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Defining the Role of the Federal Courts

Erwin Chemerinsky & Larry Kramer***

If there is one thing about which practically all federal judges agree, it is that their dockets are overcrowded. This belief appears well-founded. By almost any measure, the amount of work federal judges must do has grown precipitously in the past thirty years.¹ So far, Congress has responded conservatively, mainly by creating new judgeships² and making incremental changes like consolidating review of patent litigation in the Federal Circuit. But Congress recently suggested that it may be pre-

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1. The Annual Reports of the Director of the Administrative Office of the United States Courts show that since 1960 case filings have increased by 250% in the district courts and 900% in the courts of appeals. While this growth is partially offset by new appointments, filings per judge increased during the same period by 55% in the district courts and 336% in the courts of appeals. Furthermore, most measures of difficulty also indicate that federal judges' workloads are increasing. In the district courts, the amount of time each judge spends in court has increased by 35%. A more refined measure, "weighted" case filings (which adjust raw caseload data to account for the relative amount of time required for different cases), indicates that the average workload of each district court judge doubled between 1962 and 1988. In the courts of appeals, the increase in workload has been still more dramatic. Terminations after oral argument or the submission of briefs increased by more than 600% since 1960. Even taking new appointments into account, the number of appeals heard by each court of appeals judge increased 211%. And while the percentage of cases decided by a signed, published opinion decreased from 74% to 38%, the number of such opinions increased from 31 per judge in 1960 to more than 46 in 1988. These data are analyzed in greater detail in Part I of the Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States. *See also* R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* chs. 3-4 (1985).

2. The number of federal judges has increased steadily in recent years. There were 321 federal judges in 1960. By 1970 that number had grown to 479; by 1980 there were 626. There are now 699 judges filling 743 authorized judgeships in the district courts and the courts of appeals. Congress has also expanded the rest of the judicial bureaucracy—especially law clerks, staff attorneys, magistrates and the like. As a result, judges constitute a decreasing proportion of the judiciary as a whole. In 1925, 14% of the personnel of the federal courts were Article III judges; in 1960, this number was 10.1%; by 1988, it had shrunk to 3.4%. *See* R. POSNER, *supra* note 1, at 27-28; 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 50-55.

pared to reconsider this conservative strategy by commissioning a study of the federal courts to "examine problems and issues currently facing the courts of the United States [in order to] develop a long-range plan for the future of the Federal judiciary."³

Are more dramatic changes in the structure and jurisdiction of the federal courts necessary? Or should Congress continue on its present course of appointing new judges to keep up with the growing calendar? Adding more judges has the advantage of not requiring significant rethinking of the nature or role of federal courts. But it is bitterly opposed by many judges and commentators who argue that further expanding the federal courts will impair their quality.

We consider this claim in Part I. While most of the arguments against appointing more judges are overstated, there is a reason to hesitate before making the federal courts much larger than they are now. The problem is not in the district court, which can easily be expanded since its judges work alone. But it is dangerous to vest too much power in individual trial judges, and it is therefore also necessary to ensure adequate appellate review. Because the Supreme Court's appellate capacity is limited, primary responsibility for reviewing most legal questions is in the courts of appeals, and these courts are not so easily expandable. Experience in the old Fifth and present Ninth Circuits suggests that as the number of judges in a single circuit becomes large, it becomes more difficult to maintain intracircuit uniformity, which then impairs the efficacy of appellate review. If, however, many small circuits are created, intercircuit conflict increases—shifting the problem to the court least capable of assuming a larger caseload, the Supreme Court. Given the pivotal role of the courts of appeals, we conclude that Congress should at least consider alternative strategies for reducing the caseload.

Determining how to decrease the federal caseload is difficult and controversial. A useful first step is to develop a picture or model of what the federal courts' role should be in order to find a frame of reference against which to judge particular proposals for reform. We therefore attempt to construct such a model in Parts II and III. In Part II, we conclude that it is impossible to develop a detailed prescription for federal jurisdiction that has long-term viability because we cannot predict what federal

3. The Judicial Improvements and Access to Justice Act of 1988, PUB. L. NO. 100-702, tit. 1, § 102(b)(1)(2) (1988).

courts will be needed for in the future. Nonetheless, certain aspects of federal jurisdiction are relatively constant, as are certain priorities. Identifying these functions enables us to construct a minimal model of federal jurisdiction that is still quite useful. We attempt to do this, including suggestions for priorities among different types of claims, in Part III.

I. THE SIZE OF THE FEDERAL COURTS

Most of the arguments against making the federal bench larger are familiar.⁴ Basically, these arguments all boil down to the claim that as the bench becomes larger its quality diminishes. This is a serious charge. The high quality of the men and women who have served as federal judges is one of the distinguishing features of the federal courts. Of course, the nation generally has high expectations for its judges, but these expectations are especially warranted at the federal level. Federal judges decide more cases of widespread public importance than state judges, and they wield considerably more power. In addition, the constitutional provisions for life tenure and salary protection insulate federal judges from direct political control. These protections make it all the more important to select the most qualified persons to serve.

Opponents of a larger judiciary suggest that creating more judgeships strains the effectiveness of the appointments process, increasing the likelihood that unqualified candidates will be nominated and confirmed. The public attention given to the limited number of federal judgeships, they say, helps ensure that the President and Senate maintain high standards. At present, on average, approximately 7% of the full complement of 750 federal judges is appointed each year. Thus, even if the size of the federal bench is not increased, more than 50 nominations will be made this year—several each week once we exclude periods when the Senate is not in session. The amount of scrutiny to which these candidates are subjected potentially decreases as the number of nominees being reviewed grows larger. As the number of federal judges passes 1,000 and heads toward 2,000,

4. The arguments against expanding the federal courts in the discussion below are drawn primarily from R. POSNER, *supra* note 1; H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 28-31, 39-41 (1973); and Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989).

the selection and confirmation process will inevitably become a routine bureaucratic matter.

But the appointments process plays only a small role in maintaining quality. Other than a few politically controversial appointments, most nominees for federal judgeships receive little scrutiny, and most of this is for politics rather than quality. To the extent that there is any explicit evaluation of quality, it is done by congressional staff and interested organizations like the American Bar Association—groups whose resources are already large enough or could be expanded to evaluate additional candidates.

More frequently heard is the complaint that increasing the size of the federal judiciary “will result, by its own Gresham’s law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts.”⁵ This is a serious matter, for as Judge Friendly observed, “[p]restige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits.”⁶ It is not (and never has been) politically feasible to pay the most qualified candidates anywhere near what they can make in private practice.⁷ The prestige of being a federal judge is thus an important form of non-pecuniary compensation that enables the government to attract highly qualified individuals. Since adding to the ranks of judges dilutes their individual influence and status, making them still more “underpaid,” the quality of the bench must be expected to decline.

While not entirely implausible, this argument seems greatly overstated. The federal judiciary was much smaller when Justice Frankfurter first made this claim about cheapening the judicial currency (279 judges versus 699 judges today),⁸ yet there does not seem to have been any reduction in the prestige of being a federal judge.⁹ Of course, there probably is a point at which in-

5. *Lumberman’s Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). See also Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928) (“Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions.”).

6. H. FRIENDLY, *supra* note 4, at 29.

7. See R. POSNER, *supra* note 1, at 41.

8. See *id.* Table B.3 at 279; *supra* note 2.

9. Note also that while the size of the federal judiciary has increased considerably, the turnover rate among judges remains extremely low as compared to other professions. See R. POSNER, *supra* note 1, at 39.

creasing the number of judges will make judging less prestigious. But this point seems far removed from current figures, and we believe that a federal judgeship would remain highly coveted were the present judiciary tripled or even quadrupled. Even 3,000 federal judges would be an incredibly elite group within bench and bar.¹⁰ The prestige of being a federal judge comes mostly from the power these judges wield in deciding what are (and would undoubtedly remain) the nation's most important and controversial cases. Granted that as the number of judges increases each judge will hear fewer such cases, this decrease is not likely to change the status of judging as one of the most prestigious jobs for a lawyer; nor will it affect the status of being a federal judge as the most prestigious judgeship.

Third, commentators note that, unlike their counterparts of earlier decades, today's federal judges participate in an elaborate administrative structure that includes responsibilities to their courts, to judicial councils, and to committees of the Judicial Conference. As each court grows in size, "there is a more than corresponding increase in the amount of administrative work"¹¹—making it more difficult to keep up with one's docket and further diminishing the attractiveness of becoming a federal judge. On the contrary, while adding judges may increase the amount of administrative work, most of this work does not increase as fast as the number of judges. Consider, for example, tasks such as drafting local rules, participating in judicial councils and the like. Adding judges may produce economies of scale that actually result in less administrative work for each judge. And even were this not the case, much administrative work presently done by judges could easily be delegated to other personnel within the judicial branch.

Finally, many commentators argue that a properly functioning federal bench depends on familiarity and collegiality among the judges and that these qualities are lost as the court becomes larger and more bureaucratic. Familiarity and collegiality, we are told, are particularly important in the courts of appeals, which sit in panels. But these qualities are also important at the district court level, since they encourage judges to pay attention to

10. There are more than 27,000 judges in the country including state and local courts, and more than 600,000 lawyers. See *id.* at 46; P. HEYMANN & L. LIEBMAN, *THE SOCIAL RESPONSIBILITY OF LAWYERS* xxi (1988); G. HAZARD & D. RHODE, *THE LEGAL PROFESSION* 53 (2d ed. 1988).

11. H. FRIENDLY, *supra* note 4, at 30.

one another's rulings and serve an important socializing function by restraining the idiosyncracies of individual judges. There is a culture among judges that reinforces their devotion to a common task. In addition, familiarity and collegiality give judges a greater sense of accountability for their work. On a small court, each judge is more aware of his or her contribution to the court's output and reputation. As the bench grows, judges are likely to feel less accountable for producing top-notch work.

In our view, this argument understates the importance of other factors that contribute to how conscientiously a person performs his or her job. Foremost is the person's own sense of pride and responsibility and of the importance of the task being performed. Most candidates for the federal bench would never become prominent enough to be nominated if they were not both conscientious and ambitious, and these qualities should go far toward assuring a high quality output. At the very least, these qualities loom large enough to make the effects of a reduction in collegiality *de minimis*.

The danger when judges have strong collegial relationships is that they may be reluctant to challenge colleagues and so decide cases or join opinions to preserve those relationships. Less collegiality may thus increase independence—a virtue of good judging. Not that collegiality is bad. The point is rather that good judging calls for a mix of independence from and deference to colleagues, and the relation of the court's size to achieving the proper mix is unclear. Being a good judge ultimately turns more on individual integrity than on the number of one's colleagues.

While we are unpersuaded by the usual arguments against increasing the size of the federal bench, we do believe that continuing to appoint large numbers of new judges may pose additional problems. More judges means more opinions expressing different views, which creates uncertainty in the law and encourages still more litigation. The pressures are felt mainly in the courts of appeals. District court judges presently face little pressure to follow the rulings of other judges in the same district, and none at all to follow the rulings of judges in other districts.¹² The federal judicial system instead encourages percolation of issues at the district level and relies on the courts of appeals for final decisions on most legal issues.

This arrangement is by design: Congress made a conscious

12. See *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987).

administrative choice to lodge primary responsibility for settling most legal questions in the courts of appeals. The first Judiciary Act left almost all appeals in the Supreme Court. While not a problem in the early years of the republic, the number of federal cases increased after the Civil War to the point where the lack of appellate capacity became a serious problem. Various stopgaps were attempted until 1891, when Congress enacted the Evarts Act creating the courts of appeals.¹³ The Evarts Act thus greatly expanded the capacity of the federal system to review trial judges for error, while freeing the Supreme Court to concentrate on issues of particular public importance.

The scheme established in the Evarts Act presupposes that effective appellate review requires a relatively small court of appeals in order to maintain consistent and uniform positions. Because the federal caseload was too large for a single court to handle all the nation's appeals, Congress established a small number of intermediate appellate courts with jurisdiction over relatively large areas. On the one hand, each court was small enough to assure reasonable uniformity within its jurisdiction. On the other hand, as long as the number of circuits was also relatively small, the Supreme Court could handle conflicts among the courts of appeals.

Making the courts of appeals larger undermines this scheme. Each new judge increases geometrically the number of different panels that may hear a case: the D.C. Circuit's twelve judges may be combined into 220 panels; the Ninth Circuit's twenty-eight judges into 3,276. More panels means more uncertainty about how the court is likely to rule in any particular case—encouraging more appeals and making intracircuit conflicts more likely. At the same time, as the court grows, it becomes more difficult both to hear cases *en banc* and to obtain a majority in cases that are heard by the whole court. Before long, even *en banc* procedures no longer ensure uniformity. Pressure then grows to divide the circuit into several smaller circuits. But every such decision increases the likelihood of splits among the circuits and simply shifts the pressure of maintaining uniformity back to the Supreme Court.

These problems are not hypothetical. Problems of size and maintaining intracircuit uniformity have already led to the division of the Fifth Circuit and may soon do the same to the Ninth.

13. Act of March 3, 1891, 26 Stat. 826.

Few believe that we would be better off with *more* courts of appeals as large as the Ninth Circuit, yet at current rates of growth the number of new appointments would soon make the present Ninth Circuit seem small. If caseload pressures are to be relieved by appointing more judges, however, the only alternative to giant courts of appeals is more courts of appeals—an uninviting prospect that places more responsibility on the court least able to handle it, the Supreme Court.¹⁴

In other words, while it may be possible to increase the size of the federal courts without causing the judicial system to collapse, adding many more judges may fundamentally change the nature of that system. Increasing the size of the district courts is easy. Yet expanding these courts without also increasing the output of the courts of appeals would only exacerbate the problems in the courts of appeals and in the Supreme Court.¹⁵ Thus, the courts of appeals must also be made larger, which means either larger circuits or more circuits. Either way, the result is likely to weaken the effectiveness of appellate review, shifting power back to individual trial judges.

This is not to say that the federal bench is now as large as it can be or that further growth spells the end of justice as we know it. Such predictions were made when the federal courts were only a fraction of their present size, yet most observers agree that these courts still do a generally good job. The risks, however, are real. Thus, while we do not recommend a moratorium on further increases in the size of the federal bench, we do recommend that Congress consider alternative solutions to the caseload problem. Making the federal courts bigger is not likely to improve the quality of justice for anyone, although it may substantially alter the nature of these courts.

II. THE "IDEAL" SCOPE OF FEDERAL JURISDICTION

If caseload pressures are to be reduced without substantially

14. Another alternative would be to adopt one of the proposals for an intermediate court to resolve conflicts among the circuits. A full discussion of this alternative—which has its own complications—is beyond the scope of this article, but there is a large literature on the subject. See, e.g., Commission on Revision of the Federal Appellate System, *Structure and Internal Procedures: Recommendation for Change*, 67 F.R.D. 195 (1975); Federal Judicial Center, *Report of the Study Group on the Caseload in the Supreme Court*, 57 F.R.D. 573 (1972); see also S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* (1986).

15. H. FRIENDLY, *supra* note 4, at 31 (increasing the number of district judges "would prove utterly destructive to the courts of appeals and to the Supreme Court").

increasing the number of judges, we must find ways to, in Judge Friendly's words, "avert the flood by lessening the flow."¹⁶ This can be accomplished in part by increasing the efficiency of the courts and by encouraging parties to settle or use alternative dispute resolution, issues that have received careful attention from scholars and policymakers in recent years. But any substantial reduction in caseload must also include a reduction in the number of cases being filed in federal court, and this means somehow redefining the scope of federal jurisdiction.

We began this article with the intent of constructing an ideal model of federal jurisdiction for Congress to use in allocating judicial resources. After further consideration we conclude that this is not a fruitful approach and, indeed, that the common assumption that there is an objectively "correct" model of federal jurisdiction misconceives the problem. There are objectively identifiable outer constitutional limits on federal jurisdiction—the limits established in Article III of the United States Constitution. But these are extremely permissive, and no one contends that federal jurisdiction should extend this far.¹⁷ Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress,¹⁸ essentially making the lower federal courts a resource to be used as Congress deems necessary.

The decisions Congress makes in this regard reflect important value choices and have significant political consequences.

16. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

17. Diversity jurisdiction is limited by the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), but complete diversity is not constitutionally required. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967). The potential reach of this jurisdiction is thus quite broad. Similarly, general federal question jurisdiction is limited by the well-pleaded complaint rule of *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). But this rule also is not constitutionally required, and Congress may extend federal jurisdiction to any case in which a federal question is an "ingredient," even if the federal issue arises by way of defense. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). Considering how broadly the Constitution and federal laws have been construed—especially the open-ended due process clause—federal jurisdiction could be asserted over an enormous number of cases.

18. See 4 THE FOUNDER'S CONSTITUTION 131-212 (P. Kurland & R. Lerner eds. 1987); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 6-11 (1928).

The first Judiciary Act, for example, represented a hard-fought compromise between federalists and anti-federalists who understood only too well the implications of federal jurisdiction for the development of substantive law and the allocation of power within the federal government and between the federal government and the states.¹⁹ Congress expanded federal jurisdiction after the Civil War because it recognized this as essential to the success of its plans for Reconstruction and for expansion of the national economy. The political implications of altering federal jurisdiction delayed until 1891 changes in the structure of the federal courts that everyone had recognized were necessary years earlier.²⁰ History thus underscores that any model identifying the "proper" role of the federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension. Defining the role of the federal courts simply is not a scientific inquiry.

Even if we could develop a model of federal jurisdiction, its usefulness would be short-lived. Political consensus with respect to the business of the federal courts is rare, and when it occurs it does not last. The scope of federal jurisdiction evolves with the nation's substantive needs and goals, and the business of the federal government changes much too fast and often and is much too controversial for the federal docket to be stable. No one foresaw in the 1850s that federal courts would be needed to protect myriad new federal rights by the end of the 1860s. No one thought in the years before the Eighteenth Amendment was ratified that a huge investment of federal judicial resources would be necessary to enforce Prohibition, just as no one foresaw how short the Amendment's life would be and how quickly this business would disappear. Of more recent vintage, we doubt that many people in the mid-1950s anticipated how important civil rights cases would become, and no one would have predicted as recently as last year that we would begin a "war on drugs" requiring a massive investment of federal judicial resources—just as no one can predict whether this demand will survive the year. Our priorities as a nation change so fast that investing substantial time articulating a well-defined model federal jurisdiction would be a waste.

19. See generally Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

20. F. FRANKFURTER & J. LANDIS, *supra* note 18, at 85.

Nonetheless, there are some useful things to say about the scope of federal jurisdiction. Notwithstanding this unavoidably political dimension, some principles of federal jurisdiction appear constant. By identifying these, we can develop a minimal model of cases whose resolution in federal courts should be uncontroversial. As the discussion below elaborates, the areas of agreement turn out to be surprisingly large. In addition, these principles help to establish some priorities among cases that remain outside the minimal model. Identifying these may help Congress reach decisions about where to make cuts if federal jurisdiction is to be reduced.

III. A MINIMUM MODEL OF FEDERAL JURISDICTION

A. *Functions Served By the Federal Courts*

The federal judiciary currently performs six major functions. These overlap to a considerable degree, but clarity requires separate consideration of each.

1. *Enforcing the United States Constitution*

Perhaps the least controversial area of federal jurisdiction involves constitutional claims posing questions concerning the structure of the federal government. In recent years, federal courts have resolved such separation of powers issues as the constitutionality of the Sentencing Commission,²¹ the lawfulness of the legislative veto,²² and the validity of a statute providing for an independent prosecutor to investigate allegations of executive misconduct.²³ It would be quite peculiar if these cases were decided by state courts: as an independent sovereign, the federal government is entitled to have its own courts rule on how power should be distributed among its constituent elements.²⁴

Similarly, allowing federal courts to decide questions of federalism is uncontroversial. Although the argument is weaker since the states are also interested in these cases, the propriety of a federal forum derives from Article VI of the Constitution, which makes the federal government supreme over the states. One could push this argument to the conclusion that federal ju-

21. *Mistretta v. United States*, 109 S. Ct. 647 (1989).

22. *INS v. Chadha*, 462 U.S. 919 (1983).

23. *Morrison v. Olson*, 487 U.S. 654 (1988).

24. See Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 505 (1974).

risdiction should be exclusive, but this is not necessary as long as the Supreme Court can review state court decisions to ensure their compliance with the Constitution and laws of the United States.

Whether it is necessary for federal courts to decide cases involving individual liberties and equal protection is more controversial. There is a vigorous scholarly debate over whether state courts equal federal courts in their ability and willingness fairly to adjudicate federal constitutional claims.²⁵ Advocates of expansive federal jurisdiction argue that state courts cannot be trusted to safeguard federal rights.²⁶ Recounting the post-Civil War history of state court hostility to federal claims, these commentators urge that state courts are prejudiced against individual claimants asserting constitutional rights.²⁷ In addition, advocates of broad federal jurisdiction point to differences in the institutional characteristics of the two judicial systems.²⁸ Federal judges are insulated from direct political control by constitutionally mandated tenure and salary protection, whereas forty-two states still have some form of judicial election.²⁹ Furthermore, federal courts are said to attract better judges because the federal government pays more and provides greater institutional support, and because being a federal judge is more prestigious.³⁰

Other commentators maintain that state courts are equally able and willing to protect constitutional rights.³¹ These commentators argue that the historical animosity between state and federal systems has disappeared, that state courts have im-

25. See E. CHEMERINSKY, *FEDERAL JURISDICTION* 29-32 (1989) [hereinafter CHEMERINSKY, *FEDERAL JURISDICTION*]; Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. REV.* 233 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*].

26. See, e.g., Neuborne, *The Myth of Parity*, 90 *HARV. L. REV.* 1105 (1977) [hereinafter Neuborne, *The Myth of Parity*]; Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 *WM. & MARY L. REV.* 725 (1981) [hereinafter Neuborne, *Toward Procedural Parity*].

27. Neuborne, *The Myth of Parity*, *supra* note 26, at 1124-27; Neuborne, *Toward Procedural Parity*, *supra* note 26, at 727.

28. Neuborne, *The Myth of Parity*, *supra* note 26, at 1115-30; Ziegler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective*, 19 *U.C. DAVIS L. REV.* 31, 46-48 (1985); Peller, *In Defense of Federal Habeas Corpus Rerelitigation*, 16 *HARV. C.R.-C.L. L. REV.* 579, 677-85 (1982).

29. See K. LEE, *COURTS AND JUDGES* 109-79 (1987).

30. See, e.g., R. POSNER, *supra* note 1, at 144.

31. See, e.g., Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 *HASTINGS CONST. L.Q.* 213 (1983).

proved, and that the differing institutional characteristics do not affect decisions.³² That state and federal courts reach different results says nothing about which system is better—perhaps the results reached by state courts are correct and federal courts are prejudiced against state officials and biased in favor of individual claimants.³³ Since both systems offer equally acceptable processes, jurisdiction should not turn on an unfounded assumption that one is superior.

Many doctrinal ebbs and flows in federal jurisdiction are directly attributable to the Supreme Court's view of the parity issue. For example, explicitly proceeding on the premise that expansive federal jurisdiction is necessary to assure adequate protection of constitutional rights, the Warren Court increased the availability of habeas corpus for state prisoners,³⁴ expanded the scope of relief under 42 U.S.C. section 1983,³⁵ limited the circumstances in which federal courts must abstain,³⁶ and minimized the preclusive effect of state court judgments in federal cases.³⁷ The Burger Court, in contrast, narrowed federal jurisdiction because it thought state courts equally capable of deciding constitutional claims. This confidence in state courts was reflected in restrictions on habeas corpus relief,³⁸ limitations on section 1983 suits,³⁹ expansion of abstention doctrines,⁴⁰ and greater preclusive effect for state court decisions in federal proceedings.⁴¹

The parity debate is ultimately unresolvable because parity is an empirical question and we lack a meaningful standard by which to judge decisions in competing judicial systems.⁴² Legis-

32. *Id.* at 224-25; Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

33. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

34. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963).

35. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd*, 436 U.S. 658 (1978).

36. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

37. See, e.g., *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

38. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976).

39. See, e.g., *Parratt v. Taylor*, 451 U.S. 527 (1981), *rev'd*, 474 U.S. 330 (1986).

40. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

41. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980).

42. See Chemerinsky, *Parity Reconsidered*, *supra* note 25, at 261-73. See also M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 3 (1980) ("There are . . . no statistical data to support the assertion that federal courts are, on the whole, better equipped to guard federal interests than their state counterparts. In-

lators, judges, and academics may make judgments about whether they believe the federal or state courts are superior, but supporters of expansive federal jurisdiction cannot "prove" that federal judges do a better job in constitutional litigation any more than their opponents can demonstrate the contrary. Each side is left with its beliefs and no objective way to resolve the impasse.

It is not necessary to resolve this dispute for present purposes. After all, no one contends that federal courts are an inappropriate forum in which to adjudicate federal constitutional claims. The parity debate may be relevant in resolving technical issues such as the precise scope of abstention or habeas corpus. It may also be relevant in considering whether federal jurisdiction should be exclusive. But no one disputes the propriety of federal jurisdiction over federal constitutional claims.

2. *Protecting the interests of the federal government as a sovereign*

A sovereign can always sue in its own courts. Thus, the first federal question jurisdiction—the only such jurisdiction conferred by the Judiciary Act of 1789—was over prosecutions for violations of federal criminal laws. This was consistent with what was even then a longstanding principle that "[t]he Courts of no country execute the penal laws of another."⁴³ Later, when Congress waived sovereign immunity on some civil claims against the federal government, it created a new federal tribunal—the Court of Claims—to hear them. And federal courts have always had jurisdiction over suits against federal officers arising out of their official duties.⁴⁴

Federal jurisdiction to hear suits by and against the United States is uncontroversial. As a formal matter, this jurisdiction is explained as one of the traditional prerogatives of sovereignty. A functional explanation is that the risk of mistreatment of federal governmental interests in state court is too great not to preserve at least the option for the federal government to bring or remove a lawsuit into its own courts.

Closely related is the question of jurisdiction over suits by

deed, it would be difficult to devise a system of measurement which could be used to answer that question empirically.").

43. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

44. See H. FRIENDLY, *supra* note 4, at 9-10.

or against foreign nations or their officials. The federal government is not directly interested as a party, but the same reasons that justify giving a federal forum to the federal government apply to foreign governments. Foreign policy is the prerogative of the federal government, and it is important to the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. The federal government is responsible—and is sometimes required by treaty—to provide foreign nations with justice according to standards recognized in international law. Since the federal government will be held accountable for any denial of justice, it should be able to provide foreign governments with a forum whose procedures it establishes and controls. These same arguments further justify federal jurisdiction over suits involving foreign nationals who are not government officials.

Some commentators argue that these cases fall within a more general category of “protective jurisdiction.” According to these commentators, if Congress can enact substantive law in a particular area, it can take the less drastic step of creating federal jurisdiction without creating federal substantive law.⁴⁵ The Supreme Court has neither approved nor disapproved of this theory,⁴⁶ but other scholars have criticized it: what, these scholars ask, is the federal law under which the case arises? The only federal law is the law creating jurisdiction. But as Professor David Currie notes, “[t]o say that a case arises under federal law whenever a federal statute gives jurisdiction is to destroy all limits on federal jurisdiction.”⁴⁷ In any event, protective jurisdiction remains largely an academic concern for the moment.

3. *Serving as an umpire in interstate disputes*

Several provisions of Article III authorize federal jurisdiction over disputes between states and their citizens. Most notably, the Supreme Court has original jurisdiction over suits be-

45. See, e.g., Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 542 (1983); Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982); Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948).

46. See, e.g., Verlinden, B.V. v. Bank of Nigeria, 461 U.S. 480, 491 n.7 (1983); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring in the result).

47. D. CURRIE, *FEDERAL JURISDICTION* 103 (2d ed. 1981).

tween two states. The justification for this provision is plain enough: without a tribunal to resolve their differences, state governments might retaliate in ways that threaten the cohesiveness of the union. No state court is likely to be viewed as sufficiently neutral, and the states might view resolution by an inferior federal court as an affront. The Supreme Court's original jurisdiction over suits between states is therefore exclusive.⁴⁸

Jurisdiction over suits between citizens of different states is more controversial. The traditional explanation for this branch of federal jurisdiction is the fear that state courts will favor their citizens over nonresidents.⁴⁹ Some twentieth century scholarship suggests that protecting creditors from pro-debtor state courts was an equally important concern.⁵⁰ Whatever its original justification, the continuing need for this jurisdiction has been a matter of lively debate since the turn of the century. Proponents of diversity argue that bias is still a problem and that federal jurisdiction is necessary because state courts are slower and less satisfactory than federal courts. Opponents of diversity respond that prejudice against nonresidents has been replaced by other prejudices that are more salient in today's world. If state courts provide slow or inadequate justice, they add, the cure is to improve these courts, not to select a favored class of litigants to receive the benefits of a federal forum.

These arguments are addressed at length elsewhere.⁵¹ For the moment, we limit ourselves to a few observations that should be uncontroversial. First, this branch of federal jurisdiction—which in 1789 represented the most important business of the federal courts—has diminished in importance over the years. The process began with the creation of general federal question jurisdiction in 1875 and was accelerated by the Supreme Court's decision in *Erie Railroad v. Tompkins*⁵² and by the twentieth century proliferation of substantive federal laws. Federal courts devote an ever-increasing proportion of their physical and intellectual resources to federal issues. Second, while other forms of jurisdiction have expanded throughout the twentieth century,

48. 28 U.S.C. § 1251 (1982).

49. See Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 406 (1979).

50. See, e.g., Friendly, *The Historic Basis for Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

51. See Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97.

52. 304 U.S. 64 (1938).

only diversity jurisdiction has been constricted—by Congress' retaining and then increasing the amount-in-controversy requirement, expanding corporate citizenship, and limiting removal to nonresident defendants. Third, and somewhat more arguable, if diversity jurisdiction had never existed in the past, Congress almost certainly would not create it today; the continuing viability of this jurisdiction rests to a considerable degree on its historical pedigree.

Judge Posner recently offered a more sophisticated argument for federal jurisdiction over interstate disputes, one that does not depend on proof of parochialism or outright hostility. He reasons that when "either the benefits or the costs of a governmental action are experienced outside the jurisdiction where the action is taken," federal jurisdiction may be necessary to prevent states from imposing costs on other states and to deal with free-rider problems.⁵³ Thus, in all contract and in many tort cases, state courts are unlikely to discriminate against nonresidents because the nonresidents are economically linked with residents. But if the nonresident is a tort victim of a resident and the parties were strangers before the accident, there is a risk of cost-externalization by state courts. This risk is reduced in a federal court, which has a national perspective. Judge Posner adds that this reasoning also applies to federal/state issues, and he suggests that externalities may explain why state court judges are less concerned with protecting some federal rights. Avoiding cost externalization may therefore justify federal jurisdiction over such matters as suits against the United States government, federal criminal prosecutions, and some admiralty cases.⁵⁴

4. Assuring uniform interpretation and application of federal law

A large proportion of the federal docket consists of cases arising under federal statutes, and this category has grown steadily over the years. Although federal jurisdiction to hear such cases hardly seems controversial today, it was a subject of heated debate throughout the nineteenth century—the issue being whether general federal question jurisdiction would make the federal courts too powerful.⁵⁵ The primary reason for adding

53. R. POSNER, *supra* note 1, at 174-77.

54. *Id.* at 175-78.

55. See F. FRANKFURTER & J. LANDIS, *supra* note 18, at 65-69.

this jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law.⁵⁶ The underlying premise is that because the Constitution, treaties, and statutes of the United States apply to the entire country, they should have essentially the same meaning in all parts of the country.

Where the desire for uniformity is especially strong, federal jurisdiction may be made exclusive. Federal courts have exclusive jurisdiction, for example, in copyright and patent cases, in admiralty and maritime cases, and in bankruptcy cases.⁵⁷ In the admiralty area, exclusive federal jurisdiction is also justified by the potential international and foreign relations implications of many admiralty cases and by the difficulty of determining the applicable law in cases of injury on the high seas.

In most other areas, federal jurisdiction is concurrent with that of the states, which seems to undercut the argument from uniformity. Indeed, even when federal jurisdiction is exclusive, the Supreme Court's limited appellate supervision means that most issues are settled in one of thirteen independent courts of appeals, again suggesting that the uniformity rationale may be overstated. But it would be wrong to place too much emphasis on these seeming departures from the goal of uniformity, which are best understood as concessions to practicality. As noted above, general federal question jurisdiction was controversial in the nineteenth century because it threatened a dramatic shift of power away from the states. Expediency may thus explain the original decision to make federal question jurisdiction concurrent (though the likelihood of federal dominance was facilitated by provisions for removal). Today, concurrent jurisdiction over federal questions may simply be a workload necessity, for while we lack precise statistics, a significant number of federal issues are heard by state courts.⁵⁸ Similarly, as explained above, reliance on the courts of appeals to settle most questions represents a compromise between the desire for uniformity and the enormous federal appellate workload.

Nor is it true that resolving issues in independent courts of

56. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting).

57. See 28 U.S.C. §§ 1333(1), 1334, 1338 (1982).

58. A LEXIS search of just state cases citing the United States Code in 1989 turned up almost 2000 cases, and in a random search of 200 of these over 40% involved the resolution of federal claims.

appeals and having concurrent state jurisdiction completely undercuts the goal of uniformity. These arrangements do prevent the attainment of absolute uniformity, but experience indicates that the availability of a federal forum significantly advances that goal. This at least was the conclusion of the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts.⁵⁹

Finally, jurisdiction over federal questions is sometimes justified on the ground that it improves the quality of adjudication by making federal courts specialists in federal law. The American Law Institute explained that because federal question cases constitute the basic grist of federal tribunals, "[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law."⁶⁰ As a result, federal courts are comparatively more skilled than state courts at interpreting and applying federal law, and are more likely correctly to divine Congress' intent in enacting legislation.⁶¹

5. *Developing federal common law*

Observers have long recognized that rather than eliminate federal common law, *Erie* merely shifted its focus to a more appropriate sphere. That is, while *Erie* commands deference to state law where there is no unique federal substantive interest, it has led to what Grant Gilmore has described as a "federalizing principle" by which federal statutes are often read to generate a common law penumbra of their own.⁶² This new federal common law has become increasingly important over the years, particularly in areas like labor law, antitrust law and, more recently, ERISA law.⁶³

In some areas, federal common law has been developed to protect the interests of the United States government.⁶⁴ In

59. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-68 (1965) [hereinafter ALI STUDY].

60. *Id.* at 164-65.

61. *Id.* at 165; M. REDISH, *supra* note 42, at 71; CURRIE, FEDERAL COURTS 160 (3d ed. 1982).

62. See G. GILMORE, THE AGES OF AMERICAN LAW 93-95 (1977); H. FRIENDLY, BENCHMARKS 185-95 (1967).

63. For a discussion of federal common law, see CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 25, at 293-322; Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

64. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); D'Oench,

Boyle v. United Technologies Corp., for example, the Supreme Court held that federal common law should determine the liability of a defense contractor to the federal government because the unique federal interest in obtaining equipment for the military might be impaired by applying state tort law.⁶⁵ In other instances, federal courts have found it necessary to create federal common law to fulfill congressional intent. The most well-known example is the Court's conclusion that section 301 of the Labor Management Relations Act, which confers jurisdiction over actions for breach of a collective bargaining agreement, authorizes federal courts to create federal contract law.⁶⁶ The Court recently found a similar grant of common lawmaking power in ERISA.⁶⁷ This is statutory construction only in the most formal sense. In reality, the Court is engaging in traditional common law adjudication, except that its exercise of this power is to some extent directed by the broad purposes behind the particular statute or federal interest.

Fashioning federal common law is a task the federal judiciary is uniquely able to perform. Indeed, while this jurisdiction need not be exclusive, it is hard to imagine a federal common law without federal courts to develop it. Most federal common law resembles or is closely related to state common law, and it is asking a lot of state judges to develop a uniquely federal common law that differs from their state law without a body of federal precedent to consult. The situation is similar to that faced by a judge in one state who is called upon to apply another state's common law. If courts in the latter state lacked jurisdiction to decide common law cases and instead left it to courts in other states to do it for them, the judge in the first state would almost certainly wind up applying his state's own common law rules— after all, judges in that state have already found these to be the most sensible rules.⁶⁸ In areas governed by federal common law, then, federal jurisdiction is needed to generate a body

Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

65. 109 S. Ct. 214 (1987).

66. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

67. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983).

68. This conclusion is supported by experience in choice of law cases, where there has been a pronounced tendency to apply forum law in states that give the court discretion to choose among competing laws. See, e.g., Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989); R. SEDLER, *ACROSS STATE LINES* 44-45 (1989).

of precedent with the unique federal perspective that gives this law its distinctive tone and content.⁶⁹

6. *Hearing appeals*

Finally, in some instances, federal courts perform an appellate function, reviewing decisions of other adjudicatory bodies. The most important example is judicial review of decisions of federal administrative agencies. Less obviously, federal courts perform an essentially appellate function in reviewing petitions for writs of habeas corpus from state prisoners.⁷⁰ Federal jurisdiction in these cases follows from the determination that a remedy is desirable. In the case of review of administrative agencies, there is a particularly strong need for uniformity (hence jurisdiction in this area is invariably exclusive) as well as Supremacy Clause concerns.⁷¹ In the case of habeas corpus, the rationale for a federal remedy is distrust of state courts; it therefore makes little sense to create a duplicative habeas corpus scheme without giving federal courts jurisdiction to apply it.

B. A Minimal Model and Some Priorities for Federal Jurisdiction

Of the functions described above, which, if any, must be performed by federal courts? And among the remaining, non-essential functions, which have the strongest claim on the time of federal judges?

Before turning to these questions, we offer two caveats. First, we do not make any assumptions about the nature of the forum in which federal jurisdiction should be vested. It is common to conflate questions of federal jurisdiction with questions of the jurisdiction of the federal courts of general jurisdiction, since these courts have traditionally handled most federal judicial business. However, while there may be strong reasons to rely primarily on courts of general jurisdiction, federal jurisdiction

69. Consider the preference for arbitration that is central to the federal common law under § 301 of the Labor Management Relations Act. When first developed, this principle was at odds with the law in most states respecting arbitration. Without federal courts to articulate and develop this preference, the course of labor law would likely have been quite different.

70. See Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

71. Any constitutional requirements for judicial review of agency adjudication, see, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), could be satisfied by review in state courts.

can also be exercised by specialized tribunals of limited jurisdiction or (within limits imposed by the due process clause) by tribunals with non-traditional procedures. Our discussion at this juncture is limited to the need for some sort of federal tribunal.

Second, at least with respect to claims that are creatures of federal law, Congress can diminish the federal caseload in two ways: by repealing the substantive right, or by repealing the provision for federal jurisdiction to adjudicate it (and leaving this task to state courts).⁷² Some commentators have urged Congress to repeal laws they deem unimportant—the most frequently mentioned examples being the Federal Odometer Act, the Federal Employers' Liability Act, and the Jones Act.⁷³ But while docket pressures would obviously be eased if there were less law and fewer rights, the few laws whose repeal would not be controversial (and they are few indeed) account for a minuscule portion of the federal docket. To make this strategy effective, Congress would have to repeal laws affecting substantial numbers of people and around which substantial interests have coalesced.⁷⁴ There may come a time when caseload pressures in the federal courts are such that the only solution is to repeal substantive laws. But that time has not yet arrived, and we believe that Congress can solve any current problems without repealing substantive rights if it restructures the way these rights are adjudicated. Consequently, the discussion of priorities below assumes that reform is to take place within the existing contours of substantive law.

The analysis of functions served by the federal courts suggests that these courts are necessary for at least four of the functions described. First, there should be a federal forum to hear cases involving questions of separation of powers and possibly also questions of federalism. Second, there should be federal jurisdiction over cases brought by or against the United States, including suits against government officials arising out of the performance of their duties. Third, there should be federal juris-

72. Furthermore, federal jurisdiction can be limited either by removing certain classes of cases from the federal docket altogether or by giving federal courts some discretion in hearing cases. See Newman, *supra* note 4, at 770-76.

73. See, e.g., Briant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet?*, N.Y. St. B.J. 20, 22 (July 1989).

74. This is virtually a matter of definition: to make a noticeable impact on the docket, a law would have to account for a substantial amount of litigation. But the more litigation there is, the more likely it is that there are powerful interests in retaining the status quo.

diction to hear cases brought by or against foreign governments. Fourth, there should be federal jurisdiction to decide disputes between state governments.

While it would be necessary to create federal courts to hear these four classes of cases, there are several other areas in which, if there is any judicial jurisdiction at all, it should include federal jurisdiction. Most important, this includes areas in which Congress wants courts to fashion federal common law. As explained above, while federal jurisdiction in such cases need not be exclusive, the proper development of federal common law requires a body of federal court precedent.

In addition, federal jurisdiction is necessary in those areas where federal courts presently review other adjudicatory bodies—review of federal administrative agencies and habeas corpus petitions from state prisoners. With respect to the former, some judicial review is constitutionally required, and it seems inconceivable that Congress would subject federal agencies to review in the state courts—not only because of supremacy concerns,⁷⁵ but also to ensure the coherence and uniformity of federal regulation. Subjecting agencies to review in thirteen independent courts of appeals already complicates the administrative process by subjecting agencies to conflicting commands from different courts. These problems would be greatly exacerbated if federal agencies were subject to review in fifty state courts. With respect to habeas corpus, because this remedy is justified as necessary to prevent mistakes in the state courts, the decision to provide a remedy is indistinguishable from the question of jurisdiction. There is, to be sure, a vigorous debate over whether habeas corpus is really necessary or should be restricted, but for present purposes the point is simply that if there is to be a federal habeas corpus remedy (whatever its scope) federal courts should have jurisdiction to grant it.

Finally, we would include admiralty jurisdiction within the “mandatory” jurisdiction of the federal courts. The law in this area is federal common law, or so the Supreme Court held in 1917 in *Southern Pacific Co. v. Jensen*.⁷⁶ The Court might not affirm that holding today, however, and for reasons that make the federal common law argument somewhat weaker in this con-

75. Review of agency actions could, in fact, be included within the category of suits in which the United States is a party.

76. 244 U.S. 205 (1917).

text. The holding that admiralty law cannot be delegated to the states is less the reflection of a unique federal substantive interest than recognition that uniformity in the admiralty area is particularly desirable. While this is certainly an argument in favor of federal jurisdiction, it is weaker than the usual argument for federal jurisdiction to develop federal common law—to wit, that the national perspective of federal courts is necessary to differentiate federal from state common law. In the case of admiralty, the states have little common law of their own, and the law would therefore be made by reference to a substantial body of already existing federal and international precedent. Hence, while the Supreme Court might have more conflicts to resolve, this is one area in which state courts could perhaps develop federal common law without help from the lower federal courts.

Nonetheless, we believe that there should be federal jurisdiction over admiralty cases. The need for uniformity in this area is particularly strong, and without federal jurisdiction the law in the states would inevitably begin to differentiate. Moreover, many admiralty cases involve foreign flag ships or foreign seamen and raise the concerns discussed in connection with cases involving foreign sovereigns. The distinguishing feature of maritime law is that a ship's owner may, through the fiction that the ship is the wrongdoer, be sued in any port where the ship calls. This is a useful device for making shipowners answerable for wrongdoing in courts convenient for their victims, but as a modest *quid pro quo* for having to defend themselves in courts all over the world, shipowners have demanded and been granted access to the national courts of the countries at which their ships call.⁷⁷ Finally, the law of admiralty is a subspecialty, with its own complex substantive and procedural rules. Having possessed this jurisdiction since 1789, the federal courts have considerable expertise and experience with it.

We still have not discussed several categories of cases: cases involving individual constitutional rights, cases involving foreign nationals, cases arising under federal statutes, and diversity cases. These are, of course, important categories—the latter two accounting for at least two-thirds of the district courts' docket and half of the docket of the courts of appeals.⁷⁸ Nonetheless,

77. R. POSNER, *supra* note 1, at 178.

78. See, e.g., 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-1A, C-1, C-2.

the area in which federal jurisdiction seems essential turns out to be surprisingly large.

We disagree about the classification of cases involving individual constitutional rights. Professor Chemerinsky would include this task together with the four essential components of federal jurisdiction described above. At a minimum, he would place it among the cases for which, if there is any judicial jurisdiction, there should be federal jurisdiction. Constitutional claims presented by individuals are among the nation's most important litigation. (A full defense of this proposition is beyond the scope of this paper, but few would disagree that a central function of the Constitution is to safeguard individual liberties and to assure equal protection.) Effective judicial enforcement is imperative if these rights are to be protected. But federal and state courts vary in their ability and willingness to protect these rights; certainly there is no reason to believe that federal and state courts are always fungible. The point is not that federal judges are "better." As noted above, we are agnostic on the ultimate resolution of the parity debate. The point is simply that federal and state courts vary: in some places, on some issues, one or the other may be more likely to vindicate constitutional claims. In light of this variance, litigants raising constitutional claims should be able to select the forum they prefer. Consequently, a central role of the federal courts should be to offer a forum to individuals asserting violations of their constitutional rights.⁷⁹

Professor Kramer agrees that constitutional cases involving individual rights have a strong claim on federal judicial resources, but feels that these cases nonetheless belong in the category of permissive federal jurisdiction. Prior to 1875, the nation got along quite nicely without federal jurisdiction over constitutional claims, and it was really not until the second half of this century that the dominance of the federal courts in this area was established. Professor Chemerinsky is surely correct that some sort of judicial remedy is desirable, but it does not follow that the plaintiff has or must have a correlative right to a choice of forum. If one court provides an adequate process, there is no logical or structural necessity for jurisdiction in the other.

Nonetheless, Professor Kramer also believes that there

79. Professor Chemerinsky has defended this proposition in detail elsewhere. See Chemerinsky, *Parity Reconsidered*, *supra* note 25, at 300-26.

should be federal jurisdiction over cases involving constitutional claims. Enforcement of the United States Constitution has come to be closely associated with the federal courts, and today most observers consider this to be one of their core functions. Indeed, the importance of a federal forum for federal constitutional claims is one of the few issues about which there appears to be virtually unanimous consensus. It need not be so; it has not always been so. But for now at least, these cases have a relatively high priority in the jurisdiction of the federal courts.

And what about the remaining cases in which federal jurisdiction is permissive: cases against foreign nationals, federal question cases and diversity cases? One might assume that the proper way to classify these cases is by "social importance," retaining federal jurisdiction over those with the greatest social consequences. Such an approach would presumably cut across all three categories of cases. But even assuming that we have an accurate way to measure social consequences, it is not clear that this is how federal jurisdiction should be allocated. In our view, it makes more sense to think about reserving federal judicial resources for those cases in which there is a particular need for a *federal*, as opposed to a state, forum.

From this perspective, cases involving foreign citizens should have a high priority in the jurisdiction of the federal courts. Cases brought by or against foreign nationals raise many of the concerns associated with suits against foreign governments or their officials. To be sure, the risk of an international incident or of interference with foreign policy is reduced when the party is a private foreign citizen. Nonetheless, the risk remains. Moreover, many of the federal government's obligations under international law run to foreign nationals as well as to foreign governments and their officials.⁸⁰ If there is an incident, the federal government is responsible; it thus wants to afford foreign citizens the option of bringing or removing their lawsuits into courts whose procedures it controls. For these reasons, the State Department advocates retaining federal jurisdiction over cases involving aliens.⁸¹

This leaves the two largest categories: nonconstitutional

80. See ALI STUDY, *supra* note 59, at 108.

81. *Diversity of Citizenship Jurisdiction, 1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Comm. on the Judiciary, 97th Cong., 2d Sess. 336-37 (1982)* (letter from State Department dated August 9, 1982).

federal question cases and diversity cases. The fact that these categories are so large and diffuse makes discussing them difficult. If we had to treat these categories as monoliths and choose between them, it seems obvious that federal question cases would have a higher priority. The entire history of the federal courts since the first Judiciary Act has reflected the growth in importance of federal questions relative to diversity cases. Moreover, the federal government is naturally more concerned with the interpretation and application of its own laws than it is with the laws of the states—particularly since, after *Erie*, federal decisions in diversity cases have no formal precedential effect.

But do we need to treat these categories as monoliths? Certainly it is possible to have federal jurisdiction over some federal questions and some diversity cases while leaving other federal questions to be heard exclusively in state courts. There is precedent in the old amount-in-controversy requirement that formerly limited general federal question jurisdiction and still limits federal jurisdiction over a few federal questions.⁸² Alternatively, a number of diversity proponents argue that Congress could make room for some diversity cases in the federal courts by limiting or repealing some federal laws.⁸³ As noted above, we do not address this latter possibility other than to note that the examples cited account for too small a portion of the federal docket to provide much relief.

In any event, while it is theoretically possible to shift some federal questions out of the federal courts, this solution has several problems. First, how should Congress decide which federal questions must be heard in federal courts and which can safely be left to the states? One solution is to utilize Judge Posner's analysis of cost-externalization. Some federal laws provide benefits and impose burdens that are wholly internal to each state, while others create externalities in other states. If Judge Posner is correct, a federal forum serves a more important purpose in the latter cases. But the results of this analysis may contradict many common assumptions about when a federal forum is desirable and are likely to be highly controversial. For example, Judge Posner's analysis suggests leaving most civil rights cases to state courts, since the costs and benefits of these cases tend to

82. See, e.g., 28 U.S.C. § 1337 (1982) (limiting federal jurisdiction over actions under 49 U.S.C. § 11707 to those for more than \$10,000).

83. See, e.g., Brieant, *supra* note 73, at 22.

be internalized, while leaving most economic regulation in the federal courts. Alternatively, it may be possible to make more ad-hoc judgments about which federal cases must be heard in state courts, though any such decisions are likely to be controversial.

In any event, there is a second problem with relying on a strategy of state court enforcement of federal laws. The federal government already imposes a substantial burden on the states by requiring them to hear federal question cases concurrently with federal courts. Given this burden and the constraints of federalism generally, it is inappropriate for Congress to enact a substantive law and require the states to devote judicial resources to administering it without also making federal judicial resources available.⁸⁴ Again, this still leaves the option of repealing selected federal laws. But aside from that, we believe that federal questions should have a higher priority than diversity cases.

Finally, it is possible to articulate some priorities among diversity cases. A federal forum is most necessary, for example, if procedural limitations in the states limit the ability of state courts to provide full relief, as in some interpleader or complex multiparty cases. Similarly, the likelihood of discrimination against nonresidents is greater in some cases than others,⁸⁵ and it therefore makes sense to give a higher priority to these cases. One simple line to draw in this regard is between cases brought by resident and nonresident plaintiffs. Another line, suggested by Judge Posner's analysis of cost-externalization, distinguishes cases in which the fate of non-residents is linked to that of residents from cases in which impairing costs on non-residents has no adverse effects in the forum state.

IV. CONCLUSION

The continued growth in federal caseloads demands attention, for caseload pressures threaten to impair the quality of justice provided by the federal judiciary. Federal judges already seem unanimous in the belief that the crush of litigation risks sacrificing the quality of work we have come to expect from them. One possibility is to increase the number of judges. Some

84. Congress could perhaps provide federal funds to the state courts, but this solution does not appear to be politically feasible.

85. R. POSNER, *supra* note 1, at 174-77.

expansion is inevitable and certainly desirable. Many arguments have been advanced against expansion, but on consideration most seem overstated and questionable. At the same time unlimited expansion does pose problems. As the number of district judges increases, courts of appeals must also expand. Growth in the federal courts of appeals increases the likelihood of conflicts within and between circuits. Uniformity in the interpretation and application of federal law—a central function of the federal judiciary—will be increasingly difficult to maintain.

The alternative is to reduce the number of cases in the federal courts. But restrictions on federal jurisdiction must be adopted with care for we cannot presume that the increase in federal court litigation is undesirable. If the growth in caseload indicates that more people are having their rights vindicated and their injuries remedied, this rise would be desirable.

Curtailing federal jurisdiction must therefore begin with an analysis of the proper role of the federal courts. What matters are most deserving of federal judicial resources? This article has considered this question, suggesting some areas where federal jurisdiction seems essential and others where more controversial choices must be made. Ultimately, hard choices about federal jurisdiction must be made, and many of these choices will depend on substantive preferences. Such decisions are likely to be an important part of the scholarly and political agenda for years to come.