L. Rev.* 1024 (1967) [hereinafter Hill, *Lawmaking Power*]. Al, it

enclaves, state law provided the applicable rule of decision unless Congress had provided otherwise.¹⁴ This was a direct challenge to more embracing conceptions of federal judicial common law-making. Al's 1969 article, *Constitutional Remedies*, was very widely noticed.¹⁵ He explored the possibility of the Constitution itself providing remedies against governmental interference with constitutionally protected interests,¹⁶ anticipating the issues raised by the *Bivens* doctrine.¹⁷ And Al wrote two insightful articles on the extent to which the Supreme Court would be barred from reviewing state court decisions on matters of federal law. One dealt with the inadequate state ground doctrine¹⁸ and the other with the forfeiture of constitutional rights in criminal cases.¹⁹

This gives the reader at least a sense of the energy and range that Al possessed. And Al's intellectual interests were more wide-ranging than federal courts. He was a major contributor to the then-challenging field of conflict of laws.²⁰ He also wrote a very influential article on defamation and the First Amendment.²¹ Each of the articles mentioned is a significant contribution to the topics it addressed.

Al continued to write long after his retirement, but the period I have focused on was a particularly important one. In my Tribute to Al, I wrote "Al Hill was and is a teacher to many great professors, students, and lawyers, including those who never once have set foot inside Columbia Law School. I have been among that group, and I wish to say, thank you. And so, thank you, but not good bye!"²² Now, sadly, it is time to say goodbye.

should be noted, had a rather capacious view of what counted as statutory construction. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 650 (Richard H. Fallon, Jr. et. al. eds., 7th ed. 2015).

14. Hill, *Lawmaking Power*, supra note 13, at 1080.

15. Alfred Hill, *Constitutional Remedies*, 69 *Colum. L. Rev.* 1109 (1969).

16. *Id.* at 1109–12.

17. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 393–97 (1971) (allowing an implied right of action for damages for an alleged Fourth Amendment search and seizure violation).

18. Alfred Hill, *The Inadequate State Ground*, 65 *Colum. L. Rev.* 943 (1965).

19. Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 *Colum. L. Rev.* 1050 (1978).

20. E.g. Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 *Colum. L. Rev.* 960 (1981); Alfred Hill, *The Judicial Function in Choice of Law*, 85 *Colum. L. Rev.* 1585 (1985).

21. Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 *Colum. L. Rev.* 1205 (1976).

22. Henry Paul Monaghan, *In Honor of Alfred Hill*, 91 *Colum. L. Rev.* 231, 231 (1991).