STATE CASES BELONG IN STATE COURTS

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BARBARA ISAACMAN**

INTRODUCTION***

During recent years members of the legal community have become increasingly concerned about the spiraling caseload of the federal courts. A perusal of the most recent available statistics demonstrates that this concern is justified. In the 1976 fiscal year 130,597 cases were filed in the 94 federal district courts, representing an 11.3% increase over filings in 1975 and an increase of 120% over cases filed in 1960.1 The courts of appeals saw a similar mushrooming of activity. A record 18,408 new cases were docked in 1976 which represents a 10.5% increase over fiscal year 1975.2 Moreover, although the number of filings and terminations doubled between 1968 and 1976, the number of authorized judgeships for the courts of appeals remained constant at 97.3

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*** Since the preparation of this article, Congress has passed H.R. 7843, signed on October 20, 1978 as Public Law 95-486, which increases the number of federal district judgeships by 117 to a total of 516 and federal circuit judgeships by 35 to 132. While changing some of the statistics quoted below, this much needed legislation does not dispel the concerns leading us to advocate here the elimination of federal diversity jurisdiction. Simply, the federal caseload consistently grows faster than the willingness of Congress to create additional judgeships. New federal judges are needed just to handle the predictable increase of cases in subject areas by nature not assignable to the states. Nor does the passage of this legislation make the elimination of federal diversity jurisdiction an academic question—the last House of Representatives passed a diversity jurisdiction bill in full knowledge of the upcoming increases in federal judgeships, and it can be assumed that legislation eliminating or curtailing diversity jurisdiction will be considered by the next Congress.
2. Id. at 152.
3. Id. In 1962 there were 78 authorized appeals court judgeships. The number was increased to 97 in 1968 and has remained at that figure since then. The judicial
Despite major efforts by the federal courts to streamline their activities and become more efficient,\textsuperscript{4} every year they find themselves further and further behind in clearing their dockets.\textsuperscript{5} In caseload of the appeal court between 1962 and 1976, however, has more than kept pace with the increased number of judgeships. While the number of judgeships rose by only 24.4\% between 1962 and 1976, the number of cases filed and terminated increased by 281.7\% and 294.2\% respectively during this period. \textit{Id.} at 153. These figures demonstrate the complete failure of Congress to comprehend and deal adequately with the dilemma facing the federal courts.

\textsuperscript{4} Between 1970 and 1976, for example, the district courts increased their termination rate by 40\% from 201 cases per authorized judgeship in 1970 to 276 cases per authorized judgeship in 1976. \textit{Id.} at 152-53. Only the Second Circuit, however, closed more cases than were filed. \textit{Id.} at 157.

\textsuperscript{5} This problem is graphically depicted in the following chart showing the increasing backlog of the federal district courts:

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Authorized judgeships</th>
<th>Civil Cases per authorized judgeship</th>
<th>Pending on June 30</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>183</td>
<td>190</td>
<td>204</td>
</tr>
<tr>
<td>1950</td>
<td>218</td>
<td>286</td>
<td>244</td>
</tr>
<tr>
<td>1960</td>
<td>245</td>
<td>242</td>
<td>252</td>
</tr>
<tr>
<td>1970</td>
<td>401</td>
<td>218</td>
<td>201</td>
</tr>
<tr>
<td>1974</td>
<td>400</td>
<td>250</td>
<td>244</td>
</tr>
<tr>
<td>1975</td>
<td>400</td>
<td>293</td>
<td>262</td>
</tr>
<tr>
<td>1976</td>
<td>399</td>
<td>327</td>
<td>276</td>
</tr>
</tbody>
</table>

\textit{United States Courts 1976, supra} note 1, at 171. The courts of appeals face a similar problem.

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Number of judgeships as of June 30</th>
<th>Filed</th>
<th>Terminated</th>
<th>Pending</th>
<th>Increase in appeals pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>78</td>
<td>4,823</td>
<td>4,167</td>
<td>3,031</td>
<td>616</td>
</tr>
<tr>
<td>1963</td>
<td>78</td>
<td>5,437</td>
<td>5,011</td>
<td>3,457</td>
<td>426</td>
</tr>
<tr>
<td>1964</td>
<td>78</td>
<td>6,023</td>
<td>5,700</td>
<td>3,780</td>
<td>323</td>
</tr>
<tr>
<td>1965</td>
<td>78</td>
<td>6,766</td>
<td>5,771</td>
<td>4,775</td>
<td>995</td>
</tr>
<tr>
<td>1966</td>
<td>88</td>
<td>7,183</td>
<td>6,571</td>
<td>5,387</td>
<td>612</td>
</tr>
<tr>
<td>1967</td>
<td>88</td>
<td>7,903</td>
<td>7,527</td>
<td>5,763</td>
<td>376</td>
</tr>
<tr>
<td>1968</td>
<td>97</td>
<td>9,116</td>
<td>8,264</td>
<td>6,615</td>
<td>852</td>
</tr>
<tr>
<td>1969</td>
<td>97</td>
<td>10,248</td>
<td>9,014</td>
<td>7,849</td>
<td>1,234</td>
</tr>
<tr>
<td>1970</td>
<td>97</td>
<td>11,662</td>
<td>10,699</td>
<td>8,812</td>
<td>963</td>
</tr>
<tr>
<td>1971</td>
<td>97</td>
<td>12,788</td>
<td>12,368</td>
<td>9,232</td>
<td>420</td>
</tr>
<tr>
<td>1972</td>
<td>97</td>
<td>14,535</td>
<td>13,828</td>
<td>9,939</td>
<td>707</td>
</tr>
<tr>
<td>1973</td>
<td>97</td>
<td>15,629</td>
<td>15,112</td>
<td>10,456</td>
<td>517</td>
</tr>
<tr>
<td>1974</td>
<td>97</td>
<td>16,436</td>
<td>15,422</td>
<td>11,470</td>
<td>1,014</td>
</tr>
<tr>
<td>1975</td>
<td>97</td>
<td>16,658</td>
<td>16,000</td>
<td>12,126</td>
<td>658</td>
</tr>
<tr>
<td>1976</td>
<td>97</td>
<td>18,408</td>
<td>16,426</td>
<td>14,110</td>
<td>1,982</td>
</tr>
</tbody>
</table>
1976, 327 civil cases were filed for each of the 399 authorized district court judgeships, which represents a 50% increase over 1970, the year in which the number of judgeships was last raised. And although the judges were able to increase their terminations by about 40% in this seven year period, the ever increasing number of cases filed meant that the pending caseload at the close of each year also rose. At the end of 1976 there were pending 351 civil cases per authorized judgeship, a rise of more than 50% over the pending caseload per judgeship in 1970. Similar gloomy results must be reported for the courts of appeals. In 1968, the last time the number of judgeships was increased, there were 6,615 cases pending; in 1976 there were 14,110 pending cases, an increase of 113.3% with no increase in the number of appellate judgeships.

Many reasons have been advanced for this tremendous increase in litigation, some of which help to explain increased utilization of state courts as well as federal ones. The most fundamental factor seems to be the growth of population in the United States; the existence of more persons in the same amount of physical space is bound to create more conflicts, some of which end up in court. Thus, increases in personal mobility, in automobile ownership and use, in economic activities, and in the urban

<table>
<thead>
<tr>
<th>Percent change</th>
<th>1976 over</th>
</tr>
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<tbody>
<tr>
<td>1962...</td>
<td>281.7</td>
</tr>
<tr>
<td>1968...</td>
<td>101.9</td>
</tr>
<tr>
<td>1975...</td>
<td>10.5</td>
</tr>
</tbody>
</table>

Id. at 153.
6. It should be noted, however, that all the authorized judgeships are not filled because of the time it takes to find and confirm replacements. Thus, although there were 399 authorized district court judgeships, only 375 were filled on June 30, 1976. At the appeals court level only 94 of the 97 authorized positions were taken. Id. at 76.

7. One must also remember that the size of the pending caseload is a function not only of the number of filings but also of the complexity of the issues presented. The more complex the subject matter, the longer it takes to terminate the case. Thus, for example, although only 499 cases were filed under the National Environmental Protection Act, 42 U.S.C. §§ 4321-4347 (1970), in 1976, they are so complex that they consume a tremendous amount of judicial time. See Judd, The Expanding Jurisdiction of the Federal Courts, 60 A.B.A.J. 938 (1974); United States Courts 1976, supra note 1, at 129.
9. Id. at 76.
10. The caseload of state courts has also risen dramatically. Chief Justice Robert J. Sheran reported in his 1978 State of the Judiciary address that 14% more matters were filed with the Minnesota Supreme Court in 1977 than 1976.
crime rate all help to raise the caseloads of the nation's courts, both state and federal.¹¹ This pattern has been aided by the increased affluence of many of our citizens which permits more people the luxury of litigation.¹² And for poor citizens the development of legal assistance for indigent criminal defendants as well as civil legal aid programs has permitted poor persons for the first time to litigate problems of concern to them.¹³ Finally, expanding constitutional concepts, such as equal protection and due process, have caused people to turn more and more to the courts for relief against perceived oppressions at the hands of both their government and private citizens.¹⁴

Aside from these general reasons for the increase in litigation, there are some specific causes of the soaring caseload in the federal courts. The most important of these factors is the creation by Congress of new federal statutory rights, primarily during the last decade, which can be vindicated in the federal courts.¹⁵ The sub-

¹⁴. Id. at 79.

Each year the Administrative Office of the United States Courts prepares an “Impact Study of Major Statutes and Events on Criminal and Civil Caseload in the U. S. District Courts” that delineates the ways in which congressional activity affects the caseload of the federal courts. See, e.g., United States Courts 1976, supra note 1, at 119-48. The following chart presents the problem graphically:
stantive\(^{16}\) and procedural\(^{17}\) rulings of the federal courts, especially

**CHART 1**

Civil Cases Filed in the U.S. District Courts
Fiscal Years 1960-1976

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Source: Administrative Office of the United States Courts

*Id.* at 120.

Mr. Chief Justice Warren E. Burger has suggested that this kind of behavior by Congress is irresponsible and has called for an impact before any legislation is passed that will affect the caseload of the federal court. Burger, *1977 Report to the American Bar Association*, 63 A.B.A.J. 504, 505 (1977).

16. The major substantive changes include:

1. an increased role by the federal courts in the supervision of state criminal justice administration resulting both from the selective incorporation of the Bill of Rights into the due process clause of the Fourteenth Amendment and from the habeas corpus decisions from *Fay v. Noia*;

2. the utilization of the equal protection clause in school desegregation, reapportionment, discrimination on the basis of age, sex, economic status;
the Supreme Court, which have created new causes of action and liberalized access to the courts have also attracted much new litigation. Together, they have created the illusion that if a problem exists that cannot be remedied elsewhere, the federal courts will be able to fashion a solution.\(^\text{18}\)

The problem of the spiraling federal caseload takes on added significance when one realizes that the trends and circumstances that produced more than a doubling of the federal caseload in the last sixteen years are likely to persist\(^\text{19}\) and maybe even accelerate unless drastic action is taken. For example, federal question cases accounted for the greatest portion of the increase in the federal caseload during this period,\(^\text{20}\) and there is no indication that the number of cases in this category will not continue to increase in the future. Federal question cases now account for 53.9\% of the total number of civil cases filed in the district courts (see Chart #1), and it is likely that filings in this area will continue to increase even if Congress passed no other statutes dealing with these or similar federal rights, an outcome that is extremely unlikely. Although antitrust litigation\(^\text{21}\) accounts for only 1.2\% of the total civil filings, it is the most time-consuming category of cases,\(^\text{22}\)


17. Among the important procedural changes are:

1. the liberalization of the standing requirement;
2. the contraction of the political question category;
3. the permission of private parties to get review of administrative action;
4. the growth of class action suits following the revision of the Federal Rules of Civil Procedure in 1966.

18. The "Burger Court" has reiterated in numerous decisions that there are some problems for which no solution exists. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975) ("We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues * * *"). This position is at variance with that taken by the "Warren Court" which went to lengths to extend the authority of the federal courts.

19. By emphasizing such concepts as standing, justiciability, equitable jurisdiction remedies, case and controversy, and comity and by narrowing the circumstances under which class actions are appropriate, the Supreme Court has curtailed federal jurisdiction. See notes 53-70 infra and accompanying text.

CIVIL CASES COMMENCED
United States District Courts
Fiscal Year 1976

TOTAL CIVIL CASES: 130,597

STATUTORY ACTIONS—70,372 (53.9%)—
TORTS—25,736 (19.8%)

STATE PRISONER PETITIONS—11.5%
FEDERAL PRISONER PETITIONS—3.7%
CIVIL RIGHTS—9.4%
LABOR LAWS—5.9%
N.A.R.A.*—0.1%
FORFEITURES & PENALTIES—2.0%
SOCIAL SECURITY—7.9%
ANTI-TRUST—1.2%
TAX SUITS—1.4%
COPYRIGHT, PATENT AND TRADEMARK—2.0%
OTHER STATUTORY—8.7%

MOTOR VEHICLE—4.6%
MARINE—4.0%
OTHER PERSONAL INJURY—7.6%
PERSONAL PROPERTY—3.5%

CONTRACT 23,998 (18.4%)
REAL PROPERTY 8,475 (6.5%)
ALL OTHER 2,016 (1.5%)

* Narcotic Addict Rehabilitation Act of 1966, Title III.
** Of these, 31,675, or 63.7%, were based on diversity of citizenship.

thus adding greatly to the over-all burden on the federal courts. Moreover, because it is part of our ethos that competition serves the public interest and should be stimulated by the federal government and by private attorneys-general, such litigation is likely to increase rather than decrease. Similar considerations apply to the
environmental cases now reaching the federal courts in increasing numbers.

Civil rights cases, which represented almost 10% of all civil filings in 1976, is another area of federal question litigation that is likely to increase in the future. Since the establishment of the Equal Employment Opportunities Commission in 1972, there has been a sharp increase in equal employment cases which now comprise nearly 43% of all civil rights suits filed. With the recent shift from race to sex discrimination cases, it is likely that this trend of increased filings will continue. Social security cases, another employment-related area, have also risen in numbers. In 1976, they also accounted for almost 10% of the civil caseload, an increase of 77% above the number filed in 1975 and 189 percent above such filings in 1974. The major cause of this increase was the burgeoning number of "black lung" cases which represented 47% of all social security cases filed in 1976. Since the federal government is only now beginning to deal with the "black lung" problem, litigation in this area should also continue to rise. Finally, the courts have seen a massive increase in prisoner petitions from both state and federal prisoners. Although they only rose by 2.6% in the last fiscal year, they represent 15% of the total civil caseload. Prisoner petitioners increased by 810% since 1960, and they are unlikely to disappear until massive changes are made in the administration of criminal justice in this country.

The increasing vigilence of private citizens in enforcing the rights protected under the Bill of Rights and federal statutory law

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24. In his report the Director anticipated an increase in enforcement of such environmental suits with the abatement of the recession. United States Courts 1976, supra note 1, at 129 (Ease with which such environmental suits can be brought; liberal interpretation by the courts of standing.).


27. Id. at 127.


30. Between 1960 and 1976 the number of petitions by those incarcerated in state institutions soared by 1,624%. Most of these were habeas corpus petitions. During the same period the petitions of federal prisoners rose by 266%. United States Courts 1976, supra note 1, at 133.

31. They do not, however, consume 15 percent of the time of the district court judges because most of them are dismissed immediately as frivolous complaints.

32. United States Courts 1976, supra note 1, at 133.

33. Although recent decisions make it harder for prisoners to prevail, see note 58 infra, they do not seem to have stemmed the tide of such petitions.
is a positive development that must not be hampered. Nevertheless, unless we are able to provide a relatively speedy forum for the vindication of those rights, alternative methods of dispute resolution may be sought which are less compatible with our legal tradition. For these reasons, drastic steps must be taken to free the courts of cases that either do not belong there or can be better resolved in some other fashion; only then will we be able to ensure that the courts remain available to decide the cases that need to be litigated there.

ALTERNATIVE MEANS FOR IMPROVING THE FLOW OF CASES IN THE FEDERAL COURTS

INCREASE SIZE OF FEDERAL JUDICIARY

The most logical solution to the problem of the overworked federal courts would be to simply increase the number of federal judges until the federal judiciary reached a size capable of handling the work coming into the courts. Legislation is currently making its way through Congress which will partly solve the problem, but even when it is enacted, this legislation will not provide a sufficient number of additional judges to enable the federal courts to deal with their present and projected caseload problems.

For some reason Congress has historically been unsympathetic to the plight of the federal courts. Additional judgeships have been slow in coming, and the increases finally authorized have been minimal in light of the problems existing at the time each legislative increase has been passed. By the time new judgeships are authorized and filled, the caseload has already become

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34. The two possibilities that come to mind are self-help and the imposition of a more authoritarian political system, neither of which is an acceptable alternative.

35. This position of course reflects the value judgment of the authors that the protection of the individual from overreaching by the government is one of the major functions of the courts, both state and federal. Accord, C. McGowan, supra note 12, Johnson, The Role of the Judiciary with Respect to the Other Branches of Government, 11 Ga. L. Rev. 455 (1977) [hereinafter cited as The Role of the Judiciary]; Johnson, Observation: The Constitution and the Federal District Judge, 54 Tex. L. Rev. 903 (1976) [hereinafter cited as The Constitution and the Federal District Judge].

36. H.R. 7843, which would increase the size of the federal judiciary by 140 judges passed the House of Representatives on February 7, 1978. This bill is slightly different from the Senate version which also mandated division of the Fifth Circuit Court of Appeals into two circuits. The bill has gotten bogged down in conference, and it is not clear how it will actually look upon final enactment. Two of the major areas of controversy appear to be the reorganization of some of the circuits and the merit selection of district court judges. For a brief discussion of some of the problems involved see State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 309-10, 323-26 (1977).
unmanageable even with the additional judges that have then become available.

The usual reason given for maintaining the relatively small size of the federal judiciary is that any massive increase in its size would require the recruitment of more mediocre persons which, in turn, would dilute the high prestige in which the federal judiciary is held. This argument was first espoused by Felix Frankfurter in 1928 as part of his thesis that there was a need to limit the jurisdiction of the federal courts.\(^\text{37}\)

A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions \(* * *\). It is idle to ratio the number of judges to changes in the wealth or population of the country. Subtle considerations of psychology and prestige play havoc with the mechanical notion that increase in the business of the federal courts can be met by increasing the number of judges.\(^\text{38}\)

Although this position has been accepted uncritically by legal commentators,\(^\text{39}\) it does not ineluctably follow that size alone determines quality. In fact, in 1928 Frankfurter bemoaned the fact that the number of federal judges had by that date increased to 170, up from 115 in 1907 and 66 in 1884.\(^\text{40}\) Yet, those who accept his argument in the 1970's are talking about 496 federal judges,\(^\text{41}\) a number which, by Frankfurter's standards, would likely include some mediocre members of the bar. Frankfurter's present-day counterparts, however, are afraid that if the number were to get beyond 496, the quality of federal judges would be bound to suffer and their prestige to drop drastically causing all Americans to lose confidence in the federal judiciary.

Moreover, if one were to accept Frankfurter's argument, then state judges, by the mere fact of their greater numbers, are bound to be inferior to their federal counterparts. If some state judges do in fact suffer by comparison, we contend that the reasons lie in the

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\(^{38}\) Id. at 515-16.


\(^{40}\) Frankfurter, *supra* note 37, at 515-16.

\(^{41}\) United States Courts 1976, *supra* note 1, at 76.
methods of recruitment, compensation, and their differential degrees of independence from the other branches of government.\(^4\)

Congress' reluctance to increase the size of the federal judiciary probably stems more from its fear that the process would be irreversible. Once more judgeships are created, their holders get appointed to lifetime tenure, and it would be impossible to cut back the size of the judiciary at a later time, even if the caseload decreased sufficiently to warrant it. Thus, Congress prefers to move slowly and overly cautiously.

Another related reason for congressional delay in legislating more federal judges is the very political nature of the judicial appointment process. When Congress approves new judgeships, the political party in power gains an enormous political advantage by controlling the selection procedures. Since both federal district court and appellate judges have, in the past, been chosen overwhelmingly from the political party of the United States President,\(^4\) it may be that the Republicans in the Congress would prefer to stave off any massive infusion of judges until there is a Republican in the White House.\(^4\) Similarly, controversies over exactly which states will receive additional judgeships may operate to force those whose states are not among the chosen to vote against such a proposal even if they belong to the same political

\(^{42}\) See notes 216-227, 299-302 and accompanying text infra.


Goldman notes that between 1920 and 1972 over 90% of the appointments to the federal appeals courts were affiliated with the political party of the appointing President. Goldman, 1974 Ariz. St. L.J. at 218; Goldman, 1967 Wis. L. Rev. at 196 & n.32.

\(^{44}\) Merit selection of the federal judiciary may avoid this problem to a certain extent. President Carter has spoken out in favor of merit selection, and, by Executive Order, he has imposed a system of merit selection of appellate court judges. Exec. Order No. 11972, 42 Fed. Reg. 9659 (1977), as amended by Exec. Order No. 11993, 42 Fed. Reg. 27197 (1977). It should be noted, however, that this is just an experiment and that the Executive Order expires on December 31, 1978. Exec. Order No. 11972, sec. 8. Another shortcoming of Carter's approach is that he gets to choose the Commission that recommends five persons for the particular vacancy involved. Exec. Order No. 11993, sec. 3(a)(4). This means that the political pressures for appointing a member of the President's political party may still remain.

Because of the greater possibility of political patronage, merit selection of district court judges does not yet exist. While the Justice Department is in favor of such procedures at the district court level as well, much political opposition exists in Congress. Some members of Congress use their own form of merit selection by appointing selection committees to cover the various districts within their constituencies. See, 123 Cong. Rec. S17123 (daily ed. Oct. 13, 1977). This, of course, does not necessarily remove the political element from the appointment process.
party as the President.\textsuperscript{45}

For all of these reasons, therefore, it is highly unlikely that Congress will, in fact, increase the size of the federal judiciary sufficiently for it to handle effectively its projected, much less its current, caseload. Although it is still necessary to work to achieve such an outcome, we must also focus our attention on other proposals to ease the caseload of federal judges at all levels.

**DIVERSION OF CASES TO NON-JUDICIAL FORUMS**

Another possible way to relieve the federal courts of some of their caseload would be to employ nonjudicial techniques of dispute resolution on a wider scale. Although the courts were originally hostile to this concept, and refused to enforce arbitration clauses in contracts on the ground that it impermissibly deprived them of their proper jurisdiction and thus was against public policy,\textsuperscript{46} compulsory arbitration has become an accepted alternative to litigation in large numbers of situations.\textsuperscript{47} Mediation and con-

\textsuperscript{45} Such controversies can be seen in the history of the most recent legislation to wind its way through Congress.


One commentator argues that arbitration might not retain its advantages of privacy, speed and informality when it is utilized in other than a contractual context. McCree, *Address to 1977 Law Alumni Reunion Banquet, Georgetown University Law Center*, reprinted in *State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 95th Cong., 1st Sess.* 789 (1977). He is also concerned that arbitration proposals single out relatively small claims—the very areas affecting the powerless and poor that Congress thought were sufficiently important to exempt from the jurisdictional amount requirement of 28 U.S.C. § 1331. \textit{id.} at 5. A similar argument was made by Thomas Ehrlich, President of the Legal Services Corporation,

\textit{In the cause of easing the congestion in the Federal courts, we must not allow the perception, let alone the reality of secondclass or cheap justice for the poor. The poor have long sought effective access to the federal system of justice in general, and to the Federal courts in particular. We must not relegate their cases and their problems to institutions and tribunals that appear to be set up only for them and that other participants, the wealthy and the Government, are able to avoid. State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 49 (1977) (statement of Thomas Ehrlich).}

Another way to lighten the workload of the federal district court judges is through the increased use of federal magistrates. The Federal Magistrates Act, 28 U.S.C. §§ 631-639 (Supp. 1978) was passed in 1968 to assist federal district court judges in this regard. Under 28 U.S.C. § 636(B)(1), \textit{as amended} by Pub. L. No. 94-577 (1976), a magistrate can be designated to hear any pretrial matter pending before the court and he can conduct hearings, take evidence and make recommendations regarding post-trial relief and habeas corpus petitions. During 1976 the
conciliation are other nonjudicial methods of dispute resolution that have increased in popularity in recent years, and Congress should encourage their utilization whenever possible.

The advantages of these nonjudicial alternatives to litigation stem from the greater flexibility which they permit, the speed with which they operate, and the substantial savings in costs which flow from their utilization. Nevertheless, because of the belief that judges are generally the most competent decisionmakers, it is unlikely that these advantages of nonjudicial resolution will, without added incentives, result in the voluntary removal of large numbers of cases from the courts. Congress can assist in this regard by requiring potential parties to a lawsuit to employ one of these nonjudicial methods as either an alternative or a prerequisite to utilization of the federal courts.

Closely analogous to the utilization of nonjudicial forms of dispute resolution is the requirement that parties exhaust their administrative remedies before they are permitted access to the courts. It is hoped that the utilization of administrative mechanisms will resolve the problem to the satisfaction of the complaining party, making judicial intervention unnecessary. The exhaustion rationale also assumes that once legitimate complaints are brought to the attention of the agency, it will move to correct the causes of the problems on its own initiative. To the extent

magistrates reviewed 1,480 social security cases and 8,231 prisoner petitions. United States Courts 1976, supra note 1, at I-76, 8.

48. The federal government has long had a policy favoring mediation and conciliation in labor disputes. The Federal Mediation and Conciliation Service was established in 1947 as part of the National Labor Relations Act to arbitrate labor disputes. 29 U.S.C. § 172 (1970). Other specific policies of conciliation exist in various federal statutes. Thus, under the Age Discrimination in Employment Act, before the Secretary of Labor can bring a suit on behalf of a litigant, he must attempt conciliation with the employer. 29 U.S.C. § 626(b) (1976). The Commissioner of the Equal Employment Opportunities Commission has a similar duty. 42 U.S.C. § 600e-4(g)(4) (Supp. 1972). Finally, the Secretary of Housing and Urban Development is given the power to engage in conciliatory activities that further the provisions of the Fair Housing Act. 42 U.S.C. § 609 (1970). Obviously, all these activities keep some cases from ever reaching the federal courts.

49. Although the exhaustion procedures are judicial in character, they have been analogized to nonjudicial decisionmaking because they do not involve judicial officers. The hearing examiners before whom disputed cases are heard are federal civil service workers employed by the various administrative agencies. Their activities are governed by the provisions of the Administrative Procedure Act. See Administrative Procedure Act § 11, 5 U.S.C. §§ 3305, 3105, 3344, 5362, 7521 (1970).

50. This requirement is imposed by statute as well as by judicial decision. Recently, the Supreme Court has intimated that exhaustion of administrative remedies might be required before a suit under section 1983 can be commenced. See Ingraham v. Wright, 430 U.S. 651 (1977). See also Paul V. Davis, 424 U.S. 693 (1976); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1233 (1977).

51. Opponents of the exhaustion requirement find it time consuming and expensive, especially since the assumptions behind the rationale are often incorrect.
that this assumption reflects reality, the expansion of exhaustion requirements should relieve the courts of some of the cases seeking review of agency decisions.

Even if all of the assumptions regarding the efficacy of these nonjudicial forms of dispute resolution prove correct, however, their added utilization will probably not have a noticeable impact on the federal caseload. They can serve only as a supplement to, not as an alternative for, other action of a more drastic nature.

**Supreme Court Congruction of the Federal Caseload Through the Case-by-case Decisionmaking Process**

In the face of congressional failure to take meaningful steps to relieve the congestion in the federal courts, the United States Supreme Court has made some changes of its own whose effect will be a decrease in federal litigation. Perhaps in response to the charges of persons like Judge Friendly that previous decisions of the Supreme Court have done much to overburden the federal courts by permitting new causes of action and relaxing procedural hurdles, the Supreme Court in its recent decisions has attempted to decrease litigants' utilization of the federal courts.

Since many agencies are committed to their procedures, exhaustion simply draws out the time and energy which must be expended before meaningful relief is possible. Some of these problems are eloquently discussed by Judge Johnson, Chief Judge of the United States District Court for the Middle District of Alabama, in the context of prison reform and the conditions of confinement of the mentally retarded. Johnson, *Observation: The Constitution and the Federal District Judge*, supra note 35; Johnson, *The Role of the Judiciary*, supra note 35. But see United States Courts 1976, supra note 1, at 187 (federal habeas corpus petitions declined by 15.5 percent probably in response to the initiation of a new procedure in the federal prisons to handle complaints internally).


In an attempt to get around these restrictive holdings and ensure that litigants receive the protections they desire, some commentators have urged that state supreme courts take a more activist role in interpreting their state constitutions. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Ziegler, *Constitutional Rights of the Accused—Developing
stressing the requirements of standing, justiciability, case and controversy, and comity by making it more difficult to win habeas corpus and section 1983 actions; and by emphasizing "federalism," the Supreme Court has narrowed access to federal


55. By reviving principles of comity and federalism, especially when the result is to force the dismissal of a lawsuit originally filed in the federal courts, the Supreme Court is saying, in effect, that these are not justiciable issues in the federal courts. See note 57 infra.

56. Theelimination of implied causes of action arising out of violations of administrative and criminal laws is a form of restricting the case or controversy requirement as a precondition to federal jurisdiction over the issue. This seems to be what the Supreme Court has done in such cases as National RR Passenger Corp. v. National Ass'n of RR Passengers, 414 U.S. 453 (1974); Securities Investor Protection Corp. v. Barbour, 421 U.S. 413 (1975); Cort v. Ash, 422 U.S. 66 (1975).

57. InYounger v. Harris, 401 U.S. 37, 44 (1971), the Court defined comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." This concept, which involves the expansion of principles of exhaustion and abstention, has been applied in such later cases as Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Judice v. Vail, 430 U.S. 327 (1977). See Neuborne, Procedural Assault, supra note 53, at 556-66; Society of American Law Teachers, supra note 53, at 712-18; Comment, Equitable Restraint, supra note 53, Comment, Restriction of Access to Federal Courts, supra note 53. Comity can involve either putting off a federal court's jurisdiction until the state courts get a chance to construe the constitutionality of the challenged action, see, e.g., Bellotti v. Baird, 428 U.S. 132 (1976), or the requiring the entire dismissal of the federal court action, see, e.g., Gibson v. Berryhill, 411 U.S. 564, 577 (1973). See Developments in the Law, supra note 50, at 1136.


60. See text accompanying notes 67-68 infra. See also Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years
courthouses for many would-be litigants. It is doubtful, however, whether these developments are the most efficacious way in which to deal with the problem of federal court congestion because some of those who are unable to use the federal courts are the very persons who most need protection and whose complaints may not be sympathetically received in many state court-

past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Rizzo v. Goode, 423 U.S. 362, 372-73 (1976) ("[P]rinciples of federalism which play such an important part in governing the relationship between federal courts and state governments... likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments... ").

61. This pattern of limiting access to the federal courts has been pervasive, according to the Society of American Law Teachers. Although the pattern is not uniform, it is clear enough; the Supreme Court is making it harder and harder to get a federal court to vindicate a broad range of federal constitutional and other legal rights. That there is indeed a pattern, and that it is more than accidental, seems clear from the scope and pervasiveness of the phenomenon. Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorney's fees, [the fashioning of] meaningful remedies—in these and other contexts, the Supreme Court has sharply restricted the federal courts' power to protect basic rights.

SOCIETY OF AMERICAN LAW TEACHERS, SUPREME COURT DENIAL OF CITIZEN ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTS: THE RECORD OF THE BURGER COURT 2-3 (October 1976).

The Court has also reduced federal protection of individual rights by contracting the substance of these constitutional rights as well. See, e.g., cases cited in Comment, Protecting Fundamental Rights in State Courts, supra note 53, at 63 n.1.

62. As Mr. Justice Brennan noted recently: It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

Brennan, supra note 53, at 498.

63. Although the state courts have also had jurisdiction over federal question litigation, federal judges are better able to ensure even-handed administration of justice in this area because of their insularity from local popular pressures and their greater expertise in interpreting complex constitutional and statutory issues. See The Supreme Court, 1973 Term, 88 HARV. L. REV. 41, 210 n.41 (1974); notes 216-27 and accompanying text infra. Some commentators have also argued that federal judges feel more of a responsibility to abide by the constitutional interpretations of the United States Supreme Court than their state counterparts. See Neuborne, Myth of Parity, supra note 53; Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 CALIF. L. REV. 943, 959-60 (1976).
houses in this country.\textsuperscript{64}

The contours of the doctrine of "our federalism" were described by Mr. Justice Black in \textit{Younger v. Harris},\textsuperscript{65} in which the Court held that principles of equity, comity, and federalism required federal courts to abstain from enjoining, under section 1983, a pending state criminal prosecution unless the petitioner were able to demonstrate bad faith on the part of the prosecutor or immediate, irreparable harm to himself from a continuation of the prosecution.\textsuperscript{66} The Court spoke of the need for a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.\textsuperscript{67}

The Court then went on to describe "our federalism" as follows:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts* * *. What the concept does represent 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.\textsuperscript{68}

The effect of \textit{Younger} and its progeny\textsuperscript{69} has been to strengthen the belief that state, rather than federal, courts are the proper fo-

\textsuperscript{64} This was the conclusion reached by the American Law Institute in its study of the division of business between the state and federal courts. \textit{ALL STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS} 166 (1969). \textit{See also McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 VA. L. REV. 250, 263-64 (1974); Neuborne, \textit{Myth of Parity, supra note 53; Stolz, supra note 63, at 960; Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1060-63 (1970). A recent student note summed up the issue succinctly:

This federal interest theoretically can be protected by the states as well as by the federal government . . . . In its reasoning, [however,] the Court ignores the differences in institutional setting and outlook of the state and federal courts. It ignores the inadequacy and unavailability of state remedies' as well as the lack of responsiveness of state institutions. Finally it ignores the basic assumptions that have led to the provision for inferior federal courts in the first instance . . . .

Until it can be shown with greater certainty that state forums will give sufficient protection to federal rights, Congress should act to maintain the availability of the federal courts for vindication of those rights.

Note, \textit{Stone v. Powell and the New Federalism, supra note 53, at 170-71.}

\textsuperscript{65} 401 U.S. 37 (1971).

\textsuperscript{66} \textit{Id.} at 43-57.

\textsuperscript{67} \textit{Id.} at 44.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{See cases cited in note 57 supra. See also Note, Stone v. Powell and the
rum for the initial determination of federal constitutional rights.\textsuperscript{70} This may be inconsistent with the position taken by Congress when it granted the federal courts federal question jurisdiction in 1875.\textsuperscript{71} As Senator Nelson commented recently on the floor of the Senate,

In my view, the assertion of constitutional rights—and the existence of a federal forum to review those claims—is vitally important for the society, as well as for the petitioner. Our willingness to use scarce judicial resources in this way reflects again the high priority this society places on constitutional liberties and individual freedom. If this society no longer values the constitutional rights to the same degree, that judgment should be reflected by the representatives of the people—Congress—through a decision to restrict the habeas jurisdiction of the federal courts. Congress is also the only body which can address the rising caseload in the federal courts in a systematic way and make some basic judgments about how scarce judicial resources should be allocated.\textsuperscript{72}

Under article III, section 1 of the Constitution\textsuperscript{73} it is Congress which has the power to define the limits of jurisdiction of the federal courts.\textsuperscript{74} Case-by-case decisionmaking is not the best method for determining what sort of cases belong in the federal courts. The Court is not equipped to gauge, or expected to measure the long-term administrative implications of its decisions.\textsuperscript{75} The legislative process is better able not only to seek the viewpoints of all who will be affected by the enactment of statutes but attempt to

\textsuperscript{70} The result of this position, however, may be to close the federal courts entirely to these claims because once they have been litigated in state court, principles of res judicata may bar their relitigation in a federal forum. See Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975). \textit{See also note 57 supra.}

\textsuperscript{71} Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.


\textsuperscript{73} U.S. CONST. art III, § 1. Article III, section 1 states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior federal courts as the Congress may from time to time ordain and establish.”

\textsuperscript{74} \textit{See} Reddish \& Woods, \textit{Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis}, 124 U. PA. L. REV. 45 (1975). Mr. Justice Brennan, in his dissent in Stone v. Powell, 428 U.S. 465, 515 (1976) (Brennan, J., dissenting), argued that the majority’s approach to the issue was “an obvious usurpation of Congress’ Article III power to delineate the jurisdiction of federal courts.” A similar position is taken in Comment, \textit{Equitable Restraint}, supra note 53, at 291 (“Although state courts may be fully competent to adjudicate federal claims, the plaintiff’s right to a federal forum has been guaranteed by Congress and should not arbitrarily be brushed aside due to general notions of equity, comity and federalism. A continuation of the present trend soon will destroy the right Congress has seen fit to provide for its constituents.”).

\textsuperscript{75} Mr. Justice Brennan has argued that the Court is antagonistic to the interests themselves raised by plaintiffs in these lawsuits rather than merely to the perceived overuse of the federal courts. Stone v. Powell, 428 U.S. 465, 536 (1976)
accommodate conflicting positions in the drafting of the statutes themselves. Thus, in an area as sensitive as access to the federal courts, Congress should make the ultimate determinations.

**CONGRESSIONAL DIVERSION OF PART OF THE WORKLOAD OF THE FEDERAL COURTS**

Since the alternatives discussed earlier are insufficient, in order to provide meaningful relief to the federal courts, some theory must be found which would permit the massive diversion of cases to other tribunals. The task of distinguishing between the cases that logically belong in Article III courts and those that can be handled efficiently and competently elsewhere, however, is not a simple one, even though much has been written on the subject.

(Brennan, J., dissenting); Warth v. Seldin, 422 U.S. 490, 520 (1976) (Brennan, J., dissenting); Judice v. Vail, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting) (“[T]he Court in a series of decisions... has shaped the doctrines of jurisdiction, justiceability and remedy so as increasingly to bar the federal courthouse door to litigants with substantial federal claims... These decisions have in common that they have been rendered in the name of federalism. But they have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated... and systematic... violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly reflect the nature of our federalism.”) See also Brennan, supra note 53, at 503-04; Fiss, Dombrowski, 86 YALE L.J. 1103, 1159-60 (1977); Society of American Law Teachers, supra note 61. Fiss strikes a similar ominous note:

I wonder whether ‘federalism’ is itself being used as a proxy for another set of values. I suspect that it is. I suspect that at the heart of Rizzo—and at the heart of the progeny of ‘Our Federalism’—is more than a concern that federal courts should not interfere in state agencies. I suspect that at the heart of Rizzo there is a new version of laissez-faire—one specially tailored to the welfare state. It consists of a desire to insulate the status quo from judicial interference, regardless of whether the protected institution is a judicial system, legislature or administrative agency. I suspect that the overarching spirit of the Burger Court is a hostility toward the activism of judges, not just federal judges. ‘Federalism’ is but one handle available to the Supreme Court for curbing some of the more ambitious—more idealistic—projects of its own judges.

Fiss, supra.

Even if this is not true, its decisions discourage federal litigation because of overly broad interpretations rendered by lower federal courts of their lack of power to deal with these issues. See Comment, Equitable Restraint, supra note 53.

76. Article III courts exist to protect federal rights. It is argued later that Article III courts need to perform different functions today than in the period when they were established. Thus, the cases that logically belong in the federal courts today are not the ones that the Founders would have put there. See notes 179-190 and accompanying text infra.

77. This question has been a controversial one from the very beginning of this nation’s history. A number of arguments in the Federalist Papers centered around the division of jurisdiction between state and federal courts, and it was of burning interest to the first Congress and the early history of the United States Supreme Court. Congressional interest in this question was revived briefly after the Civil War, but it was not until the post World War II period that real state-federal friction became of critical importance. The issue around which it coalesced was the civil rights movement which has permanently affected the balance between them. The
and any discussion of alternative forums inevitably raises questions about constitutional interpretations and the role that the principle of federalism should play in modern American life.

It is clear that there are a number of possible ways to divert a significant proportion of the federal caseload to other judicial tribunals in which they can receive equal or superior treatment to what is possible from the presently overburdened federal judges. Cases can be siphoned off into either specialized courts or state trial courts of general jurisdiction.

The concept of specialized judicial decisionmaking has recently gained attention as commentators have grappled with possible ways to revise the structure of the federal appellate courts. In order to relieve the United States Supreme Court, which is no longer able to give its burgeoning caseload the consideration it deserves, a number of legal commentators and judges have called on Congress to create a National Court of Appeals below the Supreme Court but above the present circuit courts of appeals. A variant of this approach would be the establishment of an intermediate court to review state and federal criminal convictions. Such a court would greatly relieve the federal district courts of their habeas corpus review function which presently accounts for about 15% of their total civil caseload.

Another possibility would be to utilize more efficiently the two mechanisms that have been used most frequently to change this balance are the commerce clause and the fourteenth amendment.


79. This principle underlies recent decisions limiting the jurisdiction of the federal courts. Cf. Fiss, supra note 75, at 1103, 1159-60.


81. See notes 268-322 and accompanying text infra.


84. See, notes 82-83 supra.


86. See note 30 and accompanying text supra.
isting Article I courts by giving them exclusive jurisdiction over tax and patent matters. Although these cases do not comprise much of the current federal district court caseload, they are specialized matters requiring a certain amount of expertise which, it is argued, makes them amenable to such specialized treatment.

The most popular suggested forum to receive more federal cases, however, is the state court. As Mr. Chief Justice Warren Burger recently noted in his 1977 State of the Judiciary message to the American Bar Association, there are more than ten times as many state trial court judges as there are federal district court judges. Thus, in theory, by spreading the redistributed caseload

87. The major difference between Article I and Article III courts is that judges in the former do not have the same life tenure as those in the latter. It is unlikely that this distinction should make any difference in the outcomes of the kinds of cases that are likely to be tried in Article I tribunals.


89. United States Courts 1976, supra note 1, at 174. Together they represent only 3.4% of the total civil caseload at the district court level. See Chart 1 at note 15 supra.


92. He stated that there were 4000 state court judges as compared to 400 federal district court judges. Burger, supra note 15, at 504. He was limiting himself to those state judges whose caseload would be similar under state law to that of the federal district court judges since there are many more state court judges altogether than 4000.

### NUMBER OF JUDGES

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evenly among the state courts, large numbers of cases could be

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(a) Associate Judges of circuit court.
(b) A unified system with 83 District Court Judges who possess the full jurisdiction of the court. An additional 19 District Associate Judges, 19 full-time Judicial Magistrates, and 169 part-time Judicial Magistrates have limited jurisdiction.
(c) New court of appeals takes effect January 1977.
(d) See footnote (d) on Table 1.
(e) Twenty-four justices permanently authorized; in addition, as of October 1975, 18 justices and certificated retired justices had been temporarily designated.
(f) In Oklahoma, there are 3 judges on the Court of Criminal Appeals and 6 on the Court of Appeals. In Tennessee there are 9 judges on the Court of Appeals and 7 members on the Court of Criminal Appeals. In Texas there are 5 judges on the Court of Criminal Appeals and 42 on the Court of Civil Appeals.
(g) Information reflects 1974 survey. Later information not available.

The Book of the States 93 (1976).
diverted—which would have a significant effect on the caseload of each federal judge—without overly burdening the state judges who would each receive only one tenth of the diverted cases.

By far the hardest problem in this redistribution process is to isolate those kinds of cases to divert. Aside from ensuring that the choices of forums are based on logical principles, the number of cases diverted must be large enough so that, along with some of the other proposals discussed previously, the federal caseload is reduced to a manageable level.

The proposal which would result in the most massive redistribution of the caseload of the federal courts is that advanced by Judge Henry Friendly. Long a proponent of reducing the heavy burden on the federal courts, his more recent writings on the subject foresee the transfer of almost the entire federal caseload to the states. He would eliminate from the federal dockets not only diversity jurisdiction, but state prisoner habeas corpus cases, numerous criminal cases, and much federal question litigation such as environmental protection, personal injury actions created under federal law, and others.

It is of course not true that the caseload would be so evenly distributed. Rather, it is more likely that because of venue provisions in both state and federal statutes, the transfer would be from urban, congested federal courts to urban state courts which also tend to be the most overburdened at the state level. Frank, Let's Keep Diversity Jurisdiction, supra note 15. Other commentators have long advocated this particular reform. See, e.g., Clark, supra note 39, at 409 & n.7; Frankfurter, supra note 37, at 516. Clark specifies the following local crimes which should be eliminated from federal criminal statutes: drunk driving, 18 U.S.C. § 13 (1970); larceny and theft, 18 U.S.C. §§ 641-644 (1970); automobile theft, 18 U.S.C. §§ 2312-2315 (1970); prostitution, 18 U.S.C. §§ 2421-2424 (1970); drug abuse, 21 U.S.C. §§ 841-843 (1970). Clark, supra at 409 & n.7.

The overlapping of federal and local crimes not only adds cases to the federal docket which could just as easily be handled in state courts, but it creates potentially serious problems of double jeopardy and the spectre of differential treatment of persons similarly situated when the sentences imposed under local statutes is greatly different from that under federal law for the same offense.

93. It is of course not true that the caseload would be so evenly distributed. Rather, it is more likely that because of venue provisions in both state and federal statutes, the transfer would be from urban, congested federal courts to urban state courts which also tend to be the most overburdened at the state level. Frank, Let's Keep Diversity Jurisdiction, supra note 15. See notes 36-51 and accompanying text supra.

94. See notes 36-51 and accompanying text supra.

95. H. Friendly, supra note 15. Aside from diverting most of the federal caseload to state courts, he would also transfer such matters as patents, taxes, administrative appeals, and antitrust into specialized federal courts where they could be decided quickly and more efficiently than in the federal district courts of general jurisdiction. Id. at 153-96.

96. He wrote his first article on the subject in 1927 at which time he prophesized that Congress would soon act to curtail federal jurisdiction. Friendly, supra note 77.


99. Id. at 104-07.


The overlapping of federal and local crimes not only adds cases to the federal docket which could just as easily be handled in state courts, but it creates potentially serious problems of double jeopardy and the spectre of differential treatment of persons similarly situated when the sentences imposed under local statutes is greatly different from that under federal law for the same offense.

ated by federal statutes, and most section 1983 suits. Without dwelling on the merits of the various forms of federal actions which Judge Friendly would divert, we believe his proposal is too drastic. It would remove from the federal courts almost its entire caseload as well as its raison d'etre. Instead, we start with the assumption that the federal courts are the proper forum for federal question cases. What can and should be pared from their caseload are the cases involving issues of general common law, namely cases that reach the federal courts by alleging diversity of citizenship between the parties.

It is our belief that cases based on diversity of citizenship jurisdiction clog up the federal courts with large numbers of cases which can just as well be decided in state courts. Although the

102. Id. at 129-38.
103. Id. at 87.
104. Although he approaches the issue from a different perspective, Anderson, a district court judge in Minnesota, would agree that the existence of two court systems, federal and state is inefficient. Since there is an increasing overlap of subject matter—federal courts deal with state and local legislation and state courts handle cases arising under the Constitution and federal law—and a growing uniformity in the procedures followed in both, all the courts should be unified into one system. Anderson, supra note 40, at 1203-04.
105. Except for a very brief period in 1801, the federal courts did not have jurisdiction over federal question cases until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. This provision is currently codified in 28 U.S.C. § 1331 (1970). Prior to this time the vindication of federal claims was confined to state courts, although the United States Supreme Court would review the case on appeal if the state court denied a claim of federal right. Act of September 24, 1789, § 25, 1 Stat. 73, 85. Since 1875 the grant of jurisdiction has grown steadily as a result of both congressional enactments and Supreme Court interpretations of existing statutes. This growth in jurisdiction is catalogued in H. FRIENDLY, supra note 15, at 15-54; Friendly, supra note 52, at 1020-30; Frankfurter, supra note 37, at 507-11.
106. Given the fact that the federal courts cannot control their caseload, if the solution requires the diversion of cases out of the federal courts, it is better to get rid of those based on diversity of citizenship rather than federal question litigation. Accord, Fraser, supra note 91, at 191.
107. 28 U.S.C. § 1332 (1970), which governs diversity of citizenship jurisdiction, reads in relevant part as follows:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
(c) ** ** A corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business ** **.
(d) The word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.
Id.
108. See notes 266-322 and accompanying text infra. As Judge Bratton recently noted,
Ultimately there should be a fair and rational allocation of the nation's liti-
proportional increase in diversity cases has not been as great in recent years as the increase in other categories of cases, suits based on diversity of citizenship do account for more than 24% of the total number of civil filings in the federal district courts, and more than five out of every eight cases that do not rest on federal question jurisdiction are based on diversity. At the appeals

Bratton, supra note 91, at 354. See also City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941), rehearing denied, 314 U.S. 714 (1941) (Frankfurter, J.) ("The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business.").

Between 1962 and 1976 the number of civil cases commenced in the federal district courts rose from 61,836 to 130,597 an increase of over 100 percent. United States Courts 1976, supra note 1, at 169. During the same period the number of diversity cases filed rose at a slower rate, from about 18,000 to 31,675. Id. at 122-23. This rise is graphically depicted as follows:

Change in the amount in controversy from $3,000 to $10,000
P.L. 85-554, July 25, 1958

Id. at 123. The reason for the decline shown is that in 1958 Congress raised the jurisdictional amount from $3,000 to $10,000. 28 U.S.C. §§ 1331-1332 (1970). Nevertheless, by 1973 the numbers had risen to the pre-1958 level and they continued to increase at a slow but steady rate since then.

United States Courts 1976, supra note 1, at 122.

See Chart #1 at text following note 20 supra.
court level diversity cases represent a smaller percentage of the
caseload, but they still impose a heavy burden on judicial time
and help to exacerbate the already serious caseload crisis.  

THE CURRENT STATUS OF THE DIVERSITY DEBATE

Ever since the birth of the United States, controversies over
what should be the proper distribution of jurisdiction between
state and federal courts have centered on the diversity of jurisdic-
tion provision in the United States Constitution. Under Article
III, the federal judicial power extended to controversies “between
a state, or the citizens thereof, and foreign states, citizens or sub-
jects.” Because this jurisdiction was concurrent with that of
state courts, rather than exclusive, however, Congress did not have
to invest the inferior federal courts with any of it. Nevertheless,
fearing local prejudice against foreigners or at least local hostil-
ity toward incipient capitalist development, in the Judiciary Act
of 1789 Congress gave the federal courts jurisdiction over suits in
which “an alien is a party or the suit is between a citizen of the
State where the suit is brought, and a citizen of another State.”

Although, from time to time Congress has raised the jurisdic-
tional amount for both diversity and federal question litigation in

112. For the 1976 fiscal year there were 1,714 diversity appeals out of a total
Except for the District of Columbia and Ninth Circuits in which these appeals rep-
resented only 8 and 12%, respectively of the caseload and the Tenth Circuit in which
they were about 23%, they ranged between 15 and 20% in all other circuits. Id.

Diversity cases place almost no burden on the Supreme Court’s caseload, see
Casper & Posner, A Study of the Supreme Court’s Caseload, 3 J. Legal Studies 339,
350 (1974), especially since petitions for certiorari are almost uniformly denied,
Kurland, supra note 83, at 630-31, and only a small percentage of diversity cases

113. See notes 2-3 and accompanying text supra.

114. See Frankfurter, supra note 37, at 511-15; Friendly, supra note 71; Moore &
Weckstein, supra note 78, at 1-6; Phillips & Christenson, The Historical and Legal
Background of the Diversity Jurisdiction, 46 A.B.A.J. 959 (1960); Warren, New Light
on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). For a
history of modern proposals to eliminate diversity, see Bratton, supra note 91, at
351-52.

115. U.S. Const. art III, § 1, cl. 1.

116. See, e.g., Mr. Chief Justice Marshall’s discussion in Marbury v. Madison, 5
U.S. (1 Cranch) 137 (1803).

117. See, e.g., Moore & Wicker, Federal Jurisdiction: A Proposal to Simplify the
System to Meet the Needs of a Complex Society, 1 Fla. S. U. L. Rev. 1, 17 (1973); Frank,
For Maintaining Diversity Jurisdiction, 73 Yale L.J. 7, 9 (1963). But see
Friendly, supra note 77, at 493, who argues that this was never the case. It is also
interesting to note that removal was eliminated because it was never used. Moore
& Wicker, supra, at 17 n.90.

118. See, e.g., Moore & Weckstein, supra note 78, at 16-17; Friendly, supra note
77, at 498.

119. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.
an attempt to ease the burdens of the federal case calendar,\textsuperscript{120} it has never come close to eliminating diversity jurisdiction entirely.\textsuperscript{121} The present campaign to eliminate, or at least to restrict the scope of diversity jurisdiction dates from 1959 when Earl Warren, the then Chief Justice of the United States Supreme Court, suggested that the American Law Institute study the allocation of cases between the federal and state court systems in an attempt to determine how to cut down on the federal caseload. In his address to the ALI at its annual meeting he stated: "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 the light of the basic principles of federalism."\textsuperscript{122}

The proposed legislation that emerged from the ALI study, however, was inadequate to deal with the problem.\textsuperscript{123} It assumed

\textsuperscript{120} Originally the federal district courts were given jurisdiction over all actions between citizens of different states where the amount in controversy was greater than $500. Judiciary Act of 1789 ch. 20, § 11, 1 Stat. 73, 78. It appears that the jurisdictional amount was to prevent defendants from being forced to travel long distances to defend small claims. Moore & Weckstein, supra note 78, at 6 n.29. In 1887 the jurisdictional amount was raised to $2000. Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433. In 1911 the jurisdictional amount was raised to $3,000, Judiciary Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091, and in 1958 to $10,000, 28 U.S.C. § 1332(a) (1958), where it currently remains.

These developments had some short-term effect on the number of diversity cases. Although the number of cases filed dropped after the last increase of the amount in controversy to $10,000 in 1958, the number filed is now right back up to where it was before the last congressional action. See note 109 supra. The increase in the amount in controversy has had no impact on federal question cases because many deprivations are priceless and the courts have recognized this fact. In fact, the ALI proposal suggested elimination of the amount in controversy in federal question cases, and the new statute presently being considered by Congress has taken the same position.

As an outgrowth of the utilization of the amount in controversy as a way to keep litigants out of the federal courts, a whole body of caselaw on jurisdictional amounts has grown up.

It must also be conceded that manipulation of the amount in controversy is not a good way to deal with the problem of overburdened federal courts because it closes the doors of the federal courthouse to those with smaller claims. If the federal courts are better, which is one of the major rationales for the retention of diversity jurisdiction, see notes 211-227 and accompanying text infra, it is unfair to save them for the rich and force the poorer litigants to try their lawsuits in "inferior" tribunals.

\textsuperscript{121} Examples of some of these bills which were introduced appear in Moore & Weckstein, supra note 78, at 14 n.89, and in Moore & Wicker, supra note 117, at 16 n.84.

\textsuperscript{122} ALI PROCEEDINGS 33 (1969), cited in ALI, supra note 64, at ix.

\textsuperscript{123} Although such prominent commentators as Field and Wright originally supported the ALI proposals, Field, Diversity of Citizenship: A Response to Judge Wright, 13 WAYNE L. REV. 489 (1967); Wright, Restructuring Federal Jurisdiction: The American Law Institute Proposals, 26 WASH. & LEE L. REV. 185 (1969), they have both changed their position and now recommend total abolition. H.R. REP. No. 95-893, 95th Cong. 2d Sess., Appendix (1978); Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House
that prejudice against foreigners was still prevalent, and it attempted to pare down the number of diversity cases which could reach the federal courts by rationalizing the system\textsuperscript{124} and increasing the amount in controversy.\textsuperscript{125} Thus, resident plaintiffs would no longer be permitted to sue in federal court because resident defendants were unable to remove cases brought in state court to federal court under the removal statute\textsuperscript{126} and because resident plaintiffs, by definition, would not be subject to prejudice against foreigners. Under the ALI proposal approximately one-half of the diversity cases would be transferred from federal to state courts.\textsuperscript{127}

In 1971 Senator Burdick introduced a bill which incorporated the recommendations of the American Law Institute.\textsuperscript{128} Although hearings were held on this legislation during 1971 and 1972,\textsuperscript{129} it never was enacted into law. Thus, Congress did nothing during this period to alleviate the increasingly obvious overburdening of the federal courts.

Mr. Chief Justice Warren Burger took up where his predecessor had left off in urging an overhaul of the federal court system. He went even further, however, and recommended the complete elimination of diversity jurisdiction.\textsuperscript{130} In his annual messages to the American Bar Association he reiterated his call for a redistribution of caseloads which would remove diversity litigation from the federal courts.\textsuperscript{131} In response to the growing pressures on the federal caseload a number of bills were introduced in Congress.\textsuperscript{132} After numerous hearings on the various proposals,\textsuperscript{133} a bill which would entirely eliminate diversity jurisdiction passed the House in


\textsuperscript{125} The amount in controversy was to be increased to $25,000.


\textsuperscript{127} Burdick, \textit{supra} note 124. Other portions of its proposal, however, would increase the diversity caseload. \textit{Id.}


\textsuperscript{131} \textit{Id.}

\textsuperscript{132} Thus, S. Rep. No. 2094 would prohibit resident plaintiffs from access to the federal courts while S. Rep. No. 2389 would abolish diversity entirely. In the House of Representatives the comparable bills were H.R. 9123 and H.R. 9622.

\textsuperscript{133} See \textit{Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).}
early 1978.\textsuperscript{134} It was sent over to the Senate where it is presently awaiting further action.\textsuperscript{135}

Despite the dire need of the federal courts to be relieved of a substantial portion of their caseload,\textsuperscript{136} the clarity of the solution is not apparent to many in the legal profession. Some state court judges have been opposed to the redistribution because they feel that their courts are already overburdened,\textsuperscript{137} and the American Bar Association's House of Delegates, in its last meeting in 1977, after hearing the pros and cons of diversity refused to approve proposed changes. In fact, some commentators even call for the expansion of diversity jurisdiction by requiring only minimal diversity between the parties\textsuperscript{138} rather than maximum diversity, which is currently a precondition to the invocation of federal jurisdiction.\textsuperscript{139}

Our analysis of the testimony and the vast literature on this issue suggests that many are unaware of the pros and cons of the continued existence of diversity jurisdiction. Therefore, in the remainder of this article we will analyze the arguments that have been advanced in favor of its retention\textsuperscript{140} and those supporting its elimination.\textsuperscript{141} After becoming familiar with the various positions taken on this issue, it will be easier for the reader to determine in a rational manner whether the elimination of diversity jurisdiction is the most appropriate, politically feasible way of alleviating the burden currently faced by the federal courts.

\textsuperscript{134} The House Judiciary Subcommittee unanimously recommended to the House Judiciary Committee the more comprehensive bill which was overwhelmingly approved by it on February 7, 1978. H.R. 9622, abolishing diversity, passed the House of Representatives on February 28, 1978 by a vote of 266 to 133, 122 CONG. REC. H1569 (daily ed. Feb. 28, 1978).

\textsuperscript{135} The Senate companion bill is now being considered by Senator DeConcini's Senate Judiciary Subcommittee.

\textsuperscript{136} See notes 1-15 and accompanying text supra, exposing the problem.

\textsuperscript{137} See the testimony of the Chief Justice of the Florida Supreme Court to the Burdick Committee, cited in Moore & Wicker, supra note 117, at 20 & n.108. The Conference of Chief Justices recently adopted a position favoring the elimination of diversity jurisdiction, however. See text accompanying note 255 infra.

\textsuperscript{138} Moore & Weckstein, supra note 78.

\textsuperscript{139} 28 U.S.C. § 1332 (1970). Thus, removal is possible only if maximum diversity exists.

\textsuperscript{140} See notes 144-265 and accompanying text infra.

\textsuperscript{141} See notes 266-322 and accompanying text infra.

\textsuperscript{142} All the existing material on the subject of diversity jurisdiction assumes one posture and argues only that position. See, e.g., Moore & Weckstein, supra note 78 (pro); Friendly, supra note 77 (con). Judge Wright presents both sides, but he gives only cursory treatment to the entire question. Wright, The Federal Courts and the Nature and Quality of State Law, 13 WAYNE L. REV. 317 (1967).
IF IT WORKS, WHY CHANGE IT: THE TRADITIONALIST APPROACH TO THE REALITIES OF MODERN AMERICAN SOCIETY

The major argument advanced in favor of retaining diversity jurisdiction is that it works. Diversity jurisdiction was contemplated by the Founding Fathers, it has always been a part of federal jurisdiction, and no one is complaining that it works improperly, so why should it be eliminated. Closely related are the arguments that diversity is convenient, that litigants get better justice in the federal courts, that it is necessary to protect the foreign party from local prejudice, and that the existence of federal practice improves the skills of local attorneys and makes the system more uniform. Others have contended that the state courts do not want the increased caseload, and that the real way to deal with the pressure on the federal judiciary is simply to get more judges. In order to test the validity of each of these propositions, we shall first examine the arguments put forth by the traditionalists.

All proponents of the continuation of diversity jurisdiction be-

144. Frank, supra note 143, at 680-81; Frank, supra note 117, at 13; Moore & Weckstein, supra note 78, at 15; Wright, supra note 142, at 318.  
146. Frank, supra note 93, at 158; Frank, supra note 117, at 8.  
147. Moore Testimony, supra note 145; Frank, supra note 117, at 12.  
149. Frank, supra note 117, at 9. Even if this is no longer the case, Wright contends that diversity should still be maintained. Wright, supra note 142, at 327 (“The fact that the Fathers included diversity in the Constitution primarily because they feared nonresident litigants might suffer prejudice in state courts need not and should not preclude its use a century and three-quarters later for novel reasons only now perceived; if the Constitution confers the authority, we may exercise it in furtherance of any decent social purpose.”).  
150. Frank, supra note 93, at 159; Moore & Wicker, supra note 117, at 22; Wright, supra note 142, at 327; Association of Trial Lawyers, supra note 148, at 5; Moore Testimony, supra note 145, at 7-9.  
152. Moore & Weckstein, supra note 78, at 26; Moore & Wicker, supra note 117, at 25; Wright, supra note 142, at 319; Moore Testimony, supra note 145, at 2.
gin by noting its constitutional foundations\textsuperscript{153} in article III, section 2 of the United States Constitution.\textsuperscript{154} The fact that there is no grant of jurisdiction that is older than diversity convinces its supporters that it is entitled to presumptive validity until its detractors can demonstrate that it does not work properly.\textsuperscript{155} Since no one could conceivably argue that diversity jurisdiction does not provide just results for the litigants who come into federal court under its umbrella, they continue, those wishing to eliminate diversity to demonstrate its evils should have the burden of proving its inadequacies.\textsuperscript{156}

In order to evaluate this argument critically, it is first necessary to remember that the Constitution is permissive with regard to the judicial power of the United States;\textsuperscript{157} it permits the Congress to extend judicial power to the limits provided in the Constitution, but it certainly doesn’t require that result.\textsuperscript{158} Even in the area of diversity jurisdiction Congress and the courts have chosen to confine federal jurisdiction by requiring complete diversity\textsuperscript{159} between the parties rather than simply minimal diversity,\textsuperscript{160} by restricting the power of removal,\textsuperscript{161} and by recognizing two possible

\textsuperscript{153} See, e.g., Moore & Weckstein, supra note 78, at 14-15; Wright, supra note 142, at 318.

\textsuperscript{154} U.S. Const. art. III, § 2. Article III, sec. 2 provides that “[t]he Judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . .”

\textsuperscript{155} See, e.g., Moore & Weckstein, supra note 78, at 15; Wright, supra note 142, at 318; Moore Testimony, supra note 145, at 11.

\textsuperscript{156} “The proper presumption, in our view, is that the inclusion of diversity cases in article III, the vesting of such jurisdiction in the federal courts by the First Congress, the continuation of the jurisdiction, substantially unimpaired, for the life of the Republic, and the frequent invocation of the jurisdiction with a fair record of accomplishing justice between litigants clearly casts the burden of proof on those who seek to abolish or curtail diversity rather than on those who seek to defend or maintain it.” Moore & Weckstein, supra note 78, at 25. See also Association of Trial Lawyers, supra note 148, at 6.

\textsuperscript{157} Article III provides that “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, §1, cl. 2.

\textsuperscript{158} Thus, the Constitution clearly grants Congress the power to decide the extent, if any, of diversity jurisdiction. H.R. Rep. No. 893, 95th Cong., 2d Sess. 2 (1978); Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. — (1978) (Paper of Hunter presented at Williamsburg Conference) [hereinafter cited as Hunter paper].

As Mr. Justice Chase stated in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799), “[t]he notion has frequently been entertained, that the federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specific instances) belongs to Congress.”


\textsuperscript{160} The ALI proposal would permit minimal diversity. ALI, supra note 64. It is also urged by Moore & Weckstein, supra note 78, at 27-30.

\textsuperscript{161} 28 U.S.C. § 1441 (1970). Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) appeared to hold that complete diversity was constitutionally required. In State
bases of a corporation's citizenship.162 Thus, just because such jurisdiction is permissible under the Constitution does not mean that it should be authorized.

Equally important to bear in mind is that the Constitution is not only a statement of basic principles; it is also a historical document which, to a certain extent, reflects the concerns of the time in which it was drafted. The Constitutional Convention was convened to rescue the new nation from impending disaster, and the Constitution was drafted to solve numerous specific problems that had arisen under the Articles of Confederation. Particularly troublesome was the parochialism of the states and the lack of allegiance to the concept of a central unifying authority.163 Thus, proponents of the federal form of government perceived the need to create a national consciousness.164 The judicial system was one institution which could assist in this process.165 This need, however, is certainly less relevant today.

Assuming that diversity jurisdiction had an important role to play in the early development of the federal judiciary, however,


164. Hamilton was a strong proponent of this position. The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.

165. See, HART & WECHSLER, supra note 163, at 6; ALI, supra note 64, at 101; Shapiro, supra note 148, at 327. As Moore stated in his testimony before the Senate, "[The circuit courts] were courts of great dignity and brought home to all sections of the country the judicial existence of the new Republic. In doing this, diversity jurisdiction served the Nation well." Moore Testimony, supra note 145, at 7. See also, 122 CONG. REC. H1555-1556 (daily ed. Feb. 28, 1978) (remarks of Rep. Railsback).
State Cases in State Courts

1978

State Cases in State Courts

does not resolve the problem. Old laws are not automatically sacrosanct, and what made sense in 1789 may be meaningless in 1978 when the United States faces different problems and needs to utilize its courts to protect different values. If the good of the United States does not require the courts to serve a nationalizing function but instead needs them to protect constitutional rights from majoritarian tendencies or to provide uniform administration of statutorily created federal rights and remedies, diversity jurisdiction becomes anachronistic. Another major difference between 1789 and 1978 concerns the size of the federal caseload. The federal courts of the late eighteenth century had little business besides diversity. Today, however, they are much too busy, and some cases must be pared. Thus, whether diversity jurisdiction "works"—in the sense that it metes out justice to the parties who can compel a federal court to hear their claim because of the diversity of their citizenship—becomes an irrelevant question when the amount of strain on the federal bench is considered.

166. This position is eloquently argued by Hunter at the Williamsburg Conference:

'[T]hroughout the history of our nation there have been numerous and repeated changes in the original laws of our nation to meet the changes occurring in our society. The 1789 laws were never intended to be sacrosanct and to meet the needs of a 1978 society. 189 years ago conditions were vastly different. Certain changes of law have had to occur, have often occurred, and need to occur in the future if our nation and its three branches of government are to survive and properly serve this nation. Fortunately, the American people can look to their elected representatives, their Congress, to be sensitive to these problem areas where change is needed and to make those changes of law which are meritorious and in the interest of the people of this nation.

Hunter paper, supra note 158, at 11-12. This position is in direct contradiction to that taken by the supporters of diversity that because it is old, it must be good. See notes 144-45 supra.

167. See notes 299-300 and accompanying text infra.


169. Moore & Weckstein, supra note 78, at 19.

170. See notes 1-15 and accompanying text supra.

171. Frank argues that if diversity works, that is a sufficient reason to retain it, the strain on the federal bench can be remedied in other ways than by eliminating diversity. Frank, supra note 143; Frank, supra note 117; Frank, supra note 93.

172. See text accompanying note 265 infra. This position underlies the decision by the House of Representatives to vote to eliminate diversity jurisdiction entirely.

'The proposed legislation recognizes that diversity is an idea whose time has passed. The Federal courts are a scarce resource and should be treated as such. The flood of case filings can only be checked by controlling the flow of lawsuits. Just as with the energy crisis, priorities and rules of consumption must be set. First, there should be only one court per customer—the choice of forum is a luxury that our judicial system can no longer afford. Second, the Federal courts must be freed from the shackles of congestion to do the job they do best . . . .
Instead, we must ask which type of litigation "deserves" federal protection\(^\text{173}\) and what kinds of cases can be handled competently by the state courts.\(^\text{174}\)

Furthermore, the argument of the proponents of diversity jurisdiction suffers from the flaw of assuming that there is a fundamental right to choice of forum.\(^\text{175}\) Representative of this position is the statement made by the Association of Trial Lawyers of America to the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary: "It is in the very offering of an alternative—an option—as to dispute resolution—that we believe the Federal government is providing its citizens with a social service of unquestionable legitimacy."\(^\text{176}\) Instead, the choice of forum is a luxury that the States can no longer afford.\(^\text{177}\) From this perspective, their argument that the opponents of diversity have the burden of demonstrating that there are substantial reasons to limit diversity\(^\text{178}\) is not persuasive.

The reasons for including diversity jurisdiction in the original grant of judicial power to the federal judiciary remain unclear.

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\(^{174}\) This congestion argument, however, is rejected entirely by the proponents of diversity who tend to be myopic and view the question in a vacuum. According to the Association of Trial Lawyers, the blind advocacy of judicial efficiency must be rejected because court congestion symbolizes that the United States has a calm, deliberative and thorough legal system which values protection of human rights, unlike the courts of Uganda in which there is no congestion. Association of Trial Lawyers, supra note 148, at 6.

\(^{175}\) See note 35 supra.


\(^{177}\) Association of Trial Lawyers, supra note 148, at 1-2; Moore Testimony, supra note 145. This, however, is not the case. See Wright, Miller & Cooper, 13 Federal Practice & Procedure § 3601, at 596 (1975); Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) (statement of Daniel Meador) [hereinafter cited as Meador statement]. Since federal courts were always intended to be courts of limited jurisdiction, Congress can determine that litigants should not be allowed to use them unless there is a good reason for it.

\(^{178}\) See text accompanying note 156 supra.
The recorded debates in the Constitutional Convention provide little guidance in this area.\textsuperscript{179} Aside from the nationalizing function discussed above,\textsuperscript{180} three possible reasons emerge to explain why diversity jurisdiction was mentioned in the Constitution. The most often cited rationale is that because the drafters of the Constitution feared that state courts would be biased or prejudiced against out-of-state litigants, they included diversity to protect the foreign party from local prejudice.\textsuperscript{181} Closely related is the argument that the federal courts were superior to their state counterparts and, thus, as many cases as possible should be routed in their direction.\textsuperscript{182} Finally, a number of commentators have recently suggested that diversity was created to assist commercial development in the United States, since the drafters feared that some state courts were so biased toward debtors that they would not be able to deal fairly with the legitimate rights of creditors, whether from that state or another.\textsuperscript{183}

Although some commentators question whether state courts ever manifested the local prejudice against foreign litigants which the grant of diversity jurisdiction was supposed to remedy,\textsuperscript{184} it is possible that the fear, rather than the reality, of local prejudice may have played a part in the decision to create diversity jurisdic-
Granting this proposition, however, does not compel the conclusion reached by Moore and Weckstein that "[w]hile local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to the federal courts because of apprehensions as to the kind of justice that they will receive in the courts of the state of which their adversary is a citizen."\footnote{185}{See Moore & Weckstein, supra note 78, at 14-16.}

Instead, it can be persuasively argued that the concept of local prejudice as a basis for the exercise of diversity jurisdiction has been effectively eliminated by changes which have taken place in American society in recent years.\footnote{186}{Moore & Weckstein, supra note 78, at 16.} Today, Americans travel more freely than they did in the past, and they readily move their residences and businesses from one state to another. At the same time, their friends and relatives are also exhibiting similar geographic mobility. All of this movement has done much to undermine local parochialism.\footnote{187}{Although state citizenship is no longer a factor in the ability of litigants to receive justice in state courts, prejudices based on race, sex, religion, economic class, nationality, and age still affect the judicial process in both state and federal courts. See H.R. REP. No. 893, 95th Cong., 2d Sess. 4 (1978). Moreover, while prejudice against corporations and insurance companies, the largest users of diversity jurisdiction, exists, this prejudice has nothing to do with the corporation's state of residence. FRIENDLY, supra note 15, at 146; Meador statement, supra note 175, at 9.}

Thus, a litigant's state of residence has no significance in the kind of treatment he or she will receive in a court of law.\footnote{188}{Even with diversity jurisdiction, however, it would be impossible to eliminate the effect of local bias, if such bias truly existed. See generally Fraser, supra note 91, at 194-95. Thus, those cases between citizens of different states whose amount in controversy was below the statutorily defined minimum would have to be tried in state court under all circumstances. 28 U.S.C. § 1332 (1970). Similarly, cases in which diversity was not complete had no access to the federal courts. Id. Thus, a case like New York Times v. Sullivan, 376 U.S. 254 (1964), in which there was likely to be extreme local bias, could not be tried in federal court because of the lack of complete diversity. Other cases no doubt abound in which similar injustices were suffered at the hands of parochial local attitudes. Because of the fact that local and federal juries are chosen from the same populations, however, similar local sentiments might have prevailed even if cases such as Sullivan had been brought in federal court. See H.R. REP. No. 893, 95th Cong., 2d Sess. Exhibit C (1978) (letter from Kenneth L. Karst to Robert W. Kastenmeier, December 6, 1977).}

While pride in one's state still exists under certain circumstances, it would be unlikely to manifest itself through antagonism against citizens of another state.\footnote{189}{See Hunter testimony, supra note 174, at 8; Hunter paper, supra note 158. Kastenmeier also contends that technological changes, increased education, and economic prosperity all operate to reduce the risk of local prejudice. H.R. REP. No. 893, 95th Cong., 2d Sess. 4 (1978). See also Asher v. Pacific Power & Light Co., 349 F. Supp. 671, 674 (N.D. Cal. 1965); F & L Drug Corp. v. American Central Ins. Co., 200 F. Supp. 718, 723 (D. Conn. 1961).}

The original justification for diversity jurisdiction was the fear that state
These changes were explicitly recognized by the United States Congress when it amended the federal removal statute in 1948. The former removal statute, which traced back to 1867, authorized removal by the defendant "when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice" in a state court. This provision was repealed in 1948 on the following grounds:

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Although diversity jurisdiction is still widely employed by litigants throughout the United States, there is as little reason for its continued existence on the basis of the prejudice argument as there was for the removal statute.

The one reported empirical study of the utilization of diversity jurisdiction by local attorneys supports the conclusion that perceived local prejudice is not important in their choice of a federal forum. Eighty-two Wisconsin attorneys were asked to indicate all the considerations that had led them to choose a federal rather than a state forum. The author hypothesized that under the tradi-
tional wisdom, all the attorneys would list local prejudice as at least one of their reasons. This, however, was very far from the truth, since this factor was listed by only seven attorneys, and it was not the sole factor in any of these cases:

<table>
<thead>
<tr>
<th>Reasons for Choosing Federal Forum</th>
<th>No. of Responses</th>
<th>Percentage of Total Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geographical convenience</td>
<td>30</td>
<td>18.3</td>
</tr>
<tr>
<td>Broader discovery procedures in federal courts</td>
<td>26</td>
<td>15.9</td>
</tr>
<tr>
<td>Federal juries render higher awards</td>
<td>23</td>
<td>14.0</td>
</tr>
<tr>
<td>Greater confidence in the independence and judicial temperament of federal jurist</td>
<td>16</td>
<td>9.8</td>
</tr>
<tr>
<td>Calendar of federal court was more current</td>
<td>15</td>
<td>9.1</td>
</tr>
<tr>
<td>Federal juries are superior to state juries</td>
<td>11</td>
<td>6.7</td>
</tr>
<tr>
<td>Choice of forum was made by client</td>
<td>11</td>
<td>6.7</td>
</tr>
<tr>
<td>On referral from an attorney who had selected the federal court</td>
<td>8</td>
<td>4.9</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>4.9</td>
</tr>
<tr>
<td>Local bias against nonresident client*</td>
<td>7</td>
<td>4.3</td>
</tr>
<tr>
<td>Calendar of federal court was more congested</td>
<td>3</td>
<td>1.8</td>
</tr>
<tr>
<td>Bias other than nonresidency</td>
<td>2</td>
<td>1.2</td>
</tr>
<tr>
<td>Greater familiarity with federal procedure</td>
<td>2</td>
<td>1.2</td>
</tr>
<tr>
<td>Availability of federal interpleader</td>
<td>2</td>
<td>1.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>164</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

*Justification according to classical theory.*

Since the major reasons for choosing the federal courts over the state courts are tactical—geographical convenience, better discovery procedures, and the expectation of receiving a higher award

195. Summers, supra note 194, at 936.
196. Id. at 937-38.
from a federal jury. Summers concludes that there is no ideological basis left for the existence of diversity jurisdiction.

A similar conclusion was reached in a study conducted by the General Accounting Office in the Minneapolis-St. Paul area of Minnesota. On the basis of interviews with eighteen attorneys, it was concluded that the possibility of prejudice did not play a significant role in their choice of forum.

Under modern conditions, moreover, even if there is local prejudice against out-of-state litigants, bringing suit in federal court would not cure the problem. Because federal juries under the Juror Selection and Service Act of 1968 are now drawn from the same registration or voter lists as state jurors, any bias against foreigners exhibited by state juries would also be present in federal ones. Similarly, state and federal judges tend to come from the same background; many federal judges previously were state judges and federal judges generally come from the states in which they sit. Thus, the mere elevation to the federal bench would not purge them of their biases against out-of-state litigants, if such prejudice actually existed.

Whether or not there is still prejudice against certain types of litigants and whatever the form that such prejudice takes, such pockets of prejudice do not require the retention of diversity jurisdiction. Instead, the solution should be the improvement of the quality of state courts.

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197. The reason for this last tactical advantage is that federal courts tend to be located in urban areas where the cost of living is higher than in small towns. Thus, urban, federal juries are more likely to award larger verdicts.

198. Summers, supra note 194, at 938.

199. Kastenmeier statement, supra note 168. Although the Association of Trial Lawyers admitted the importance of the fact that federal courts are located in major cities and that if its members were limited to state courts, they would often find themselves litigating in rural areas or small towns, the Association still claimed that it was the parochial attitudes of these areas that made the federal courts preferable. Association of Trial Lawyers, supra note 148, at 4-5. Nevertheless, it must be recognized that lawyers like to introduce their lawsuits where they are themselves located, and most lawyers practice in large cities, the same places where federal courts are located. Summers, supra note 194, at 938.

200. The Jury Selection and Service Act, 28 U.S.C. § 1861 (1970). The only difference between state and federal juries is that federal juries are chosen from a wider area within the state.

201. See note 43 supra; Hunter testimony, supra note 174, at 9.

202. Hall, supra note 43; Neuborne, Myth of Parity, supra note 53, at 1120 & n.50; Shapiro, supra note 148, at 330.

203. See note 187 supra.

If litigants fear the kind of justice they will receive in the courts of the state in which their adversary is a citizen, it is probably not because of local prejudice against persons from outside the state, but rather because of their perceptions regarding the quality of justice dispensed in state courts in general. But, if well founded, this would work to the detriment of state citizens as well as foreigners. If noncitizens are permitted to choose to litigate in the federal courts, either initially or through removal, there is no real reason not to extend this privilege to persons who happen to be citizens of the state within which the suit is commenced. Those who favor the continuation of diversity jurisdiction argue that it is unfair to penalize noncitizens for what is claimed to be the low level of competence of state judges. If their claim is valid, however, it would be equally unfair to penalize citizens as well as noncitizens.

Whether state courts are, in fact, inferior to federal ones, and whether that reason was perceived by the drafters of the Constitution to justify the existence of diversity jurisdiction, dicta to that effect are found sprinkled through Supreme Court decisions and in congressional debates.

Those persons who wish to retain diversity jurisdiction inevitably stress the continuing superiority of the federal courts, although some admit that the state courts have improved in their

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207. Proponents of diversity suggest this. See Moore & Weckstein, supra note 78, at 27; Wright, supra note 142, at 327-28 (the federal courts are better, and society is served by having as many cases as possible tried there). But see ALL, supra note 64, at 103 ("pushing the constitutional grant of diversity jurisdiction to the maximum would be destructive of the dignity and prestige of state courts, harmful to the federal courts, and disruptive of federal-state relationships.")
208. See, e.g., Frank, supra note 143, at 684; Wright, supra note 142, at 328.
210. During the debate on the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (1870), Representative Coburn argued:
The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . . We believe we can trust our United States courts, and we propose to do so.
211. See note 148 supra.
ability to dispense justice in recent years. The usual bases of federal court superiority mentioned are the high caliber of the federal judiciary, and the mediocrity of state judges and the procedural superiority of federal practice rules.

The most important difference between the federal and state judiciaries is that federal judges have life tenure while state judges do not. This difference could have an impact on judicial

212. See, e.g., Moore & Weckstein, supra note 78, at 22.
213. Anderson, supra note 39, at 1212-13; Johnson, Role of the Judiciary, supra note 35; Shapiro, supra note 148, at 330; Wright, supra note 142.
214. Reath, supra note 148; Moore & Weckstein, supra note 78, at 22.
215. See, e.g., Shapiro, supra note 148, at 328; Moore testimony, supra note 145, at 10-11.
216. U.S. Const. art. III § 1, cl. 2.
217. Three general methods of selecting state trial judges exist—appointment, election, either partisan or non-partisan, and appointment initially followed by a retention election. Only in Massachusetts, Rhode Island, New Hampshire, and New Jersey, where judges are appointed for life, do state judges have the same insularity from majoritarian pressures as the federal judiciary enjoys. The following provides the most up-to-date information on methods of judicial appointment in the various states:

Alabama .................Appellate, circuit, district, and probate judges elected on partisan ballots. Judges of municipal courts are appointed by the governing body of the municipality.

Alaska ..................Supreme court justices, superior, and district court judges appointed by governor from nominations by Judicial Council. Approved or rejected at first general election held more than 3 years after appointment. Reconfirmed every 10, 6 and 4 years, respectively. Magistrates appointed by and serve at pleasure of the presiding judges of each judicial district.

Arizona ..................Supreme court justices and court of appeals judges appointed by governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Appellate Court Appointments. Maricopa and Pima County superior court judges appointed by governor from a list of not less than 3 for each vacancy submitted by a 9-member commission on trial court appointments for each county. Superior court judges of other 12 counties elected on non-partisan ballot (partisan primary); justices of the peace elected on partisan ballot; city and town magistrates selected as provided by charter or ordinance, usually appointed by mayor and council.

Arkansas ..............All elected on partisan ballot.

California ..............Supreme court and courts of appeal judges appointed by governor with approval of Commission on Judicial Appointments. Run for election on record. All judges elected on nonpartisan ballot.

Colorado ...............Judges of all courts except Denver County and municipal, appointed initially by governor from lists submitted by nonpartisan nominating commissions; run on record for retention. Municipal judges appointed by city councils or
behavior, if state judges have their eyes on the ballot box or on the
town boards. Denver County judges appointed by mayor
from list submitted by nominating commissions; judges
run on record for retention.

Connecticut .......... All appointed by legislature from nominations submitted
by governor except that probate judges are elected on par-
tisan ballot.

Delaware ............ All appointed by governor with consent of senate.

Florida .............. All trial judges are elected on a nonpartisan ballot. All ap-
pellate judges are appointed by governor with recommen-
dations by a Judicial Nominating Commission. The latter
are retained by running on their records.

Georgia ............. All elected on partisan ballot except that county and some
city court judges are appointed by the governor with con-
sent of the senate.

Hawaii .............. Supreme court justices and circuit court judges appointed
by the governor with consent of the senate. District judg-
es appointed by chief justice of the state.

Idaho ............... Supreme court and district court judges initially are nomi-
nated by the Idaho Judicial Council and appointed by the
governor, thereafter, they are elected on nonpartisan bal-
lot. Magistrates appointed by District Magistrate's Com-
mission for initial 2-year term: thereafter, run on record for
retention for 4-year term on nonpartisan ballot.

Illinois ............. All elected on partisan ballot and run on record for reten-
tion. Associate judges are appointed by circuit judges and
serve 4-year terms.

Indiana .............. Judges of appellate courts appointed by governor from a
list of 3 for each vacancy submitted by a 7-member Judicial
Nomination Commission. Governor appoints members of
municipal courts and several counties have judicial nomi-
nating commissions which submit a list of nominees to the
governor for appointment. All other judges are elected.

Iowa ................. Judges of supreme, appeals, and district courts appointed
initially by governor from lists submitted by nonpartisan
nominating commissions. Appointee serves initial 1-year
term and then runs on record for retention. District asso-
ciate judges run on record for retention; if not retained or
office becomes vacant, replaced by a full-time judicial
magistrate. Full-time judicial magistrates appointed by
district judges in the judicial election district from nomi-
nees submitted by county judicial magistrate appointing
commission. Part-time judicial magistrates appointed by
county judicial magistrate appointing commission.

Kansas ............... Judges of appellate courts appointed by governor from list
submitted by nominating commission. Run on record for
retention. Nonpartisan selection method adopted for
judges of courts in general jurisdictions in 23 of 29 districts.
legislature when they make judicial decisions. Whether state

Kentucky ............ All judges elected on nonpartisan ballot.
Louisiana ............ All elected on open (bipartisan) ballot.
Maine ................ All appointed by governor with confirmation of the senate, except that probate judges are elected on partisan ballot.
Maryland ............. Judges of court of appeals, courts of special appeals, circuit courts, and Supreme Bench of Baltimore City appointed by governor, elected on nonpartisan ballot after at least one year's service. District court judges appointed by governor subject to confirmation by senate.
Massachusetts ........ All appointed by governor with consent of Executive Council. Judicial Nominating Commission, established by executive order, advises governor on appointment of judges.
Michigan ............. All elected on nonpartisan ballot, except municipal judges in accordance with local charters by local city councils.
Minnesota ............ All elected on nonpartisan ballot. Vacancy filed by gubernatorial appointment.
Mississippi .......... All elected on partisan ballot, except that city police court justices are appointed by governing authority of each municipality.
Missouri ............. Judges of supreme court, court of appeals, circuit and probate courts in St. Louis City and County, Jackson County, Platte County, Clay County, and St. Louis Court of Criminal Correction appointed initially by governor from nominations submitted by special commissions. Run on record for re-election. All other judges elected on partisan ballot.
Montana .............. All elected on nonpartisan ballot. Vacancies on supreme or district courts and Worker's Compensation Court filled by governor according to established appointment procedure (from 3 nominees submitted by Judicial Nominations Commission). Vacancies at end of term may be filled by election, except Worker's Compensation Court. Gubernatorial appointment face senate confirmation.
Nebraska ............. Judges of all courts appointed initially by governor from lists submitted by bipartisan nominating commission. Run on record for retention in office in general election following initial term of three years; subsequent terms are 6 years.
Nevada ............... All elected on nonpartisan ballot.
New Hampshire....... All appointed by governor with confirmation of Executive Council.
New Jersey .......... All appointed by governor with consent of senate except that judges of municipal courts serving one municipality only are appointed by governing bodies.
New Mexico .......... All elected on partisan ballot.
New York ............. All elected on partisan ballot except that governor appointes chief judge and associate judges of court of appeals, with advice and consent of senate, from a list of per-
judges are initially appointed or not, in all states except Massachu-

tons found to be well qualified and recommended by the
bipartisan Judicial Nominating Commission, and also ap-
points judges of court of claims and designates members
of appellate division of supreme court. Mayor of New
York City appoints judges of the criminal and family
courts in the city.

North Carolina. All elected on partisan ballot. By executive order, gover-
nor has established 1-year trial system for merit selection
of superior court judges.

North Dakota. All elected on nonpartisan ballot.

Ohio. All elected on nonpartisan ballot except court of claims
judges who may be appointed by chief justice of supreme
court from ranks of supreme court, court of appeals, court
of common pleas, or retired judges.

Oklahoma. Supreme court justices and court of criminal appeals judg-
es appointed by governor from lists of 3 submitted by Judicial
Nominating Commission. If governor fails to make
appointment within 60 days after occurrence of vacancy,
appointment is made by chief justice from the same list.
Run for election on their records at first general election
following completion of 12 months' service for unexpired
term. Judges of court of appeals, and district and associ-
ate district judges elected on nonpartisan ballot in adver-
sary popular election. Special judges appointed by dis-

tric judges. Municipal judges appointed by governing
body of municipality.

Oregon. All judges except municipal judges are elected on nonpar-
tisan ballot for 6-year terms. Municipal judges are mostly
appointed by city councils except 1 Oregon city elects its
judge.

Pennsylvania. All originally elected on partison ballot; thereafter, on non-
partisan retention ballot, except police magistrates, city of
Pittsburgh—appointed by mayor of Pittsburgh.

Rhode Island. Supreme court justices elected by legislature. Superior,
family, and district court justices and justices of the peace
appointed by governor, with consent of senate (except for
justices of the peace); probate and municipal judges ap-
pointed by city or town councils.

South Carolina. Supreme court and circuit court judges elected by legisla-
ture. City judges, magistrates and some county judges
and family court judges appointed by governor—the latter
on recommendation of the legislative delegation in the
area severed by the court. Probate judges and some coun-
ty judges elected on partisan ballot.

South Dakota. All elected on nonpartisan ballot, except magistrates (law
trained and others), who are appointed by the presiding
judge of the judicial circuit.

Tennessee. Judges of intermediate appellate courts appointed initially
by governor from nominations submitted by special com-
mission. Run on record for re-election. The supreme
court judges and all other judges elected on partisan ballot, except for some municipal judges who are appointed by the governing body of the city.

Texas .................. All elected on partisan ballot except municipal judges, most of whom are appointed by municipal governing body.

Utah ................... Supreme court, district court, and circuit court judges appointed by governor from lists of 3 nominees submitted by nominating commissions. If governor fails to make appointment within 30 days, chief justice appoints. Judges run for retention in office at next succeeding election; they may be opposed by others on nonpartisan judicial ballots. Juvenile court judges are initially appointed by the governor from a list of not less than 2 nominated by the Juvenile Court Commission, and retained in office by gubernatorial appointment. Town justices of the peace are appointed for 4-year terms by town trustees. County justices of the peace are elected for 4 years on nonpartisan ballot.

Vermont ............... Supreme court justices, superior court judges (presiding judges of town courts), and district judges appointed by governor with consent of senate from list of persons designated as qualified by the Judicial Selection Board. Supreme, superior, and district court judges retained in office by vote of legislature. Assistant judges of county courts and probate judges elected on partisan ballot in the territorial area of their jurisdiction.

Virginia ............... Supreme court justices and all judges of circuit courts, general district, and juvenile and domestic relations district courts elected by legislature. Committee on district courts, in the case of part-time judges, certifies that a vacancy exists. Thereupon, all part-time judges of general district courts and juvenile and domestic relations courts are appointed by circuit court judges.

Washington .......... All elected on nonpartisan ballot except that municipal judges in second-, third-, and fourth-class cities are appointed by mayor.

West Virginia ......... Judges of all courts of record and magistrate courts elected on partisan ballot.

Wisconsin ............. All elected on nonpartisan ballot.

Wyoming ............... Supreme court justices and district court judges appointed by governor from a list of 3 submitted by nominating committee and stand for retention at next election after 1 year in office. Justices of the peace elected on nonpartisan ballot. Municipal judges appointed by mayor.

Dist. of Col. .......... Nominated by the president of the United States from a list of persons recommended by the District of Columbia Judicial Nomination Commission; appointed upon the advice and consent of the U.S. Senate.

American Samoa ...... Chief justices and associate justice(s) appointed by the U.S. Secretary of Interior pursuant to presidential delegation of authority. Associate judges appointed by governor of American Samoa on recommendation of the chief jus-
run for election periodically. This fact could instill a certain
amount of caution and a fear of stepping too far afield from local
mores.\textsuperscript{219} Similarly, state judges tend to be more reticent than
their federal counterparts to declare an act of a state legislature
unconstitutional.

Although these generalizations suggest a greater impartiality
on the part of the federal judiciary, they have little bearing on the
decisionmaking process in diversity cases\textsuperscript{220} because the vast
number of such cases involve simple tort and contract issues\textsuperscript{221} in
which judges need fear neither inflaming local passions against
them nor alienating the legislature. Rather, the considerations
outlined above have a much greater bearing on the outcomes of
cases challenging the constitutionality of state statutes or those
seeking judicial protection of certain constitutional or federal stat-
tice, and subsequently confirmed by the senate of American Samoa.

Guam\textsuperscript{†} All appointed by governor with consent of legislature from
list of 3 nominees submitted by Judicial Council for term
of 5 years; thereafter run on record for retention every 5
years.

Puerto Rico All appointed by governor with consent of senate.

\textsuperscript{†}Reflects 1976 survey.

\textsuperscript{218} According to Reath, the state trial judiciary has too many mediocre or sec-
ond-rate judges who “have denigrated the dignity of their offices by serving as the
handmaidens to partisan political leaders on whom the judiciary all too frequently
are dependent for their selection, election, compensation, tenure, advancement,
and appropriations for general court administration.” Reath, supra note 148, at
1246. \textit{See also} Moore \& Weckstein, supra note 78, at 22.

\textsuperscript{219} Johnson believes that the basic strength of the federal judiciary is its inde-
pendence from political and social pressures, and its ability to “rise above the influ-
ence of popular clamor.” Johnson, \textit{Role of the Judiciary, supra} note 35, at 474-75.
\textit{See also} Neuborne, \textit{Myth of Parity, supra} note 53.

Neuborne argues both that plaintiffs advancing federal constitutional claims
against local officials are more likely to prevail in federal than in state court and
that federal district courts are “institutionally preferable” to state appellate courts
as forums in which to litigate federal constitutional claims. \textit{See also} Note, \textit{Stone v.
Powell and the New Federalism, supra} note 53, at 163-64.

\textsuperscript{220} [The claim of federal superiority] is unsupportable as applied to state
law problems where state law controls. Such a belief, if carried to its logical
conclusion, would result in the placing of all litigation in the federal court
system . . . . Our state courts have exclusive jurisdiction over murder
cases with the death penalty applicable; they have jurisdiction over . . . our
property rights, our marital rights, inheritance rights, etc. . . . To say they
are not to be trusted with the trial of an automobile collision event because
of the happenchance of diversity of citizenship is shocking and illogical.

Hunter paper, supra note 158, at 6-7.

\textsuperscript{221} \textit{See Chart #1} at text preceding note 21 supra.
These cases may need the protection of the insulated federal judiciary. Yet, the existence of diversity jurisdiction makes it harder for them to get the consideration they deserve in federal court because the seriously overworked judiciary is spending too much of its judicial time on diversity cases.223

Closely linked to the concept that the independence of the federal judiciary which flows from life tenure makes it superior is the belief that the lure of life tenure attracts competent judges to the federal bench.224 The prestige of the national government itself is also thought to play a role in attracting competent professionals to its service.225 Finally, the small size of the federal judiciary, as compared with that of the states,226 could ensure that the highest standards be maintained in the judicial selection process.227

While it is true in one sense, that the federal government has more prestige than any single state228 and that most judges would consider elevation from the state to the federal bench to be a promotion, it is somewhat of an overgeneralization to lump all the states together when speaking of judicial selection.229 There are a number of different methods currently in use for filling the ranks of the state judiciaries, some of which are better than others.230 Moreover, to the extent that merit selection of judges represents an improvement over selection based on political considera-

222. See notes 218-219 supra.
223. See notes 106-113 and accompanying text supra.
224. According to Anderson, life tenure, the salary level of the federal judiciary, the freedom from having to run in competitive elections, the retirement of federal judges with no loss of income, and the method of selection all make the federal judicial office more attractive than its state counterpart. Anderson, supra note 39, at 1212-13. See also Neuborne, Myth of Parity, supra note 53.
226. Compare note 92 supra with text accompanying note 314 infra.
227. Anderson, supra note 39, at 1212. This same argument is used by Frankfurter and Friendly to support the elimination of diversity jurisdiction. They believe that if the increase in caseload continues, Congress will be forced to increase drastically the size of the federal judiciary which will have the ultimate effect of diluting the high quality of the federal bench by forcing the government to fill the new positions with mediocre people. See H. Friendly, supra note 15, at 28-31; Frankfurter, supra note 37, at 515.
228. Anderson, supra note 39, at 1212.
229. See note 217 supra for a discussion of the various forms of judicial selection.
230. The various forms of judicial selection presently being used are described in note 217 supra. Below is a graphic representation of the forms of judicial selection:
tions, some of the states are ahead of the federal government. Finally, in so far as the states have developed mechanisms for disciplining and removing judges who are incompetent, they are

<table>
<thead>
<tr>
<th>Partisan election</th>
<th>Election by Legislature</th>
<th>Appointment</th>
<th>Missouri Plan</th>
<th>Nonpartisan election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Connecticut</td>
<td>Alabama</td>
<td>Alabama</td>
<td>Arizona</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Rhode Island</td>
<td>Delaware</td>
<td>California</td>
<td>California</td>
</tr>
<tr>
<td>Florida</td>
<td>South Carolina</td>
<td>Hawaii</td>
<td>Colorado</td>
<td>Idaho</td>
</tr>
<tr>
<td>Georgia</td>
<td>Vermont</td>
<td>Maine</td>
<td>Illinois</td>
<td>Michigan</td>
</tr>
<tr>
<td>Indiana</td>
<td>Virginia</td>
<td>Maryland</td>
<td>Indiana</td>
<td>Minnesota</td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
<td>Massachusetts</td>
<td>Iowa</td>
<td>Montana</td>
</tr>
<tr>
<td>Kentucky</td>
<td></td>
<td>New Hampshire</td>
<td>Kansas</td>
<td>Nevada</td>
</tr>
<tr>
<td>Louisiana</td>
<td></td>
<td>New Jersey</td>
<td>Missouri</td>
<td>North Dakota</td>
</tr>
<tr>
<td>Mississippi</td>
<td></td>
<td>Montana</td>
<td>Nebraska</td>
<td>Ohio</td>
</tr>
<tr>
<td>Missouri</td>
<td></td>
<td>Oklahoma</td>
<td>South Dakota</td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


231. According to Hyde, a good selection system should logically:
   1. systematically seek the best potential judicial talent; 2. discriminate between aspirants on the basis of their qualifications; 3. operate in a dignified manner so as not to alienate potential candidates; 4. provide sufficient tenure to encourage quality decisions and to permit competent attorneys to give up flourishing law practices to seek judicial office; 5. deserve public respect and trust.


232. Merit selection has still not been instituted for district court judges. President Carter and Attorney General Bell have expressed their desire to fill district court vacancies in this manner, but, so far, Congress appears unwilling to give up its control over the patronage involved in filling district court positions. For a discussion of the use of merit selection to fill vacancies at the federal appeals court level, see note 44 *supra*.

233. Forty-six jurisdictions, the District of Columbia, Puerto Rico and Guam have formal mechanisms for disciplining their judges. The vast majority have commission plans; Delaware, New York and Oklahoma utilize courts on the judiciary, and New Jersey, Vermont, and Puerto Rico use their Supreme Courts in some capacity. ABA, *Standards Relating to Judicial Discipline and Disability Retire-
more advanced than the federal judiciary with regard to whom it is
still an open question whether judicial removal by means other
than impeachment is possible.

Commentators who favor the retention of diversity jurisdiction
also argue that federal judicial procedures are superior to those
available in the states. Moore and Wicker cite, as examples, non-
technical pleadings, third party practice; broad discovery, a better
attitude toward harmless error, effective pretrial procedures, a su-
perior jury system, greater authority of the judge over the conduct
of the trial, simpler appellate procedures, and better court admin-
istration. Other procedural niceties include the 100-mile bulge
rule and the federal interpleader statute.

Such procedural superiority, however, does not necessarily
support the continuation of diversity jurisdiction in its present
form. Because there is an amount in controversy precondition
for diversity cases, these procedures are unavailable to those with
less expensive cases, although they would appear to be as valuable
to these litigants. In addition, even the strong proponents of this
position recognize that most of the states have followed the lead of

Ment 6 (Tentative Draft, December, 1977); American Judicature Society, Judicial
disability and Removal, Commissions, Courts and Procedures (1973); Green-

Most of these procedures are relatively new, so there are, as yet, no critiques of
their effectiveness. California's system, however, has been in operation since 1960.
It is evaluated in Note, Judicial Discipline in California: A Critical Re-evaluation,

Presently, a federal judge serves for life unless he is impeached by Con-
gress "for conviction of treason, bribery, other high crimes and misdemeanors.


In Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74 (1970), the
United States Supreme Court let stand the disciplining of a federal district court
judge by the Judicial Council. There is, however, great controversy presently rag-
ning over this issue. See Battisti, An Independent Judiciary or an Evanescent
Dream, 25 Case W. Res L. Rev. 711 (1975) (federal district court judge opposed to
all attempts to remove or discipline federal judges except via impeachment); Boyd,
Federal Judges: To Whom Must They Answer, 61 A.B.A.J. 324 (1975) (supports judi-
cial removal bill for the federal judiciary).

Moore & Wicker, supra note 117, at 19. See also Shapiro, supra note 148, at
328 (consolidation of multidistrict litigation in a single district for pre-trial pur-
poses, 28 U.S.C. § 1407, transfer of case to more convenient forum, 28 U.S.C. §
1404(a), availability of pretrial discovery in other districts, Fed. R. Civ. P. 45(d),
availability to register federal court judgment in any other federal court, 28 U.S.C. §
1963); Moore testimony, supra note 145, at 10 (greater resources of federal court,
greater mobility of federal judiciary, ability to handle multi-district litigation, na-
tionwide process, convenience of federal forum).

Fed. R. Civ. P. 4(f) enables federal courts to get jurisdiction over some out-
of-state parties, and Fed. R. Civ. P. 45(e)(1) extends the 100-mile bulge rule to the
service of subpoenas on witnesses.

It should be noted, however, that state long-arm statutes can accomplish similar
results in state courts.

See note 207 supra.
the federal government in making the procedural reforms discussed above.\textsuperscript{240} And since the federal courts must still resolve the case by applying the same law as the state court would,\textsuperscript{241} the quality of the justice dispensed in diversity cases should vary little between the state and federal courts.

Aside from the alleged bias against foreigners\textsuperscript{242} and the superiority of the federal judicial system,\textsuperscript{243} the proponents of diversity jurisdiction laud its role in improving the administration of justice in both state and federal courts.\textsuperscript{244} They contend that the existence of diversity not only forces local attorneys to practice regularly in federal court,\textsuperscript{245} but it also allows new and innovative ideas to move from one court system to the other.\textsuperscript{246} Without diversity, it is argued, a specialized federal bar will develop which will retard both of these useful developments.\textsuperscript{247}

What these commentators fail to realize, however, is that the entire movement to eliminate diversity is based on the existence of too many other types of cases in federal court.\textsuperscript{248} Because of the great increase in federal litigation, largely through the expansion of federal question jurisdiction,\textsuperscript{249} it is highly unlikely that a specialized bar will ever develop.\textsuperscript{250} Instead, such expansion probably brings more attorneys into federal court than diversity jurisdiction ever did. In fact, those persons who stand most to lose by the elimination of diversity jurisdiction are attorneys who currently appear only in federal court; without diversity, they will have to become willing to litigate in state courts or risk losing clients.\textsuperscript{251}

\textsuperscript{240} Thus, over forty states, including Minnesota, have adopted rules of procedure which are almost identical to the Federal Rules of Civil Procedure. \textit{See} Meador statement, supra note 175. Moreover, many of the procedural advantages discussed in note 236 and accompanying text supra are also available in state courts through reciprocal or uniform laws. \textit{See} Shapiro, supra note 148, at 328.


\textsuperscript{242} \textit{See} notes 181-204 and accompanying text supra.

\textsuperscript{243} \textit{See} notes 205-241 and accompanying text supra.

\textsuperscript{244} \textit{See} note 150 supra.

\textsuperscript{245} \textit{See}, \textit{e.g.}, Frank, supra note 143, at 683; Wright, supra note 142, at 327; Association of Trial Lawyers, supra note 148, at 5.

\textsuperscript{246} \textit{See}, \textit{e.g.}, Frank, supra note 117, at 11; Frank, supra note 93, at 159-60; Shapiro, supra note 148, at 325; Wright, supra note 142, at 326; Association of Trial Lawyers, supra note 148, at 5.

\textsuperscript{247} Frank, supra note 143, at 683; Association of Trial Lawyers, supra note 148, at 5.

\textsuperscript{248} \textit{See} notes 1-2 and accompanying text supra.

\textsuperscript{249} \textit{See} note 20 and accompanying text supra.

\textsuperscript{250} Shapiro, supra note 148, at 324; Meador statement, supra note 175, at 6.

\textsuperscript{251} Meador statement, supra note 175, at 6.
Finally, it is argued that the elimination of diversity jurisdiction will not resolve the problems facing the federal judiciary. Rather than overburdening the states with cases that they do not want, the real solution is simply to increase the size of the federal judiciary.

Support for the argument that the states do not want diversity cases comes primarily from statements made by members of the Florida and North Dakota Supreme Courts in 1971. Since then, however, the Conference of Chief Justices, which represents the Chief Justices of all the state supreme courts, has gone on record as strongly supporting the elimination of diversity jurisdiction.

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252. See note 151 supra.

253. See note 152 supra.


255. It took this position at its annual meeting in Minneapolis, Minnesota, on August 3, 1977. This resolution reads as follows:

   Be it Resolved, that the Conference of Chief Justices approve the recommendations of the Committee of Federal-State Relations concerning the following principles:

   (1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights.

   (2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead—a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

   (3) Efforts to divert, where appropriate, the processes of dispute resolution from the federal and state court systems through devices such as arbitration are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

   (4) Notwithstanding reasonable expectations of dispute diversion, it can be anticipated that our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts.

   (5) Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

      (A) Adequate review of state court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

      (B) Increased participation in the resolution of federal-question cases;

      (C) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

   (6) National funding to the states should include procedures and allocations to assure that the state court systems receive an equitable share of the funds without prejudice to the independence of the judiciary.

   (7) Increased communication between congressional committees considering legislation affecting state courts and such entities as the Conference of Chief Justices will be useful.
In fact, even those, such as Professor Charles Alan Wright, who previously supported its retention, have changed their position.\textsuperscript{256} The only groups who still argue strongly for diversity jurisdiction are the Association of Trial Lawyers of America,\textsuperscript{257} whose members specialize in personal injury litigation, and corporate lawyers whose clients prefer the federal courts.\textsuperscript{258}

Furthermore, while one solution to the caseload crisis facing the federal courts might be to increase the size of the federal judiciary whenever necessary,\textsuperscript{259} it is very unlikely that Congress will do so.\textsuperscript{260} Thus, to suggest this as the ultimate and logical resolution of the problem is visionary.

The above discussion highlights what is perhaps the major reason for the continuation of diversity jurisdiction—namely, the preference that corporations and their attorneys have for litigating in the federal courts.\textsuperscript{261} In fact, Moore and Weckstein argue that diversity jurisdiction was included in the initial grant of power to the federal courts precisely to encourage commercial and corporate development.\textsuperscript{262} Not only was it feared that the state courts

\begin{itemize}
  \item \textsuperscript{256} See \textit{Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess.} 3-4 (1977) (statement of Charles Alan Wright). \textit{See also} note 123 \textit{supra}.
  \item \textsuperscript{257} Association of Trial Lawyers, \textit{supra} note 148.
  \item \textsuperscript{258} John Frank and Professor Moore certainly fall into this category.
  \item \textsuperscript{259} This argument has been rejected as unwise by a number of commentators on the theory that it would decrease the prestige of the federal bench and lower the quality of the judges chosen because of the need to choose larger numbers. \textit{See} notes 37-41 \textit{supra} and accompanying text. \textit{See also} note 227 \textit{supra}. This argument is overstated, however, because there are numerous competent attorneys to fill the positions. What makes this solution unreasonable is that Congress would never authorize the number of judgeships needed to deal adequately with the overcrowded dockets because of the expense of doing so and the patronage problems that a vast increase would inevitably create. \textit{See} text accompanying notes 43-45 \textit{supra}.
  \item \textsuperscript{260} \textit{See} notes 36-45 and accompanying text \textit{supra}.
  \item \textsuperscript{261} In his testimony before the House Subcommittee, Frank makes a plea to retain diversity for the good of the middle class. \textit{Diversity of Citizenship Jurisdiction/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess.} 240, 245 (1977). Members of this group are typically the plaintiffs in personal injury suits against insurance companies. They like diversity not necessarily because it permits them to get into federal court but because it ensures them of urban juries which are more likely to approve higher recoveries. \textit{See} note 197 \textit{supra}. If the state venue laws permitted these suits to be brought always in urban areas, this group would not really need diversity jurisdiction. Thus, the real beneficiaries are the corporations which have always preferred to litigate in the federal courts, and it is their attorneys who argue most strenuously for the retention of diversity jurisdiction.
  \item \textsuperscript{262} \textit{See} Moore \& Weckstein, \textit{supra} note 78, at 17 \& n.105. \textit{See also} Frank, \textit{supra} note 143, at 681-82, Parker, \textit{The Federal Jurisdiction and Recent Attacks Upon It}, 18 A.B.A.J. 433, 437 (1932) ("[N]othing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union, and nothing has been so potent in sustaining the public credit and sanctity of private contracts.").
\end{itemize}
would prove sympathetic to debtors and hostile their out-of-state creditors, but it was hoped that uniformity in legal treatment from state to state, which would only be possible in the federal courts, would provide a supportive environment within which commercial and corporate enterprises could flourish.

Thus, the argument that diversity "works" turns out to be little more than that some corporations and some personal injury litigants prefer the federal to the state courts. As long as suits

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264. Moore & Weckstein, supra note 263, at 1449.

265. One reason for this preference may be that the procedures are the same from one federal district to another while, even with state emulation of the Federal Rules of Civil Procedure, they vary somewhat from state to state. Thus, if an attorney can limit his practice to the federal courts, he does not have to be familiar with different systems.

Evidence that diversity is used primarily by corporations is provided in the following table compiled by Senator Burdick, the Senate's sponsor of the ALI proposals:

### TABLE 1
RESIDENCES OF PARTIES IN DIVERSITY OF CITIZENSHIP CASES COMMENCED IN THE UNITED STATES DISTRICT COURTS, FISCAL YEAR 1970

<table>
<thead>
<tr>
<th>Class</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Original</th>
<th>Removed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Resident</td>
<td>Resident</td>
<td>Non res. corp. doing business in state</td>
<td>5,901a</td>
<td>1,775a</td>
<td>7,676</td>
</tr>
<tr>
<td>2. Resident</td>
<td>Resident</td>
<td>Non res. corp. not doing business in state</td>
<td>1,046a</td>
<td>233</td>
<td>1,329</td>
</tr>
<tr>
<td>3. Resident</td>
<td>Resident</td>
<td>Other non resident</td>
<td>2,832a</td>
<td>831</td>
<td>3,633</td>
</tr>
<tr>
<td>4. Non res. corp. doing business in state</td>
<td>Resident</td>
<td>1,867a</td>
<td>78b</td>
<td>1,945</td>
<td></td>
</tr>
<tr>
<td>5. Non res. corp. not doing business in state</td>
<td>Resident</td>
<td>724</td>
<td>18b</td>
<td>742</td>
<td></td>
</tr>
<tr>
<td>6. Other non resident</td>
<td>Resident</td>
<td>5,026</td>
<td>95b</td>
<td>5,121</td>
<td></td>
</tr>
<tr>
<td>7. Non res. corp. doing business in state</td>
<td>Non res. corp. doing business in state</td>
<td>265a</td>
<td>54a</td>
<td>319</td>
<td></td>
</tr>
<tr>
<td>8. Non res. corp. doing business in state</td>
<td>Non res. corp. not doing business in state</td>
<td>71a</td>
<td>14</td>
<td>85</td>
<td></td>
</tr>
</tbody>
</table>
based on diversity of citizenship jurisdiction operate to clog the courts and to the detriment of federal question litigation, the fact that it is preferred by certain litigants is not a sufficient reason to retain it. Similarly, just because diversity jurisdiction is old does not mean that it must be good, especially if the original reasons for diversity jurisdiction are no longer valid. Today, there is no need to forge a national consciousness; prejudice against foreigners, if it ever existed, is no longer potent; the state judiciaries have been upgraded; and new groups claim to need the protection of the federal courts more than corporations do. Furthermore, while the federal courts had little business other than diversity litigation in the early days of this nation’s history, they are today extremely overworked, partly because ordinary citizens look directly to the

| 9. Non res. corp. doing business in state | Other non resident | 99a | 12 | 111 |
| 11. Other non resident | Non res. corp. doing business in state | 883 | 70a | 953 |
| 12. Non res. corp. not doing business in state | Non res. corp. not doing business in state | 31 | 2 | 33 |
| 13. Non res. corp. not doing business in state | Other non resident | 31 | 4 | 35 |
| 14. Other non resident | Non res. corp. not doing business in state | 96 | 14 | 110 |
| 15. Other non resident | Other non resident | 427 | 56 | 433 |
| 16. Resident | Resident | 119a | 24 | 143 |
| 17. Unknown | 4 | 4 | 8 |
| Total Cases | 19,510 | 3,344 | 22,854 |

a—shifted by S.1876 to state courts. These cases total 14,109. See Table 2 for further analysis.
b—these cases are not counted as shifted because it is assumed there is a non resident defendant properly joined.

Source: Administrative Office of the United States Courts.

Burdick, supra note 124, at 8-9.

According to Meador, one or both parties is a corporation in over 75% of all diversity cases, and, in the remainder, which consist almost entirely of personal injury actions between private individuals, the real defendant is the insurer, a corporation. Meador statement, supra note 175, at 8-9.
federal government rather than to their states for the vindication of important statutory and constitutional rights. Finally, the rise of the Commission on Uniform Laws and the prevalence with which state legislatures adopt these uniform statutes would appear better to assure uniformity of treatment of litigants than utilization of diversity jurisdiction. For all these reasons, those who want to retain diversity of citizenship jurisdiction, rather than those who want to eliminate it, should have the burden of demonstrating both why exceeding a threshold amount in controversy makes a case so unique that it must be brought in federal court and how litigating in state courts would unduly prejudice the administration of justice.

CAN THE STATE COURTS HANDLE THE ADDED CASES: CONVINCING THE CYNICS

Having established that the retention of diversity of citizenship jurisdiction serves no compelling federal purpose, it is still necessary to examine critically whether the reasons put forward to support its elimination suggest that such congressional action is logical and rational. These reasons fall into three related categories—that the retention of diversity is not logical because it is not a consistent remedy which is available to all who would be interested in using it; that it is more efficient for state courts, which are better at making state law than federal courts, to do so; that principles of federalism require that state courts, which are more competent at interpreting state law and less overworked than their federal counterparts, perform their proper share of judicial business.

The theory that diversity jurisdiction is a "luxurious and basically illogical mechanism" has been around for a long time. It

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266. Burger, supra note 130; Fraser, supra note 91, at 194-95; H.R. Rep. No. 893, 95th Cong., 2d Sess. (1978); Meador statement, supra note 175.
267. Friendly, supra note 91, at 634; Hertz, supra note 241; Wright, supra note 142, at 323, Meador statement, supra note 175, Hunter testimony, supra note 174, at 6-7.
268. Bratton, supra note 91, at 354; Meador statement, supra note 175.
269. H.R. Rep. No. 893, 95th Cong., 2d Sess. 2 (1978). As Professor Charles Alan Wright argued in his Statement to the Subcommittee on Courts, Civil Liberties and the Administration of Justice on September 29, 1977, "[w]e cannot afford to maintain an elaborate and basically illogical mechanism that brings nearly 32,000 cases a year into federal courts merely because in a very few of those cases this provides a welcome escape from some disgraceful condition in a particular state court." Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 220 (1977) (statement of Charles Alan Wright).
270. See generally note 105 supra.
prompted Mr. Chief Justice Warren to call for the ALI study,271 and it has been adopted by the present Chief Justice as a cornerstone of his plans to revise the caseload of the federal courts.272 "Diversity jurisdiction had some validity for the first hundred years of our history but has had none for at least a generation. Today there is no rational basis to put an automobile accident case in a federal court simply because the litigants reside in different states."273

Because of the amount in controversy requirement274 and the preconditions which must be met before cases brought initially in state court can be removed to federal court,275 the continued existence of diversity jurisdiction makes little sense even if there were, in fact, local prejudice against out-of-state litigants.276 As things presently stand, if an out-of-state plaintiff sues a local defendant in state court, the case cannot be removed to federal court,277 although an in-state plaintiff has the choice of bringing the case originally in either state or federal court.278 The requirement of complete diversity before federal jurisdiction can be invoked is similarly inconsistent.279 If there truly were prejudice against out-of-state litigants, minimal diversity should be sufficient to get the case into federal court.280 Finally, because of the amount in controversy requirement, not all suits involving citizens of different states can be tried in federal court, despite the operation of the same sort of prejudice against the foreign litigant. If federal courts are really superior to their state counterparts, the amount in controversy requirement suggests that our society wants to preserve this superior form of justice only for cases involving more expensive claims. Apart from the needless litigation which the amount in controversy and other diversity requirements have created,281 there is no logical reason why a personal injury suit, for

271. See note 113 and accompanying text supra.
272. Burger, supra note 130.
273. Id. at 1126.
276. See note 188 supra.
280. In fact, this is exactly what Moore and Weckstein propose. See Moore & Weckstein, supra note 78, at 27. See note 207 and accompanying text supra.
281. An analysis of the statistics available clearly demonstrates that, on the average, diversity cases are more time consuming than other civil cases. In 1976, for example, of all the civil cases, other than those concerning land condemnation, 8.1% actually resulted in a trial. Of diversity cases, however, 12.9% went to trial. Looking at the statistics from another angle, 3.3% of all civil cases were tried by a jury in 1976; 8.1% of diversity cases were disposed of this way. United States Courts 1976, supra note 1, Table C-4, at 312-13.

These findings are consistent with those of a 1969-70 study by the Federal Judicial Center. In that year diversity cases represented 26.2% of all civil findings, but
example, in which damages of $11,000 are provable should be treated differently from one in which the plaintiff suffers only $9,000 worth of damages. Because of these logical inconsistencies, diversity jurisdiction is both over- and under-inclusive as a remedy for alleged victims of prejudice. To resolve these problems without further overburdening of the federal courts requires its complete elimination.

A more serious shortcoming of the retention of diversity jurisdiction however, is that it is an inefficient use of federal court time. With the landmark decision of *Erie Railroad v. Tompkins*, in which the Supreme Court held that federal courts sitting in diversity cases are to apply the law of the state in which they sit, federal courts were stripped of their ability to contribute meaningfully to the development of the common law. Instead, they were expected to discern state law and apply it as the state’s supreme court would under the same circumstances.

While this task might appear simple, in practice, it has done more to confuse the law than to create evenhanded application. Because the federal court is expected to apply, rather than to create state law, there has been a tendency to construe state law overly mechanistically to avoid the charges frequently leveled against federal interpretations by state supreme courts. Thus, for example, federal courts, attempting not to step on the toes of the state courts, have had a greater tendency to defer to old state law.

they took 37.9% of the time of district court judges. Federal Judicial Center, The 1969-1970 Federal District Court Time Study, Table XVII (1971). Federal judges also perceive spending more time on diversity than on other cases. In a study conducted by Shapiro, district court judges thought they spent 32.4% of their time spent on all civil cases on diversity cases, and appeals court judges thought they spent 18.8% of their time on diversity appeals. Yet only 24.3% of civil cases filed in the district courts and 16.5% of the appeals were diversity cases. Shapiro, supra note 148, at 334-35.

282. “[T]he arguments for retaining [diversity jurisdiction] will not hold water when the federal courts are overburdened with distinctively federal business. While the *Erie* decision eliminated the evil of forum shopping, it also stripped the federal courts of the power to ‘make law’ in diversity actions. And there is simply no respectable arguments for permitting the jurisdiction to be invoked today by a resident of the state where the federal court is held.”

Friendly, supra note 91, at 641.

283. 304 U.S. 64 (1938).

284. Id. at 78.

285. The evil sought to be resolved in *Erie* was forum shopping. While the decision appears to have accomplished that goal, but see text accompanying note 294 infra, it has created new problems in its wake. See Friendly, supra note 91, at 634; Hertz, supra note 241. One way to avoid some of these problems is through certification of questions of state law to state supreme courts. See Note, Civil Procedure—Scope of Certification in Diversity Jurisdiction, 29 Rutgers L. Rev. 1155 (1976).

286. Hertz, supra note 241.

287. See cases cited in Hertz, supra note 241, at 868 n.42.
precedents,\textsuperscript{288} and the Supreme Court even requires federal courts in diversity cases to follow the decision of an intermediate state appellate court unless there is clear evidence that the state's highest court would decide the issue differently.\textsuperscript{289}

Because decisions in diversity cases perform no creative function in the evolution of the common law, the same issues must wait to be resolved again in state court before they have an precedential value. The judiciary serve two functions in our legal system—to provide a decision in the case being litigated and to announce useful precedents to guide future behavior.\textsuperscript{290} Diversity litigation, however, serves only the first of these functions and thus results in the squandering of judicial resources.\textsuperscript{291} This waste of federal judicial energy is especially unfortunate, given the extreme overcrowding characteristic of the federal courts at this time.\textsuperscript{292} That diversity cases take more time to resolve than other litigation\textsuperscript{293} and have less impact on the law than other federal decisions provide compelling reasons to bar them from the federal docket.

Moreover, it can be persuasively argued that even \textit{Erie's} goal of eliminating forum shopping diversity cases has not been accomplished.\textsuperscript{294} Thus, where a difficult question of state law is involved, a plaintiff often takes his case to federal court since, if he doesn't like the result he need not be bound by it in future litigation in state court. Similarly, when the old precedents favor the plaintiff, he will often bring his suit in federal court because he realizes that the federal judge is less likely to refuse to apply the

\textsuperscript{288} Wright, \textit{supra} note 142, at 321.
\textsuperscript{290} Wright, \textit{supra} note 142, at 323. Since diversity impedes the achievement of justice, litigants would be better off in state court. Hunter testimony, \textit{supra} note 174, at 6-7.
\textsuperscript{291} Hertz, \textit{supra} note 241; Wright, \textit{supra} note 142, at 322-23 & nn.24 & 25. Not all commentators, however, take such a gloomy position.

Certainly, federal judges are not generally inept at examining state legislative history or at understanding prior rulings of state courts . . . . While state judges may bring greater experience with the law of their state to bear on the construction of state law, to the extent that this experience is the product of their prior decisions, these decisions are available for their federal counterparts to examine . . . .

\textit{Developments in the Law, supra} note 50, at 1258. Federal judges merely construe old precedents as state courts would; if they are discredited, they will be discarded. \textit{Id.} Moreover, federal courts in section 1983 actions also have to construe state law, and no one has suggested that they are not competent to do so. Shapiro, based on this own personal survey of the 90 or so recent diversity cases decided with full opinions, notes that 21 “made arguably useful contributions to developing state law,” which leads him to conclude that diversity cases make a substantive contribution to state law. Shapiro, \textit{supra} note 148, at 325-26.

\textsuperscript{292} \textit{See} notes 1-15 and accompanying text \textit{supra}.
\textsuperscript{293} \textit{See} note 281 \textit{supra}.
\textsuperscript{294} \textit{See} note 285 \textit{supra}.
old law, even if it is completely out of step with modern conditions, than his state counterpart. Finally, when an issue is decided against the plaintiff in federal court, he may sue in state court in the hope of convincing the state judge not to follow the federal interpretation. All this wasteful litigation not only strains the resources of both state and federal courts, but it permits plaintiffs to manipulate the dual system of courts to their own, as opposed to society's, advantage; fosters excessive and unnecessary litigation; and breeds cynicism on the part of litigants and their attorneys, all of which helps to bring the judicial office into disrepute.

If it is assumed that state courts are the interpreters of state law, then it comports more with principles of federalism to require cases in which state law must be construed to be litigated in state courts.295

Ultimately there should be a fair and rational allocation of the nation's litigation based upon the principle that, since state courts are the authoritative expositors of state law under our system, they should be the courts where such issues are tried, and upon the principle that federal courts should be limited to their proper role as national courts dealing with litigation affecting federal rights.296

It has already been pointed out that bias against foreigners297 and grossly incompetent state judicial systems298 are no longer

295. Judge Lay, of the United States Court of Appeals for the Eighth Circuit, although speaking of federalist principles in the context of state vindication of federal constitutional rights, demonstrates why principles of federalism require the elimination of diversity jurisdiction:

[T]he most prominent aspect in the evolutionary process of federalism has been the inability of the states to perform their duties. In response to this inability, or reluctance, of the states, power has been vested where it will be exercised—in Congress and the federal courts. [In recent decisions, however,] [t]he Supreme Court not only is asserting a renewed confidence in the ability of the states to perform their duties, but . . . is also encouraging states to act by giving them the opportunity to do so . . . . Thus, the Court is engaging in a federalistic experiment by giving the states the opportunity to demonstrate that the federal government need not act because the states are adequately performing.

Lay, supra note 91, at 13.

296. Bratton, supra note 91, at 354. Hunter takes exactly the same position:

We recognize the need for a proper jurisdictional balance between the federal and state court systems, and an assignment to each system of those cases most appropriate to that system in the light of the basic principles of federalism. The guiding principle is that there should be federal court jurisdiction where federal questions are at stake and state court jurisdiction where state questions are at stake and state courts are available to provide an adequate forum. The continuing existence of diversity jurisdiction is preventing our federal judges from giving the necessary attention they would like to give to other federal cases which properly belong in the federal courts and have no other forum.

Hunter testimony, supra note 174, at 10-11.

297. See notes 184-204 and accompanying text supra.

298. See notes 205-241 and accompanying text supra.
the problems that they were once assumed to be. Thus, no reason exists not to require the resolution in state courts of disputes concerning state law. To continue to call for the retention of diversity cases in the federal courts, on the ground that litigants receive better justice there, is demeaning to the state courts. The proposition the federal judges are better suited to handle litigation concerning federal statutory or constitutional rights, not only because of their greater expertise in this area, but also because they are more insulated from majoritarian pressures and have more sympathy than state court judges for substantive federal rights, does not bear on the ability of state court judges to decide the issues of state law that form the basis of diversity jurisdiction. The only reasons that might mitigate against this transfer of cases from the federal to the state courts would be if state judges were incompetent to deal with the new caseload or if it would so seriously overburden the state courts as to impair their continued operation.

Despite the feeling of certain commentators, and even some members of Congress, that state court judges are less competent than their federal counterparts because they serve for only limited terms and are thus under the influence of local political forces, the caliber of state judiciaries has improved dramatically. This trend has been accelerated by the states' adoption of Codes of Judicial Conduct, continuing judicial education, and

300. See Stolz, supra note 63, at 963 (because state court judges have less sympathy for substantive federal rights, there is a feeling that they cannot be trusted with power over matters of national concern which must be entrusted in the first instance to the federal courts); State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 119 (1977) (statement of Burt Neuborne).
301. See, e.g., Neuborne, Myth of Parity, supra note 53; Reath, supra note 148. Carl McGowan, a federal judge, rejects the idea espoused by Anderson, supra note 39, that the state courts could serve as the nation's only trial courts on the ground that variations in the quality of state judicial systems with their backward provisions for judicial selection and tenure make that suggestion unwise. C. McGowan, supra note 12, at 83-84.
302. In debating H.R. 9622, one Representative noted: “The difference between a Federal judge and a State judge is profound. A Federal judge is on Mount Olympus; he is appointed for life. A State judge is elected, and he is in the political swamps and gets those phone calls from political people. So, there is a vast difference in the atmosphere of the two courts.” 122 Cong. Rec. H1560 (daily ed. Feb. 28, 1978) (remarks of Rep. Hyde).
304. For a history of judicial education in the United States, see Cady & Coe, Education of Judicial Personnel: Coals to Newcastle, 7 Conn. L. Rev. 423 (1975). See also Hyde, supra note 231, at 173; The Book of the States, supra note 92, at 90-91.
the institution of judicial discipline and removal procedures. Moreover, the kinds of disputes that state judges would be called upon to resolve were diversity jurisdiction eliminated are the very same type of cases they are used to deciding—tort and contract actions. For these reasons state judges are presently competent to handle the issues which would result from the transfer of diversity cases from the federal to the state courts.

It still remains to be determined, however, whether the increased caseload could be handled by existing state judicial re-

305. See, e.g., MINN. STAT. §§ 490.15 to 490.18. See also note 233 supra. The judicial training programs of all the states are described in NATIONAL CENTER FOR STATE COURTS, STATE JUDICIAL TRAINING PROFILE (1976).

306. State trial courts have had this kind of experience for years, even if one considers only cases that involve citizens from other states. Some cases that qualify for diversity treatment are either never brought in federal court or not removed. Numerous other cases must be brought in state court because the amount in controversy is less than the amount required to get into federal court. This latter group has increased greatly with the enactment of state long-arm statutes and the willingness of state supreme courts to construe them to permit jurisdiction as long as it is consistent with constitutional principles of due process. Thus, the only limits on a state's assumption of jurisdiction over foreigners under its long-arm statutes are those addressed in such cases as Shaffer v. Heitner, 429 U.S. 813, (1977) (minimum contacts test governs all assumptions of jurisdiction) and Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) (when state's utilization of its own law under choice of law principles is permissible).

An analysis of the caseloads of various state courts also reveals the prevalence of these kinds of cases. Thus, in New York, its general trial courts received 111,018 cases in 1976, of which 21,481 were motor vehicle tort cases and 8,998 were contract cases. The total number of tort cases was 34,997. STATE OF NEW YORK, ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE, TWENTY-SECOND ANNUAL REPORT 70-71 (1977). A similar pattern emerges in Maryland. Of all the civil cases filed in its circuit courts, 31.6% were motor torts, 12.2% were other torts, and 24.7% were contract cases. ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND ANNUAL REPORT 1975-76, at 82 (1977). That almost all the tort and contracts cases in the federal courts are based on diversity of citizenship is demonstrated by the following table:

<table>
<thead>
<tr>
<th>Nature of Suit</th>
<th>Total Private Cases</th>
<th>Diversity of Citizenship</th>
<th>Percent Diversity of Citizenship</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONTRACT ACTIONS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>3,218</td>
<td>3,191</td>
<td>99.16%</td>
</tr>
<tr>
<td>Negotiable Instruments</td>
<td>981</td>
<td>942</td>
<td>96.02%</td>
</tr>
<tr>
<td>Marine</td>
<td>3,678</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Miller Act</td>
<td>1,009</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Other Contract Actions</td>
<td>11,179</td>
<td>10,983</td>
<td>98.25%</td>
</tr>
<tr>
<td>TOTAL CONTRACT ACTIONS</td>
<td>20,055</td>
<td>15,116</td>
<td>75.34%</td>
</tr>
<tr>
<td>REAL PROPERTY ACTIONS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Condemnation of Land</td>
<td>41</td>
<td>12</td>
<td>29.24%</td>
</tr>
<tr>
<td>Other Real Property Actions</td>
<td>1,589</td>
<td>1,053</td>
<td>66.27%</td>
</tr>
<tr>
<td>TOTAL REAL PROPERTY ACTIONS</td>
<td>1,630</td>
<td>1,065</td>
<td>65.34%</td>
</tr>
</tbody>
</table>
sources without unduly burdening them. Otherwise, it would be unwise to transfer cases from one court system to another if the effect on the receiving system impaired its ability to dispense quality justice. One of the major arguments of those who wish to retain diversity jurisdiction is that its elimination would only more seriously overburden the already bulging state court dockets and increase the already serious delay in bringing cases to trial in state courts.

TORT ACTIONS

<table>
<thead>
<tr>
<th>Category</th>
<th>State</th>
<th>Federal</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airplane Personal Injury</td>
<td>673</td>
<td>605</td>
<td>89.90%</td>
</tr>
<tr>
<td>Assault, Libel, Slander, Personal Injury</td>
<td>691</td>
<td>668</td>
<td>96.67%</td>
</tr>
<tr>
<td>Employer's Liability Act, P.E.</td>
<td>1,306</td>
<td>-0-</td>
<td>-0-</td>
</tr>
<tr>
<td>Marine Personal Injury</td>
<td>4,950</td>
<td>1,180</td>
<td>23.84%</td>
</tr>
<tr>
<td>Motor Vehicle Personal Injury</td>
<td>5,470</td>
<td>5,346</td>
<td>97.73%</td>
</tr>
<tr>
<td>Other Personal Injury</td>
<td>6,469</td>
<td>6,306</td>
<td>97.48%</td>
</tr>
<tr>
<td>Personal Property Damage</td>
<td>4,174</td>
<td>1,388</td>
<td>33.25%</td>
</tr>
<tr>
<td>TOTAL TORT ACTIONS</td>
<td>23,733</td>
<td>15,493</td>
<td>65.28%</td>
</tr>
</tbody>
</table>

307. Flango and Blair suggest that a more serious problem than court congestion may be providing the increased number of supporting personnel and facilities that the transfer of diversity cases to the states will require. Nevertheless, the court administrations in such populous states as New York and Illinois favor the transfer of these cases. Flango & Blair, The Relative Impact of Diversity Cases on State Trial Courts 16-17 (1978) (unpublished research prepared for the National Center for State Courts).

308. According to John Frank, one of diversity's staunchest supporters, transfer of cases from federal to state dockets will simply increase the congestion in the state courts of the nation's largest cities. To demonstrate his point, he compiled the following table from the INSTITUTE OF JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY 1971 and the 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1971).

TABLE OF WAITING TIME STATE AND FEDERAL

<table>
<thead>
<tr>
<th>City</th>
<th>State, months</th>
<th>Federal, months</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chicago</td>
<td>61.7</td>
<td>14</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>51.9</td>
<td>16</td>
</tr>
<tr>
<td>Manhattan</td>
<td>49.9</td>
<td>27</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>46.8</td>
<td>37</td>
</tr>
<tr>
<td>Jersey City</td>
<td>35.6</td>
<td>26</td>
</tr>
<tr>
<td>Boston</td>
<td>35.0</td>
<td>15</td>
</tr>
<tr>
<td>Detroit</td>
<td>34.3</td>
<td>23</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>24.3</td>
<td>12</td>
</tr>
<tr>
<td>Minneapolis</td>
<td>21.4</td>
<td>6</td>
</tr>
<tr>
<td>Cleveland (1970)</td>
<td>27.5</td>
<td>20</td>
</tr>
<tr>
<td>Memphis</td>
<td>9.9</td>
<td>11</td>
</tr>
</tbody>
</table>

Frank, supra note 93, at 160-61. See also Moore & Wicker, supra note 117, at 22 & n.116; Stolz, supra note 63, at 953-55 & n.44 (each year the California courts handle three to four times the business of all the federal district courts).
Those studies which have attempted to document the actual effect that the transfer of diversity cases would have upon state courts have found only a minimal impact. If the ALI proposals, which would prevent resident plaintiffs from utilizing diversity jurisdiction were enacted the increase in the states’ caseloads would vary from 0.8 to 7.4 additional cases per state judge with an average of 2.7 cases per year. A more recent study conducted under the auspices of the National Center for State Courts using 1976 figures concluded that the complete elimination of diversity jurisdiction would transfer an average of 4.12 cases to each trial court judge.

These figures may be somewhat misleading, however, because they assume that diversity cases would be redistributed evenly throughout the trial courts of the United States. This, of course, will not be the case. Not only are more diversity cases originally filed in some federal districts than in others, but the transfer of diversity cases to the states would undoubtedly place more of a burden on urban, than rural, state courts, the very courts that are already most overworked. The following tables provide some rough breakdowns of the effect of the elimination of diversity jurisdiction on the various states, using figures from 1970 (Table #1) and from 1976-77 (Table #2):

**TABLE #1**

**DIVERSITY CASES SHIFTED (1970)**

<table>
<thead>
<tr>
<th>States</th>
<th>Total No. of State Civil Cases</th>
<th>Total No. of Diversity Cases</th>
<th>Number of State Trial Judges</th>
<th>Number of General Jurisdiction</th>
<th>Diversity Cases Shifted Per State Trial Judge (Avg)</th>
<th>Civil Terminations Per State Trial Judge (Avg)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st CIRCUIT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>41,947</td>
<td>309</td>
<td>60</td>
<td>11</td>
<td>5.5</td>
<td>—</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>12,741</td>
<td>53</td>
<td>46</td>
<td>7.6</td>
<td>658</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>5,130</td>
<td>78</td>
<td>13</td>
<td>8.0</td>
<td>1,268</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>—</td>
<td>385</td>
<td>—</td>
<td>—</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>—</td>
<td>385</td>
<td>—</td>
<td>—</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd CIRCUIT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>19,399</td>
<td>193</td>
<td>35</td>
<td>5.5</td>
<td>508</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>75,809</td>
<td>1947</td>
<td>225</td>
<td>8.7</td>
<td>336</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>—</td>
<td>261</td>
<td>6</td>
<td>43.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd CIRCUIT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>4,203</td>
<td>66</td>
<td>12</td>
<td>5.5</td>
<td>463</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>33,777</td>
<td>555</td>
<td>78</td>
<td>7.1</td>
<td>427</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>25,707</td>
<td>2078</td>
<td>254</td>
<td>8.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4th CIRCUIT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>53,667</td>
<td>334</td>
<td>79</td>
<td>4.2</td>
<td>635</td>
<td></td>
</tr>
</tbody>
</table>

310. See notes 123-127 and accompanying text *supra* for a discussion of the ALI proposals.
<table>
<thead>
<tr>
<th>States</th>
<th>Total</th>
<th>Number of Diversity Cases 1975-76</th>
<th>Number of Diversity Cases 1976-77</th>
<th>General Jurisdiction Judges</th>
<th>Diversity Cases Shifted Per Judge 1976-77</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>988</td>
<td>967</td>
<td>102</td>
<td>9.5</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Total Cases</th>
<th>New Cases</th>
<th>Total Cases 2021</th>
<th>New Cases 2021</th>
<th>% Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>69</td>
<td>88</td>
<td>17</td>
<td>5.2</td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td>233</td>
<td>251</td>
<td>72</td>
<td>3.5</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>473</td>
<td>469</td>
<td>55</td>
<td>8.5</td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>1,535</td>
<td>1,612</td>
<td>501</td>
<td>3.2</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>467</td>
<td>335</td>
<td>87</td>
<td>3.9</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>273</td>
<td>277</td>
<td>45</td>
<td>6.2</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>104</td>
<td>91</td>
<td>14</td>
<td>6.5</td>
<td></td>
</tr>
<tr>
<td>D. C.</td>
<td>477</td>
<td>427</td>
<td>44</td>
<td>9.7</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>1,130</td>
<td>966</td>
<td>272</td>
<td>3.6</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>1,226</td>
<td>1,220</td>
<td>88</td>
<td>13.9</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>133</td>
<td>155</td>
<td>22</td>
<td>7.1</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>101</td>
<td>107</td>
<td>88</td>
<td>1.2</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>1,688</td>
<td>1,593</td>
<td>603</td>
<td>2.6</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>728</td>
<td>834</td>
<td>149</td>
<td>5.6</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>234</td>
<td>236</td>
<td>113</td>
<td>2.1</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>484</td>
<td>545</td>
<td>65</td>
<td>8.7</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>369</td>
<td>394</td>
<td>82</td>
<td>4.8</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>1,103</td>
<td>1,174</td>
<td>125</td>
<td>9.4</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>97</td>
<td>90</td>
<td>14</td>
<td>6.4</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>449</td>
<td>411</td>
<td>85</td>
<td>4.8</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>604</td>
<td>611</td>
<td>46</td>
<td>13.3</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>1,081</td>
<td>1,077</td>
<td>158</td>
<td>6.8</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>386</td>
<td>385</td>
<td>70</td>
<td>5.5</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>747</td>
<td>794</td>
<td>65</td>
<td>12.2</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>745</td>
<td>826</td>
<td>111</td>
<td>7.4</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>135</td>
<td>131</td>
<td>28</td>
<td>4.7</td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
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<tr>
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<tr>
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<td>747</td>
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<tr>
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<td>123</td>
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<tr>
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<tr>
<td>Washington</td>
<td>276</td>
<td>202</td>
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</table>
It is clear from these statistics that the aggregate impact on the states will not be unmanageable. The average annual rate of increase in cases filed in state courts over the last fifteen years ranges from 3 to 4% in states like Minnesota, Kansas, and Iowa to 7 or 8% in more populated and industrial states, such as Ohio and Michigan.\(^{315}\) Since the natural increases in caseloads is greater than the increase in the number of diversity cases filed, their transfer to the states should have no major impact on their ability to administer justice.\(^{316}\) Nevertheless, Flango and Blair find that the addition of diversity cases will be particularly burdensome on the courts of Georgia, Kansas, Massachusetts, Minnesota, Missouri,


\(^{316}\) This minimal impact can be seen from a comparison of the difference in civil filings and diversity filings in selected states:

<table>
<thead>
<tr>
<th></th>
<th>Civil Cases Filed '69</th>
<th>Civil Cases Filed '70</th>
<th>Increase in Cases Shifted</th>
<th>Diversity Cases Shifted</th>
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<tbody>
<tr>
<td>California</td>
<td>97,997</td>
<td>103,749</td>
<td>5,752</td>
<td>476</td>
</tr>
<tr>
<td>Connecticut</td>
<td>17,565</td>
<td>19,399</td>
<td>1,834</td>
<td>153</td>
</tr>
<tr>
<td>Kansas</td>
<td>25,995/(^a)</td>
<td>28,737/(^a)</td>
<td>2,742</td>
<td>299</td>
</tr>
<tr>
<td>Louisiana</td>
<td>99,139</td>
<td>105,439</td>
<td>6,300</td>
<td>925</td>
</tr>
<tr>
<td>Maryland</td>
<td>50,384</td>
<td>53,667</td>
<td>3,283</td>
<td>334</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>41,736</td>
<td>41,047</td>
<td>-688/(^b)</td>
<td>350</td>
</tr>
<tr>
<td>Michigan</td>
<td>82,292</td>
<td>86,693</td>
<td>4,401</td>
<td>756</td>
</tr>
<tr>
<td>Minnesota</td>
<td>15,533</td>
<td>16,924</td>
<td>1,391</td>
<td>363</td>
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<tr>
<td>Missouri</td>
<td>59,037</td>
<td>71,166</td>
<td>12,129</td>
<td>522</td>
</tr>
<tr>
<td>New Jersey</td>
<td>34,341</td>
<td>33,892</td>
<td>-149/(^b)</td>
<td>555</td>
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<tr>
<td>New York</td>
<td>69,783</td>
<td>75,809</td>
<td>6,206</td>
<td>1,974</td>
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<tr>
<td>North Carolina</td>
<td>11,880</td>
<td>13,589</td>
<td>1,709</td>
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<td>4,973</td>
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<td>Oregon</td>
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<td>285</td>
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<tr>
<td>South Dakota</td>
<td>5,341</td>
<td>5,939</td>
<td>597</td>
<td>87</td>
</tr>
<tr>
<td>Washington</td>
<td>57,423</td>
<td>60,569</td>
<td>3,146</td>
<td>194</td>
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</table>

\(^{a/}\) The case filings for Kansas are from 1970 and 1971 respectively.  
\(^{b/}\) In Massachusetts and New Jersey civil case filings were less in 1970 than 1969. However, the cases shifted are substantially fewer than the decrease in state cases so that a net reduction of the state caseload would still occur.

Burdick, supra note 124, at 18.
New York, Rhode Island, South Carolina, and Wyoming, and that states such as New York, Pennsylvania, Texas, California, Illinois, Florida, Georgia, Louisiana and Michigan will have to add some judges to handle the diversity cases which would be brought in state courts. Comparing these two groups of states, they conclude that Georgia and New York may need to add four or more judges, Mississippi and South Carolina may need to add three, Kansas and Massachusetts might require two, and Rhode Island and Wyoming could get along without any.

It is impossible to rebut completely the position taken by Frank that the urban courts which are the most overburdened will get the largest increase in caseload. Nevertheless, states are beginning to use more efficiently their existing judicial resources. Under the Minnesota Court Reorganization Act of 1977, for example, it becomes possible to utilize the services of more than 100 county and municipal court judges if the caseload of the 72 district court judges becomes too heavy because of the transfer of diversity cases from the federal to the state courts. Similar flexibility in other states should go far toward alleviating whatever short-term problems occur.

Even if the transfer of diversity cases from the federal to the state courts required some additional judicial personnel, however, it would be cheaper for the few states who needed more judges to appoint them than for the federal government to increase the size of its judiciary. Transferring the diversity caseload to the state courts would make the system work more efficiently and, thus, more economically. With diversity litigation out of the federal courts it would no longer be necessary for the judge hearing the case to make the threshold determinations regarding satisfaction of the requirements of complete diversity and the jurisdictional amount. All of these procedural issues, which are themselves appealable, and thus time-consuming, would be irrelevant if the case were brought initially in a state court of general jurisdiction.


318. Flango & Blair, supra note 107, at 14.

319. Id. at 15.

320. See note 308 supra.

321. Minn. Stat. § 484.69, subd. 3 (1977); Sheran statement, supra note 315, at 179.

322. Of course, whatever additional expenses are incurred by the states in effectuating this transfer should be shared by the federal government.
Thus, these cases would take less total judicial time to resolve. Efficiency of judicial resources would also be served because the substantive issues litigated in a federal court would not have to be relitigated all over again in another lawsuit in state court.

CONCLUSION

Because the steady expansion in the demand for access to the courts is likely to continue into the future, in order to protect our court systems from total breakdown, it is necessary to alleviate the conditions that are responsible for this expansion. Whenever appropriate, litigants should be encouraged to utilize other mechanisms for dispute resolution. Even with the acceleration of diversionary procedures, however, the federal courts especially will continue to be overburdened, unless a significant portion of their caseload can be handled elsewhere. The most logical other judicial forum, which is currently underused in comparison to the number of judicial officers it employs, is the network of state courts. The task of determining what types of cases to transfer from the federal to the state courts is not an easy one, but we have attempted to demonstrate the reasons why cases based on diversity jurisdiction deserve least to be retained by the federal courts. Federal question litigation which involves interpretations of federal law or constitutional principles, although cognizable in state courts, is better resolved in the federal courts because of the greater independence of the federal judiciary from both local passions and legislative pressures and because federal judges have developed expertise in certain complex areas of federal law. Neither of these reasons, however, justifies federal retention of diversity jurisdiction. The law being interpreted in these cases is state, rather than federal, law, and the issues are ones with which state judges resolve competently in the ordinary course of their judicial careers. Moreover, because such litigation challenges neither unpopular beliefs nor the constitutionality of state statutes, there is little danger of prejudice due to the lack of insularity of state judiciaries. Finally, since local prejudice against foreigners is no longer prevalent and since the caliber of state judicial systems has improved dramatically since 1789, when jurisdiction of cases based on diversity of citizenship was given to the federal courts, there is no longer any logical reason for the retention of these cases which comprise over 20% of the federal caseload.

The time to eliminate diversity jurisdiction is now. Therefore, we strongly urge Congress to revise the Judicial Code to require litigation based on state law to be brought in state court. The Sen-
ate should act promptly to join the House of Representatives in enacting this legislation. Then the federal courts would be better able to decide the cases they are most competent to decide—those involving federal questions.