Chapter 4
Judicial Federalism

JUDICIAL federalism relies on the principle that the state and federal courts together comprise an integrated system for the delivery of justice in the United States. Historically, the two court systems have played different but equally significant roles in our federal system. The state courts have served as the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law. The federal courts, in contrast, have had a much more limited jurisdiction. The source and nature of federal jurisdiction derive from a number of constitutional powers vested in Congress; and the notion of a limited federal court jurisdiction is premised on the more fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states.

It follows from this fundamental view of the nature of our federal system of government that the jurisdiction of the federal courts should complement, not supplant, that of the state courts. Although Article III, Section 2 of the Constitution potentially extends federal judicial power to a wide range of "cases and controversies," the Framers wisely left the actual scope of lower federal court jurisdiction to Congress' discretion. Traditionally, Congress has refrained from disturbing the jurisdiction of state courts, allocating a narrower jurisdiction to the lower federal courts than the Constitution permits[1] and allowing state courts to retain concurrent jurisdiction in numerous civil contexts. Indeed, for nearly the first century of the Republic, the federal courts did not have general original jurisdiction in matters arising under the Constitution, laws and treaties of the United States,[2] and a minimum amount in controversy was required for some "federal question" cases until fairly recently.[3] For that reason, it is possible to distinguish between federalism in the legislative context—the breadth of Congress's power to legislate under Article I, Section 8—and in the judicial context—the appropriate allocation of jurisdiction to the federal courts under Article III.

Beyond historical practice, the allocation of limited jurisdiction to the federal courts is justified by both theory and practice. Unless a distinctive role for the federal court system is preserved, there is no sound justification for having two parallel justice systems. If federal courts were to begin exercising, in the normal course, the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve

[1] For example, the diversity jurisdiction conferred by statute, 28 U.S.C. § 1332 (1988) (see *infra* Recommendation 7), is narrower than that authorized by Article III, Section 2 of the Constitution. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531 (1967).

[2] *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (now codified at 28 U.S.C. § 1331(a) (1988)).

[3] The general amount-in-controversy requirement for "federal question" cases was eliminated in 1976 for "action[s] brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, and in all cases four years later. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369.

fairly and efficiently those cases of clear national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts—federal and state—might as well be consolidated into a single system to handle all judicial business. To follow this course—toward either a single national court system or two systems engaged in essentially identical business—would be disastrous.

The federal courts, however, have proceeded well on their way down the latter path. As Congress continues to "federalize" crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk.

The following recommendations attempt to articulate and preserve a sound judicial federalism, an end that can be attained in large part—

- first, through sensible limitations on federal criminal and civil jurisdiction
- second, by means of a cooperative federalism in which the federal government and the states work together to promote effective civil and criminal justice systems
- third, through the carefully controlled growth of the federal judiciary
- fourth, through improvement in state justice systems, which may require significant federal financial assistance to state courts, prosecutors, and law enforcement agencies.

Achieving these four goals will produce a dual benefit: federal courts embodying their core values and state courts remaining vital and efficient forums to adjudicate matters that belong there in the light of history and a sound division of authority. Moreover, reduced filings of cases that do not require a federal forum will enhance the federal courts' abilities to vindicate rights in other areas of national interest.

The first goal—limiting the federal court's jurisdiction—should be consistent with, and flow from, an understanding of the benefits of having dual systems of government. In general, the federal government can grapple with problems extending beyond the borders of individual states, problems that require uniform treatment, and problems that are too sensitive or volatile within a local community for effective local regulation or enforcement. State governments, in contrast, are better able to respond to matters of local concern—focusing on the impact that a problem may have in a discrete region, as well as any local interests, needs, or standards that may be implicated. The same principles can apply specifically in the judicial context—but with emphasis on reserving federal court jurisdiction for matters requiring adjudication in that forum.

Meeting the second goal of a cooperative federalism is essential because the missions of the federal and state justice systems, while undoubtedly distinct, nevertheless overlap. Each system can succeed only by communicating and cooperating with the other. Recommendations 4 and 14 strive to promote a healthy federalism in which both judicial systems are made better off through their collective efforts.

The third goal—controlling the growth of the federal judiciary—follows from limitations on growth of the federal courts' jurisdiction. The appropriate size of the federal judiciary is necessarily a function of its jurisdiction. If in the coming years, Congress and the American people remain committed to the principle of judicial federalism, they will remain vigilant in limiting

the jurisdiction—and, consequently, the size—of the federal courts.

Finally, the fourth goal—improving state justice systems—is a necessary condition for preserving the proper roles of the state and federal courts. Active efforts to improve the quality—perceived and actual—of state justice systems may be one of the most productive courses of action for those concerned about federalization and the growth of the federal courts' caseload.[4] Improving perception is important because many lawyers and litigants, unfairly or not, have less confidence in the state courts than their federal counterparts. Improving the actual capacity of the state courts becomes urgent because it is unfair to solve the future caseload burdens of the federal courts by foisting them off onto the states.[5] This is particularly true now, as many fine state court systems face grave fiscal crises. Federal policy currently recognizes the need to provide additional resources to state law enforcement agencies. An effective policy of judicial federalism means that Congress must also consider making significant resources available to the state courts so that they are able to maintain their effective roles in our interdependent justice system.

The starting point in articulating a sound judicial system is identifying the essentials of federal court jurisdiction. In the following sections, the plan recommends prudential guidelines for limiting federal jurisdiction and implementing a sound judicial federalism. Any such proposals, like the ones discussed here or others, would favor certain interests over others, and may therefore be seen by some to constitute an initiative beyond the province of a nonmajoritarian apolitical institution. However, sensible planning presupposes a sound allocation of jurisdiction, consistent with the overarching constitutional scheme, and what ensues is a principled effort to recommend a proper balance. The Congress, needless to say, will have the final word.

Defining and Maintaining A Limited Federal Jurisdiction[6]

❒ RECOMMENDATION 1: **Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.**

The recommendations that follow are efforts to implement this overarching principle; in that sense, achieving the goals of this first recommendation absolutely depends on implementing those more specific recommendations. Nonetheless, the goal of a limited federal court jurisdiction is doomed unless Congress embraces the fundamental philosophy described above.

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[4] *See* Arthur D. Hellman, Paper Presented to the Judicial Conference Committee on Long Range Planning 5 (Oct. 21, 1991).

[5] William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1 (Kastenmeier Lecture, University of Wisconsin Law School, Sept. 15, 1992).

[6] Many of the recommendations contained in this chapter—as well as the supporting rationale—are based on similar recommendations and rationales developed by the Federal Courts Study Committee and contained in that Committee's Report and Working Papers. *See* I FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 94-468 (July 1, 1990).

Criminal Proceedings

❒ RECOMMENDATION 2: **In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:**

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.

No one seriously disputes that conduct directly injurious to or affecting the federal government or its agents should be subject to the exclusive jurisdiction of the federal investigative, prosecutorial, and judicial branches. Treason and counterfeiting are examples of crimes with direct impact on the federal government. Another example is criminal activity within federal enclaves, including prosecution of major crimes in Indian country.

By the same token, federal criminal jurisdiction should also reach offenses in which Congress, in the interests of uniform national regulation, has taken over or preempted an entire regulatory field. Interstate environmental concerns, nuclear regulation, and wildlife preservation (migratory birds, etc.) are examples of the latter.

Finally, this criterion also is intended to capture those occasions when local matters require national attention and resources. In most circumstances, the federal government's involvement in matters that, in one sense, are purely local, but, in another sense, have garnered the nation's interest, will be targeted to particular prosecutions, especially local matters that are beyond the reach of effective action by the state courts.

Appropriate subjects of federal criminal jurisdiction:

- offenses against the federal government or its inherent interests
- criminal activity with substantial multistate or international aspects
- criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise
- serious, high-level or widespread state or local government corruption
- criminal cases raising highly sensitive local issues

(b) The proscribed activity involves substantial multistate or international aspects.

Simply because criminal activity involves some incidental interstate movement does not mean that state prosecution is necessarily inappropriate or ineffective. Activity having some minor connection with and effect on interstate commerce might perhaps be constitutionally sufficient to permit federal intervention, but it should not be enough by itself to require a federal court forum. In contrast, significant interstate activity by actors engaged in a massive enterprise, such as a multistate drug operation or a multistate fraud scheme, should normally call for the resources and reach of the federal government.

(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.

In addition to multistate operations, there are local criminal enterprises that are so complex that they have generally received the resources and attention of the national government. Some commercial crime involving an interplay of business, financial, and government institutions—such as the recent savings and loan investigations—falls into this category. The rationale for federal involvement here is not that a federal role is essential, but that state criminal justice resources have been sorely overtaxed. To the extent that the states receive sufficient resources and develop the expertise to handle these cases, federal involvement should diminish.

(d) The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

Historically, federal prosecutorial and judicial resources have been utilized frequently in state and local public corruption cases. The rationale for federal involvement has been, not so much that state resolution of these matters would be ineffectual, but that federal prosecution and adjudication promote a higher level of public confidence in the country's system of justice.

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

During the height of the civil rights era, there was a manifest need in some parts of the country for the federal government to prosecute acts of violence against civil rights workers when local law enforcement had moved reluctantly against the violators. Even today, some civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government. Charges of a systematic use of excessive force by police officers or criminal interference with the exercise of constitutional rights also fall within this category.

❒ RECOMMENDATION 3: **Congress should be encouraged to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation 2 above. In addition, Congress should be encouraged to consider use of "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.**

There are good reasons for a comprehensive recodification of the federal criminal law wholly apart from any considerations of appropriate federal jurisdiction. As the Federal Courts Study Committee noted:

> [F]ederal criminal law is hard to find, hard to understand, redundant, and conflicting . . . . Important offenses such as murder and kidnapping are commingled with trivial offenses like reproducing the image of "Smokey Bear" without permission (18 U.S.C. § 711) and taking false teeth into a state without the approval of a local dentist (18 U.S.C. § 1821). . . . Lack of a rational criminal code has also hampered the development of a rational sentencing system.[7]

Additionally, by involving itself in a comprehensive redrafting of the criminal code, Congress might become more sensitive to the wise use of executive and judicial branch resources. If encouraged to pinpoint only those offenses worthy of prosecution in federal court, Congress might be persuaded to "weed out" current offenses not appropriate for prosecution in that forum. If "sunset" provisions are included in any new criminal legislation, the process will be an ongoing one. Additionally, continued scrutiny of the criminal code might provide legislators with a broader viewpoint on criminal justice in a federal system that will restrain Congress from creating many similar offenses in the future.

❒ RECOMMENDATION 4: **Congress and the executive branch should be encouraged to undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems.**

Implementation Strategies:

4a *There should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.*

4b *The practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution should be increased.*

4c *State courts should be authorized to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction.*

The growing federalization of state crimes is due in part to Congress' belief that state resources— prosecutorial, judicial, and penal—are overtaxed or inadequate. Congress has a choice, however, in remedying perceived state inadequacies. One alternative, that chosen in recent years, is to create more federal crimes and increase the resources for criminal law enforcement in the federal system. This has had the unfortunate consequence of changing the nature of federalism and hurting the federal courts. Rather than choosing this option with its unintended consequences, Congress could accomplish the same purpose by increasing federal assistance to state criminal justice systems and encouraging cooperative efforts among federal and state prosecutors.

Presently, law enforcement has been enhanced by cross-designations of federal and state prosecutors as well as other coordinated ventures between state and federal law enforcement agencies. With cross-designation, those responsible for a criminal investigation can proceed with a case regardless of whether the resulting prosecution is brought in a federal or state court. The fo-

[7] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106 (1990).

rum can be selected on the basis of whether federal or state interests are implicated, rather than on (among other reasons) a federal or state prosecutor's greater familiarity with the facts. This practice maximizes the effective use of available resources without blurring the necessary distinction between the two court systems.

By authorizing concurrent state and federal jurisdiction over certain federal crimes, Congress could further this cooperation by encouraging prosecution of federal crimes in state courts. For example, federal prosecutions of local drug activity and some violent crime could take place in state court, either by the U.S. Attorney's Office (through cross-designation) or the state's attorney. Incarceration for violation of a federal criminal statute might still result in imprisonment in a federal prison, or additional federal resources could be devoted to aiding state prisons.

Adopting this proposal would require repeal of 18 U.S.C. § 3231, which makes federal criminal jurisdiction an exclusively federal matter, and its replacement with a statute granting the state courts concurrent jurisdiction over some federal crimes. It would also require confronting and resolving many procedural issues arising from the complexity of prosecuting one system's laws in a second system's courts. Notwithstanding these difficulties, the underlying idea is a sound way to enhance cooperative initiatives between the federal and state justice systems.

❒ RECOMMENDATION 5: **The executive branch should be encouraged to develop standards on which the Justice Department will base the promulgation of prosecutorial guidelines. Specifically, standards should be considered—**

(a) that are consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation 2; and

(b) under which the potential for harsher federal sentencing policies and greater capacity in the federal prisons would be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state, criminal statute.

The decisions of federal prosecutors on what offenses to prosecute in federal court rather than state court are as crucial to the success of judicial federalism as any congressional action. In recent years, executive branch policies have occasionally allowed prosecutors to bring federal criminal cases based on factors unrelated to the appropriateness of a federal forum. An established, effective set of guidelines informed by federalism principles could limit prosecutions in federal courts to those matters where national interests are paramount, and avoid using the federal system merely as a substitute for state proceedings. Among the guidelines might be the following criteria for federal prosecution:

(1) offenses commonly prosecuted in state court (*e.g.*, firearm or drug offenses) should not be federally prosecuted absent a demonstrated federal interest beyond the mere violation of a federal statute;

(2) priorities should be set in recognition of limited federal court resources and how they can be used most effectively; and

(3) targets for federal investigation should be selected in accordance with prosecutorial policies (*i.e.*, investigate only those

activities that might properly be the subject of federal prosecution).

Civil Proceedings

❒ RECOMMENDATION 6: **Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. Federal court jurisdiction should extend only to civil matters that—**

(a) arise under the United States Constitution;

There is no serious debate that the federal courts should be charged with the core duty of enforcing and interpreting the federal constitution. One of the federal courts' principal roles is to articulate the nation's fundamental structure of government and its underlying values, including the preservation of individual rights and liberties found in the Bill of Rights and subsequent amendments. Another similar role is the federal courts' protection—through the writ of habeas corpus—of persons held in violation of the Constitution or federal law.

(b) deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests;

A significant percentage of the federal courts' docket involves claims arising under federal statutes. This part of the docket has grown steadily over the years, due in large part to the tendency of Congress to create additional federal causes of action and to provide a federal judicial forum. This criterion identifies two general circumstances in which federal statutory law should provide an Article III forum.

The "strong need for uniformity" standard encourages Congress to be cautious in "federalizing" every matter that captures the nation's attention. It calls for Congress to do so only when uniform resolution is required on an issue that has not been, and clearly cannot be, resolved satisfactorily at the state level. The burden to satisfy this showing should be a high one if the core values of the federal courts are to be preserved. Cases brought under the patent, trademark, and copyright laws are just a few examples of categories of cases satisfying this high standard.

The "paramount interest" standard is intended to account for those areas in which the justification for a federal judicial forum is tied, not so much to a need for uniformity, but to the critical importance our federal government attaches to certain societal values.

Legislation protecting the environment and the free market system and authorizing federal court jurisdiction has arisen in response to the nation's strong interest in these matters. Legislation protecting fundamental rights and liberties also falls within this category. For example, the federal courts have played a vital role in promoting civil rights and in eliminating invidious discrimination in all parts of society. This role should continue. At the same time, Congress should recognize that all state judges take an oath to uphold the U.S. Constitution and the supremacy of federal law. Absent a showing that state courts cannot satisfactorily deal with an issue, Congress should be hesitant to enact new legislation enforceable in the federal courts,

and should not do so in any event without a concomitant reduction of federal jurisdiction in other areas.

Appropriate subjects of federal civil jurisdiction:

- cases arising under the U.S. Constitution
- matters deserving of federal adjudication that involve either a strong need for uniformity or a paramount federal interest
- matters involving foreign relations of the United States
- actions involving the federal government, its agencies or officials
- disputes between or among states
- substantial interstate or international disputes

(c) involve the foreign relations of the United States;

Foreign policy is the prerogative of the federal government, and the federal courts should be the exclusive tribunal for resolving disputes that touch upon relations of the United States with other countries.

(d) involve the federal government, federal officials, or agencies as plaintiffs or defendants;

A sovereign may always sue in its own courts. Providing a forum for resolving all disputes involving the federal government is consistent with the policy of protecting the interests of the federal government as a sovereign. Federal courts also have always had jurisdiction over actions brought by or against agencies and federal officers arising out of their official duties. Exercise of that jurisdiction over such actions ensures that those arms of the federal government can be confident of a forum for the uniform interpretation and application of federal law.

(e) involve disputes between or among the states; or

Absent a neutral forum for resolving disputes between or among the states, state governments occasionally might be tempted to retaliate against each other when a decision in one state's court system had a significant negative impact on the other. In order to promote the solidarity of our union, a federal forum is necessary to resolve controversies between and among the states.

(f) affect substantial interstate or international disputes.

Just as the federal government and its court system should be involved in the criminal prosecution of significant multistate or international activities, it is appropriate for the federal courts to resolve and adjudicate civil matters significantly affecting interstate and international commerce. For example, federal common law jurisdiction over disputes relating to navigable waters derives from the federal government's legitimate interest in substantial interstate activities. Inasmuch as one of the purposes of the federal government is to foster and regulate interstate activity, the federal court system is an appropriate forum for resolving civil disputes over those kinds of activities.

❒ RECOMMENDATION 7: **Congress should be encouraged to seek reduction in the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures:**

(a) eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located; and

(b) otherwise limiting diversity jurisdiction by—

(1) amending the statutes conferring original and removal jurisdiction on the district courts in diversity actions to require that parties invoking diversity jurisdiction plead specific facts showing that the jurisdictional amount-in-controversy requirement has been satisfied;

(2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or

(3) amending the statutory specification of the jurisdictional amount to exclude punitive damages from the calculation of the amount in controversy.

Under Article III of the Constitution and 28 U.S.C. § 1332, the district courts are vested with original jurisdiction over controversies between—

(1) citizens of different states;

(2) citizens of a state and citizens or subjects of a foreign state;

(3) citizens of different states in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state as plaintiff and citizens of a state or of different states.

In such actions, the exercise of federal judicial power is based solely on the identity of the parties, not on any substantive rights, privileges or immunities conferred by federal law. Under the doctrine established in *Erie Railroad Co. v. Tompkins*,[8] the substantive law to be applied by the federal courts in such cases is the statutory or common law of the state in question.

From 1950 through 1995, diversity cases annually have comprised between 20 percent and 38 percent of all civil cases filed in the federal district courts. Approximately 50 percent of all civil trials in the federal courts involve diversity actions.

Diversity jurisdiction currently accounts for more than one of every five civil cases filed in the federal district courts, about one of every two civil trials, about one of every ten appeals, and more than one of every ten dollars in the federal judicial budget.[9] The federal courts' diversity docket constitutes a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law.

Perhaps no other major class of cases has a weaker claim on federal judicial resources. Many believe the original justification for diversity jurisdiction—to protect against local prejudice in state courts—no longer exists, or that it exists in very few

[8] 304 U.S. 64 (1938).

[9] The 49,693 diversity cases filed in 1995 mark a decline from the peak of 68,224 filings in 1988. Diversity jurisdiction, however, continues to provide a substantial part of the federal courts' civil caseload. The reason for the recent decline in diversity filings is not entirely clear, though a significant factor is the 1989 increase in the jurisdictional amount-in-controversy requirement from $10,000 to $50,000.

cases.[10] Given the difficulties that federal judges frequently encounter in predicting state substantive law and the unavoidable intrusion of the federal courts in this law-making function of the state courts,[11] the theoretical justifications for diversity jurisdiction are extremely weak in comparison to other areas of federal court activity.[12]

Changes in the amount-in-controversy requirement for diversity actions:

- 1789: established at $ 500
- 1887: increased to $2,000
- 1911: increased to $3,000
- 1958: increased to $10,000
- 1989: increased to $50,000

Since 1977, the Judicial Conference has supported abolition of federal jurisdiction based on diversity of citizenship.[13] There has been relatively little movement toward attaining that goal. During the same period, the Conference has pursued a variety of intermediate measures designed to narrow, or lessen the impact of, diversity cases on the federal courts. Among other things, it has endorsed repeal of diversity jurisdiction for cases brought by "in-state" plaintiffs, establishment of higher, stricter amount-in-controversy requirements, and treatment of corporations as "citizens" of every state in which they are licensed or registered to do business.[14]

Although the Conference's underlying position on the issue remains unchanged, this plan does not identify total elimination of the diversity docket as a strategic goal. This is so for two reasons.

In the first place, the federalism principles counseling against federal litigation of state-law matters do not require abolition of diversity jurisdiction in all cases. Indeed, most commentators believe that the federal courts should retain diversity jurisdiction at least in actions involving aliens or interpleader.[15] It has also been suggested that Congress consider *extending* diversity jurisdiction in ways that could facilitate the efficient consolidation and resolution of mass tort litigation.[16]

Secondly, there are many, both inside and outside the federal judiciary, who believe that the historical purpose of diver-

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[10] *See* I FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 426-35.

[11] *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

[12] Those opposing elimination of diversity jurisdiction argue its perceived practical benefits: (1) creative interplay between federal and state jurists in development of common law; and (2) availability of alternative forums to enhance efficient administration of justice to litigants.

[13] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8-9 (Mar. 1977); *id*. at 52 (Sept. 1977); *id*. at 7 (Mar. 1978); *id*. at 66 (Sept. 1979); *id*. at 17 (Mar. 1986); *id*. at 72 (Sept. 1987). *See also* Conference of Chief Justices, Resolution I(5)(C) (1977) (expressing state courts' willingness to relieve federal judges of all or part of their diversity caseload).

[14] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Apr. 1976); *id*. at 72 (Sept. 1987); *id*. at 22-23 (Mar. 1988); *id*. at 60 (Sept. 1990); *id*. at 48-49 (Sept. 1993).

[15] 28 U.S.C. § 1335 (1988).

[16] While otherwise seeking to curtail or eliminate diversity jurisdiction, the Judicial Conference supports establishment of "mimimal" diversity criteria to allow federal court consolidation of multiple litigation involving personal injury or property damage arising out of a single event. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21-22 (Mar. 1988). In this connection, a National Commission on the Federal Courts, proposed in Implementation Strategy 91d *infra*, should continue the work of the American Law Institute's Complex Litigation project. It should study and recommend appropriate legislation and rules revisions to provide: (1) for the aggregation or consolidation of claims for pretrial and trial; and (2) for expedited means of bringing claims to trial in ways that are consistent with the Seventh Amendment and protect the rights and interests of the parties.

sity jurisdiction—protection of out-of-state litigants from local prejudice—still has limited viability. Although that protection might be afforded, in theory, by limiting diversity jurisdiction to those cases in which a reasonable need for a federal forum is clearly demonstrated, such a solution poses practical problems. It would require federal courts to determine the susceptibility of state courts to local prejudice—a difficult inquiry with obvious negative consequences for federal-state relations. Even more seriously, it would shift from Congress to the judiciary the power to make "legislative" policy choices about appropriate access to federal court, and it might spawn "satellite" litigation that would undercut the desired reduction in federal judicial workload.[17]

The above recommendation, therefore, incorporates the proposals on diversity jurisdiction in the 1990 Report of the Federal Courts Study Committee.[18] This follows the pragmatic view that the diversity docket will be eliminated, if at all, through a gradual process. While not abandoning the theoretical goal, this plan seeks to keep the judiciary's efforts focused—as they have been for several years—on attainment of practical objectives that will serve the broader interests of both the federal and state courts. Consistent with Recommendation 14, any substantial reduction of the diversity docket will require, at least for a limited time, the congressional transfer of resources to the state courts so that they can accommodate the increased workload.[19]

In the 12-month period ending June 30, 1995, more than 12,000 cases brought under diversity jurisdiction

—approximately 25 percent of the total number of diversity filings in that period—

were filed as original actions by in-state plaintiffs.

❒ RECOMMENDATION 8: **The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.**

State court certification procedures benefit the federal courts by occasionally relieving them of the time-consuming task of deciding questions of law more wisely left—on federalism principles—to the states. In 43 states, the District of Columbia, and

[17] It is, of course, appropriate to eliminate diversity jurisdiction where prejudice clearly is not an issue. If any vestige of the historical purpose of diversity jurisdiction remains—*i.e.*, protecting litigants against local prejudice in state courts—that rationale is wholly inapplicable to the in-state plaintiff. Abolishing diversity jurisdiction in that instance is fully consistent with 28 U.S.C. §1441(b), which already prohibits an in-state defendant from removing a case to federal court on the basis of diversity jurisdiction. It should not, however, preclude an out-of-state defendant from removing a diversity case in which one or more of the plaintiffs is a citizen of the state in which the federal district court is located.

[18] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990).

[19] Complete elimination of diversity cases from the federal courts would add approximately 50,000 cases annually to the nearly 15 million civil cases (excluding domestic relations matters) that state courts handle each year, increasing their caseload by only a third of one percent. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—1994 ANNUAL REPORT OF THE DIRECTOR 7 (Table 4); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993—A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 11 (1995). Although eliminating "in-state" plaintiff cases and increasing the amount-in-controversy requirements would result in an even smaller increase (probably less than one-tenth of a percent), state court filings may not increase uniformly in number and complexity around the country, resulting in disproportionate workload burdens in some locations. *See* Report of the Judicial Conference Committee on Federal-State Jurisdiction 38-40 & App. D (Sept. 1993); Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990).

Puerto Rico, the court of last resort has either mandatory or discretionary jurisdiction to consider state-law issues upon certification from a federal court.[20] Some, but not all, of these states permit consideration of questions certified by any Article III court. All 50 states should authorize the federal courts, both trial and appellate, to employ these procedures for obtaining authoritative interpretations of state law.

Criticism has been levied that certification procedures engender long delays in the federal appellate process and hence that "the game is not worth the candle." Certification procedures should be attentive to this problem, and federal judges should be alerted to the advisability of exercising restraint.

❒ RECOMMENDATION 9: **Congress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.**

Implementation Strategies:

9a *Legislation should be requested to improve the adjudicative process for Social Security disability claims by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts.*

9b *Legislative and other measures should be pursued to give agencies the requisite authority and resources to review and, where possible, achieve final resolution of disputes within their jurisdiction.*

The limited resources of the federal courts can be conserved, in part, by reducing the court time devoted to fact-finding and review of administrative determinations that often turn primarily on factual issues. If administrative agencies are to screen and, where possible, resolve disputes before they ever reach a federal court, it may be necessary, in some instances, to expand and improve the agency process in terms of speed, accuracy, and completeness.

Congress, for example, should be encouraged to enact legislation to improve resolution of disability claims under the Social Security Act, as proposed by Judge Joseph F. Weis, Jr. and two other dissenting members of the Federal Courts Study Committee.[21] That proposal contemplates a thorough administrative review of ALJ decisions, followed by opportunities for review of all issues in the district court, review of constitutional issues and matters of statutory or regulatory interpretation (and discretionary review of "substantial evidence" questions) in the court of appeals, and discretionary review in the Supreme Court.

Improvement is needed in other program areas, as well. Because of serious underfunding, the EEOC, for example, accords claims of employment discrimination only cursory review before issuing "right-to-sue" letters. If the resources were provided for the kind of careful investigation, evaluation and conciliation originally contemplated by Congress, the number of employment discrimination cases requiring federal court action might be reduced. Indeed, all agencies with jurisdiction over

[20] JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 15-18 (Am. Judicature Soc'y 1995) (describing the authority and scope of state certification rules).

[21] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 58-59 (1990).

various kinds of disputes should be empowered and required to conduct more thorough review and encouraged to resolve disputes before they may be brought to the federal courts.

Implementation of this recommendation, however, depends on providing adequate funding so that agencies can effectively resolve as many disputes as possible at the agency level, either through an administrative process or through private mediation and arbitration services. It also requires clear statutory authority. The present Administrative Dispute Resolution Act[22] clarifies agency authority to employ alternative dispute resolution methods and encourages the use of such methods. Although that statute expires this year,[23] Congress should be urged to extend it as an important means of promoting final resolution of disputes before they require federal court review.

❒ RECOMMENDATION 10: **Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.**

In addition to strengthening the existing adjudicative processes of federal agencies,[24] Congress should be encouraged to empower agencies or Article I courts to adjudicate, in the first instance, those types of cases involving government benefits or regulation that routinely require substantial fact-finding and do not implicate the right to a jury trial under the Seventh Amendment. This approach is desirable in subject areas where a consistently large volume of cases is expected and initial consideration in a single forum is important to the uniformity of program administration. It has been utilized in a variety of contexts for many years.[25]

This recommendation urges Congress, when enacting benefit and regulatory schemes, to follow the historical success of the existing schemes that have provided Article I courts or administrative agencies as the first-tier fact-finders. The approach conserves judicial resources by providing Article III reviewers with an established evidentiary record and limiting the scope of review. Also, with a more streamlined mechanism for initial dispute resolution, it should be possible for agencies to enforce important federal mandates more expeditiously.

❒ RECOMMENDATION 11: **Congress should be encouraged to enact legislation to—**

(a) generally prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit; and

(b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals.

[22] 5 U.S.C. §§ 571-583 (1994).
[23] Pub. L. No. 101-552, § 11, 104 Stat. 2736, 2747-48 (1990) (agency authority to use dispute resolution procedures under the Act terminates October 1, 1995).
[24] *See* Recommendation 9 *supra*.
[25] See, *e.g.*, 15 U.S.C. § 21 (1994) (Federal Trade Commission and other agencies); 29 U.S.C. § 160 (1988) (National Labor Relations Board); *id*. § 659 (Occupational Safety and Health Review Commission); 38 U.S.C. § 7252 (1988 & Supp. V 1993) (Court of Veterans Appeals); 42 U.S.C. § 5851(b) (1988 & Supp. V 1993) (adjudication of nuclear industry "whistleblower" complaints by the Secretary of Labor)

A policy of non-acquiescence to precedent established in a particular circuit, which some agencies, such as the Department of Health and Human Services, the Department of the Treasury, and the National Labor Relations Board, have sometimes followed, undermines the fundamental principle that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue. Indeed, apart from its questionable propriety and inefficiency, non-acquiescence is unfair to litigants, many of whom are pro se, who frequently are unaware of precedent favorable to their cases.[26]

Congress should be urged to go beyond simply repudiating the policy of intracircuit non-acquiescence. It should be asked to enact legislation that, except under certain specified exceptions, generally prohibits a federal agency from relitigating a precedent established in a particular circuit rejecting agency policy. Those exceptions should include circumstances when a federal agency is unable to seek review of a particular decision—for example, because the case has become moot on appeal and vacatur has not been granted, or because the decision otherwise reaches a favorable outcome for the agency. In such circumstances, intracircuit non-acquiescence allows an agency to challenge an unfavorable precedent in a later case in the same circuit, through en banc or Supreme Court review.

Congress should also be encouraged to establish standards for deciding when an agency should be permitted to relitigate an issue in an additional circuit when a uniform precedent has been established in multiple courts of appeals. Congress might require an agency to make some additional showing—for example, changes in societal or other relevant circumstances or empirical data—before relitigating in another circuit an issue that has received the careful scrutiny (*e.g.*, published opinions) and uniform interpretation by several (perhaps three or more) appellate panels. Congress alternatively could require an agency to petition the Supreme Court for certiorari before relitigating in another circuit an issue that has received the careful scrutiny and uniform interpretation of a number of circuits.

❒ RECOMMENDATION 12: **Congress should be encouraged to refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the state courts have substantial experience. Existing federal jurisdiction in these matters should be eliminated in favor of dispute-resolution or compensation mechanisms available under state law.**

Implementation Strategies:

12a *Congress should be encouraged to eliminate federal court jurisdiction over work-related personal injury actions, such as that provided by the Federal Employers' Liability Act and the Jones Act, where the states have proven effective in resolving worker compensation disputes in other industries and occupations.*

12b *The jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished, except when application or interpretation of federal statutory or regulatory requirements are at issue.*

[26] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 59-60 (1990) (discussing the problem of non-acquiescence).

12c *Any new cooperative federal-state program to establish national standards for employee benefits (*e.g.*, health care) should designate state courts as the primary forum for review of benefit denial claims. However, any such program should include establishment of an administrative remedial process that must be exhausted before a state court action may be filed.*

Over the years, Congress has provided for federal court resolution of a variety of work-related disputes that involve essentially state-law questions. Rather than ensuring an expert, uniform interpretation and application of federal law, the availability of a federal forum in these cases suggests—erroneously—that state courts and agencies are inadequate to the task of providing fair, adequate remedies.

Early examples can be found in the Federal Employers' Liability Act (FELA) and the Jones Act—legislation that opened the federal courts to worker injury claims in the railway and maritime industries, respectively. These statutes were enacted at a time when workers' compensation schemes did not exist or were regarded as inadequate. That perception is no longer valid, and, notwithstanding that these cases are small in number, the jurisdiction of the federal courts under these statutes should be eliminated, allowing claims by railway employees and seamen to be subsumed under state law. Alternatively, if uniform federal remedies are regarded as desirable, they should be provided through federally administered workers' compensation systems.

A similar situation exists with respect to certain litigation arising under the Employee Retirement Income Security Act of 1974 (ERISA). In addition to providing exclusive federal court jurisdiction to enforce fiduciary obligations, plan funding and vesting requirements, and other congressional mandates—most of which apply exclusively to pension plans—ERISA allows participants and beneficiaries of employee welfare (*e.g.*, health insurance and severance pay) plans to bring actions in either federal or state court to recover benefits due under the terms of the plan and to enforce or clarify plan terms.[27] Resolution of those cases turn, not on the specific substantive provisions of ERISA or its underlying regulations, but on contract and trust law principles embodied in a "federal common law" developed from state legislation and common law. Under a system of judicial federalism, the federal courts should not be involved in the adjudication of disputes that do not require their particular expertise because they essentially involve application of state law.

During the statistical year ending June 30, 1995, 9,650 ERISA actions, 1,925 FELA actions, and 2,325 maritime (including Jones Act) actions were filed in the district courts. In the same year, civil filings in those courts totalled 239,013.

The same holds true for any national health insurance or other employee benefit program that Congress may establish in the future. Apart from cases in which specific federal requirements (*e.g.*, any prohibition on discriminatory administration of plan benefits) are at issue, a state court should be the sole forum for litigation of routine claims relating to benefit entitlement. To prevent an undue burden on the state judicial systems, any program of this kind should include an administrative dispute-resolution process that must be completed before a claim can be pursued in a state court.

In each of these situations, Congress should be urged to provide adequate re-

[27] *See* 29 U.S.C. § 1132(a), (d) (1988).

sources to state justice systems so that they can handle any increased burden these new cases will bring.

Confronting the Effects of Allocating Jurisdiction

Impact of Legislation

❒ RECOMMENDATION 13: **When legislation is considered that may affect the federal courts directly or indirectly, Congress should be encouraged to take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.**

New criminal legislation inevitably imposes financial and other burdens on the judicial branch associated with the investigation, prosecution, resolution, and punishment of those offenses. While judges feel these burdens directly, it is other parts of the judicial system—probation and pretrial services officers, public defenders and panel attorneys, and court reporters, interpreters, and clerks—who are most affected. Likewise, the enactment of new civil causes of action produces additional costs to the courts when litigation is brought to assert or defend newly created rights.

Although some of the increases in workload are also attributable to interpretations of legislation by the courts themselves, the ultimate policy making authority lies with Congress. If the same institution that provides a budget for the federal courts takes the costs associated with jurisdictional and procedural changes into account, workload may be allocated to the federal courts in a more reasoned, responsible manner.

Beyond jurisdictional expansions, Congress has imposed specific deadlines for judicial action and other procedural or reporting requirements—*e.g.*, the Speedy Trial Act of 1974 and the Civil Justice Reform Act of 1990—that require the courts to shift priorities, hold additional hearings or other proceedings, and alter methods of case management. Although these statutory mandates do not create new workload as such, they profoundly affect the allocation of judicial time and other resources.

During the past quarter century, both Congress—through more than 200 pieces of new or amended legislation—and the federal courts—through interpretation of constitutional and statutory provisions—have contributed to an enormous expansion of federal judicial workload.

Since 1991, the Administrative Office of the United States Courts has supplied Congress with judicial impact statements on legislation potentially affecting federal court workload and budgets. This process should be continued in the hope that reminding legislators of the cost of their policy initiatives will result in fewer and more tailored expansions of federal jurisdiction, and a recognition that the courts cannot carry new burdens without concomitant resources or the reduction of jurisdiction in other areas. This principle applies also with respect to the possible impact of federal legislation on state judiciaries (see Recommendation 14 *infra*).

❒ RECOMMENDATION 14: **In considering measures that would shift jurisdiction away from the federal courts or provide new jurisdiction through the establishment of concurrent jurisdiction, Congress should also be**

encouraged to consider and address the impact of the proposed legislation on the states. Specifically, it should be urged to—

(a) consult with state authorities and state judicial leaders in defining any new limits on federal jurisdiction; and

(b) provide federal financial and other assistance to state justice systems to permit them to handle the increased workload that would result from the reduction or elimination of existing federal court jurisdiction or the creation of new concurrent jurisdiction.

As explained above, cooperation between federal and state authorities (legislative, executive, and judicial) is essential to judicial federalism—to maintaining the "harmonious and consistent WHOLE" that Hamilton envisioned.[28] The purpose of limiting federal jurisdiction is to preserve *both* the distinctive role of the federal courts *and* the critical role of the state courts as general dispute-resolution forums. If both ends are to be achieved, no reduction in federal jurisdiction or expansion of concurrent state court jurisdiction should be undertaken without also ensuring the states' capacity to handle the extra burden. This requires both effective federal-state communication[29] and a commitment by Congress to provide states with the necessary financial resources.

Growth of the Article III Judiciary

❒ RECOMMENDATION 15: **The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.**

Implementation Strategies:

15a *The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 12.*

15b *The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.*

15c *The need for additional judgeships should be reduced through control of federal court caseloads as described in this plan (including the appropriate reallocation of cases to state courts and other forums), and by operational improvements in the courts that increase efficiency without sacrificing either quality in the judicial work product or access to the remedies available only in a federal forum.*

In response to an ever-increasing judicial workload, some (including legal scholars, representatives of the bar, and, at times, the federal judiciary itself) have seen additional judgeships as the key to ensuring continued access to federal justice. The potential risks of that approach, however, should not be ignored. While no available data indicate a precise point at which the federal judiciary would reach the "feasible limits on its growth," it is apparent that unlimited increases in Article III judgeships are far from being a complete (much less an appropriate) answer to workload pressures. To the contrary, a future of unrestrained

[28] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see Chapter 1 *supra*.
[29] *See* Chapter 9, Recommendation 92 *infra*.

In 1950, there were 65 authorized judgeships in the geographic courts of appeals and 221 authorized district judgeships. By 1990, those figures had grown to 167 circuit judgeships (a 257 percent increase) and 649 district judgeships (a 297 percent increase).

During the same 40 years, annual district court filings increased by 128 percent on the criminal docket and nearly 400 percent on the civil docket. Annual court of appeals filings increased by 1,445 percent.

growth would alter irrevocably the nature of the judicial institution and impose a substantial burden on the federal treasury in terms of additional costs for support personnel, logistical support, and space and facilities.

It has also been suggested that the most effective means of curbing growth in the federal judiciary would be an inflexible "cap" or "ceiling" on the number of Article III circuit and district judgeships. While that approach may be meritorious in theory, it would not allow the federal courts to maintain both the excellence for which they are known and appropriate access to federal remedies. Any specific limit would be artificial and of questionable utility in deterring the legislative and prosecutorial policies that increase the workload of the federal courts.

The best strategy for ensuring both access and excellence is to tread a middle path that rejects unlimited expansion yet avoids a policy of zero growth. This path may be followed in large part by controlling expansion of federal court jurisdiction as described earlier in this chapter. At the same time, there must also be restraint in the creation of new judgeships. The court system must evaluate its judicial resource needs using formulas and standards that are current and take into account all relevant data and factors. Additional judgeships should be requested only after other appropriate alternatives have been exhausted, including improvements in case management and reallocation of existing resources.