# On the Federalization of the Administration of Civil and Criminal Justice

Federal Judicial Center

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# Foreword

To help inform the planning process in the federal judiciary, the Center is preparing a series of papers on topics critical to long-range planning. This paper is the second of the series. The first paper, *Imposing a Moratorium on the Number of Federal Judges*, was published last year. Papers on federal court governance, federal criminal justice, alternative dispute resolution, and demographic diversity are in development and will be published in the next several months.

## Acknowledgments

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# Part I: Introduction

What should be the role of the federal courts? More specifically, what should be the jurisdiction of the federal courts in relation to that of the state courts? Is there a basis for a principled allocation of jurisdiction between the two court systems? These are critical issues in the administration of civil and criminal justice at any time, but they are becoming more critical as the demands on the courts increase while their resources decline. Debate over them engages all three branches of the federal government, and state authorities as well.

At the heart of the debate lies the question of federalization. Many federal judges and other commentators on the federal courts have expressed concern over a growing trend toward "federalization" of state crimes and civil causes of action—the extension of federal court jurisdiction to civil claims and criminal prosecutions that could be maintained in state courts.[1] For example, at its September 1991 meeting, the Judicial Conference of the United States reaffirmed its "long-standing position that federal prosecutions should be limited to charges that cannot or should not be prosecuted in state courts."[2] Chief Justice Rehnquist has observed that "[m]ost federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts," noting that "[c]ontinuation of the past decade's trend toward large-scale federalization of the criminal law has the enor-

1. We refer to matters that *could* be maintained, rather than only to those that *should* be maintained, in state courts. The former are the universe of matters potentially subject to federalization. The latter constitute a subset defined by normative judgments about how jurisdiction should be allocated between the two systems. How those judgments may be made—if they can be made—is the subject of the discussion in this paper but ultimately must be left to the reader.

This paper does not address factors other than subject-matter jurisdiction—such as personal jurisdiction, venue, and a court's backlog—that influence where a particular action might be maintained.

2. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1991, at 45. Again, at its September 1993 meeting, the Conference "reaffirmed the federal judiciary's historical commitment to the principle that the jurisdiction of the federal courts should be limited, complementing and not supplementing the jurisdiction of the state courts." Preliminary Report, at 6.

mous potential of changing the character of the federal judiciary."[3] A majority of the Judicial Conference and some others have also long favored the complete or at least partial elimination of diversity of citizenship jurisdiction, which opens the federal courts to nearly the full range of state law claims.[4] More recently, federal and state judges have raised questions about provisions in pending crime bills creating new federal drug and weapons offenses, and in the versions of the Violence Against Women bill that extend federal civil and criminal jurisdiction over matters they see as lying within the traditional province of state courts—violent crimes motivated by gender bias.[5]

It is beyond argument that, for a variety of reasons, Congress has increasingly looked to the federal courts as the place to attack

3. William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, Remarks to the Fourth Circuit Judicial Conference 12–13 (June 26, 1993) (transcript on file with the Office of the Circuit Executive, U.S. Court of Appeals for the Fourth Circuit). *See also* William H. Rehnquist, *Welcoming Remarks to the National Conference on State–Federal Judicial Relationships*, 78 Va. L. Rev. 1655, 1660 (1992). Supporting evidence can be found in the Federal Judicial Center's 1992 survey of federal judges, showing that 91.5% of the active district judges and 89% of the active circuit judges expressed strong or moderate support for "defin[ing] federal criminal jurisdiction more narrowly to reduce prosecution of 'ordinary' street crime in federal courts." Federal Judicial Center, Planning for the Future: First Report of Results from a Survey of United States Judges, Dec. 1992 (unpublished manuscript, on file with the Federal Judicial Center). The survey's overall response rate was 78.5%. *See also* Report of the Federal Courts Study Committee 35–38 (1990).

4. *See* A Fresh Look at In-State Plaintiff Diversity Jurisdiction: Why It Was Enacted and Why It Should Be Repealed 3–9 (Attachment to Report to the United States Judicial Conference from the Committee on Federal–State Jurisdiction, June 18, 1993) (unpublished manuscript, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts). The arguments for and against the partial or total abolition of diversity jurisdiction have been fully addressed elsewhere and are not rehearsed in this paper. *See generally* Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 Dayton L. Rev. 405, 408–13 (1990); Henry J. Friendly, Federal Jurisdiction: A General View 139–52 (1973); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992); Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet*, 61 N.Y. St. Bar J. 20 (July 1989) and (*contra*) Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, *id.* at 14.

5. H.R. 1133, S. 11, 103d Cong., 1st Sess. (1993).

problems it regards as having national significance. Congress has created new rights of action and remedies, many of which touch areas traditionally covered by state law; and it has enacted criminal statutes opening the federal courts to the prosecution of offenses that traditionally would have been brought in the state courts. Similarly, the executive branch has increasingly prosecuted in federal court offenses that could have been prosecuted in state court. The bar, for its part, jealously protects its access to the federal courts. And state officials are watching with mixed emotions, concerned about the impact of these trends on the stature and independence of state courts but also conscious of the resulting relief afforded state court dockets.

Accompanying these trends has been a rise in the overall volume of criminal filings and appeals, coupled with a relative decline in the courts' resources. From 1980 to 1992, annual criminal case filings per sitting judge increased, from fifty-eight to eighty-four cases,[6] as did the proportion of inherently more complex and burdensome drug and fraud cases.[7] Filings in the appellate courts have doubled since 1980.[8] The federal courts' resource requirements have grown dramatically, as have appropriations, but since 1987 Congress has made larger reductions from the amounts the courts have requested.[9]

The question of what should be the jurisdiction of the federal courts—whether it is possible to draw a line dividing the business of the federal courts from that of the state courts, and, if so, how to draw it—is therefore of great importance. The capacity of the federal courts, with less than 7% of the general jurisdiction judges in the country, is much less than that of the state courts;[10] inevitably,

6. Administrative Office of the U.S. Courts, Annual Reports of the Director, 1980–1992, including table D2; figures are per sitting judge (authorized judgeships less vacancies). These data are also presented graphically in Figure 6 of the Appendix.

7. *See* Figure 2 of the Appendix.

8. Filings in the courts of appeals from 1980 to 1992 rose from 23,200 to 47,013. Administrative Office of the U.S. Courts, Annual Reports of the Director, 1980–1992, including table B.1.

9. Congressional Quarterly Almanac, 1984–1992. *See* Figure 3 of the Appendix.

10. *See infra* note 60.

as the federal courts are charged with business the state courts could handle, other matters within the federal courts' jurisdiction will be pushed aside. Yet, as new needs arise, the federal courts must be able to meet them.

The question implicates complex issues concerning how the state and federal judicial systems relate to each other. As Chief Justice Rehnquist recently observed, in the words of Alexander Hamilton, that relationship "cannot fail to originate questions of intricacy and nicety."[11] Such questions have long occupied academics, judges, legislators, and the bar,[12] but as the debate about them continues, the answers to them have not become clearer. Nevertheless, as Justice Sandra Day O'Connor has suggested, "it [is] critical to the long-term success of our joint enterprise, as well as important for the decision of many issues that come to our Courts, that we occasionally pause to seek an overview of our dual judicial system as a whole."[13]

In the end, the determination of what should be the federal courts' jurisdiction is, of course, a matter of legislative policy that the Constitution leaves to Congress, just as decisions about how to enforce the laws are for the executive branch. But the judicial branch is more than an interested bystander; it is able to offer insight and experience which, through appropriate interbranch communication and consultation, can contribute to informed decisions by Congress and the executive branch. This paper is one of a series of papers intended to further that process by helping the judiciary think about problems that are critical to its future. It has been prepared by the Federal Judicial Center in pursuit of its

11. The Federalist No. 82, *quoted in* Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, *supra* note 3. In his address, the Chief Justice suggested that any allocation of cases between the state and federal systems raises four serious questions: What impact does it have on federalism values? How efficient is it? Does the receiving system have the resources necessary to do the job? and What impact will the new allocation have on the other tasks already assigned to the state or federal system?

12. *See, e.g.*, Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L. Rev. 67.

13. Sandra Day O'Connor, Remarks to the Western Regional Conference on Federal–State Judicial Relationships 1 (June 4, 1993) (transcript on file with the Federal Judicial Center).

statutory mandate to "conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other[s] . . . [and] to provide . . . planning assistance."[14] Its purpose is not to take sides, but to encourage and inform discussion about the role of the federal courts in relation to the state systems.

The paper begins by briefly sketching the background of the debate over federalization. It then considers four key propositions at the center of the debate and discusses the major issues implicated in the analysis of each proposition. To focus the discussion, the paper summarizes the principal arguments for and against each proposition, first those opposing federalization and then those favoring it. The purpose here is not to support or oppose one side or the other. Rather, it is to inform the reader by an exposition of the points that can be made on each side. The review of the arguments on the federalization question leads into the final section of the paper, the first part of which examines several approaches to a division of jurisdiction between federal and state courts that have been offered by commentators; the second part suggests an alternative approach to dealing with the dilemma of federalization based on a set of practical guidelines.

14. 28 U.S.C. § 620(b)(1) and (4).

# Part II: Background of the Debate

Concern over federalization is not new. As far back as 1922, Chief Justice William Howard Taft, addressing the American Bar Association, observed that "the effort to dispose of [the federal courts' criminal business] has in many jurisdictions completely stopped the work on the civil side" and warned:

> For many years, the disposition of business in the Federal courts of first instance was prompt and satisfactory. This was because the business there was limited, and the force of judges sufficient to dispose of it; but of recent years the business has grown because of the tendency of Congress toward wider regulation of matters plainly within the federal power which it had not been thought wise theretofore to subject to Federal control.[15]

In 1925, Professor Charles Warren complained of "[t]he present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavily burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal Crimes."[16] Chief Justice Earl Warren, in his May 1959 address to the American Law Institute's annual meeting, noted "the constant upward trend in the total volume" of cases filed in the district courts, observed that "it is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism," and called on the institute to "undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of federal and state courts."[17] In the Introductory Statement to its later Study of the Division of Jurisdiction Between State and Federal Courts, the American Law Institute said:

15. William Howard Taft, *Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts*, 6 J. of Am. Judicature Soc'y, Dec. 1922, at 36.

16. Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 545 (1925) (urging Congress to allow the state courts to exercise primary, or at least concurrent, criminal jurisdiction in most cases to which the federal judicial power applies).

17. *Quoted in* American Law Institute, *Foreword* to Study of the Division of Jurisdiction Between State and Federal Courts ix (1969).

> A reappraisal from time to time of the structure of our judicial system is appropriate, but the present inquiry has a special urgency because of the continually expanding workload of the federal courts and the delay of justice resulting therefrom. In addition to the inevitable added volume of business because of the growing population, there has been a substantial increase in criminal cases, habeas corpus, civil rights litigation, and, in some of the busiest districts, securities litigation. It is unwise to paralyze the federal courts by maintaining conditions that will generate constant and unending pressure for the expansion of the federal judiciary. It is intolerable that these delays and these pressures be produced by cases that have no proper place in the federal courts . . . .[18]

The same theme was echoed by Judge Henry J. Friendly in his 1972 Carpenter lectures when he declared that "the inferior federal courts now have more work than they can properly do—including some work they are not institutionally fitted to do. This arises in part because Congress is continually giving them more to do . . . ." "The time has long been overdue," he said, quoting Professor Henry M. Hart, Jr., "for a full-dress re-examination by Congress of the use to which these courts are being put."[19] The Federal Courts Study Committee renewed the call for such a re-examination in its 1990 proposals "to improve the allocation of business between state courts and the federal courts . . . [to achieve] a principled allocation of jurisdiction,"[20] a call most recently reiterated by Senator Joseph R. Biden.[21]

In the part that follows, the paper examines the propositions central to such a re-examination.

18. *Id.* at 1. The objective of the study was stated to be "that cases be divided between the state and federal courts in a manner grounded on rational principle." *Id.* at 6. The study made no reference to criminal cases. Its principal recommendation was elimination of resident plaintiff diversity jurisdiction; it also made a number of other recommendations, some of which would have reduced federal jurisdiction, and some of which (multiparty, multistate diversity actions) would have enlarged it. Virtually none have been enacted into law.

19. Friendly, *supra* note 4, at 3–4.

20. Report of the Federal Courts Study Committee 35 (1990) (emphasis omitted). It proposed limits on federal drug prosecutions, as well as statutory changes in civil jurisdiction.

21. Senator Joseph R. Biden, Setting the Stage for the Nineties—Our Mutual Obligation 12 (Address Before the Third Circuit Judicial Conference, April 19, 1993) (transcript on file with the Federal Judicial Center).

# Part III: Arguments Opposing and Favoring Federalization

This part of the paper identifies the key propositions and major issues implicated in the debate over federalization, that is, extending the jurisdiction of the federal courts to civil claims and criminal prosecutions that could be maintained in state courts.[22] It presents the arguments, first those opposing federalization and then those favoring it, on both sides of the following propositions.

1. The Constitution dictates a limited role for the federal courts.
    a. The constitutional scheme directs it.
    b. Congress's implementation of the constitutional scheme confirms it.
    c. The current state of the constitutional scheme requires it.
2. Sound public policy mandates a limited role for the federal courts.
    a. The role of the states as laboratories requires it.
    b. Respect for local autonomy demands it.
3. The continued expansion of the role of the federal courts subverts their traditional role and purpose.
    a. Continued expansion contradicts their historic role.
    b. Continued expansion defeats the purpose for which they exist.
4. The continued expansion of the role of the federal courts threatens their quality and competence.
    a. Escalating workloads impair the quality of justice in the federal courts.
    b. The federal courts lack the resources necessary to deal with the escalating workloads.

22. This paper addresses only federalization, not other matters that bear on the role or workload of the federal courts. And with respect to federalization, it does not discuss proposals for consolidation of mass tort litigation in federal court.

1. The Constitution dictates a limited role for the federal courts.

a. *The constitutional scheme directs it.*

*The argument*

*The Constitution establishes a national government of limited powers, authorized to exercise only those powers that are delegated to it; all other powers are reserved to the states or the people.* Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[23] In an oft-quoted passage, Justice Hugo Black described the federal system as one of limited national power, exercised with sensitive regard for the interests of the states:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." What the concept [represents] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.[24]

This system of constitutional federalism recognizes a division of jurisdiction between the state courts and the federal courts that is consistent with the role of the states within the federal structure.[25] Although the founders were committed to the creation of a national judicial power, they disagreed about the kinds of tribunals

23. U.S. Const. amend. X.

24. Younger v. Harris, 401 U.S. 37, 44–45 (1971). *See generally* Paul A. Freund, *The Supreme Court and the Future of Federalism, in* The Future of Federalism 37 (S. Shuman comp., 1968) (discussing the cardinal values of "Our Federalism").

25. *See* Garcia v. San Antonio Metro. Transit Author., 469 U.S. 528, 547 (1985): "[T]he text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for '[b]ehind the words of the constitutional provisions are postulates which limit and control.'"

and the exact jurisdiction they should have.[26] Many of them feared that they could become instruments of tyranny. Elbridge Gerry refused to sign the Constitution principally because he feared "that the judicial department will be oppressive."[27] The Constitution, moreover, reflects the founders' contemplation that criminal law enforcement should reside primarily in the states,[28] for it defines only a few specific federal crimes, all of which are crimes against the federal government itself, such as counterfeiting, piracy, and treason.[29]

### *The response*

*The idea of a pure federal model for the government under the Constitution does not find support in the document.* The term "federal," so readily invoked to describe our government structure, does not appear in the Constitution; indeed, the Constitution's chief architect said that it was "neither a national nor a federal Constitution, but a composition of both."[30] Though the term more accurately

26. *See generally* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923); Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 3–5 (3d ed. 1988) [hereinafter "Hart & Wechsler"]; Felix Frankfurter & James M. Landis, *The Business of the Supreme Court—A Study in the Federal Judicial System*, 38 Harv. L. Rev. 1005, 1008–34 (1925).

27. *Quoted in* Warren, *supra* note 26, at 54.

28. In fact, in the early years of the Republic, state courts exercised concurrent jurisdiction over federal crimes. *See* Thomas M. Mengler, Federal Criminal Jurisdiction 5–9 (Report to the Long-Range Planning Committee of the Judicial Conference of the United States, March 1993 draft) (unpublished manuscript, on file with the Administrative Office of the U.S. Courts).

29. Friendly, *supra* note 4, at 61; Mengler, *supra* note 28, at 5–9. The history of the Judiciary Act of 1789 may suggest, however, that some intended the federal courts to have general jurisdiction over common-law crimes. *See* Warren, *supra* note 26, at 73.

30. *See* Madison's description in The Federalist No. 39: "The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; *in the operation of these powers, it is national, not federal;* and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national." The Federalist No. 39, at 250 (Modern Library ed. 1937) (emphasis added). *See also* Martin Diamond, *What the Framers Meant by Federalism, in*

describes the form of government under the Articles of Confederation, which the Constitution replaced, the Constitution's supporters adopted it as a tactical ploy to avoid the strong opposition to a national form of government.[31] James Madison's expansive view of federal judicial power is reflected in his argument for the establishment of a national government on the basis of "the necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice . . . . Was it to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States?"[32]

The Constitution's text places no limits on federal jurisdiction other than those limiting the authority of Congress. The statement defining the bounds of federal court jurisdiction, found in Article III and nowhere else in the Constitution, establishes by logical inference the absence from the Constitution of any other explicit limitations. The statement itself is expansive.[33] But largely because the framers could not agree on the role the federal courts should play, they left that question to Congress, "essentially making the lower federal courts a resource to be used as Congress deems necessary."[34] Thus, there can be little doubt that Congress may extend

A Nation of States: Essays on the American Federal System 24–41 (R. Goldwin ed., 1963).

31. *See* Diamond, *supra* note 30.

32. *Quoted in* Diamond, *supra* note 30, at 33.

33. Art. III, § 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

34. Chemerinsky & Kramer, *supra* note 12, at 75. *See also* Stanley Elkins & Eric McKitrick, The Age of Federalism 766 (1993): "Gouverneur Morris, who as chairman of the Committee on Style had been responsible for the phraseology of the Constitution, wrote many years later that the judiciary article, unlike the others, had to be worded somewhat equivocally. 'On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove, and to the best of my recollection, this was the only part

federal jurisdiction to the limits of its powers under the Constitution, although it has not done so for reasons of policy. Policy considerations bearing on decisions about extending jurisdiction need therefore to be evaluated on their own merits, without being confused with unfounded constitutional notions:[35]

> One of the consequences of our federalism is a legal system that derives from both the Nation and the states as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived . . . . The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government . . . . Questions of jurisdiction, however, bear commonly a subordinate or derivative relation to the distinct problem of determining the respective spheres of operation of federal and state law. It is in the effort to identify and to delineate these areas of federal and state authority that the nature of federalism and its crucial problems are . . . most significantly revealed.[36]

The debate over federalization revolves around the search for the key to identifying and delineating those "respective spheres of operation of federal and state law." How those spheres are identified and delineated—if at all—has far-reaching consequences, not the least of which is determining the role of the federal courts, and in consequence the magnitude of the courts' workload; their size, including the number of federal judges; and their need for resources. To say that, however, is not to say that federal jurisdiction is or has been designed with an eye to all its consequences. The Constitution gives Congress the power to create federal courts, other than the Supreme Court, and to determine their jurisdiction, and it has been the legislative process that has shaped and reshaped federal jurisdiction. Thus, as one sets out to consider federalization, one needs to appreciate that judicial federalism derives

which passed without cavil.'" (quoting a letter from Morris to Timothy Pickering, Dec. 22, 1814, *in* 3 The Records of the Federal Convention of 1787, at 420 (Max Farrand ed., Yale U. Press, 1966)).

35. Recall that Justice Black's expansive statement about "Our Federalism," quoted at note 24 *supra,* was made in the context of ruling on federal court power to enjoin proceedings in state court. *See* Charles Alan Wright, The Law of Federal Courts 323–30 (4th ed. 1983).

36. Hart & Wechsler, *supra* note 26, at xxvii.

not from abstract or academic notions of constitutional government or federalism theory, but from the policy decisions of the national legislature—politics, if you will.[37]

In any event, reference to "respective spheres" of jurisdiction may be a misleading description of the issue, for it assumes that jurisdiction can be neatly divided between federal and state courts. Yet there does not seem to be a basis for drawing such a jurisdictional dividing line. It may be more accurate to say that as federal jurisdiction expands—largely through legislation but to a lesser extent through court decisions and litigants' choices—it intrudes into that residual area in which the state courts exercise jurisdiction under our constitutional system of reserved power. Referring to "the delicate balance of [our] federal system," Professor Charles Alan Wright said that "expansion of the jurisdiction of the federal courts diminishes the power of the states . . . ."[38] But it does not follow that every expansion of federal jurisdiction in fact ousts the state courts, for (as discussed later) when Congress creates federal civil jurisdiction, it generally gives the state courts concurrent jurisdiction, resulting in overlapping jurisdiction, and only rarely does it create preemptive federal civil or criminal jurisdiction.

*b. Congress's implementation of the constitutional scheme confirms it.*

*The argument*

*Since the First Judiciary Act, Congress has recognized that the federal courts should have a limited role.*[39] Congress has specifically limited the power of federal courts to interfere with ongoing state court proceedings.[40] In enacting diversity jurisdiction, Congress has never exercised the full reach of its power under Article III, recognizing at least tacitly the desirability of leaving the development of the

37. *See infra* text accompanying notes 101–103.

38. Wright, *supra* note 35, at 2.

39. *See* Warren, *supra* note 26. *See also* Sloviter, *supra* note 4, at 1671–72 nn.3, 4 (reviewing the different rationales for the original enactment of diversity jurisdiction).

40. *See* Anti-Injunction Act, 28 U.S.C. § 2283 (1988).

general common law to the state courts.[41] It has accepted a wide range of judicially created doctrines of restraint, such as those based on comity,[42] and the well-pleaded complaint rule excluding from federal-question jurisdiction cases involving a federal-law defense.[43]

It is true that since the Civil War Congress has expanded the jurisdiction of the federal courts progressively and substantially, but the character of that jurisdiction has remained consistent with their role as national courts. The implementation of the Civil War amendments,[44] to guarantee citizens equality under law and protect their civil rights, and the later development of statutory schemes to attack national economic problems can be seen as serving a national purpose.

Thus, constitutional federalism remains as a principle of restraint on federal court jurisdiction, notwithstanding the expansive interpretation of Congress's powers in the twentieth century, particularly under the commerce clause. It is one thing for Congress to legislate at the outer edges of its commerce power; it would be quite another for it to expand the federal courts' jurisdiction to the point where the difference between the federal courts and the state courts becomes blurred, if not obliterated.

*The response*

*Under the Supreme Court's long-standing interpretation of the commerce clause—the most sweeping authority exercised by Congress—few subjects within the traditional scope of state concerns remain beyond the authority of*

41. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (existing law, but not the Constitution, requires complete diversity).

42. Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941); Younger v. Harris, 401 U.S. 37 (1971).

43. *See* Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908); Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 740 (1824); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Martin H. Redish, Federal Jurisdiction: Tension in the Allocation of Judicial Power 72–77 (1980) (discussing and criticizing the well-pleaded complaint rule).

44. Principally the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1983 (1988), and the Habeas Corpus Act of 1867, now codified as 28 U.S.C. §§ 2241–2251 (1988).

*Congress to regulate.*[45] In the criminal area, narcotics and weapons are objects par excellence for the exercise of Congress's commerce power: They move predominantly in interstate commerce and have created a major national problem. Similarly, in the civil area, ensuring the consistent enforcement of civil rights guaranteed by the Constitution is an appropriate object for national action. There is no reason to inhibit Congress's power to create federal court jurisdiction in areas in which it is empowered to legislate and regulate.

### c. *The current state of the constitutional scheme requires it.*

*The argument*

*Adhering to the federalism principle of restraint is essential to maintaining the continuing vitality of the federal system.* The vast expansion of federal court involvement in matters that have traditionally been the province of the state courts threatens to undermine the historic separation of the spheres of state and federal jurisdiction. Single-minded concern with drugs and weapons, for example, or with the desired elimination of other social or economic ills, will inevitably impair the vitality of the federal system. If Congress exercises its authority to regulate interstate commerce indiscriminately rather than directing it at genuine national problems with a proven need for federal intervention, the resulting massive intrusion into areas of state responsibility will diminish the role and stature of the state courts and distort the balance between the two systems. Though differences of opinion about the need for federal intervention will from time to time arise in the application of the federalism principle of restraint, Congress and prosecutors will need to observe the principle if the vitality of our dual court system is to be preserved.

*The response*

*Abstract constitutional notions of federalism cannot meet the changing needs of society; federalism, like other ideas underlying our system, adapts to*

45. The Supreme Court has upheld the application of a criminal statute prohibiting conduct of a type that affects interstate commerce to instances of such conduct having no connection with interstate commerce. Perez v. United States, 402 U.S. 146 (1971) (loan-sharking conviction upheld although defendant's conduct had no effect on commerce).

*changing circumstances and the exigencies of the times.* Society's social and economic demands and the emergence of a truly national economy are forging a much more closely intertwined system of state and federal authority. Federalism has become a unifying concept rather than a dividing one, rendering the idea of separateness in the realm of jurisdiction largely obsolete. Chief Justice Rehnquist has urged that "we need to remind ourselves of Alexander Hamilton's argument when he first tried to convince a skeptical audience that the Constitution's mixed judicial system could work. National courts need not overpower or supplant the existing state courts, Hamilton wrote. Instead 'the national and State systems are to be regarded as one whole.'"[46]

2. Sound public policy mandates a limited role for the federal courts.

a. *The role of the states as laboratories requires it.*

*The argument*

*The continued existence of separate spheres of responsibility of the state governments and federal government is a powerful source of creativity.* As Justice Louis Brandeis argued over sixty years ago, any state can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[47] The control of local crime and the development of tort and contract law principles are areas in which local experimentation can provide valuable guidance to the rest of the country.

*Federalization inhibits state experimentation and adaptation.* Local action not only provides an opportunity to experiment but also allows tailored responses to particular needs reflecting local circumstances and culture. No doubt some problems require uniform national solutions. But federalism recognizes the value, in the absence of a demonstrated need for a uniform national solution, of permit-

46. William H. Rehnquist, Welcoming Remarks to the National Conference on State–Federal Judicial Relationships (1992), *in* 78 Va. L. Rev. 1655, 1658 (1992).

47. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

ting states to craft their own solutions to their problems. National solutions responsive to needs assessments made in Washington may not always serve local interests best. The control of alcoholic beverages is an illustration of an ill-fated attempt to impose a national solution and of the efficacy of local solutions tailored to local needs and policies. Disputes arising out of domestic or intimate relations may be another matter whose resolution should be responsive to the values and culture of local communities, which differ widely across the country. Similarly, penal policies adopted by some states, though perhaps not satisfying all members of the national government, may reflect the states' diverse values and priorities; indeed, experience under such divergent policies may provide an opportunity to evaluate their relative merits and success. Even if adherence to federalism may at times seem to enshrine inefficiency and even inaction, it can also be a safeguard against precipitate and ill-considered action by the national government in response to some high-profile but perhaps only transitory phenomena.

*The response*

*Respect for the states' freedom to experiment must not override attention to national concerns.* The establishment of a national government reflected the founders' purpose to guard against domination by parochial interests over national interests.[48] The argument for the Constitution's ratification stressed that it would create a government capable of acting vigorously to counter threats to individual rights by local majorities. Precipitate action is a much greater threat coming from state legislatures than from Congress.

To see the idea of federalism, therefore, as a legitimate shackle on the national government's ability to attack what it identifies as national problems would be to misconstrue it. In any event, congressional legislation for the most part enables, it does not preclude; rarely does legislation preempt state court jurisdiction.[49] Thus, the contention that the expansion of federal jurisdiction somehow interferes with the states' ability to serve as laboratories, to innovate, and to pursue their own policies is fallacious.

48. The Federalist No. 10, at 53–62 (Modern Library ed. 1937).
49. *See infra* notes 71, 74.

### b. *Respect for local autonomy demands it.*

*The argument*

*Failure to respect judicial federalism endangers local autonomy, imposes added burdens, and can undermine important state policies.* National legislation has a tendency to overshoot the mark; well-intentioned laws often have unintended consequences that can intrude deeply into areas of state concern. For example, the Employee Retirement Income Security Act (ERISA),[50] intended to remedy acknowledged abuses by regulating pension administration, has had the effect of largely preempting state law on, and state court jurisdiction of, ordinary wrongful discharge claims, which have little if any connection with pension rights, let alone interstate commerce. Presumably this was an unintended consequence of the legislation, but if it was, it illustrates how sweeping federal remedial legislation that vests large and generally ill-defined jurisdiction in the federal courts breeds unintended consequence. Another example is the Racketeer Influenced and Corrupt Organizations Act (RICO),[51] which was intended to attack racketeering but has extended federal jurisdiction over ordinary state-law fraud claims.[52] Greater respect for federalism would help prevent such intrusions into state autonomy and the disruption that often follows.

Legislation that by expanding federal court jurisdiction federalizes claims in areas covered by state law also imposes added burdens on state courts. This follows from the state courts' usual concurrent jurisdiction to enforce federal civil causes of action, which requires them to entertain federal claims when litigants choose to bring them in state courts.

50. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C.).

51. 18 U.S.C. §§ 1961–1968 (1988).

52. In addition, Congress frequently imposes mandates directly on state courts, controlling their activities. Examples are reporting requirements for state courts under the Immigration and Nationality Act, 8 U.S.C. §§ 1101–1525 (1992), and required changes in court procedures for foster care cases under the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C.). *See* State Judicial Impact Statement, P.L. 96–28, at 1 (Conference of State Court Administrators, June 1993).

Sweeping application of federal criminal laws to predominantly local offenses can nullify state policy on the prosecution of crimes and the punishment of offenders. Minor street crimes traditionally within the jurisdiction of state courts, such as small drug sales to consumers or unlawful possession of a low-grade weapon, have become federal offenses that can bring mandatory sentences of five or ten years or more. As a result, Congress and federal prosecutors can override the policy decisions of state legislatures and the judgment of local prosecutors and judges about the appropriate treatment of such offenders in light of the interests of the community.[53]

That is not to say that there is not a proper federal role here consistent with federalism. The scope and complexity of some offenses—particularly their interstate or international character—will at times require federal law enforcement resources and justify federal prosecution. Interdiction of drugs at the border clearly demands federal action. Even in cases of lesser dimensions, special circumstances may warrant action by federal prosecutors; federalism is surely not a shield to protect official corruption or willful abuse of civil rights from federal prosecution. But decisions to prosecute do not invariably rest on such solid grounds; an example has been the practice in some districts of declaring one day a week "Federal Day" and sweeping all drug and weapons offenders arrested that day into the federal court.[54] Such prosecutorial decisions raise a question whether they may be motivated more by a desire to accumulate impressive statistics than by well-considered policy choices. They need guidance that is based on an appreciation of federalism values and a recognition that federal intervention should be supported by demonstrable necessity.[55]

53. Under the Justice Department's Project Triggerlock, for example, "violent criminals typically prosecuted in State court will be prosecuted Federally to take advantage of stiff mandatory sentences without the possibility of parole." 1991 Att'y Gen. Ann. Rep. 19. While this, of course, relieves a state's chronic shortage of prison space, it also subjects its citizens to sentences which are substantially more draconian than those that would have been imposed under state law and not necessarily consistent with its penal policies.

54. Mengler, *supra* note 28, at 3.

55. *See* S. 1630, 97th Cong., 1st Sess. (1981), which would have established guidelines for determining the presence of a substantial federal interest warranting the exercise of concurrent federal criminal jurisdiction. *See also* Senate Comm.

There is also a need to resort to less drastic and more constructive alternatives to federalization to support the states' law enforcement activities. The federal government has numerous options for lending support without bypassing federalism constraints, such as providing funds, assisting criminal investigations, or sharing prisons or other facilities. Failure to respect those constraints, even if at times it may promise short-run efficiencies and political gains, will in the end weaken the capacity of the states to deal effectively with crime in their jurisdictions; those who support federalization may not attach sufficient importance to its policy implications and long-term consequences. No matter how ambitious the federal government's crime-fighting commitment, in the end the country will always have to depend on the states for the bulk of law enforcement activity.[56] Disregard of the wise restraint federalism imposes will endanger the long-term capacity of the states to deliver.

Finally, while local autonomy is undermined, important federal interests are likely to be neglected. Federalization creates the risk that criminal prosecutions only the federal government can undertake will be sacrificed. Inevitably, with prosecutorial resources being limited, decisions to deploy them against local activity will mean that they cannot be deployed against national crimes, such as tax, procurement, and health care fraud; environmental crimes; and other white-collar offenses.

### *The response*

*The relationship between federal and state jurisdiction is and has been marked by overlap.* The argument that federal court jurisdiction is intruding into areas that were the traditional province of state courts rings hollow, considering that for over 100 years, since the creation of federal-question jurisdiction, there has been a massive overlap of state and federal jurisdiction.[57] That overlap is not proof, however, that Congress has overstepped legitimate, Constitution-based boundaries. When Congress creates federal jurisdiction, it acts in response to a demonstrated public need. Congress is not an iso-

on the Judiciary, Report on the Criminal Code Reform Act of 1981, S. Rep. No. 307, 97th Cong., 1st Sess. (1981).

56. *See infra* note 60.

57. *See* text accompanying *infra* notes 73–74.

lated decision maker; its actions are the product of a composite judgment reflecting political imperatives from its members' many constituencies. In fact, action by Congress is evidence that states and local communities, as well as other interests, want help. Even national political action necessarily reflects local politics.[58]

The strength of the argument is not diminished by the fact that some federal legislation may be subject to criticism. Though imperfect, both ERISA and RICO were adopted to deal with widely acknowledged problems: serious abuses in the administration of pension plans and widespread racketeering activity. Defects in those and other statutes could readily be cured by Congress, should it choose to do so.[59] Congress could also protect against such defects by enacting sunset clauses (providing for automatic expiration of legislation on a specified date unless renewed by Congress) and holding periodic oversight hearings.

*Opposition to expansion of federal jurisdiction comes mostly from federal judges and reflects primarily their interests.* Rarely are state or local officials or the bar heard to complain when Congress expands federal jurisdiction. On the civil side, one hears no pleas for limiting the jurisdiction of federal courts or the access of litigants to them. When new causes of action and other remedies are created by Congress, it is in response to public, and often powerful, demand, as in the case of civil rights laws. The bar's support for diversity jurisdiction is unwavering, and even many state court judges favor the relief it affords them.

While one may take issue with the particulars of federal sentencing law and policy, there is no public opposition to the federal government's vigorous participation in the fight against crime, particularly crime involving drugs and violence. It is extremely rare that federal prosecutions of local crime are undertaken over the objection of local prosecutors. Generally, federal activity augments

58. "'Let me tell you something I learned years ago [House Speaker Thomas P. O'Neill's father told him]. All politics is local.' It was good advice and I've always adhered to it." Thomas P. (Tip) O'Neill, Man of the House 26 (1987). *See also* Paul Clancy & Shirley Elder, Tip 19 (1980).

59. Arguably, at least, those defects, being mainly the extension of the preemptive effect of ERISA and of the reach of RICO to common-law torts, resulted from the way in which the courts interpreted those statutes.

and is conducted in cooperation with state law enforcement activity.[60] When it is not, it is most likely because local politics stand in the way of, or are indifferent to, prosecuting criminal conduct. At times state prosecutors initiate the effort to bring in their federal counterparts because they appreciate the superiority of and need for federal investigatory and prosecutorial resources. A local "Federal Day" campaign may well be a rational prosecutorial strategy to achieve maximum deterrence by marshaling law enforcement resources for a concerted, and highly visible, attack on crime. It is a good illustration of the practical character of federalism as a principle of cooperation, not division.[61]

*National interests are often at stake, demanding federal intervention.* Even absence of support for federalization among state officials, however, would not be a ground for restricting the expansion of federal jurisdiction where needed. Federal courts may be needed to ensure protection of the rights of the poor, the disadvantaged, and those suffering discrimination.[62] Victims of drug offenses and violence will take a different view of the evils of federalization than federal judges do. Moreover, the impact of pervasive, virulent social problems is not limited to the directly affected individuals. Drug offenses and violence, though often appearing as local incidents, present a grave national problem. A seemingly local incident may be a part of multistate or international activity requiring federal crime-fighting resources; unified federal investigatory and prosecutorial efforts can promote efficiency. But even apart from efficiency considerations, such incidents' cumulative damage to the social fabric calls for a national response.

60. Ample reason for federal support of state law enforcement efforts is found in statistics indicating that (1) criminal filings in the state general jurisdiction courts were eighty-four times higher than those in the federal district courts; (2) on average, a state court judge carries a caseload three times as large as that of a federal district judge; and (3) the state general jurisdiction judiciary handles more than fifty-two times as many civil and criminal cases, with only fifteen times as many judges, as the federal judiciary. Brian J. Ostrom et al., State Court Case Load Statistics: Annual Report 1991, at 40–44 (National Center for State Courts 1993).

61. *See* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism,* 19 Ga. L. Rev. 861, 875 (1985).

62. *See* Stephen Reinhardt, *Too Few Judges, Too Many Cases,* ABA J., Jan. 1993, at 52, 53.

Experience with the prosecution of controversial and sometimes inflammatory civil rights cases has confirmed the unique value of the federal court presided over by life-tenured judges largely insulated against the pressures generated by the community. The results of the trials of the police officers involved in the beating of Rodney King are one illustration, replicating the experience in civil rights litigation in the South. Some may, of course, argue that these are cases at the core of the federal courts' jurisdiction; the difficulty, however, is to define that core jurisdiction. Abstract federalism principles must not be used to unduly constrain the practical judgment of authorities in the selection of such cases.

3. The continued expansion of the role of the federal courts subverts their traditional role and purpose.

a. *Continued expansion contradicts their historic role.*

*The argument*

*Continued expansion of federal jurisdiction by Congress and the executive branch undermines the historic role of the federal courts.* From the First Judiciary Act, Congress has been sparing in creating federal jurisdiction, limiting such grants narrowly to accomplish particular purposes. Respect for federalism has stood as a bulwark against the federal courts' absorption of state court jurisdiction. Not until late in the nineteenth century did Congress create general federal-question jurisdiction, and until recently that jurisdiction was limited to cases that needed the federal forum, that is, to cases brought to implement the Constitution or federal legislation.

The traditional indicia of federal jurisdiction have been few: the protection of the federal government's interests and of the fundamental rights of its citizens; the implementation of federal regulatory schemes, generally implicating civil rights or large interstate commercial activity; and the enforcement of federal criminal statutes having significant interstate or international dimensions. Although the reach of these indicia has grown over time, sweeping in much potential litigation, they retain validity as benchmarks of

federal jurisdiction.[63] That historic and principled pattern of jurisdiction is being abandoned.

In recent years, Congress's use of its authority to "regulate Commerce with foreign Nations, and among the several States" and, to a lesser degree, legislative and judicial enforcement of the Fourteenth Amendment have involved the federal courts in numerous areas within the traditional province of the states. Civil and criminal jurisdiction have been vastly expanded. New causes of action create an array of rights and entitlements, many of which go far beyond traditional notions of federal interest.[64] Proposed legislation now in the congressional pipeline would further extend the scope of federalization.[65] Similarly, Congress has cast the net of federal criminal statutes wide, covering much crime that has traditionally been the business of the states.[66] And federal prosecutors

63. *See* Chemerinsky & Kramer, *supra* note 12 (constructing a minimum model of federal jurisdiction based on traditional subject matter: the Constitution, sovereign interests of the federal government, interstate disputes, interpretation and application of federal law, federal common law, and agency decisions).

64. For example, the Developmental Disabilities Act of 1984, 42 U.S.C. §§ 6000–6009, 6041–6043, 6061–6064, 6081–6083 (Supp. III 1991) (establishing standards for state programs to assist the developmentally disabled); Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (codified as amended in scattered sections of 42 U.S.C. (same for elderly persons); Fair Housing Amendments Act of 1988, 28 U.S.C. §§ 2341–2342, 42 U.S.C. §§ 3602, 3604–3606, 3614 (1988) (prohibiting discrimination in sale or rental of housing); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (requiring employers of fifty or more persons to provide family and medical leave); Civil RICO, 18 U.S.C. § 1964 (1988) (making "pattern" of state-law fraud actionable); Odometer Disclosure Act, 15 U.S.C. §§ 1981–1991 (1988) (prohibiting alteration of automobile odometers); Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (Supp. III 1991) (prohibiting "dumping" of uninsured emergency room patients).

65. For example, proposed health care reform legislation would, among other things, federalize much medical malpractice litigation and other claims arising under it.

66. For example, the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, 42 U.S.C. §§ 654, 663 (providing for enforcement of state custody orders); False Identification Crime Control Act of 1984, 18 U.S.C. §§ 1028, 1738, 39 U.S.C. § 3001 (prohibiting fraud in connection with identification documents); Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (prohibiting computer fraud); Child Support and Recovery Act of 1992, 18 U.S.C. §§ 228, 3563, 42 U.S.C. §§ 3793, 3769cc–3797 (criminalizing failure to pay child support); Anti-Car Theft

spark the federalization debate when, faced with activity that is illegal under both federal and state statutes, they prosecute cases that in earlier times they might have deferred to state prosecutors. A serious question arises whether Congress and the executive branch, by intruding so far into matters within the normal province of the states, are undermining the traditional role of the federal courts.

It is no answer to say that it is the litigants who determine when the courts will exercise their jurisdiction. Certainly Congress has opened the doors of the federal courts and often offered incentives, such as fee shifting, to litigants who would otherwise bring their cases in state court, if at all. And the Justice Department, an arm of the federal government, has led the way in bringing into federal courts offenses that could be prosecuted in state court.

*The response*

*The evolution of the role of the federal courts reflects a congressional purpose to confer jurisdiction to meet the needs of a nation expanding geographically, economically, and socially.* That evolution cannot be written off in simplistic or pejorative terms; "federalization" is not a satisfactory shorthand description of this historic development. The courts' role in the agricultural and early industrial era cannot be compared to that in the post-industrial era; nor can one ignore the emergence of a highly interdependent yet diverse multiethnic and multilingual population. Yet, the expansion of federal jurisdiction has been a fact since the earliest days of the Republic, paralleling its growth and development. Though the First Judiciary Act created (over considerable opposition) what appears today as very limited federal jurisdiction, it also conferred diversity jurisdiction. And that jurisdiction at the time was seen, and feared by some, as a major step toward federalization: State law disputes between diverse par-

Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified in scattered sections of 15, 18, 19, and 42 U.S.C.) (setting federal theft prevention standards for auto parts and making it a federal criminal offense to steal a car while possessing a handgun); Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (prohibiting disruption of animal enterprises, such as laboratories); and the Gun-Free Schools Act of 1990 (making it illegal to possess a gun within 1,000 feet of a school; held invalid under the commerce power in United States v. Lopez, 62 U.S.L.W. 2173 (5th Cir. Sept. 9, 1993)). And more legislation, such as the 1993 crime bill, is in the mill.

ties and involving more than $500 became cognizable in the federal courts.[67] Later, *Swift v. Tyson*[68] authorized the federal courts, in competition with state courts, to develop their own common law to decide diversity cases.

Still, by today's standards, federal jurisdiction before the Civil War was quite limited; federal courts did not even have general federal-question jurisdiction. Following the Civil War, however, the federal courts began to play an increasing role in the expansion and industrialization of the nation and, at least for a time, in the enforcement of civil rights. The Judiciary Act of 1875[69] created general federal-question jurisdiction and thus made the federal courts, in the words of Felix Frankfurter and James Landis, "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[70] Thus began the process of expanding those rights, in the course of which Congress opened the federal courts to claims that previously did not exist or, if they did, would have been the province of the state courts.[71]

The search through history for the traditional role of the federal courts or traditional indicia of federal jurisdiction is unavailing. As Warren has described it,

> [T]he Federal judicial system has not been a logical development on lines of consistent theory; it has been the product of temporary necessities and emergencies, arising from both political, sectional, and economic conditions. It has not been the embodiment of the theo-

67. *See supra* note 39.

68. 26 U.S. (1 Pet.) (1842). In one sense, Swift v. Tyson can be seen as a step in the direction of federalization by giving federal courts authority to declare the common law governing claims arising under state law. In another sense, however, it was the decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requiring federal courts to apply state law in diversity cases, that subjected state common law to a degree of federalization by giving federal courts authority to interpret and apply it.

69. Act of Mar. 3, 1875, 18 Stat. 470.

70. Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1928).

71. As noted before, in doing so, of course, it also expanded the jurisdiction of state courts, since federal statutory rights of action are concurrently enforceable in state court unless Congress provides otherwise. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981).

> ries of any particular political party . . . . A judicial expedient deemed wise at one time has seemed unwise at another.[72]

The history of federal jurisdiction reveals no bright lines that have traditionally divided the business of the federal courts from that of the states. The so-called traditional role of the federal courts, on closer examination, is much less distinct from that of the state courts than might be supposed. Much conduct that can be prosecuted under federal criminal statutes has long been equally subject to prosecution under state law, although perhaps under different labels. Drug and weapons offenses and car theft, for example, have been federal offenses for many years.[73] Criminal statutes that implement many long-standing federal regulatory schemes are directed at offense conduct that is generally subject also to state prohibitions, such as theft, fraud, and embezzlement. Federal statutes creating civil causes of action have long covered much conduct within traditional subject-matter jurisdiction of state courts, such as civil rights violations, railroad and maritime workers' injuries, and fraudulent activities covered by the securities acts. Conversely, much of the work of state courts involves the enforcement of claims arising under those federal statutes and others that give state courts concurrent jurisdiction.[74] And certainly diversity jurisdiction has, since *Erie Railroad Co. v. Tompkins,* put the federal courts into the business of not only interpreting and applying state civil law, but by necessity also developing it where the highest state court has not spoken.[75] History suggests not so much a separate domain for the federal courts, but a twofold strategy by Congress:

72. Warren, *supra* note 16, at 598.

73. Drug offenses have been covered by federal criminal statutes since the Harrison Act, 38 Stat. 785 (1914); automobiles, since the National Motor Vehicle Theft Act, 41 Stat. 324 (1919); and weapons, since the National Firearms Act, 48 Stat. 1236 (1934).

74. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) ("Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."). *See generally* Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 109–38 (1980).

75. *See supra* note 68; and Sloviter, *supra* note 4. It is noteworthy that until the adoption of the Rules Enabling Act in 1934 (28 U.S.C. § 2072), federal courts followed the rules of procedure of the state in which the court was located.

to attack perceived national problems through national legislation and to provide an alternate forum to respond to dissatisfaction with state courts.

Legislation, of course, tells only part of the story. Jurisdiction is largely theoretical until it is invoked by the choices of litigants. The choice of a forum rests with the litigants, and those choices determine much of the work of the federal courts. The Justice Department may or may not choose to prosecute state offenses under federal law.[76] Private litigants make their forum choices by considering tactics and convenience.[77] Thus, the business of the federal courts is shaped more by litigants voting with their feet than by abstract, federalism-based notions about the division of business between state courts and federal courts.

### b. *Continued expansion defeats the purpose for which they exist.*

*The argument*

*Federalization has proceeded apace, largely ignoring the characteristics of the federal system and its role and purpose.* The structure of the federal courts reflects the traditional indicia of federal jurisdiction. Above all, it is a system designed not to process high-volume litigation, but to adjudicate small numbers of disputes involving national interests and calling for deliberative consideration by life-tenured judges. Federal judges come to the bench with experience somewhat different from that of state judges and through a different selection process. Life tenure and salary protection particularly qualify them for what are often counter-majoritarian tasks. And, to accommodate their jurisdiction, federal courts are equipped with a

76. *See* Roger A. Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, the Proposed Federal Criminal Code*, 47 Geo. Wash. L. Rev. 475, 496 (1979) ("[P]rosecutorial discretion in the exercise of federal jurisdiction, and not jurisdictional constraints themselves, has been and continues to be the primary means relied on by Congress to preserve the balance between federal and state criminal law enforcement.").

77. A survey of attorneys in state and federal courts discloses a wide range of factors influencing their choice between state courts and federal courts. *See* Victor E. Flango, Attorneys' Perspectives on Choice of Forum in Diversity Cases (National Center for State Courts, Sept. 1991). Anecdotal evidence strongly suggests that relative preferences, influenced by such things as perceptions of judicial quality and attitudes and comparative times to disposition, change over time.

support system that is much more costly and sophisticated than that of state courts generally.

This design is being undermined by present trends. In many federal courts, criminal trials are crowding out civil trials,[78] and the civil dockets are themselves crowded with cases, many of which could be brought in state court. In metropolitan areas, the federal courts are beginning to resemble the city court system, handling high-volume criminal litigation. Although some federal prosecutions attack major drug conspiracies appropriate for the federal courts, as Senator Biden has stated, "[m]any small cases—against first-time offenders or low-level runners—are brought in federal courts rather than in the state courts that are equally competent to hear them."[79] The resulting prosecutions, complicated by the application of highly technical, time-consuming, and often extremely severe federal sentencing laws, not only clog the trial courts but have brought what many see as a crisis of volume to the appellate courts.[80] On the civil side, RICO and ERISA are examples of how Congress has federalized what are plainly traditional state-law claims: fraud and wrongful discharge.

Concern over this trend is not grounded on a wish to turn the clock back to, perhaps, the pre–civil rights period. Rather, it stems from the failure to make principled decisions about the role of the federal courts. No doubt, whenever Congress acts to enlarge federal jurisdiction, it does so with substantial political support. That the decision has majority support, however, does not make it wise. The federal courts' traditional role and purpose is being changed, and their distinctive character as courts charged with handling

78. The number of criminal jury trials has increased 65% since 1980; the percentage of trial time represented by criminal cases has risen from 35% to nearly 50%; and the average length of criminal jury trials has nearly doubled since 1970, from 2.5 to 4.9 days. Administrative Office of the U.S. Courts, The Criminal Caseload: An Increasing Burden on the District Courts? at 14–15, Chart 13 (Report to the Judicial Conference of the United States from the Committee on Federal–State Jurisdiction, Sept. 1993) (unpublished manuscript, on file with the Administrative Office of the U.S. Courts). *See also* Mengler, *supra* note 28, at 1–2.

79. Biden, *supra* note 21, at 12.

80. *See* Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications 8 (Federal Judicial Center 1993) [hereinafter *Moratorium*].

cases of national significance is being diluted, if not imperiled. Whatever may be the objective facts, perceptions of the federal courts change, and appearances become reality. But one undeniable consequence of federalization has been the virtually irresistible growth in the numbers of federal judges. Notwithstanding the complexity of the growth issue, it is clear that growth will inexorably change the character of the institution.[81]

Adherence to the federalism principle of restraint ensures that the federal courts will perform the special role that the Constitution carved out for them and that they can perform more effectively than state courts. There are compelling reasons for preserving them as an institution of limited size and high quality. Granting that circumstances have changed dramatically over the past 200 years and that new problems require new solutions, which may often involve the federal courts, the validity of the federalism principle of restraint nevertheless remains unimpaired. The present trend, placing expediency above principle, threatens to obliterate the distinctions between the two court systems, raising in the end the question why the country should maintain two separate but indistinguishable court systems.

*The response*

*Although the federal courts' jurisdiction has expanded throughout American history, that expansion in recent years has not been disproportionate or excessive, as some have claimed.*[82] Cries of alarm about overcrowded federal court dockets have been heard for many years, certainly for the past seventy years.[83] In fact, although criminal filings have increased since 1980, they remained below the 1972 level until 1992.[84] The percentage of drug cases has increased signifi-

81. *See id.* As noted above (see note 60), filings in state courts dwarf those in the federal courts; as a consequence, even a minute shift brought about by federalization could have a staggering impact on the federal courts.

82. *See* Figure 7 of the Appendix, and *infra* notes 84, 86.

83. *See* text accompanying *supra* notes 15–21.

84. Criminal filings have been cyclical, as shown in Figure 1 of the Appendix. In 1972, 47,043 criminal cases were commenced in federal district court. From 1972 to 1980, the number of criminal filings fell to a low of 27,968. Starting in 1981, criminal filings rose, but did not exceed the 1972 high until 1992, when they reached 47,467 cases. Criminal trials in 1992 were at approximately the same level

cantly, but so has the complexity (and hence the federal character) of most drug prosecutions. The shift from possession cases to distribution cases and the increase in the number of defendants bear out the fact that federal drug prosecutions increasingly involve large-scale interstate or international criminal conspiracies, appropriate objects indeed for the application of federal investigative and prosecutorial resources and trial in federal court.[85] The quantitative and qualitative increase in the federal criminal workload thus has been the product of the national and international proliferation of drugs and the consequent complexity of prosecutions of offenders, not the result of federalization.

The increase in civil filings has occurred in federal-question cases, primarily prisoner and civil rights cases.[86] The increase in prisoner filings has been a function of the rapidly escalating popu-

as in 1972. *See also* Hart & Wechsler, *supra* note 26, at 53 (since 1934, criminal filings have ranged between 30,000 and 50,000, and fluctuations have been caused by such things as price controls, immigration law enforcement, selective service cases, and efforts in the 1970s to concentrate on white-collar and organized crime and divert routine crimes to the states). *See also* Figure 6 of the Appendix, which reflects that the rate of criminal filings per sitting judge was lower in 1992 than in 1975.

85. In 1973, drug cases accounted for 22% of all federal criminal cases and 21% of all defendants. Drug cases fell throughout the remainder of the 1970s, reaching a low of 10% of all criminal cases and 17% of all defendants in 1979. From 1980 forward, drug cases experienced a consistent and dramatic increase, reaching a high of 27% of all criminal cases and 37% of all defendants in 1992. *See* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1973–1992, table D2. These numbers, however, mask significant changes in the nature of federal drug prosecutions from the 1970s to the 1990s. A recent study by the Statistics Division of the Administrative Office has shown that from 1972 to 1992, drug distribution cases rose from 78% of all federal drug cases to 83%, and defendants per distribution case from 1.8 to 2.1; drug possession cases fell from 17% of all federal drug cases to 8%, and defendants per possession case from 1.3 to 1.2. Because drug distribution cases tend to be more complicated than drug possession cases (one indication of this is that according to the most recent Federal Judicial Center weighted caseload time study, cocaine and heroin distribution cases require an average of 6 hours of judicial time per defendant, whereas cocaine and heroin possession cases require only 1.5 hours of judicial time per defendant), these trends, taken together, indicate a significant increase in the average complexity of federal drug prosecutions and in the resources required to process them.

86. *See* Figure 4 of the Appendix. Federal statutory actions have dominated the civil docket, having risen from 23% in 1961 to 54% in 1990.

lation of state and federal prisons; the rise in civil rights cases has been generated by ongoing federal legislative activity and favorable court decisions.[87] These two categories of cases which dominate the civil docket represent, for the most part at least, what would generally be regarded as appropriate business for the federal courts—the vindication of individual rights by life-tenured judges.[88] Other types of civil cases in the federal-question category, fewer in number but potentially of great complexity, are those brought under federal environmental, securities, antitrust, and similar regulatory laws. These cases are no less appropriate subjects for the expertise and resources of the federal courts. Diversity cases, in contrast, have been declining as a percentage of the docket for over thirty years and absolutely since 1985.[89]

*The growth of filings has little relationship to federalization.* Although the business of the federal courts has generally been increasing,[90] this trend, as shown above, cannot be condemned in simplistic terms as the product of "federalization." Without doubt Congress has greatly enlarged the scope of civil rights and remedies, and in the past ten years it has also become more engaged in fighting

87. The courts themselves have at times played a part in expanding their jurisdiction by, for example, interpreting the habeas corpus statute in ways that tended to enlarge the rights of criminal defendants and diminish the finality of the state criminal process.

88. Not everyone agrees that employment discrimination cases, included within the civil rights category, necessarily fall within a core function of the federal courts to protect basic individual rights. *See* Report of the Federal Courts Study Committee 60–61 (1990).

89. From 1950 to 1992, cases brought under diversity jurisdiction averaged 27% of total filings, ranging from a high of 38% in 1958 to a low of 21% in 1992. *See also* Figure 5 of the Appendix.

90. This increase, however, has been subject to cyclical fluctuations, and, importantly, there have been disparities across districts and circuits. As filings have increased so has the number of judges, though not proportionately, particularly in the courts of appeals; from 1960 to 1991, filings per district judgeship increased from 356 to 391, per appellate judgeship from 57 to 252. *See* Moratorium, *supra* note 80, at 29. Dramatic disparities exist, however, when data are examined on a district-by-district or circuit-by-circuit basis: In 1992, thirteen districts had total filings per judgeship ranging from 500 to nearly 700, whereas ten districts had filings per judgeship ranging from as low as 152 to 300. In the courts of appeals, merit dispositions ranged from 195 to 605 per active judge. *See* Administrative Office of the U.S. Courts, 1992 Federal Court Management Statistics, *passim.*

crime, as has the Justice Department. As a consequence, the federal courts' role in these areas has also expanded. But while these developments reflect a more active role by the federal government, they do not demonstrate a deliberate intrusion into the states' domain. In fact, federal court involvement when viewed in light of the growth of the population is now proportionately the same in criminal prosecutions as it was twenty years ago;[91] in civil litigation, it has doubled over that period but, as discussed above, the growth has been in areas well within the scope of federal concern.[92]

There can be no argument that the federal courts have a special role. Senator Biden described it as providing, when needed, a "superior forum . . . because of the institutional independence enjoyed by federal judges and [their ability] to ensure consistent enforcement of constitutionally protected rights [and] . . . to speak with the voice of the entire nation."[93] While that role clearly ought to be preserved, the genius of the American constitutional system permits it to be flexible to meet the needs of the times. But to characterize it as wholly distinct from the role of the state courts would be misleading. The federal courts' jurisdiction has always overlapped substantially with that of the state courts, not only because Congress has legislated in areas within the competence of the states, but also because the state courts have concurrent jurisdiction under most federal statutes and a large part of their caseload arises under those statutes. And in the end, the state courts play the dominant role in the administration of civil and criminal justice in the country: Over 98% of all civil cases and over 99% of all criminal cases are filed there.

91. Criminal cases were filed in 1970 at a rate of 19 per 100,000 of population; in 1980, at 12 per 100,000; and in 1990, at 19 per 100,000.

92. Civil cases were filed in 1970 at a rate of 42 per 100,000 of population; in 1990, at 87 per 100,000.

93. Biden, *supra* note 21, at 15.

4. The continued expansion of the role of the federal courts threatens their quality and competence.

a. *Escalating workloads impair the quality of justice in the federal courts.*

*The argument*

*Federalization undermines the capacity of federal courts to meet public expectations and retain public confidence.* One cannot ignore the impact of federalization on the capacity of the federal courts to perform their role. Recognizing that the courts, created to serve the public, are not an end in themselves, there is nevertheless no point in permitting the destruction of their *raison d'être.* The purpose of the federal courts is to provide a tribunal of undoubted integrity and competence for the adjudication of disputes imbued with a federal, that is, a national interest. Public confidence in those courts is a vital ingredient of our constitutional system. Yet federalization is surely contributing to a deterioration in the quality of justice federal courts are able to dispense.

As discussed above, federalization contributes to the steady growth of the federal courts' criminal and civil dockets, as well as an accompanying increase in their workload and in the cost and complexity of their administration. Docket congestion in trial and appellate courts is impairing access to justice for those whose cases depend on the federal forum and the quality of justice as well. The enforcement of civil rights statutes, for example, may well be adversely affected when, as is true in some district courts, civil trials are few and far between. In the courts of appeals, less than half of the appeals now receive an oral hearing and are disposed of by published opinion.[94] "In some jurisdictions," Senator Biden observed, "judges and other court personnel are overwhelmed by the sheer volume of their dockets."[95] As a result, inexorable pressures to increase the number of judges are generated, along with all of the undesirable consequences such an increase entails. Particularly

94. Search of Federal Court Cases: Integrated Data Base, Inter-university Consortium for Political and Social Research, University of Michigan, # 8429 (Aug. 10, 1993) (cases terminated on the merits between July 1, 1991, and June 30, 1992).

95. Biden, *supra* note 21, at 2.

in the courts of appeals, increase in size jeopardizes consistency, diminishes collegiality, and impairs the quality of the justice process.[96]

*The response*

*Increases in the workload of the federal courts are the result of a number of factors, federalization playing only a small and largely localized part.* As previously discussed, federalization's contribution to workload increases, in those courts in which they have occurred, is at best debatable. But workload, in any event, should not be the criterion for determining federal jurisdiction. The federal courts have a significant role to play in society, and the nature of that role necessarily changes from time to time to reflect changing conditions and needs. In their wisdom, the founders charged Congress with the responsibility of creating the inferior courts and, by implication, with fixing their jurisdiction. Thus, it is for Congress to determine from time to time the role of the courts—the purpose they are to serve and how they are to serve it. Although one must guard against letting the federal courts deteriorate through inadvertence or indifference, Congress has the prerogative to change or allow to be changed—even fundamentally—the nature and character of the federal courts. Congress ignores its constitutional charge at its peril, because as the needs and circumstances of society change, the demands made on the federal courts change and the responses must change. Certainly, a society growing in complexity, diversity, and interdependence may demand greater protection of interests in fairness and equality, giving rise to new demands on the federal courts. In making the necessary legislative judgments, Congress may benefit from the judges' experience and expertise, but it cannot let their concerns be controlling.

To the extent workload factors are relevant, one should not overlook that greater involvement of federal courts is certain to provide some relief to state courts. The gross numbers of cases diverted, even though proportionally small, and the ripple effect of federal adjudication may have a significant impact. This is particu-

96. *See generally* Moratorium, *supra* note 80; Chemerinsky & Kramer, *supra* note 12.

larly true in diversity jurisdiction cases; smaller states with disproportionately large numbers of diversity filings could be seriously hurt by the elimination of diversity jurisdiction.[97]

### b. *The federal courts lack the resources necessary to deal with the escalating workloads.*

*The argument*

*Available resources are insufficient to meet the needs of the courts, given the expanding demands on them.* At the same time as the demands on the federal courts are increasing, the resources available to meet their needs are declining. Congress, faced with an intractable deficit, has shown no disposition to exempt the federal courts from a general burden-sharing among federal agencies as funding grows scarce.[98] It makes little sense to pursue a course of federalization at a time when, as a result of resource limitations, many federal courts lack the staff and facilities needed for their existing workloads, and judges in many district courts and courts of appeals are working to capacity.

It is inefficient and wasteful to dilute the federal courts' resources designed for the resolution of cases within their traditional competence by committing them to duplicating state court jurisdiction. It also carries the potential of various harms to the system: demoralizing staff, speeding the deterioration of plant and equipment, and reducing the attractiveness to talented judges of a career on the federal bench. It is also wasteful and inefficient to devote scarce federal prosecutorial resources to crimes the states can prosecute, risking neglect in the enforcement of exclusively federal crimes, such as tax evasion and government procurement fraud.

Some may argue that the movement of cases from state courts to federal courts benefits the former by relieving their equally burdened dockets. On that ground, some state court judges support the continued maintenance of diversity jurisdiction. But the state

97. Victor Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads,* 15 Dayton L. Rev. 405, 416–22 (1990) (indicating that smaller states, such as Nevada, Montana, Louisiana, Mississippi, Oklahoma, Wyoming, Hawaii, and Connecticut, have disproportionately high rates of diversity filings).

98. *See* text accompanying *supra* note 9.

court system, in the aggregate, dwarfs the federal system; about 99% of the litigation in the United States is in the state courts.[99] Realistically, therefore, the amount of judicial business that can be diverted to federal courts, though significant for federal dockets, is proportionately so small that it can make virtually no difference to the state courts.

*The response*

*Resource concerns should not be permitted to confuse the issues respecting federalization.* While there is no question that the courts are feeling the resource pinch along with the rest of the government, Congress has the overall responsibility to determine how the courts' resources are allocated. Decisions about jurisdiction reflect priorities Congress is empowered to set. Those priorities may not conform to notions of federalism held by some, but they will control the allocation of resources.

Similarly, the executive branch must allocate its resources in accordance with its priorities. If those priorities accord federalism relatively low weight, that does not make them less consistent with the national interest.

99. *See supra* note 60.

# Part IV: Resolving the Dilemma of Federalization

## The Search for a Substantive Consensus on the Role of the Federal Courts

Examination of the arguments made on both sides of the debate over federalization does not readily lead to conclusions about how to define the appropriate role of the federal courts. Readers can be expected to find some of those arguments more cogent and persuasive than others; that an argument is advanced by proponents of a position does not necessarily mean that it has factual or legal support. Taken as a whole, however, the arguments seem to offer little ground for optimism that the goal of achieving a "principled allocation of jurisdiction," called for by the Federal Courts Study Committee, among others, is within reach.

As we have shown, federal jurisdiction is the product of legislation, although court decisions may have some effect on its expansion or contraction. When legislation concerns what are generally regarded as the core areas of federal jurisdiction—those areas that the Constitution reserves exclusively for the national government, such as internal revenue, currency, federal property, patents and copyrights, immigration, and national security—it does not implicate federalization. But when legislation extends federal jurisdiction into that much larger area in which the Constitution permits the national government to act but from which it does not exclude the states, federalization becomes a factor that can impact both state and federal courts.

Because federal criminal laws are enforced exclusively in the federal courts, federalization of crimes will tend to increase the business of the federal courts; it might also decrease that of the state courts but only at the margins. Since most civil statutes create concurrent jurisdiction in state and federal courts, federalization through the creation of new civil claims may have different consequences. It may decrease the business of the state courts somewhat by diverting a type of claim to federal court, but it more likely will

increase the business of both federal and state courts by generating new claims in both courts.

Federalization is a process that only begins with the creation of federal jurisdiction; its effect is felt when that jurisdiction is invoked by litigating parties. Legislation creating claims or crimes is not self-executing. Its impact comes largely through litigation decisions and forum choices—by the executive branch in criminal cases, and by private parties in civil cases.[100]

Thus, federalization is a complex process that engages many players and is driven by political, legal, economic, social, and pragmatic factors. It takes place within a jurisdictional framework characterized by a large overlap of state and federal jurisdiction, the absence of a bright line dividing state court and federal court jurisdiction, and a political and historical context that reflects constant shifts of judicial power between the state systems and the federal system.[101] Nothing about that process indicates that consensus on a principled division of jurisdiction is likely to be reached.

Even if such a consensus were attainable for the day, the words of Woodrow Wilson, written in 1911, remind us that it would be transitory at best; the proper balance of state and national power in the American federal system is not a matter that can be settled "by the opinion of any one generation." According to Wilson, changes in social and economic conditions, in the electorate's perception of issues needing to be addressed by government, and in prevailing political values require each successive generation to treat federal–state relationships as "a new question," subject to full and searching reappraisal.[102]

100. It does not follow, for example, from congressional enactment of a new criminal statute that federal investigatory agencies and prosecutors will have the resources to enforce it, at least not without diverting them from other enforcement activities.

101. "Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States." Justice Benjamin Curtis, *Notice of the Death of Chief Justice Taney*, 1864 Proceedings in Circuit Court of the United States for the First Circuit 9, *quoted in* Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 2 (1928).

102. *Quoted in* Harry N. Scheiber, *Federalism, in* The Oxford Companion to The Supreme Court of the United States 278 (Kermit L. Hall ed., 1992). Who

And so it is with the division of business between the state and federal courts; even if a dividing line could be drawn, it would not be static. Definitions of jurisdiction evolve in response to what the public from time to time demands of its courts. Frankfurter and Landis put it well:

> The mechanism of law—what courts are to deal with, which causes and subject to what conditions—cannot be dissociated from the ends that law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. . . . The Judiciary Acts, the needs which urged their enactment, the compromises which they embodied, the consequences which they entailed, the changed conditions which in turn modified them, are the outcome of continuous interaction of traditional, political, social and economic forces. In common with other courts, the federal courts are means for securing justice through law. But in addition and transcending this in importance, the legislation governing the structure and function of the federal judicial system is one means of providing the accommodations necessary to the operation of a federal government. The happy relation of States to Nation—constituting as it does our central political problem—is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined.[103]

Bringing the requisite wisdom to bear on the determination of the scope and limits of federal jurisdiction will be an ongoing challenge. Some would respond to that challenge by looking to "the federal judiciary's historic role as courts of limited jurisdiction whose function it is to decide only those issues that are appropri-

could have foreseen, for example, the massive investment of federal judicial resources in the enforcement of Prohibition, or its brief life; or the enormous amount of federal litigation generated by civil rights legislation after 1964; or the staggering judicial effort called for by the drug explosion? *See* Chemerinsky & Kramer, *supra* note 12, at 76.

103. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court—A Study in the Federal Judicial System,* 38 Harv. L. Rev. 1005, 1006 (1925). To appreciate the historical flux, it is well to recall that only a few years ago much concern was raised by congressional efforts to *curtail* federal jurisdiction over controversial matters, such as school busing and school prayer. *See* Hart & Wechsler, *supra* note 26, at 379–84.

ately federal in nature."[104] But as we have shown, the message of history is ambiguous at best, the "traditional role" of the courts is kaleidoscopic and elusive, and the federal nature of issues is a function of politics more than of logic.[105]

Senator Biden has offered a vision of a "principled" division of jurisdiction in which federal courts hear claims "where the states are unable or unwilling to protect an important federal interest . . . [such as] conduct that is occurring in many jurisdictions, overwhelming the ability of any one state to respond . . . [or] where the gravity of an important federal interest and the pervasiveness of states' inaction together outweigh the burden on the federal system."[106] But this proposal, too, raises questions that need to be addressed. What, for example, constitutes inability or unwillingness of "*the* states"? Under this test, how would Congress deal with interests adequately protected in some states but not in others?

More significantly, what constitutes an "important federal interest"?[107] Senator Biden has identified "[l]arge, complicated multijurisdictional drug trafficking cases [as] belong[ing] in federal court,"[108] and such cases surely involve important federal interests. The difficulty, however, lies not in defining the federal courts' "core" jurisdiction (as some have done[109])—the classes of cases that belong in federal court—but in defining what cases do *not* belong in federal court. For a division of jurisdiction to be functional, it is

104. Report of the Long Range Planning Committee to the Judicial Conference 5 (Sept. 1993) (unpublished manuscript, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts).

105. *See* text accompanying *supra* note 72.

106. Biden, *supra* note 21, at 9. *See also* the American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, *supra* notes 17–18.

107. Judge Henry Friendly raised the question twenty years ago: "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the lovenest were in Port Chester, N.Y.? . . . Why should the federal government be concerned with a $100 robbery from a federally insured savings bank although it is not if someone burned down Macy's?" Friendly, *supra* note 4, at 58 (discussing the 1971 Final Report of the National Commission on Reform of the Federal Criminal Laws, which recommended a set of standards for discretionary restraint in the exercise of concurrent criminal jurisdiction); *see also* note 55 *supra*.

108. Biden, *supra* note 21, at 12.

109. *See, e.g.*, Chemerinsky & Kramer, *supra* notes 12, 63.

not enough that it define the cases on the federal side of the dividing line; it must also define those excluded from federal jurisdiction by the terms of the division. This does not become a matter of simply looking at two sides of one coin. Could one say, for example, that all small, uncomplicated single-jurisdictional drug trafficking cases should be excluded from federal jurisdiction? How would one identify such a case? And would such a definition be functional considering that such a case could down the line lead to the unraveling of a large drug operation?

Judge Richard A. Posner has suggested an essentially retrospective rationale for the allocation of jurisdiction to state and federal courts largely based on the notion of externalities, that is, the out-of-state impact of acts and conduct that may not be adequately dealt with if left to state jurisdiction. Conversely, externalities may also help define the incentives for prosecution; for example, a state has much less incentive to prosecute interstate bank fraud than it does a local bank robbery.[110] But this particular rationale seems to leave the door open to much of the mischief those concerned with federalization complain about, not only because externality is in the beholder's eye, but also because classes of conduct capable of imposing externalities include less egregious instances of such conduct that do not impose them.[111]

Judge Posner also offers a functional rationale for much federal jurisdiction, in particular the enforcement of federally guaranteed civil rights.[112] But the rationale affords no basis for a division of business; while it makes sense to give life-tenured judges responsibility for the protection of the politically powerless, there is no reason for also removing that responsibility from the state courts.

Closely related to the functional rationale is a division premised on efficiency considerations, that is, to let each court system do what it does best. It has been said that federal courts should be left

110. Richard A. Posner, The Federal Courts: Crisis and Reform 175–79 (1985).

111. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (Because Congress has the power under the commerce clause to make loan-sharking a crime, the statute could validly be applied to a transaction having no connection with interstate commerce).

112. Posner, *supra* note 110, at 179–80.

to decide the "important cases": Because "the work of the federal courts is more vital to the nation's welfare than that of the state courts,"[113] the federal courts should not be cluttered with small cases.[114] But making judgments about the relative importance of cases takes one onto slippery ground indeed. Who is to say that a case brought by a prisoner asserting a constitutional claim is less important than, say, litigation arising out of a collapsed savings and loan enterprise? Even if federal courts may be more likely to decide cases of national significance, such cases are not a large part of the docket. In any event, a division based on importance is becoming much less tenable than it might have been in the past. State courts are increasingly adjudicating important constitutional and other civil rights issues, and deciding which courts are better suited—and a more reliable forum—to protect fundamental rights is surely a value-laden matter.[115]

Finally, in the debate there is a strong undercurrent of concern about caseloads and court resources. Certainly the burgeoning of the federal courts' dockets and the shrinking of available resources diminishes their capacity to accept business state courts could handle, although the remedy of unloading cases on other courts, what Professor Tribe has described as "pillow punching," solves a problem in one place only to have it pop out somewhere else.[116] And there is growing concern that as more cases flow into the federal courts, the courts' size may have to be increased, perhaps fundamentally altering their character.[117] While the effects of federal-

113. *Id.* at 181.

114. *See,* for example, Justice Scalia's observations about the "continuing deterioration" of the federal courts from "forums for the 'big case'—major commercial litigation under the diversity jurisdiction, and federal actions under . . . law regulating interstate commerce." Remarks by Justice Antonin Scalia Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents 11 (Feb. 15, 1987) (transcript on file with the Federal Judicial Center).

115. *See* Laurence H. Tribe, *The Relationship Between the Federal and State Courts, in* The Federal Appellate Judiciary in the 21st Century 107, 108–10 (Federal Judicial Center 1989); Chemerinsky & Kramer, *supra* note 12, at 78–80 (discussing the thorny issue of parity between state and federal courts in the decision of cases involving civil rights and individual liberties).

116. Tribe, *supra* note 115, at 115.

117. *See generally* Moratorium, *supra* note 80.

ization on court dockets generally are not readily quantifiable (although they are quite apparent in certain districts), whether considerations of resources and size should control the allocation of business is certainly controversial. One commentator has lamented that "the most common problem with our current jurisdictional structure . . . is that too often we are willing to impose limitations on federal court jurisdiction that have no rationale other than the simple fact that they limit docket size."[118] Others, believing considerations of resources and size go to the heart of the issue of the courts' effectiveness, think that they have been too long neglected.[119]

## An Alternative: Guidelines to Preserve a Limited Role for the Federal Courts

Thus, an ideal definition of the true role of the federal courts remains elusive,[120] and the search for one is likely to end in ad hoc solutions. To be sure, ad hoc, case-by-case solutions have an honorable history; they bespeak the genius of the common law. Looking at such solutions retrospectively, one may be able to identify threads of logic and common sense. But the challenge remains to bring wisdom to bear on decisions concerning the allocation of jurisdiction to state and federal courts as they are made from day to day into the future. The Chief Justice has predicted that "[t]here is, of course, no question that we will retain our federal court system in the third century," quoting Judge Friendly: "'Not even the most violent iconoclast would think it worthwhile to raise' that issue."[121] Still, retaining the federal court system means also preserving those qualities that give the dual system its reason for being. The goal,

118. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1831 (1992).

119. *See* Report of the Federal Courts Study Committee (1990) *passim.*

120. Even Judge Friendly, who predicted in 1972 that if his proposals were enacted, "the district courts and the courts of appeals [would be able] to devote themselves to the great work for which they are uniquely equipped," which he described as including "applying the federal criminal law," offered no specific definition of the federal courts' role. Friendly, *supra* note 4, at 197.

121. William H. Rehnquist, *Introduction* to The Federal Appellate Judiciary in the 21st Century 11, 13 (Federal Judicial Center 1989).

then, may become less a matter of achieving a principled allocation than of realizing the optimum utilization of each system. Keeping in mind, as Professor Wright has said, that "when . . . the delicate balance of a federal system is at stake . . . it is apparent that efficiency cannot be the sole or the controlling consideration,"[122] optimization needs to be balanced with fairness, and the demands of the present accommodated without sacrifice of the long view.

This system of federalism, like the separation of powers, is not merely a construct of political theory. It is an intensely pragmatic idea that works not by command or direction, but through a common law kind of process some might describe as "muddling through." One aspect of that process is that it is cooperative; how ever one may go about "dividing" jurisdiction, it remains a cooperative enterprise. Chief Justice Jay declared in his 1790 charge to a federal grand jury in New York that one of the great challenges in implementing the Constitution is to "provide against discord between national and State jurisdictions, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent, and yet sufficiently combined . . . ."[123]

This process, moreover, is bound to be marked by a certain "complexity and fuzziness," described by Professor David Shapiro as "not only inevitable but even desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments."[124] Any attempt to find certainty is likely to founder on the complexities discussed in this paper: the vast historic and fluctuating overlap of jurisdiction, civil and criminal, between the systems; the need to respond to the unpredictable demands of society; and the pervasive effect of the forum choices of prosecutors and private litigants. The decisions that drive this process are therefore inescapably pragmatic and ad hoc.

122. Wright, *supra* note 35, at 2; *see also* Rehnquist, *supra* note 11.

123. 3 Correspondence and Public Papers of John Jay (1890) 390–91. *See also* Van Alstyne, *The Second Death of Federalism,* 83 Mich. L. Rev. 1709, 1722–24 (1985) (discussing whether judicial review extends to federalism issues).

124. David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 Va. L. Rev. 1839, 1841 (1992).

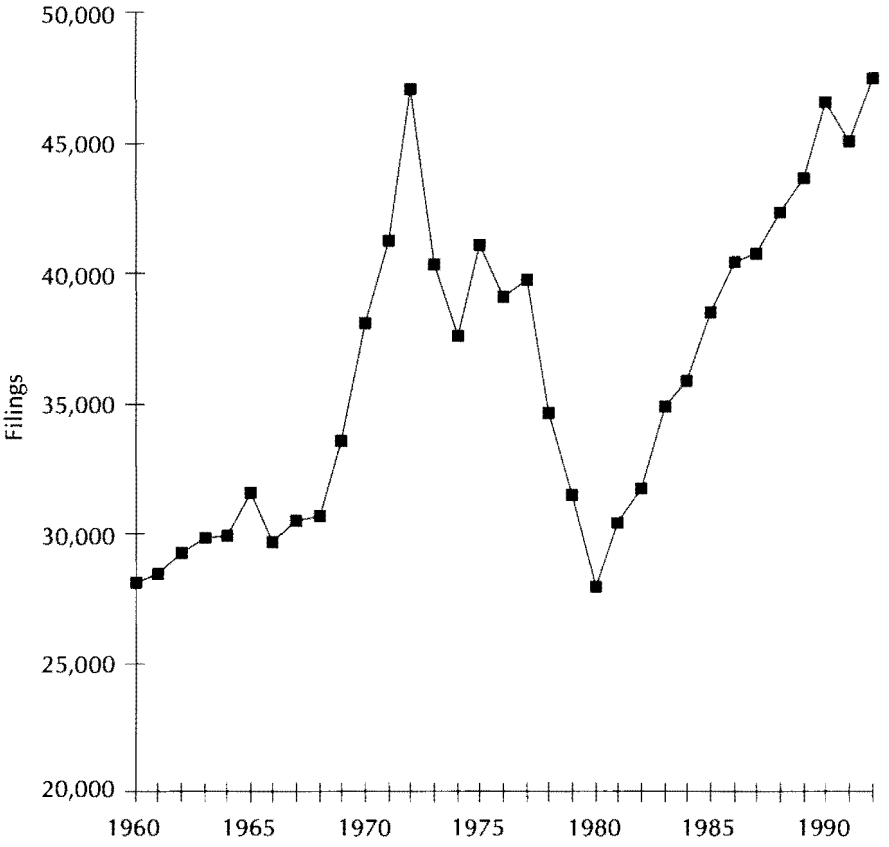
Those decisions are, of course, for Congress and the executive branch. Though courts may from time to time have something to say about the respective powers of the other branches, they do not implement federalism. While Congress is not likely to find much help in what appear to be largely illusory principles or abstractions drawn from the past, federalism interests and concerns remain relevant for the future and can provide guidance to Congress and the executive branch. Those interests and concerns, though they offer no firm and precise answers, suggest a useful set of working presumptions:

- a presumption against expanding federal jurisdiction without a demonstrated need for a national solution, determined after careful examination of the facts;
- a presumption against expanding federal jurisdiction unless less drastic alternatives, such as providing funding or other resources to the states, have been found to be inadequate to meet the need;
- a presumption against expanding federal jurisdiction unless the resources needed to make it effective are provided;
- a presumption against expanding federal jurisdiction beyond the limits of what is essential to meet the identified need, avoiding overbreadth and the risk of unintended consequences;
- a presumption against expanding federal jurisdiction when it would unduly impair the independence of states and hamper their ability to innovate;
- a presumption against permitting legislation that expands federal jurisdiction to operate without oversight and periodic review; and
- a presumption against federal prosecution of state-law crimes unless state prosecution would be demonstrably inadequate and so long as other important federal interests are not unduly impaired.

# Appendix

Figure 1

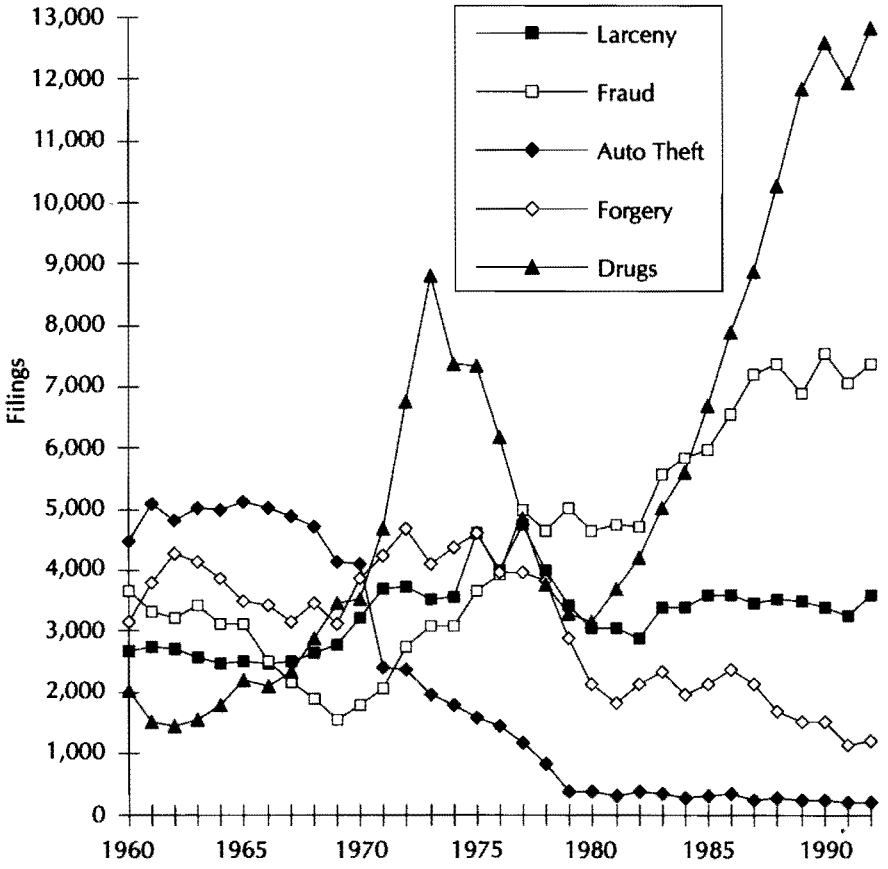
Federal Criminal Cases Commenced, Excluding Transfers, 1960–1992




*Source:* Statistics Division of the Administrative Office of the U.S. Courts.

Figure 2

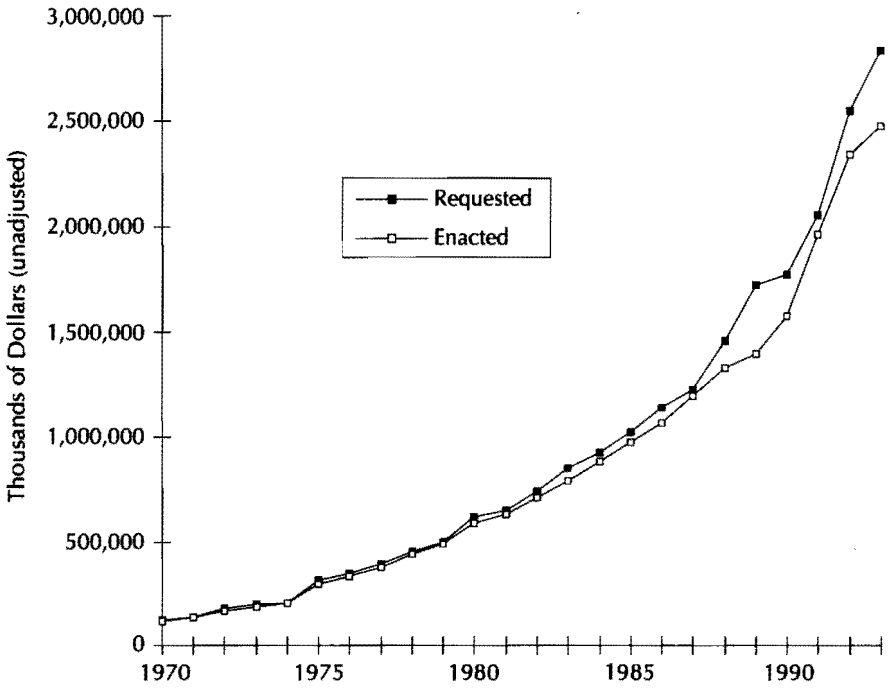
Major Trends in Federal Criminal Cases Commenced, 1960–1992, by Categories




*Source:* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1960–1992, at table D2.

Figure 3

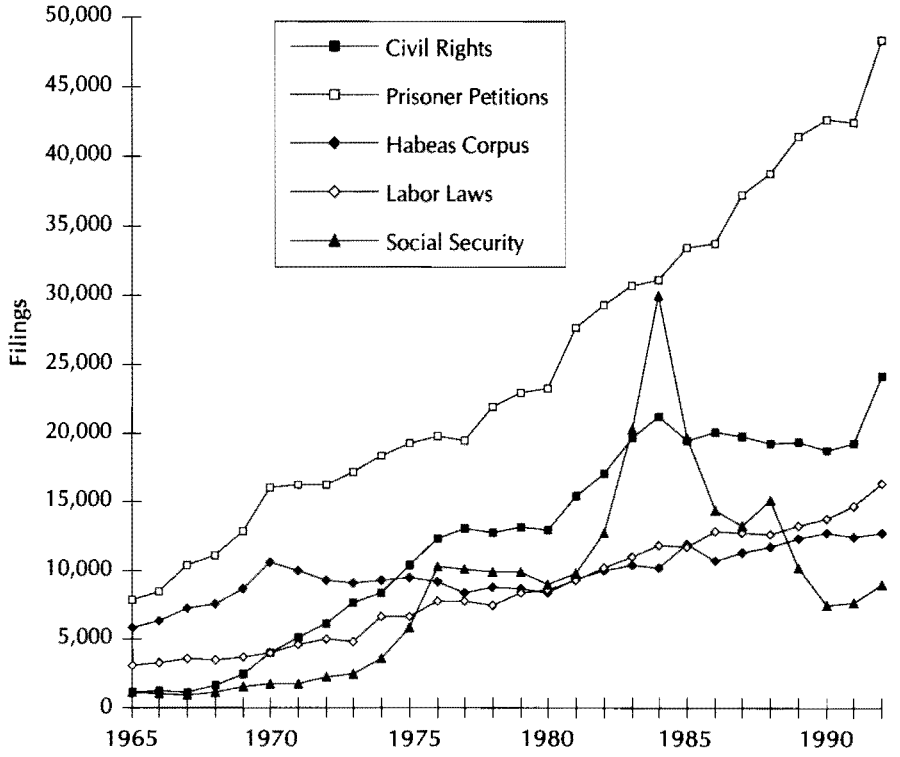
Judiciary Appropriations Requested and Enacted, 1970–1993




*Source:* Congressional Quarterly Almanac, 1969–1992.

Figure 4

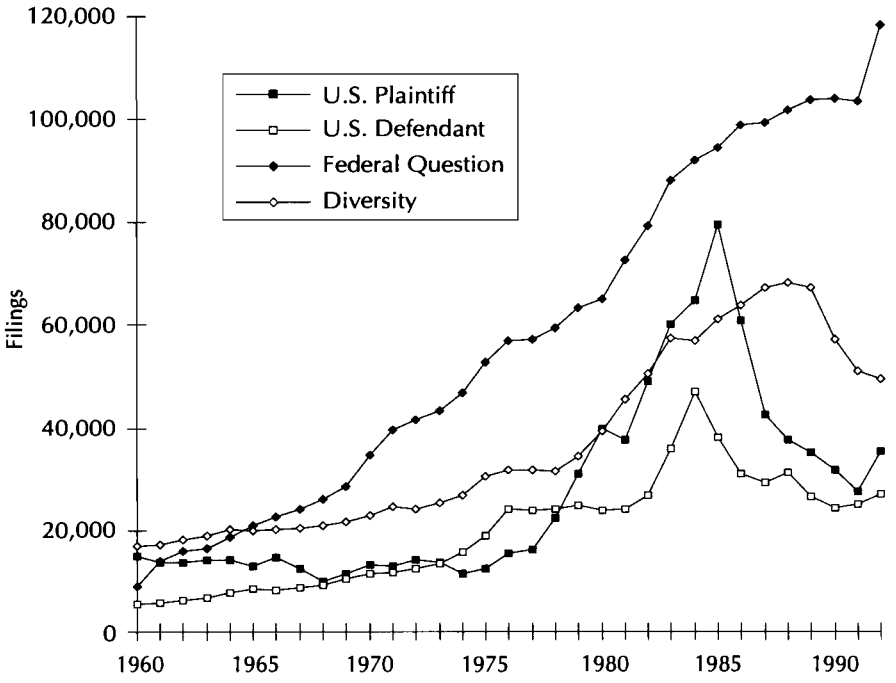
Major Trends in Civil Actions Under Statute, 1965–1992, by Categories




*Source:* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1965–1992, at table C2.

Figure 5

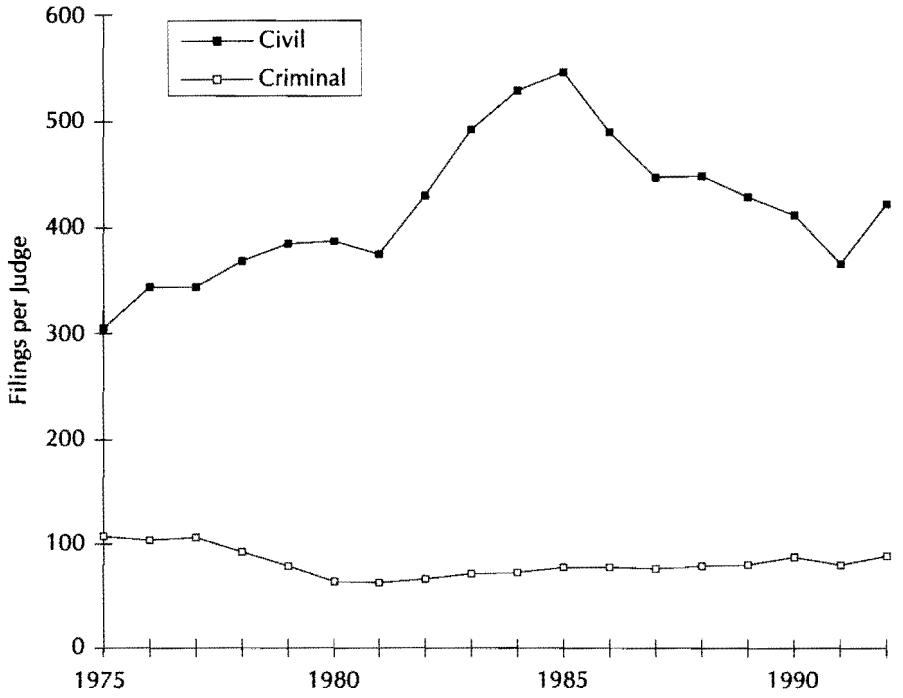
Federal Civil Cases Commenced, 1960–1992, by Categories




*Source:* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1960–1992, at table C2.

Figure 6

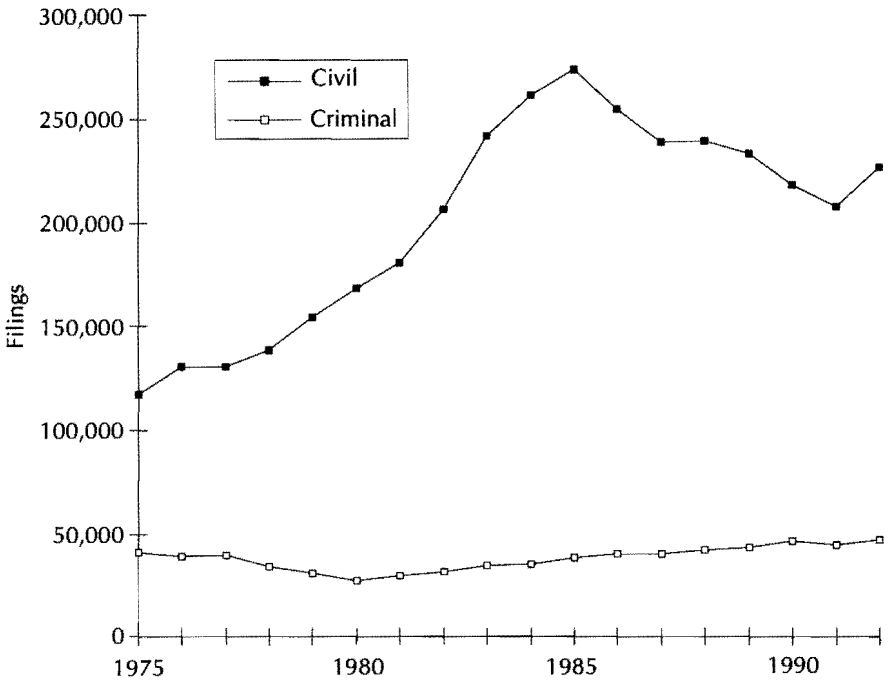
Federal Civil and Criminal Cases Commenced per Judge, 1975–1992




*Source:* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1975–1992.

Figure 7

Federal Civil and Criminal Cases Commenced, 1975–1992




*Source:* Administrative Office of the U.S. Courts, Annual Reports of the Director, 1975–1992, at tables C2, D2.

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