BYU Law Review

Volume 1991 | Issue 2 Article 14

5-1-1991

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I. INTRODUCTION

No doubt some reform of the federal courts is essential if they are to cope with the proliferation of litigation over the past thirty years and the resulting "congestion, delay, expense, and expansion" in the federal courts.[1] While the problem may not amount to an "impending crisis",[2] the burgeoning caseload surely poses a threat, at least in the long run, to the ability of the federal courts to function effectively. The hard question is

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1. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990) [hereinafter REPORT].

2. *Compare id.* at 4 ("impending crisis") *with id.* at 123 (additional statement of Judge Cabranes: "[M]ore than one circuit judge has expressed surprise at our report's characterization of the situation as critical"); *see also* Galanter, *The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 927 ("in 1960 those who worked in the federal courts, or observed them close up, did not see them as the gleaming towers they appear to be through the mists of memory"); Levit, *The Caseload Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 324 (1989) ("No comprehensive study exists which considers all of the necessary variables to adequately measure and evaluate the workload of the federal courts."); Beermann, *Crisis? What Crisis?* (Book Review), 80 NW. U.L. REV. 1383, 1389 (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)) ("The increase in the amount of litigation . . . may indicate that society actually needs the big [judicial] bureaucracy [Richard] Posner belittles. . . .").

Notice also that the Committee's perception of a crisis fails to take account of a major development in habeas corpus doctrine that occurred contemporaneously with the Committee's work. The Supreme Court held in a series of cases that habeas petitioners generally may not rely on cases decided after their convictions become final or even on inferences from Supreme Court precedent at the time of their convictions. After these cases it appears that many prisoners will be allowed access to federal habeas corpus only where the state court has violated black letter law. *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1217-18 (1990). *See generally* Note, *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 40, 308-19 (1990). Since habeas corpus is a major area of federal jurisdiction, this doctrinal development may have a significant impact on the federal caseload.

not whether something should be done, but what to do about it. There is no shortage of interesting ideas. Some of the ideas that clamor for attention are proposals for specialized courts, new layers of federal appellate review, rethinking the scope of federal jurisdiction, an expanded role for United States Magistrates, and alternative dispute resolution techniques.

The pros and cons of these and other innovations turn largely on our response to a more fundamental question: Is it better to expand the federal judiciary or to cut its workload? Of these two broad alternatives, the Federal Courts Study Committee squarely prefers limits on federal jurisdiction over large increases in the number of federal judges. I believe the Committee has made the wrong choice. While neither route is an altogether satisfactory solution to the caseload problem, an expanded federal court system is less objectionable than fencing claims out of the federal courts.

My objection is not directed so much at the specific recommendations contained in the Committee's Report. Apart from curtailing jurisdiction based on diversity of citizenship,[3] the Committee proposes only minor adjustments to the current jurisdictional statutes, and many of these are hard to fault. Reforms such as limiting diversity, repealing the Federal Employment Liability Act (FELA) and Jones Act in favor of a workers' compensation scheme,[4] prohibiting "non-acquiescence" on the part of the Social Security Administration,[5] and experimenting with new means of resolving intercircuit conflicts,[6] deserve careful consideration. Congress has already adopted the Committee's excellent suggestion[7] that federal jurisdiction be expanded by nullifying the Supreme Court's recent restriction, in *Finley v. United States*,[8] on pendent party jurisdiction.[9]

The problem with the Committee's approach to jurisdictional reform lies in the premise underlying many of the specific proposals. Although it calls for some new judgeships,[10] the Com-

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3. REPORT, *supra* note 1, at 38.

4. *Id.* at 62.

5. *Id.* at 59-60.

6. *Id.* at 125-26.

7. *Id.* at 47; *see* Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 248-49.

8. 490 U.S. 545 (1989).

9. *See* Judicial Improvements Act of 1990, Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14 (to be codified as 28 U.S.C. § 1367).

10. REPORT, *supra* note 1, at 112.

mittee rejects steady expansion of the federal judiciary.[11] Instead, the Committee adopts as the central guideline for setting the scope of federal jurisdiction the proposition that the federal court system must remain small.[12] As a result, most of its efforts are directed either at finding areas in which to cut back access to federal courts or at making the processing of federal cases more efficient by greater use of magistrates and alternative dispute resolution techniques. Whatever the merits of the current proposals, this premise should be rejected, because the advantages of a small federal judiciary are not as great as the Committee claims, while the costs of maintaining such a system are significant. Moreover, keeping the federal judiciary small would mainly hurt those who most need access to federal court: small litigants with federal constitutional or statutory claims against the state or federal government.

The Committee prefers to keep the federal judiciary small because it believes that the efficacy of the federal courts and public confidence in their decisions rest on their composition. Today federal courts are, in the Committee's view, an elite corps of highly talented and dedicated men and women, and adding a large number of federal judges would diminish their status.[13] Since almost all of the Committee's specific proposals rest on the proposition that it is a matter of vital importance to maintain an elite federal judiciary, their attractiveness depends largely on whether this premise is valid. Yet the Report contains only a few paragraphs in support of the premise and fails to consider the case against it.

This article raises three objections to the Committee's premise that it is necessary to maintain an elite federal judiciary. First, the Committee defines the problem of setting the scope of federal jurisdiction too narrowly, focusing almost exclusively on

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11. *Id.* at 8 ("It has been suggested that 1,000 is the practical ceiling on the number of judges if the Article III judiciary is to remain capable of performing its essential functions without significant degradation of quality.")

12. *Id.* at 7-8. The Committee is not alone in making this choice. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 13-14 (1973); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 181 (1985); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 793 (1981); Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 763 (1989); A. Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Council of Bar Presidents, New Orleans, La. (Feb. 15, 1987) (reported in the Christian Sci. Monitor, Feb. 19, 1987, at 15).

13. *See* REPORT, *supra* note 1, at 7-8.

the congestion in the federal courts and ignoring the impact of its solution on other worthy goals. The issue that should be posed is not whether the current system is wholly satisfactory, but whether the costs of reform are worth the benefits, all things considered. Second, an analysis of the costs and benefits of maintaining a federal judicial elite casts substantial doubt on the Committee's premise that greatly enlarging the federal judiciary is an unacceptable alternative. Third, the Committee altogether ignores the substantive dimension of jurisdictional reform. The principles underlying the Committee's proposals, if not the current proposals themselves, may have far-ranging impact on substantive rights and obligations. Some groups of litigants will lose litigating advantages they now hold, and the desirability of the recommendations depends, at least in part, on whether we think the substantive burdens of reform are fairly distributed.

II. Defining the Problem

A critic of the Committee's Report confronts a nebulous and ambulatory target. Some parts of the Report suggest that the chief aim of jurisdictional reform is to achieve a more coherent body of jurisdictional law, organized around the central principle that federal courts should be reserved for federal issues. Yet the Committee's recommendations, taken as a whole, belie its devotion to this approach to federal jurisdiction. Rather, the dominant concern is to keep the federal judiciary as small as possible in the face of the ever growing docket, and the preferred solution is to limit access to federal court for *federal* as well as state law cases.

Having identified the Committee's real agenda, the reader searches in vain for a balanced analysis of the case for smallness or some consideration of alternative approaches to dealing with congestion. Instead, the Committee virtually assumes that an elite federal judiciary is essential and devotes most of the Report to specific suggestions for trimming federal jurisdiction and improving the administration of the federal court system. It is left up to the reader to place the caseload problem in the larger context of considerations bearing on the appropriate size of the federal judiciary, and to evaluate the pros and cons of smallness without much help from the Committee.

A. Identifying the Committee's Agenda

The Committee declares that it seeks "a better federal court system, not a smaller one"[14] and that its "goal is a *principled* allocation of jurisdiction."[15] To this end, the Committee articulates a general principle that "state courts [should] resolve disputes over state law, and federal courts should resolve disputes over federal law."[16] This principle is grounded "on a desire that federal courts remain accessible in a practical as well as theoretical sense to federal claimants."[17] One of the Committee's major recommendations—the abolition of most diversity jurisdiction—is consistent with this proposition. Closer scrutiny of the Report as a whole, however, casts doubt on the Committee's commitment to this principle of division. Based on the ensemble of its recommendations for change, the Committee's central objective appears to be to restrain the growth of the federal judiciary as much as possible.

In the first sentence of the Report, the Committee characterizes the problem before it as "public and professional concern with the federal courts' congestion, delay, expense, and expansion."[18] After describing the recent growth of federal law and litigation, the Committee rejects out of hand the alternative of significant expansion of the federal judiciary. A larger system would result in "paralysis or incoherence, because of the judicial system's three-tier pyramidal structure."[19] In addition, judicial intervention "is more likely to win public acceptance if the federal judiciary is perceived as a small and special corps of men and women," and not "as a faceless, omnipresent bureaucracy."[20] For these reasons, "[t]he larger the federal court system becomes, the more difficult it becomes to expand it further without compromising the quality of federal justice," and "we may be approaching the limits of the natural growth of the federal courts."[21]

In light of the Committee's perception of the problem, it is not surprising that nearly all of the recommendations are di-

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14. REPORT, *supra* note 1, at 3.
15. *Id.* at 35 (emphasis in original).
16. *Id.* at 14.
17. *Id.*
18. *Id.* at 3.
19. *Id.* at 8.
20. *Id.*
21. *Id.*

rected at finding ways to cut the flow of cases into federal court. Where a conflict arises between this impulse and the competing principle of resolving federal-law disputes in federal courts, the Committee usually abandons the principle in favor of restraining growth.[22] Consider three examples:

(1) One large class of litigation over federal issues consists of suits by state prisoners, brought under 42 U.S.C. section 1983, asserting violations of their constitutional rights by state authorities. These suits challenge the conditions under which prisoners are confined. The Committee would require prisoners to exhaust available state administrative remedies before proceeding to federal court.[23] The Committee seems to think that its proposal, if enacted, would have no adverse impact on the prisoner's right of access to federal court.[24] But the Supreme Court has held that federal courts must give preclusive effect to findings of fact made in state administrative proceedings.[25] Consequently, the proposal may have the effect of denying state prisoners access to a federal forum, to the extent their claims turn on disputed issues of fact resolved against them in the state administrative proceeding.

(2) No field of federal jurisdiction is more significant than habeas corpus. In habeas corpus cases, state prisoners challenge the validity of their confinement (rather than the conditions of confinement) under the federal Constitution.[26] Fidelity to the principle of adjudicating federal law in federal courts would require channelling these cases into a federal forum.[27] Acknowledging that habeas is "of central concern to the nation and to its

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22. The Committee's recommendation—that pendent party jurisdiction be reinstated—is an exception to this generalization. *See supra* notes 7-9 and accompanying text. That proposal eases access to federal courts for federal claims by obviating the need to choose between bifurcating the case between federal and state court, on the one hand, and litigating both federal and state claims in state court.

23. REPORT, *supra* note 1, at 48-49. Current law requires exhaustion only where the state's administrative remedies meet standards set by the Justice Department. 42 U.S.C. § 1997e (1988). Few states have sought certification of their systems. Evidently, some states consider these requirements too "onerous." REPORT, *supra* note 1, at 49.

24. REPORT, *supra* note 1, at 50.

25. University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986). In spite of *Elliott*, Congress could avoid preclusive effect by explicitly prohibiting it. Unfortunately, the Committee's recommendation contains no such language.

26. For an elaborate discussion of the distinction between the kinds of claims that should be brought under habeas corpus and those that should be brought under 42 U.S.C. § 1983, see Preiser v. Rodriguez, 411 U.S. 475, 488-500 (1973).

27. *See* Friedman, A Tale of Two Habeas, 73 MINN. L. REV. 247, 274-77 (1988); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 993, 997 (1985).

federal courts,"[28] the Committee nevertheless chose to say nothing about it. Why? Because "Congress is considering several wide-range recommendations for revising habeas corpus procedures in death penalty cases," and "[p]roposals relating to non-death cases are in various stages of development."[29] Many of Congress' proposals would cut back the availability of habeas corpus,[30] and their presence before Congress seems an odd reason to refrain from addressing habeas. The Committee's mission was to advise Congress on reforming federal jurisdiction. One would have thought the Committee would make a point of examining the matters on which the need for advice is most pressing.

The Committee's reticence is even more surprising in view of case law developments that took place while the Committee was at work. In a series of cases dealing with the "retroactivity" of cases announcing new rules, the Supreme Court radically altered the scope of habeas, effectively denying many prisoners access to federal court. Unless the state court has ignored the black letter law on a constitutional issue, federal habeas will be unavailable for most prisoners.[31] Thus, prisoners may not rely on drawing inferences from Supreme Court precedent or on cases decided after their convictions become final. The Committee's consultant in the area, Joseph Hoffman, analyzed these developments for the Committee. Professor Hoffman urged action broadly consistent with the Committee's expressed preference for providing a federal forum to resolve federal issues.[32] The Committee tentatively adopted an approach similar to Professor Hoffman's[33] but backed away from the whole issue in the end. Whatever the Committee's motives in choosing to remain silent in the wake of recent cases, its failure to recommend statutory modification of the Supreme Court's cutbacks casts substantial

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28. REPORT, *supra* note 1, at 41.

29. *Id.* at 51.

30. For some of these recommendations, see Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989). *See generally* Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990).

31. *See* Butler v. McKellar, 110 S. Ct. 1212, 1217-18 (1990); Penry v. Lynaugh, 109 S. Ct. 2934, 2944, 2952 (1989); Teague v. Lane, 489 U.S. 288, 306-14 (1989).

32. *See* Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. REV. 183, 200-17.

33. *See* FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 59 (1989).

doubt on its commitment to the principle that federal courts should be available for federal questions.

(3) Under current law, an important departure from the "federal courts for federal issues" is the concept of federal-court "abstention." Under the abstention doctrines, the Supreme Court directs lower federal courts to turn away litigants with federal claims or to postpone their adjudication, in favor of state court action.[34] Under this rubric, federal courts defer to pending state proceedings in which the federal issues may be litigated,[35] postpone the resolution of federal questions so that state courts may first consider unsettled state law issues bearing on the litigation,[36] and dismiss federal suits in order to avoid ongoing duplicative litigation in the federal and state courts.[37] Again, the Committee's consultants proposed legislation that would limit the scope of abstention and bring federal court practice more in line with the Committee's supposed principle of allocation.[38] Again, the Committee shied away. It decided to "recommend for further study, but take no position on" proposals for modifying the abstention doctrines.[39]

No one would propose "federal courts for federal law" as an unyielding rule for determining access to federal court. A variety of considerations militate in favor of state court adjudication of some federal questions, among them the convenience of deter-

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34. *See* E. CHEMERINSKY, FEDERAL JURISDICTION 593-676 (1989); Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321.

35. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 423 (1979); Younger v. Harris, 401 U.S. 37, 43 (1971).

36. *See, e.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498-500 (1941).

37. *See, e.g.*, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662-65 (1978) (plurality opinion); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976).

38. *See* Lee & Wilkins, *supra* note 34, at 361-76. Both here and with respect to habeas corpus, I do not mean to endorse every aspect of the consultants' recommendations; however, they do constructively engage the issues, while the Committee refuses to do so.

39. REPORT, *supra* note 1, at 48. Another example of the gap between the Committee's supposed principle and its actual recommendations is its failure to propose any change in the removal statute. At present, 28 U.S.C. § 1441 permits litigants to remove cases that arise under federal law from state to federal court, but refuses to allow removal when the federal issue arises as a defense. As a result, litigants raising federal issues are denied access to federal court. The Committee chose to make no recommendation for changing this provision, *see* REPORT, *supra* note 1, at 48, doubtless because caseload concerns have a higher priority for it than the "federal courts for federal law" principle. *See* Rothfeld, *Rationalizing Removal*, 1990 B.Y.U. L. REV. 221, 230.

mining jurisdiction at the very outset of litigation,[40] the desire to avoid duplication or disruption of ongoing state proceedings,[41] and the predominance of state issues over federal issues in a case.[42] Perhaps these or other factors argue against broad federal jurisdiction in some habeas and section 1983 cases or provide adequate support for some applications of the abstention doctrines. But the Committee does not defend its failure to address arguments for broader federal jurisdiction in such terms. It simply refuses to get drawn into such a discussion. So far as it is concerned, the caseload is the problem, and proposals for major expansions of federal jurisdiction merit no attention, even if they accord with the Committee's purported principle of allocation.

B. The Caseload Problem in a Larger Context

The Report's treatment of jurisdictional reform has an air of inevitability about it. The problem to be addressed, according to the Committee, is the burden imposed on the federal courts by the mounting caseload. That problem has two broad solutions. One is to increase the number of federal judges, and the other is to cut the workload by structural and managerial reform. The Committee believes that increasing the number of federal judges would jeopardize the effective functioning of the judiciary, and so it must be rejected. The Committee believes the only viable option is to limit federal jurisdiction in various ways.

The seeming necessity with which this argument moves from its premise to its conclusion is an illusion. Directing attention solely to the caseload is a far too narrow way of framing the problem. It distorts the issue by focusing too much on caseload statistics while excluding from consideration some of the factors that warrant attention. In a world of limited resources, we cannot have everything we want, either individually or as a society.[43] Broadly conceived, our ultimate objective should not be to create the very finest federal judiciary possible, but rather to

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40. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 997 (3d ed. 1988).

41. *See* Steffel v. Thompson, 415 U.S. 452 (1974); Stefanelli v. Minard, 342 U.S. 117 (1951).

42. *See* Merrill Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986).

43. *See* Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 121.

achieve the most effective federal court system we can devise, *compatible with* the other goals we pursue through government. The task is not merely how best to relieve congestion in the federal courts, but how to pursue that aim without unduly compromising the other goals of government.

The point of stating the issue in these terms is to stress that the benefits of relieving congestion in the federal courts will be accompanied by costs to other goals. As the Committee rightly notes, large increases in the number of federal judges carry the risk that the federal judiciary will become a faceless bureaucracy, unresponsive to the needs of those who depend upon it.[44] But the Committee's own proposals impose costs, too. If Congress reserves the federal courts for just a few kinds of cases, then litigants with claims that are fenced out will feel unjustly disadvantaged, and perhaps with good reason.

To take a well known and much debated example, many observers (myself included) claim there is disparity between federal and state courts. In their view, the tenure and salary provisions of article III, along with other factors, distinguish federal judges from their state counterparts. There are systematic differences between federal courts and state courts in their attitude toward constitutional challenges to state action.[45] Federal judges are by and large more likely to favor constitutional claimants than are state judges. If this is so, then rules requiring litigants with constitutional claims to proceed in state court, rather than giving them a choice, will work to their substantive disadvantage.[46] In another vein, litigants in diversity cases may prefer federal court because they fear state court prejudice against out-of-state litigants, or because they are more familiar with the federal rules of civil procedure, or perhaps because they think federal judges are of higher quality than state judges.[47]

To emphasize the need to take account of all of the consequences of jurisdictional reform is only to state the problem. It remains necessary to decide which costs are worth bearing in or-

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44. REPORT, *supra* note 1, at 8.

45. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-30 (1977); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 331-42 (1988); Zeigler, *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, 46-49 (1985).

46. *See* Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 509-10 (1989).

47. *See* Kramer, *supra* note 43, at 117-21.

der to obtain a more effective federal judiciary, and which ones are not. The evaluation of costs and benefits may come out differently as the analysis moves from one context to another. Perhaps the costs to constitutional claimants will be too great to justify restrictions on federal jurisdiction, because the disparity they fear is real and significant. At the same time, there may in fact be so little prejudice against out-of-staters in state courts that the need to conserve scarce federal judicial resources warrants eliminating most diversity jurisdiction.

Whatever choices are ultimately made, the Report manifests no sensitivity to the larger context within which jurisdictional reform unfolds and to the need to take account of the impediments that reform may place in the way of achieving other worthy goals. The Committee starts with the premise that an elite federal judiciary is an essential feature of our system of government, but it does not carefully identify either the costs or the benefits of keeping the system small. Those who are not already convinced of the need for restricting federal jurisdiction will not be persuaded by an analysis that neglects to address important, difficult questions in order to justify the proposed cutbacks.

III. The Costs and Benefits of an Elite Federal Judiciary

In order to evaluate the case for cutting federal jurisdiction, it is necessary to identify—with greater precision than the Committee—the costs and benefits of maintaining an elite federal judiciary. The Committee declares that its solution is best because the alternative, expanding the number of federal judges, would diminish the authority and effectiveness of federal courts. Its treatment of this critical issue is limited to a few sentences. According to the Report,

> [t]he independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequence of their actions.[48]

These conditions cannot "be satisfied if there are thousands of federal judges." Furthermore, "[e]ven if a highly competent federal judiciary consisting of thousands of judges could be created

48. Report, *supra* note 1, at 7.

and maintained, the coordination of so many judges would be extraordinarily difficult."[49]

The Committee makes little effort in its Report to defend the premises of this argument in favor of smallness or to examine the validity of the assumptions about human motivation on which it rests. Nor does it consider alternative ways of achieving a more effective federal judiciary. Granted, maintaining an elite federal judiciary is a worthy goal, because it is easier to maintain high intellectual standards and a sense of mission in a small group than a large one.[50] Even so, in order to decide whether to retain a small and elite judicial corps, it remains necessary to answer two questions: (1) *How great* are the benefits of an elite federal judiciary?; and (2) Can we *afford* an elite federal judiciary? Since we do not need every desirable thing enough to justify its costs, the choice for elitism cannot rest on the mere fact that smallness is good. It is necessary to consider the benefits and their importance, and then compare them with the costs of such a system on litigants who find themselves shut out of federal court.

A. How Great are the Benefits of an Elite Federal Judiciary?

According to the Committee, three distinct grounds support the preservation of a small federal judiciary. First, in order to assure the quality of the federal bench, judges must remain part of an elite corps. Second, as the federal judiciary becomes larger, it is harder to maintain rigorous standards. Increasing the number of federal judges would lead to more inconsistencies in federal decisional law. As more judges decide more cases, they are bound to disagree more often. The Supreme Court is already overburdened and cannot hope to deal adequately with a new proliferation of conflicts. Third, besides coherence and quality, some of the comments in the Report suggest that the Committee members regard a small federal judiciary as essential to maintaining the integrity of the judicial process.

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49. *Id.*; *see also* Newman, *supra* note 12, at 762-67.

50. *See* Neuborne, *supra* note 45, at 1121-22.

1. Elitism

The Committee's case for elitism is vulnerable to attack on a number of grounds. First, the Committee's curious treatment of the article III tenure and salary provisions is at odds with the framers' plan. The premise of the case for elitism seems to be that the tenure and salary provisions are an obstacle to effective judging, for "independence . . . is compatible with [good judging] only if federal judges are carefully selected . . . and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions."[51] The Committee evidently thinks that judges without tenure can be motivated to do their jobs well by such measures as the threat of dismissal or demotion. Tenure and salary protection removes these traditional "incentives to perform assigned tasks energetically and responsibly"[52] and gives rise to the need for other mechanisms of control, such as taking extraordinary care in their appointment and according them elite status.

The framers, however, viewed tenure and salary safeguards not as obstacles to effective judging, but as prerequisites necessary to attract talented lawyers to the federal bench[53] and to guarantee fair, independent, and apolitical judging.[54] In view of the preference many litigants express for federal court, it seems likely the framers were right. Denying any special value to tenure and salary protection, the Committee finds it all too easy to deny litigants an article III forum in favor of state court or administrative adjudication.

Second, the Committee's concern that steady increases in the number of federal judges will lead to lower quality seems unfounded. It is not apparent why appointing more judges *necessarily* means that less care will be taken in their selection. Although a sudden huge increase in the judicial ranks might have this effect, it seems significantly less plausible that an enlargement over time, as caseloads gradually increase, would lead to less care in checking candidates' credentials. As it is, examining the fitness of applicants for judgeships is only a small part of the Justice Department and Congress' work. Most of the work of evaluating quality is done by organizations like the American

51. REPORT, *supra* note 1, at 7.
52. *Id.*
53. *See* THE FEDERALIST No. 78, at 471-72 (A. Hamilton) (C. Rossiter ed. 1961).
54. *Id.* at 468-71.

Bar Association[55] and by congressional staffers. Currently, about fifty appointments are made each year, and "most nominees for federal judgeships receive little scrutiny, and most of this is for politics rather than quality."[56]

Third, besides the supposed difficulty of maintaining quality control, the Committee fears that "a sufficient number of highly qualified applicants could not be found unless salaries of federal judges were greatly increased. . . ."[57] Evidently the Committee thinks that only a few persons are bright enough or industrious enough to fulfill the obligations of a federal judge, and that these persons are concentrated in the offices of high paying law firms. In my view, this argument is wholly unpersuasive. Not every bright lawyer takes a job in a private firm paying large salaries. Many choose smaller firms, public interest work, or academic life. The current six figure salaries of federal judges would be attractive to many of these potential candidates. Furthermore, stunning brilliance is not so important to effective judging as is solid intelligence and conscientious devotion to the job.

Indeed, it is an increasingly open secret that much of the work of the federal bench is performed not by the judges but by their law clerks. At least with regard to the critical task of opinion writing, the judge's role often seems to be that of an editor, and in many cases a rather unaggressive editor.[58] One need not approve of this current practice to recognize that most of the work of the federal judiciary is not produced by the highly skilled, elite cadre of federal judges of the Committee's dreams. If, as I believe, the rise of the law clerk is itself a problem, then lessening the caseload burden by creating more judgeships would help to solve it by diminishing the pressure to rely on clerks.

Fourth, these observations about how the work of the federal judiciary actually gets done suggest a more fundamental criticism of the Committee's plea for elitism. One of the implicit

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55. *See* Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1 (1990); Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550, 551-53 (1989).

56. Chemerinsky & Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 70; *see also* Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1214 (1988).

57. REPORT, *supra* note 1, at 7.

58. *See* R. POSNER, *supra* note 12, at 102-19; Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 41-42.

premises of the argument seems to be that federal judges are *now* chosen on the basis of merit, for the present regime is what the Committee wants to save by cutting jurisdiction. Yet no one who is familiar with the selection process for federal judges believes that intellectual talent or an appetite for hard work are the only factors that count in choosing them. Ever since the early days of the Republic, political affiliation and personal contacts have played a significant role in choosing judges.[59] In recent years the influence of politics has, if anything, become all the more important, as candidates have been subjected to extensive questioning by Justice Department officials in order to assure their ideological suitability.[60] Indeed, the Reagan administration boasted of its success in pushing the federal judiciary to the right.[61]

Fifth, the Committee worries that the federal judiciary may become undesirable to talented lawyers if it grows larger.[62] According to proponents of smallness, elite status is necessary in order to attract and keep persons of high intellectual talent on the federal bench.[63] To put the argument less delicately, if the job were to lose its snob appeal, worthy candidates would not want it. It is true that many people are motivated in part by the desire for status in their professional lives. But it is unlikely that status is the paramount consideration for most talented and hardworking lawyers. Sufficient status is provided by life tenure in a job that will remain rather exclusive. A federal judicial appointment permits one to play a significant role in the nation's political and social life, even if a judge has to share that role with two or three times as many colleagues as is presently the

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59. *See* Fyr, *Judicial Selection: New Players, Same Game*, 38 EMORY L.J. 771, 774 (1989); Evans, *Political Influences in the Selection of Federal Judges*, 1948 WIS. L. REV. 330, 330. *See generally* S. GOLDMAN & S. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 47-66 (2d ed. 1976).

60. *See* Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324 (1987); Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313 (1985); Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U.L. REV. 1, 3 (1989).

61. The story of the Reagan administration's efforts to change the direction of the federal judiciary is told in H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988).

62. REPORT, *supra* note 1, at 7.

63. *See* H. FRIENDLY, *supra* note 12, at 28-29; R. POSNER, *supra* note 12, at 99; W. Rehnquist, Are the True Old Times Dead?, MacSwinford Lecture, University of Kentucky (Sept. 23, 1982) (on file at the Public Information Office, Supreme Court of the United States).

case.[64] Note also that in one respect appointing more judges would make the post more attractive, for it would help to reduce the crushing burdens imposed on some judges by the current caseload.[65]

Sixth, one might ask whether a desire for high status should perhaps count *against* a candidate. Someone who insists on elite status may be a bit too self-absorbed to be a good judge. He or she may lack the sensitivity to other people's problems and the dedication to public service that account for much of the difference between mediocrity and excellence in a judge's work. While a faceless bureaucracy may become unresponsive to the needs of those who depend upon it, an elite cadre may grow just as indifferent if its members are preoccupied with their own ambitions. Expanding the number of judges might dissuade prospective candidates who are motivated by an overwhelming hunger for status in favor of those whose primary source of satisfaction is service to others.

Seventh, the Committee mistakenly equates elite status with the article III tenure and salary protections. Although I am skeptical of the need for elitism, I recognize the force of the Committee's argument that judicial intervention on behalf of individual liberty "is more likely to win public acceptance if the federal judiciary is perceived as a small and special corps of men and women whose talents are reserved for issues that transcend local concern, rather than as a faceless omnipresent bureaucracy."[66] For the sake of argument, let us grant the need for a federal judicial elite. In the Committee's view, the only way to achieve one is to limit the number of article III judges.

It would be possible, however, to design a larger federal judicial system in which all the judges have tenure and salary protection to guarantee their independence, while some judges are accorded higher status than others.[67] Judges low in the ranks would adjudicate routine matters, like social security appeals and prisoner suits. These judges would earn lower salaries, occupy less spacious chambers, and enjoy fewer perquisites than

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64. *See* Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1464 (1983); *see also* Chemerinsky & Kramer, *supra* note 56, at 70-71 (noting that "even 3,000 federal judges would be an incredibly elite group within bench and bar").

65. For a discussion of those burdens, see Robel, *supra* note 58, at 6-11, 38-40.

66. REPORT, *supra* note 1, at 8.

67. *Cf.* Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277, 279 (1990) (arguing that in practice our current arrangements approximate such a model, since many administrative adjudicators effectively have tenure).

their elite brothers. They need not be called "federal district judges". A title like "United States Magistrate" might be more appropriate. The point is that it is not necessary to deny article III independence to such officers in order to maintain a judicial elite.

2. Coherence

Quite apart from the supposed difficulty of attracting high quality judges, the Committee advances another reason for preferring a small federal judiciary. In a large system, "the coordination of so many judges would be extraordinarily difficult."[68] It would be impossible to "maintain some minimum uniformity of federal decisional law,"[69] not only across the nation but even within a single circuit, "if there are a great many judges in that circuit."[70] Increasing the number of circuits to meet the intracircuit conflict problem would "increase the number of intercircuit conflicts and hence the burden on the Supreme Court."[71] Professors Chemerinsky and Kramer echo this concern, fearing that "[m]ore judges means more opinions expressing different views, which creates uncertainty in the law and encourages still more litigation."[72]

Avoiding inconsistencies in federal law is a worthy goal, but hardly a sufficient ground for refusing to countenance growth of the federal judiciary. In the first place, the coherence goal only supports refusal to create more federal judges, and not the Committee's recommendations for foisting off federal cases on the state courts and increasing the use of federal article I courts.[73] The problem of achieving and maintaining coherence in federal law will not go away if federal cases are sent to state systems. If anything, it will be exacerbated, as the chance for variation among fifty state supreme courts is higher than among thirteen circuits. Nor would it help much to channel federal adjudication to federal article I tribunals, because their decisions are subject

68. REPORT, *supra* note 1, at 7.

69. *Id.*

70. *Id.*

71. *Id.*

72. Chemerinsky & Kramer, *supra* note 56, at 72.

73. Federal adjudicatory bodies whose members lack the article III tenure and salary guarantees are conventionally called "legislative courts" or "article I" tribunals, as most of them are created under the various powers accorded Congress under article I of the Constitution. *See* E. CHEMERINSKY, *supra* note 34, at 181-216; P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 141-58 (2d ed. 1989).

to review in the circuit courts of appeals, and conflicts will still arise among the courts of appeals. While cutting off article III appellate review of the decisions of article I bodies might reduce disharmony, that approach is very likely unconstitutional.[74] An alternative may be to permit agencies to refuse to follow appellate rulings that they dislike, but the Committee (quite properly, in my view) disapproves of such "non-acquiescence."[75]

The surest way to achieve more coherence would be to shrink the corpus of federal law by limiting its substantive scope, leaving more matters to state regulation. Short of this, there are several potential solutions to the problem of limiting inconsistencies that would not have such a drastic impact on federal court access as does the Committee's theme of trimming federal jurisdiction. The traditional method of resolving intracircuit conflicts is en banc review. As the number of federal appellate judges increases, and some circuit courts grow to more than twenty judges apiece, it may be that traditional en banc review will become unwieldy.[76] The Ninth Circuit, which already consists of more than two dozen judges, has dealt with the problem by instituting en banc review by panels of eleven judges. The panel is composed of ten judges chosen on a rotating basis plus

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74. The case law in the area is somewhat murky and deals chiefly with Congressional power to grant original jurisdiction to article I courts. *Compare* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (striking down provisions of bankruptcy act that authorized non-article III officers to adjudicate bankruptcy issues; no majority opinion) *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding adjudication by a non-article III officer). Respected commentators maintain that Congress may, without contravening the Constitution, generally grant original jurisdiction to article I tribunals, but only if appellate review is available in an article III court. *See, e.g.*, Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 266-67 (1990); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 943-44 (1988). Others question the propriety of giving even original jurisdiction to article I courts. *E.g.*, Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277 (1990).

75. REPORT, *supra* note 1, at 59-60. Agency non-acquiescence violates the fundamental principle of separation of powers that the courts must have the last word in resolving legal issues. *See* Coenen, *The Constitutional Case Against Intracircuit Non-Acquiescence*, 75 MINN. L. REV. 1339 (1991).

76. At present, it is hard to credit the notion that en banc review is particularly burdensome. Some courts of appeals apparently have sufficient time to employ en banc review not only for its vital purpose of avoiding inconsistencies in the law of the circuit, but also to further the ideological agenda of the majority of active judges. *See* Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864 (1989); *see also* Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 549-50 (1989).

the chief judge.[77] The Committee recommends that smaller circuits be allowed to adopt this approach as well.[78]

Perhaps the better solution is to create more circuits, with fewer judges sitting on each. This approach may minimize the number of intracircuit conflicts, but at the risk of generating more intercircuit conflicts.[79] If creating new circuits leads to more intercircuit conflicts, then one answer is the much debated "National Court of Appeals".[80] Another promising solution, and one that avoids building another level of hierarchy into the federal judicial system, is the Committee's own proposed experiment, under which the Supreme Court would refer intercircuit conflicts to "randomly picked federal courts of appeals sitting in banc."[81] Yet another solution is the creation of specialized courts to deal with areas where coherence is especially important.[82]

In any event, the problem of inconsistency in federal decisional law is only one of many factors that should be taken into account in making jurisdictional rules. Some inconsistency is tolerable and indeed inevitable. Anyone whose affairs cross state

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77. *See* Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 936-40 (1983); Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859. *See generally* Hellman, *supra* note 76.

78. REPORT, *supra* note 1, at 114-15. The use of "short" en bancs is not universally applauded. *See, e.g., id.* at 115 (dissenting statement of Congressman Kastenmeier).

79. On the merits of the two approaches, *compare* Hellman, *Courting Disaster* (Book Review), 39 STAN. L. REV. 297, 306-07 (1986) (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)) (arguing that "an increase in the number of regional circuits would [not] necessarily lead to a significant number of intercircuit conflicts") *with* Mishkin, *Observations*, 42 TEX. L. REV. 1049, 1050-51 n.3 (1964) (arguing that intracircuit conflicts are preferable to intercircuit conflicts because the former can be resolved by en banc decisions of the courts of appeals while the latter can be resolved only by the Supreme Court).

80. *See* Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972); Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975). *See generally* P. Low & J. JEFFRIES, *supra* note 73, at Appendix C-6 to C-7. *Compare* Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247 (1973) *and* Leventhal, *A Modern Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881 (1975) *with* Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974) *and* Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).

81. REPORT, *supra* note 1, at 12, 125-27; *see* Wallace, *supra* note 77, at 935-36.

82. *See* Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 378, 382 (specialized courts do not reduce caseload but do help achieve more coherence); Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); Bator, *The Judicial Universe of Judge Richard Posner* (Book Review), 52 U. CHI. L. REV. 1146, 1155-56 (1985) (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)).

lines must put up with persistent uncertainty as to which state's rules will govern any disputes that may arise. Yet we manage to carry on. The analogy is not perfect, of course, since varying state laws do not present the problem of a single sovereign speaking with two voices.[83] As a practical matter, however, our ability to cope with one kind of uncertainty suggests that the other can be managed as well. Keep in mind, too, that some leeway for inconsistency is useful, even necessary, for the dynamic development of law in a society where courts must constantly respond to new problems and new perspectives on old ones.[84]

3. *The integrity of the judicial process*

While the Report focuses on quality and coherence, its discussion of these matters is laced with remarks that suggest a third justification for smallness. In the Committee's view, it is important that federal judges feel "a personal stake in the consequences of their actions." If the federal judiciary grows much larger, each judge will feel "like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did." As a result, judges "would not approach the judicial task with the requisite sense that power must be exercised responsibly."[85] Later the Committee voices its desire that the federal judiciary not be viewed as "a faceless, omnipresent bureaucracy."[86]

These comments seem to reflect a concern that the integrity of the judicial process will be compromised if the federal judiciary continues to expand indefinitely. The comments are rooted in the Legal Process model of adjudication developed in the 1950s by Henry Hart, Albert Sacks, Lon Fuller, and others.[87] The Committee seems to fear that enlarging the federal judiciary would be incompatible with Legal Process theory and, in particular, with the sort of cooperative collegiality among judges

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83. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) (Supreme Court review of state court decisions is essential to achieving uniformity of federal law).

84. *See, e.g.*, R. POSNER, *supra* note 12, at 163; Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 404-07 (1984); Wallace, *supra* note 77, at 929-31.

85. REPORT, *supra* note 1, at 7.

86. *Id.* at 8.

87. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Hart, *The Supreme Court 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100, 124-25 (1959).

that theory presupposes. As Henry Monaghan, a self-confessed adherent of the school points out, "[o]n this model, federal appellate judges are members of a small, elite, collegial, deliberative, on-going institution."[88] He fears that "[t]he litigation explosion carries with it the increasing bureaucratization of the federal appellate process, a development that severely undermines the institutional premises of the . . . model."[89]

It is hard to tell from the scattered references to bureaucratization in the Report whether the members of the Committee fully endorse this argument. In any event, it is a serious objection to growth and deserves careful attention. I believe that Professor Monaghan accords the danger of judicial bureaucracy more importance than it deserves. To show why, it is necessary to discuss briefly the tenets of Legal Process thought. In the 1920s and 1930s, the Realists showed that judges do not merely deduce results from legal texts but, instead, exercise a creative role.[90] This insight posed a threat to the legitimacy of judicial inventiveness in cases not clearly governed by an existing rule. It was easy enough to infer from it that judges merely act like legislators and impose their own preferences in such cases but do so without the lawmaking authority conferred by election to a legislative post.

The Legal Process theorists sought to defend the legitimacy of adjudication and judicial invention against the charge that judicial creativity is illegitimate because judges lack a legislative mandate. Hart, Fuller, and others argued that the judicial *process* distinguishes adjudication from legislation and legitimates the judicial function even when judges make new rules. Judges do not merely impose their own preferences. Even when no rule clearly governs the resolution of a case, they base their results on "legal materials," which include "principles and policies" as well as rules.[91] Judges engage in "reasoned elaboration" from

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88. Monaghan, *Taking Bureaucracy Seriously* (Book Review), 99 HARV. L. REV. 344, 344 (1985) (reviewing R. POSNER, FEDERAL COURTS: CRISIS AND REFORM (1985)).

89. *Id.* at 345.

90. *See* J. FRANK, LAW AND THE MODERN MIND (1930); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). *See generally* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

91. *See* H. HART & A. SACKS, *supra* note 87, at 101, 158-60.

these materials to arrive at their ruling in a given case.[92] Part of this process is interchange among the judges of a multi-member court. When Professor Monaghan asserts that increasing bureaucratization of the judiciary undermines the Legal Process model, it is primarily the difficulty of maintaining collegiality and interchange on a large appellate bench that worries him.[93] He regrets that "the courts of appeals can no longer be viewed as essentially small, intimate, collegial clubs of scholarly gentlemen-judges."[94] The Committee, with its concern that judges not become tiny cogs in a vast bureaucracy, seems to share this worry with Monaghan.

One response to this line of argument for elitism would be to deny the validity of process values. The Legal Process model of adjudication has come under attack in recent years. Most of the criticism is directed at the notion that reasoning from the legal materials is all that judges do and that they must bring an "uncommitted mind" to the task of adjudication.[95] Critics claim that, at least in hard cases where the legal materials furnish no ready answer, the judge's value preferences always weigh heavily in his decisionmaking.[96] Someone who thinks that politics is paramount in judicial decision-making might maintain that the Legal Process critique of bureaucracy is entirely without force. Since process values count for nothing in the eyes of such a critic, any incompatibility between those values and an enlarged judiciary is unimportant. All that matters are the judges' substantive values.

I am unwilling to dismiss process concerns so quickly. While politics influence many judicial decisions, process values are also important. If enlarging the number of federal judges signifi-

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92. *Id.* at 161-68; *see also* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-89 (1973); Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153, 171-72 (1978).

93. *See* Monaghan, *supra* note 88, at 345, 356; *see also* Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 919 (1983); Hellman, *supra* note 79, at 306.

94. Monaghan, *supra* note 88, at 356.

95. Fuller, *supra* note 87, at 386; *see also* Hart, *supra* note 87, at 124-25.

96. *See, e.g.*, Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-24 (1983); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564-76 (1983).

cantly damages the integrity of adjudication by diminishing opportunities for "the maturing of collective thought,"[97] then we should be slow to countenance a constantly expanding federal judiciary. The issue is how much and in what ways a larger federal judiciary poses a threat to those values. It is here that the case for a judicial elite again comes up short.

No doubt there is less collegiality and interchange among judges on large courts than small ones. But Professor Monaghan exaggerates the importance of this aspect of Legal Process thought. What is crucial in the Legal Process account of adjudication is that judges employ reason to get from the legal materials to the holding, rather than merely enforcing their own value preferences. The model was intended to explain and justify the practices of not just the federal appellate courts but all judges, including district court judges who generally act alone.[98] The opportunity to have conversations and on-going relationships with other judges is of only peripheral importance to upholding the integrity of the judicial process. The key form of interchange occurs when the members of a panel sit down to discuss the case before them, which can take place no matter how large the circuit bench may become.[99]

Owen Fiss identifies a more critical process-based objection to judicial bureaucracy. He points out that "through the fragmentation and compartmentalization of tasks, bureaucracy insulates those acting within it from critical educational experiences."[100] In addition, "bureaucracy tends to diffuse responsibility," so that "no single individual or group of individuals bears the full responsibility for the action of the organization."[101] If judges delegate too many tasks to masters, magistrates, and law clerks, they can fairly be accused of bureaucratic insularity. This in turn represents a "failure of legitimacy,"[102] since the judge has not "fully engag[ed] in the dialogue [with the

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97. Hart, *supra* note 87, at 100.

98. For general discussions of the aims of the Legal Process theorists, see Vetter, *Postwar Judicial Scholarship on Judicial Decisionmaking*, 33 J. LEGAL EDUC. 412 (1983); White, *supra* note 92.

99. On the importance of deliberation and interchange in deciding *particular* cases, see Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 924-26 (1989).

100. Fiss, *supra* note 64, at 1453.

101. *Id.*

102. *Id.* at 1455.

litigants] that is the source of his authority."[103] Similarly, the dilution of the judge's sense of responsibility threatens the legitimacy of the judicial process, because "a sense of individual responsibility is necessary to animate and motivate the special dialogue that is the source of judicial authority."[104]

Professor Fiss, however, is no advocate of maintaining a small federal judiciary. He believes that the insularity and lack of accountability that may accompany bureaucracy can be combatted without restricting federal jurisdiction. What is essential is that *judges* make the decisions entrusted to them rather than magistrates, staff attorneys, and other assistants.[105] In this way judges will avoid insularity and will remain accountable for their decisions, even as the number of judges increases. The danger lies not so much in the number of federal judges as in the creation of a hierarchy where responsibility for decisions is diffused and the officers in charge are insulated from the problems they are supposed to resolve.

Viewed in the light of Professor Fiss's analysis of the evils of judicial bureaucracy, many of the Committee's recommendations would do more harm than good. The Committee proposes to expand, rather than contract the role of magistrates,[106] and to increase the use of procedures for "alternative dispute resolution," such as arbitration and mediation.[107] These devices may speed litigation, but they do so at the cost of more layers of hierarchy in the judicial system, less hands-on decisionmaking by federal judges, and greater dissipation of responsibility for the results. The import of Professor Fiss's analysis is that, insofar as bureaucracy is the problem, it would be better to increase the number of judges than to foist off more of the work onto support personnel.[108]

B. Can We Afford an Elite Federal Judiciary?

The foregoing analysis suggests that the benefits of elitism

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103. *Id.* at 1456.

104. *Id.*

105. *Id.* at 1463-64.

106. REPORT, *supra* note 1, at 79-80.

107. *Id.* at 81-87.

108. *Cf.* Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 252-58 (1980). Professor Vining argues that opinions must be written by judges themselves and not by law clerks or other staff, if they are to be "anything to which anyone will give willing obedience, which will be treated as truly authoritative." *Id.* at 248.

may be smaller than the Committee supposes. While keeping the federal judiciary small may be desirable, neither the Committee nor anyone else has shown that it is strictly necessary. But the decision whether to cut federal jurisdiction cannot be made on this basis alone. It must take account of the costs as well as the benefits of elitism: What good things must be given up for the sake of maintaining an elite federal judiciary? If the costs were minimal, then there would be little reason to quarrel with the Committee's preference for smallness. This section argues, however, that in fact the costs are high.

In general terms, the price we must pay for a small and elite judiciary is a constriction in the number of cases allowed into federal courts. If article III courts are interchangeable with other federal or state tribunals, then outcomes will be the same wherever cases are brought, and little is lost by forcing litigants out of federal judicial tribunals.[109] But there are good reasons to doubt that federal judges, agency adjudicators, and state courts are fungible forums. The attractiveness of article III courts is not based solely or predominantly on the smaller number of federal judges or their higher status. In a classic article on the disparity between federal and state courts, Burt Neuborne mentions these factors. But he also notes that life tenure, a tradition of defending constitutional values against encroachment by the state and national governments, and more demanding criteria for appointment make federal courts more sympathetic to constitutional claims than their state counterparts.

For these reasons, civil rights and civil liberties lawyers generally prefer federal over state court.[110] The institutional differences are so sufficiently pronounced that this preference persisted even after years of conservative appointments to the federal bench in the 1980s.[111] I would wager that it persists to

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109. *See* Newman, *supra* note 12, at 769-70 (maintaining that "state courts have not only competence, they have courage; it would be a mistake to think that they would routinely be less protective of federal rights than federal judges").

110. *See* Neuborne, *supra* note 45, at 1118-30.

111. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 655 n.72 (1987). The determined effort by successive Republican administrations to change the character of the federal courts may yet succeed in reversing this preference. Even so, there is little danger that vigorous enforcement of federal rights would be threatened by jurisdictional rules allowing broad access to federal courts. However broad the scope of federal jurisdiction, so long as Congress does not make it *exclusive*, litigants may choose to bring their claims to state courts. *See, e.g.*, Howlett v. Rose, 110 S. Ct. 2430, 2433 (1990); *cf.* Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 411-12 (1991) (arguing against exclusive federal jurisdiction,

this day. The intense and so far successful efforts by the American Trial Lawyers Association and others to preserve diversity jurisdiction suggests that there may be differences in outcomes between the two systems even in cases turning on state law. Since article I courts, like state courts, lack the independence and traditions of article III judges, it seems likely that there is a similar disparity between these courts and article III courts.[112]

The independence of article III courts represents a public value.[113] If federal courts reach fairer results than other tribunals, then the public interest in seeing justice done will suffer when cases are excluded from the federal courts. To the extent article III courts are more skillful than other federal or state tribunals at articulating good rules of law to govern future cases, everyone who may be affected by doctrinal developments in a given area may suffer.

Admittedly, my argument here is somewhat intuitive. No one can prove empirically that there are or are not systemic differences in outcomes depending on whether cases are heard in state or federal court.[114] But I find compelling the fact that litigators—at least in constitutional cases—generally pick federal court when they have a choice.[115] Lawyers have first hand experience on a regular basis with both court systems. They are a highly competitive group and are paid to win their cases. It seems implausible that their preference for federal court reflects a widespread misunderstanding on their part as to the characteristics of federal and state courts.

Another measure of the value of article III courts and of the cost of limiting their jurisdiction is Congress's practice of turn-

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on the ground that state courts are competent to adjudicate federal claims).

112. At one point the Committee questions the disparity thesis. REPORT, *supra* note 1, at 35 ("[N]one of our proposals carries any inference that the state courts are inferior to the federal courts and should thus be a repository for cases federal judges prefer not to decide."). There is some tension between this comment and the Committee's avowal that "[t]here are indeed situations where federal judicial intervention *is* clearly necessary. Many of these situations involve the protection of individual liberty against actions of the political branches of government." *Id.* at 8 (emphasis in original).

113. *See* Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 586-88 (1985).

114. *See* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 255-73 (1988).

115. *See* Eisenberg & Schwab, *supra* note 111, at 655 n.72; Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1344-72.

ing to these courts when it wants to solve some social problem.[116] If it were not for the vast range of federal legislation from the 1930s through the 1960s and beyond, in which Congress not only created new rights and remedies but also provided for their enforcement in federal court, there would be no caseload problem today. Even more pointedly, in the face of the current crisis, Congress continues to turn to the federal courts. Recent examples include the Sentencing Reform Act of 1984,[117] which the Committee singles out for modification,[118] and the Americans With Disabilities Act of 1990, which creates a whole new host of federal rights and duties and grants access to federal court for their enforcement.[119] Congress seems to think that achieving the substantive aims of these statutes requires the participation of the federal courts and believes that those goals are more important than relieving congestion.[120] The executive branch shares Congress' preference for federal courts to implement crucial national policies, such as the war on drugs. As the Committee notes, much of the current caseload problem—particularly in the district courts—is due to the avalanche of drug cases brought by federal prosecutors in recent years. This situation continues despite the availability of state courts to resolve many of these cases.[121]

My point is not that these judgments by Congress, federal prosecutors and private litigants are necessarily right; rather, pursuing the goal of an elite federal judiciary by cutting federal jurisdiction would inevitably have an impact on these and other substantive aims embodied in the federal legislation that grants access to federal court. Furthermore, there is no reason to think that the demands for access to federal court will diminish any time soon. As society becomes more complex, Congress will con-

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116. *See* Sager, *What Is a Nice Court Like You Doing in a Democracy Like This?* (Book Review), 36 STAN. L. REV. 1087, 1102 (1984) (reviewing M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982)) ("Federal legislation generally depends on federal judicial implementation for its effectiveness.").

117. 28 U.S.C. §§ 991-98 (1988).

118. REPORT, *supra* note 1, at 133-44.

119. Pub. L. No. 101-336, 104 Stat. 327 (1990).

120. Volume 2 of the Committee's Working Papers and subcommittee Reports (which is not numbered) contains a memo dated July 31, 1989, titled Legislation Enacted in the Last Two Decades Tending to Increase the Workload of the Federal Courts. The memo lists 195 statutes.

121. REPORT, *supra* note 1, at 35-38 (recommending that more of these cases be taken to state courts).

tinue to perceive new problems that cry out for federal legislative solutions, and it will likely continue to call upon the federal courts to enforce its commands.[122]

IV. Substantive Interests and Jurisdictional Reform

Near the beginning of its Report, the Committee observes that "[a]ny human institution is improvable, and the federal courts are no exception." The Committee goes on to insist that "[w]e want a better federal court system, not a smaller one."[123] Elsewhere, it assures us that its goal is "a *principled* allocation of jurisdiction."[124] The Committee's "overriding concern . . . is promoting the most rational possible allocation of jurisdiction between state and federal courts."[125]

In the Committee's view, the opponents of reform may not be so highly motivated. They do not want to improve the federal judiciary. Rather, they are "vested interests and pressure groups" who "do not realize" or "do not care" that their selfish demands for access to federal court hinder the effective operation of the system. The Committee urges Congress "to appraise its proposals on the merits and stand fast against" these groups.[126] The Committee is not alone in framing the problem strictly in terms of improving the federal judicial machinery. For example, Judge Richard Posner's book on overcrowding in the federal courts evinces a similar theme.[127]

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122. In an effort to stem the tide of new burdens imposed on the courts by Congress, the Committee suggests that "[a]n Office of Judicial Impact Assessment should be created in the judicial branch to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation." *Id.* at 89. It also proposes "a 'checklist' for legislative staff to use in reviewing proposed legislation for technical problems." *Id.* at 91.

While such schemes may help avoid the occasional legislative glitch, past practice demonstrates that Congress will not let judicial concerns about overcrowding get in the way of a substantive policy it seeks to achieve.

123. *Id.* at 3.

124. *Id.* at 35 (emphasis in original).

125. *Id.* at 44.

126. *Id.* at 4.

127. *See* R. Posner, *supra* note 12 (attempting to resolve jurisdictional questions by means of economic analysis). For descriptions and criticisms of Posner's approach, see, *e.g.*, Monaghan, *supra* note 88, at 348-52; Beermann, *supra* note 2, at 1400-05.

Other examples of the tendency to see jurisdictional issues strictly in terms of improving the efficiency of the judicial machinery include H. Friendly, Federal Jurisdiction: A General View (1973); Currie, *The Federal Courts and the American Law Institute (Part I)*, 36 U. Chi. L. Rev. 1 (1968); Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268 (1969); Newman, *Restructuring Federal*

Whatever the merits of the Committee's proposals, its effort to seize the high ground in the debate over jurisdictional reform misconceives the issue and deserves to fail. While the Committee members may be motivated solely by a desire to make the system better for everyone,[128] it is unfair to accuse their opponents of self interest. One consequence of the institutional differences between federal and state courts is that, throughout our history, jurisdictional arrangements have served political ends of one kind or another. They also have been open to attack and revision by the losers in the battle over the deployment of the federal government's scarce judicial resources.[129] Currently, the disparity between federal and state courts leads putative federal right holders to prefer a federal forum, while state officials and governments seek state court adjudication. The effect of the Committee's preference for smallness is to deny access to article III courts and the substantive advantage that may accompany such access to many litigants claiming violations of their rights by government officers.

A. The Politics of Federal Jurisdiction

The law of federal courts has never been concerned strictly with providing efficient judicial machinery. On the contrary, Congress and the Supreme Court have often employed the federal courts to achieve their political goals.[130] Before the Civil War, southern plantation owners pushed for broad federal judicial power in their efforts to recapture runaway slaves.[131] After the war, northern abolitionists in Congress extended federal jurisdiction in order to implement the new rights granted by the thirteenth, fourteenth, and fifteenth amendments.[132] Later, rail-

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Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. CHI. L. REV. 761 (1989); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948).

128. *See* Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973, 974 (1990) (suggesting that the Committee chose "to engage in an exercise of nonideological, as opposed to ideological, judicial reform").

129. *See* Chemerinsky & Kramer, *supra* note 56, at 95; Wells, *supra* note 46; Beermann, *supra* note 2, at 1397-1406.

130. *See* Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

131. *See* Neuborne, *supra* note 45, at 1111-12.

132. *E.g.*, The Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1988)) (creating a federal remedy for violations of constitutional rights by state officers); The Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (codified at 28 U.S.C. § 2254 (1988)) (extending federal habeas corpus to state prisoners).

roads and other big businesses resorted to the federal courts to defend themselves against state regulation.[133] In the 1960s, the Warren Court loosened federal jurisdiction restrictions to promote effective enforcement of its liberal interpretations of the bill of rights and the fourteenth amendment.[134]

When the substantive interests encouraging the growth of federal jurisdiction have lost favor in Congress or the Court, a period of contraction typically has followed. For example, the Supreme Court thwarted some of the aims of the Reconstruction Congress by narrowly construing its jurisdictional statutes.[135] In addition, the Court's abandonment of economic due process and other doctrines favoring business interests in the late 1930s was accompanied by Congressional and judicial limits on access to federal court to assert constitutional claims.[136] More recently, the Burger Court undid many of its predecessor's jurisdictional innovations in habeas corpus and section 1983 litigation.[137]

B. Why Jurisdictional Rules Have Substantive Impact

The argument that jurisdictional law making should be viewed in terms of substantive winners and losers is premised in part on the disparity adverted to earlier between federal article

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133. *E.g.*, Ex Parte Young, 209 U.S. 123 (1908) (allowing access to federal court to enjoin unconstitutional state action).

134. *E.g.*, Fay v. Noia, 372 U.S. 391 (1963) (allowing access to federal habeas corpus in spite of petitioner's failure properly to preserve his claims in state court); Monroe v. Pape, 365 U.S. 167 (1961) (section 1983 grants access to federal court even if state remedies are available), *overruled*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663 (1978).

135. *See, e.g.*, Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1317-20 (1986) (Court read 1867 statute extending Supreme Court jurisdiction over state judgments too narrowly in contravention of Congress's intent).

136. Statutory developments included the Tax Injunction Act, 28 U.S.C. § 1341 (1988), and the Johnson Act, 28 U.S.C. § 1342 (1988) (limiting federal jurisdiction to enjoin state tax collection and state utility rate orders). The Supreme Court began to develop the abstention doctrines, discussed *supra* notes 34-39 and accompanying text. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

137. *E.g.*, Anderson v. Creighton, 483 U.S. 635 (1987) (officers are immune from suit for constitutional violations whatever their motivations, so long as an officer could reasonably have believed he was acting constitutionally); University of Tenn. v. Elliott, 478 U.S. 788 (1986) (federal courts adjudicating § 1983 cases must defer to findings of fact made in earlier state administrative proceedings); Murray v. Carrier, 477 U.S. 478 (1986) (lawyer's error in failing to preserve constitutional issue in state court bars prisoner from asserting it on habeas).

III courts, on the one hand, and state courts on the other. In discussing the costs of elitism, I suggested that federal courts may make better decisions than state courts. Here the argument is rather different. Quite apart from any concern about quality, there are many cases for which the existing legal materials do not furnish a ready answer even for the most skillful jurist. In these hard cases, two courts of equal quality might easily reach different outcomes just because the judges differ on the value choices they must make in order to resolve the legal issues. Judges who come to their task with high regard for state interests in regulation will, in cases where they are free to act creatively, tend to reject constitutional claims. More libertarian judges will, by and large, find themselves more willing to strike down state legislation in such cases. According to the disparity thesis, state judges, on the whole, tend to fall in the former group and federal judges in the latter. the point here is not that federal courts are more often right. Rather, in close cases where the right answer is open to more or less endless debate, they will be more likely than state courts to favor the substantive interests of constitutional claimants.

It is no doubt true that state courts are constitutionally "adequate,"[138] but this fact is beside the point. So long as there are differences strong enough to affect the resolution of close cases, the choice of forum will impact the outcomes of litigation, and hence the substantive interests of the opposing parties.[139] Thus, persons with constitutional claims prefer federal court, while states as defendants in such suits seek state court adjudication. Each thinks (probably with good reason) that it will have a better chance of success in the forum of its choice. Perhaps the aim of jurisdictional reform is merely a politically neutral desire to improve the efficiency of the federal courts. All the same, rules that exclude claimants who would be more successful in federal court will have an impact on their substantive rights and obligations. This effect cannot be ignored.

Even if there were no disparity, rules limiting federal jurisdiction would have substantive consequences. The impetus for

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138. This view of state courts is a critical element of the Supreme Court's rationale for limiting access to federal court for constitutional issues. *See, e.g.,* Deakins v. Monaghan, 484 U.S. 193, 203-04 (1988); Allen v. McCurry, 449 U.S. 90, 105 (1980); Stone v. Powell, 428 U.S. 465, 494 n.35 (1976); Huffman v. Pursue Ltd., 420 U.S. 592, 611 (1975); *see also* Chemerinsky & Kramer, *supra* note 56, at 91.

139. *See* Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 319-26 (1988).

jurisdictional reform is that judicial bureaucracies harm the administration of justice.[140] Channelling litigants out of article III courts into state courts and federal article I courts may save the federal courts from the evils of bureaucracy, but it does not make those evils disappear. In the modern state, bureaucracy is inevitable.[141] As more cases are sent to non-article III courts, those courts will suffer even more than they do now from the lack of accountability and insularity that characterize a bureaucracy. Litigants forced into state courts will bear a burden—a lower quality of justice—so that the favored litigants who remain in federal court reap the benefits of litigating in a less crowded, less bureaucratic judicial system.

C. The Substantive Impact of the Committee's Jurisdictional Philosophy

For these reasons, it is appropriate to evaluate the Committee's proposals in terms of their substantive effects. Assuming that there is a problem of overcrowding and that increasing the numbers of judges is not an adequate response, the substantive consequences of the Committee's approach may be even less acceptable than putting up with the overcrowding. The Committee would require prisoners to exhaust state remedies before bringing section 1983 claims in federal court.[142] It would abolish most diversity jurisdiction,[143] bar access to article III courts to plaintiffs suing the government in tort for less than $10,000,[144] and shift social security cases to an administrative court lacking the constitutionally guaranteed independence of article III tribunals.[145]

With the possible exception of diversity reform, it is evident that the substantive burden of jurisdictional reform falls mainly on individuals with small means suing the state or federal governments. Arguably, the harm done by these proposals to the enforcement of constitutional, statutory, and common law rights

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140. *See* REPORT, *supra* note 1, at 7-8.

141. Fiss, *supra* note 64, at 1442-43; Beermann, *supra* note 2, at 1388-89.

142. REPORT, *supra* note 1, at 48-49.

143. *Id.* at 38.

144. *Id.* at 81.

145. *Id.* at 55. For a detailed discussion of this topic, see Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 477-507, 530-36. Although Professor Levy and the Committee think that it is possible to assure independence without according article III status to these judges, the harrowing events of the early 1980s, recounted in Levy's article, suggest otherwise.

against government is greater than their beneficial impact on the effectiveness of the federal courts. Reform aimed at maintaining smallness would appear in quite a different light if the victims of the jurisdictional ax were the parties who participate in labor, antitrust, and securities litigation. Public interest groups, civil rights organizations, and civil liberties lawyers would applaud the unclogging of the federal courts so that those courts may better enforce federal constitutional rights. The big law firms who represent businesses and other large institutions in federal court litigation on these matters would doubtless complain that their interests were being unduly slighted. I do not propose to eliminate these heads of jurisdiction; I only suggest that whether someone is for or against any particular jurisdictional reform depends largely on whose ox is being gored, not merely on a neutral inquiry into how best to improve the efficiency of the federal judicial machinery.

The focus of my concern is not so much with the current set of suggestions. By themselves, these proposals do not represent radical changes in the scope of federal jurisdiction. From a substantive perspective, what is most troubling about them is their underlying dynamic. If the first principle of reform is that the federal courts must be kept as small as possible, then the most attractive targets for elimination from the federal docket will always be bodies of litigation similar to those the Committee chooses for cutbacks. Areas of the law where individuals sue large institutions for some discrete harm done them produce the largest body of litigation, and each piece of litigation can be made to seem comparatively insignificant.

If these restrictions are enacted, then pressure will surely mount for a requirement that the exhaustion requirement imposed on prisoners be extended to other constitutional litigants. If social security claimants and small tort plaintiffs can be shuffled off to administrative tribunals, then other persons with complaints against the federal government may be next. If the Committee's preference for smallness becomes the guiding principle for jurisdictional reform, ordinary citizens with particularized grievances against the government may soon be largely shut out of the federal courts. The remaining claims will consist of large scale litigation on such matters as antitrust, labor, and securities law, as well as challenges to the facial validity of statutes. Let us at least be aware of the substantive objection to these extensions of the Committee's proposals and understand

that it is not inappropriate to oppose them on substantive grounds.

V. Conclusion

The Committee performs a valuable service in calling attention to the current congestion in the federal courts. Courts of appeals grow ever busier and larger, while phalanxes of law clerks write ever more prolix and less carefully edited opinions. In the district courts, judges spend an increasing amount of their time engaged in case management rather than actually adjudicating disputes. Magistrates play an increasingly important role in the resolution of supposedly minor cases, and drug prosecutions clog the dockets. Circuit and district judges alike complain that they are overwhelmed with work. Something must be done to relieve the overcrowding.

By focusing on these dispiriting features of the federal courts, the Committee hopes to convince us that new restrictions on federal court jurisdiction are needed. But the Committee dismisses too quickly the alternative response to docket overcrowding—expanding the pool of federal judges. In rejecting this option, the Committee overstates the benefits of maintaining a judicial elite and ignores the costs of smallness. In particular, the Committee fails to recognize that the burdens of smallness will fall mainly upon those most in need of a federal forum: individuals with constitutional or statutory claims against the state or federal governments.

A better approach is to acknowledge that nothing can ever stay the same in a rapidly changing world. The activity of the federal government has increased enormously in the past sixty years, and the legislative and executive branches—in contrast to the judiciary—have grown apace. Many judges are innately conservative.[146] This personality trait may help explain why federal judges are so reluctant to contemplate a much larger federal judiciary as the way to keep up with the steadily mounting volume of work sent to the federal courts by the other branches. It is indeed distasteful to enlarge—and thereby alter the character of—an institution that has performed superbly for two hundred years.

The advantages of enlargement emerge only when we compare it with the alternatives of doing nothing or trying to return

146. *See* Bator, *supra* note 82, at 1154.

to a lost world. Nearly everyone agrees that leaving matters as they are would sooner or later lead to trouble. Attempting to maintain a small federal court system would require ever-expanding referrals to the state systems and to article I tribunals, to the detriment of the value of judicial independence embodied in article III. Keeping cases in article III courts but assigning more tasks to masters, magistrates, and law clerks may be worst of all, as it would give rise to the evils of insularity and lack of accountability that accompany the creation of a bureaucratic hierarchy.

In contrast, enlarging the federal judiciary maintains the independence and accountability of article III judges. It directly and effectively addresses the caseload crisis, at little (if any) cost to the quality of the federal judiciary or the coherence of federal law. Most important, it preserves the historic role of the federal courts as the "primary and powerful reliances" for the enforcement of federal law.[147] It is, in the best sense of the term, the conservative solution to the caseload problem.

147. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1927).