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RECENT EXPANSION IN FEDERAL JURISDICTION: A CALL FOR RESTRAINT

JOHN R. BARTELS*

In 1974 my late colleague, Judge Orrin G. Judd, wrote in the *American Bar Journal* on the expanding jurisdiction of the federal courts.¹ He concluded that the expansion was caused by congressional legislation, decisions of the appellate courts, and the natural increase in the volume of cases.² Since that time, while the breadth of federal jurisdiction has continued to enlarge, the causes of such expansion have remained unchanged. Indeed, Chief Justice Burger,

* United States District Judge, Eastern District of New York. A.B., Johns Hopkins, 1920; LL.B., Harvard, 1923. For his assistance in the preparation of this article the author expresses his deep appreciation to his law clerk Michael S. Straus, A.B., Columbia College, 1972; M.A., Columbia University, 1976; J.D., New York University, 1980.

¹ Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A.J. 938, 938 (1974). Judge Judd noted that the federal court system was being "opened to litigants who never were there before." *Id.* at 938. That system, and all its powers, are provided for by the United States Constitution, article III, §§ 1, 2. Section 1 specifies 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. The scope of federal judicial authority is outlined in article III, § 2, cl. 1, which provides that:

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

U.S. CONST. art. III, § 2, cl. 1.

² Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A.J. 938, 938 (1974).

in his 1980 remarks to the American Law Institute, stated that:

In the past decade Congress has enacted not less than 70 new statutes enlarging the jurisdiction of federal courts. Many of these statutes expand federal jurisdiction to cover relief already available in state courts. It is not unfair to say that the federal courts, and ultimately the Supreme Court, have tended to give expansive, rather than restricted, interpretation to these statutes, along with a narrowing of the scope of immunity of government officials.³

In another forum, the Chief Justice wrote that "[t]he year 1980 brought continued and steady growth in the work of the federal courts, more complex litigation, more novel cases, and hence more problems."⁴

One could properly ask: what is wrong with expanding the jurisdiction of the federal courts? The answer is that there is nothing wrong with such expansion if it is necessary to protect constitutional rights and other areas of special federal concern. If unnecessary for that purpose, however, such expansion is unjustified because it (1) creates concurrent jurisdiction with the state courts and administrative agencies without reason; (2) increases delay and expense in the adjudication of pending litigation in the federal courts; and (3) increases the pressure on the federal courts expeditiously to dispense with a more crowded docket,⁵ which in turn

³ Welcoming Remarks of Warren E. Burger—American Law Institute, Hyatt Regency Hotel (June 10, 1980).

⁴ Burger, *A Holiday Message from the Chief Justice*, THE THIRD BRANCH, Dec. 1980, at 3. According to Clement F. Haynsworth, Jr., Chief Judge of the Court of Appeals for the Fourth Circuit:

The biggest change, of course, is the expansion of the system and the revolutionary change in the kinds of cases we get. This is largely a consequence of congressional enactments during the last two decades but there have also been self-inflicted wounds by the courts.

An Interview With Chief Judge Clement F. Haynsworth, Jr., THE THIRD BRANCH, Dec. 1980, at 5. Chief Judge Haynsworth added that the self-inflicted wounds:

are principally [due to] the implication of new private rights of action from the Constitution or from statutes which provide only for criminal sanctions or administrative regulation. I understand the temptation to provide a personal remedy to one who has been wronged, though it may be sufficient from a societal point of view that the conduct of wrongdoers can be controlled by administrative sanctions or criminal prosecutions. The implication of such private rights of action, however, contributes to the increase in the workload of the judicial system.

Id.

⁵ The impact of a shift in cases from state courts to the lower federal courts ultimately is felt throughout the federal judicial system. As the number of filings in district courts increases, so, proportionately, do the number of appeals to the circuit courts, and inevitably,

tends to affect the quality of justice.

In light of these concerns, it is appropriate first to analyze the number and types of cases currently reaching the federal bench. The evolution of the expansion of federal jurisdiction will then be discussed, and the import of such expansion will be appraised. Finally, several reforms will be suggested.

PRESENT CASELOAD

A crowded docket does not in itself indicate the need for a change in jurisdictional requirements. The courts might simply need more judges. Certainly the recent creation of new district and appeals court judgeships in the Omnibus Judgeship Act of 1978⁶ was a needed balm, but the problem is not that simple. It is not solely one of manpower.⁷ The overview of the types of cases appearing on the calendar for the years 1970 through 1980, contained in the most recent Report of the Director of the Administrative Office of the United States Courts, reveals a distribution of subject matter which fairly may be questioned as being suited to harmonious federal/state relations.

According to this report, the approximately 29,000 criminal cases commenced in district courts during the year ending June 30, 1980, represent a decrease of nearly 12% from the previous year's total. Indeed, criminal case filings have been decreasing steadily since 1972, when over 49,000 cases were commenced.

A significant factor in the decrease has been the implementation of new prosecution guidelines by the Justice Department. Auto theft violations of the under-21 "joy-ride" variety are turned over to state authorities, for example. Similarly, first-time weapons violators are prosecuted in state courts, while the federal government has focused its attention on handling convicted felons who violate the weapons control laws. There has also been a policy in favor of allowing the state courts to shoulder some of the burden of handling bank robbery cases.

In contrast to the situation on the criminal docket, the total

the number of petitions for certiorari to the Supreme Court. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 47 (1973). Moreover, "[i]n sharp contrast to decisions of state courts, every decision of a court of appeals is a potential for the Supreme Court's docket." *Id.*

⁶ Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629.

⁷ For a discussion of the problems associated with the "explosion" of federal court litigation, see H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 15-54 (1973).

number of civil filings last year was about 169,000, an increase of more than 190% over the 87,000 filings in 1970, and 280% over the number of filings in 1960. In the Eastern District of New York alone, the number of new case filings has grown by nearly 43% since 1976 and by nearly 38% since late 1978. On June 30, 1980, the pending backlog totalled 447 cases per authorized judgeship. The rise in the Eastern District's backlog has occurred despite a 36% increase in the district's case termination rate since 1976.

Significantly, 25% of the burgeoning federal civil docket is comprised of diversity cases, wherein federal courts are called upon to make decisions on matters of state law. Since federal judges probably are less qualified than state judges to judge state law,⁸ and since their decisions are not binding on the state courts, it is no wonder that the most often repeated call for jurisdictional reform is the abolition of federal diversity jurisdiction. Moreover, apart from the burden on the federal courts, litigants in diversity cases may suffer serious delays.⁹ Of the 5,000 contract and tort cases pending in the federal courts for more than three years, 3,500 were there on diversity jurisdiction.

Finally, another fifth of the federal caseload is taken up with state and federal prisoner petitions. While filings by federal prisoners have decreased steadily over the past decade due largely to the use of prison grievance procedures, state prisoner filings have increased dramatically. State prisoner petitions alleging civil rights violations under section 1983 have increased 600% from the 2,000 in 1970 to the over 12,000 filed last year.

Clearly, this brief analysis of the federal docket demonstrates the pressing need for the formulation and implementation of measures limiting federal jurisdiction. The fashioning of viable remedies, though, requires an understanding of the genesis and growth of such jurisdiction.

HISTORICAL PERSPECTIVE

The judicial power of the United States is vested in the Supreme Court and in inferior courts under article III, sections 1 and

⁸ Cf. *Allstate Ins. Co. v. Hague*, 101 S. Ct. 633, 637 (1981) (Stevens, J., concurring).

⁹ While the state courts certainly have problems of congestion as well, the Conference of Chief Justices of State Courts adopted the following resolution in 1977:

Our state court systems are able and willing to provide needed relief to the federal court system in such areas as: . . . (c) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

2, and extends to all "cases" and "controversies" in law and equity "arising under" the Constitution and laws of the United States and treaties made thereunder.¹⁰ Congress is charged on a continuing basis with the task of allocating that power in order properly to maintain the balance of judicial authority between the several states and the Union itself.¹¹ While Congress can neither restrict nor enlarge the article III grant of original jurisdiction to the Supreme Court,¹² the distribution and modes of exercise of the balance of the judicial power were dependent on Congress' decision to create lower federal courts.¹³

The issues raised by the division of jurisdiction between the state and federal courts are primarily issues of federalism, not legal technicalities: they involve "the very stuff of American politics," not simply neutral judicial procedures.¹⁴ Nevertheless, the trial

¹⁰ U.S. CONST. art. III, §§ 1, 2. See note 1 *supra*.

¹¹ U.S. CONST. art. III, § 1. See note 1 *supra*.

¹² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431 (1793). See also Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 128, 131 (1938). Article III's grant of original jurisdiction to the Supreme Court, as interpreted by *Marbury*, is codified in 28 U.S.C. § 1251 (1976). Thus, the Supreme Court is vested with original and exclusive jurisdiction over controversies between states and over actions against foreign officials. 28 U.S.C. § 1251(a)(1)-(2) (1976). The Court has original but not exclusive jurisdiction over proceedings brought by foreign officials; controversies between states and the federal government; and actions instituted by a state against the citizens of another state or against aliens. *Id.* at § 1251(b)(1)-(3). Notably, although the legislature can neither restrict nor enlarge the original jurisdiction of the Supreme Court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803), it may provide for or deny the exclusivity of such jurisdiction. See *Ames v. Kansas*, 111 U.S. 449, 469 (1884); *Börs v. Preston*, 111 U.S. 252, 259 (1884).

¹³ *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Although the judicial power of the United States is granted by the Constitution, it is a congressional prerogative to create tribunals for the exercise of that power. *Id.* Thus, pursuant to article III, the legislature may or may not establish inferior federal courts. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Indeed, Congress "could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this [Supreme] Court as Congress might prescribe." *Id.*

¹⁴ Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500 (1928). One commentator has noted that:

When the First Congress met, the national struggle between the Federalists and the anti-Federalists was reflected in the debates over the jurisdiction to be conferred upon the federal courts. One group of anti-Federalists wanted no system of lower courts at all, and would have left the enforcement of federal laws to the tribunals of the states The Federalists, on the other hand, favored the establishment of a system of federal courts clothed with all the powers granted by the Constitution.

Snepp, *The Law Applied in the Federal Courts*, 13 L. AND CONTEMP. PROBS. 165, 165 (1948). The federalist debate survives, in the Constitution itself, in article VI, § 2 and in the Bill of Rights. On the one hand, the supremacy clause of article VI provides that the "Constitution,

courts created under the Judiciary Act of 1789¹⁵ had duties significantly more limited than those faced by the district courts today. The lawsuits with which the founders were familiar involved private parties and private affairs with the general purpose on both sides to limit intervention of the government. The common-law principles providing the rationale for the resolution of such litigation were more than adequate.

In 1789, the jurisdiction of the district courts and the circuit courts—which were in part also courts of original jurisdiction—was confined to admiralty, criminal, and diversity cases, and to cases in which the United States was a party. Notably absent was lower court jurisdiction over cases specially identified as “arising under” the Constitution or laws of the United States. Except for the brief attempt to confer federal question jurisdiction on the lower courts in the “Midnight Judges Act,”¹⁶ jurisdiction over such cases was only vested in the state courts, with federal review lying in the Supreme Court from the decision of a state’s highest court.¹⁷

Beginning with the outbreak of the Civil War, however, Congress significantly expanded federal jurisdiction. In 1863, removal jurisdiction was enlarged in favor of federal officers sued both criminally and civilly for acts committed under congressional or Presidential authority.¹⁸ The right of removal was extended to pri-

and the Laws of the United States” shall bind state judges, “the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONSR. art. VI, § 2. On the other hand, the tenth amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONSR. amend. X.

¹⁵ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (codified in scattered sections of 28 U.S.C.).

¹⁶ Act of Feb. 13, 1801, ch. 4, § 13, 2 Stat. 89, repealed, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132. The “Midnight Judges Act” had provided that in any case commenced in state court and “arising under the constitution or laws of the United States, or treaties made or to be made under their authority,” parties to the action could petition for removal to a United States circuit court. Act of Feb. 13, 1801, ch. 4, § 13, 2 Stat. 89, repealed, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

¹⁷ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 352-53 (1816); Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73. The “final judgment or decree” of the highest court of a state is appealable to the Supreme Court when that judgment denies the validity of a federal statute; or sustains the validity of a state constitution or statute argued to be “repugnant to the constitution, treaties, or laws of the United States;” or denies a “title, right, privilege or exemption” claimed under the Constitution or laws of the United States. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73 (codified at 28 U.S.C. § 1257 (1976)).

¹⁸ Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755. The Act had granted federal circuit court removal jurisdiction over civil or criminal proceedings initiated in state courts against federal officers. Removal jurisdiction was restricted, however, to cases wherein the federal officer had acted pursuant to executive or congressional direction during the Civil War. *Id.*

vate citizens in cases alleging official state interference with the newly granted civil rights of the freed slaves.¹⁹ In 1867, the federal courts received authority to review final state judgments through the writ of habeas corpus.²⁰ Additionally, the new civil rights acts themselves guaranteed access to the federal courts.²¹

General federal question jurisdiction was finally conferred on the lower federal courts in 1875.²² Since that time two main forces have led to an extraordinary expansion in the variety and number of cases in the federal courts: the decisions of the Supreme Court and the relentless enactment by Congress of legislation of broad scope and complexity, with the side-effect of providing a cause of action to determine rights under such laws.

JUDICIAL EXPANSION

A plaintiff asserting his entitlement to a judicial remedy in the federal courts must predicate his cause of action on a "right or immunity created by the Constitution or laws of the United States."²³ The mere grant by Congress of a benefit to an individual does not mean that his right to the benefit is enforceable in the first instance in federal court. Two important devices—implied causes of action and an expansive construction of constitutional rights—have, however, opened federal courts to classes of plaintiffs to whom standing had never been explicitly authorized by Congress.

Removal jurisdiction for state actions against federal officers survived the Civil War, however, and is presently codified in 28 U.S.C. § 1442 (1976).

¹⁹ Act of April 9, 1866, 14 Stat. 171 (codified in 28 U.S.C. § 1443 (1976)). Section 1445(a)-(c) of 28 U.S.C., which specifically delineates several nonremovable actions, evinces, by implication, the breadth of federal removal jurisdiction. Actions which are nonremovable are civil actions against a railroad, 28 U.S.C. § 1445(a) (1976), or against a common carrier, *id.* at § 1445(b), and civil actions arising under state workmen's compensation laws. *Id.* at § 1445(c).

²⁰ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified in 28 U.S.C. § 2241 (1976)).

²¹ *See, e.g.*, Act of March 1, 1875, ch. 114, § 3, 18 Stat. 335 (codified in 28 U.S.C. § 1343(4) (1976) and 42 U.S.C. § 2000a (1976)) (district courts granted original jurisdiction over suits alleging denial of equal access to public accommodations); Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified in 28 U.S.C. § 1343(3) (1976)) (district courts granted original jurisdiction over suits alleging deprivation of rights under color of state law); Act of May 31, 1870, ch. 114, § 8, 16 Stat. 142 (codified in 28 U.S.C. § 1343(4) (1976)) (district courts granted original jurisdiction over suits alleging racially motivated interference with the franchise).

²² Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified in 28 U.S.C. § 1331 (1976)).

²³ *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936).

Implied Causes of Action

Many, if not most, congressional enactments explicitly provide for some form of agency enforcement, without specifying whether in addition private parties may bring suit.²⁴ In section 21 of the Securities Exchange Act of 1934, for example, Congress explicitly provided for SEC enforcement of the various provisions of the Act. Nevertheless, the Supreme Court has acquiesced in lower court decisions recognizing a private cause of action under section 10(b) of the Act.²⁵ Furthermore, with respect to other sections of the 1934 Act, the Court has undertaken on its own to imply a private cause of action.²⁶ But in every case in which congressional silence is read to favor a cause of action, a court "necessarily expands the scope of its federal-question jurisdiction," without requiring explicit congressional intent to do so.²⁷

This is a disturbing trend, since the premise is unchallengeable that Congress, not the judiciary, is the branch of the government to which the Constitution has assigned the task of delimiting the jurisdiction of the lower federal courts. While "[i]t is emphatically the province and duty of the judicial department to say what the law is,"²⁸ it is Congress' province both to create programs and projects and to decide how rights under them shall be enforced.²⁹ When Congress refuses in an enactment to specify its intent—perhaps on the assumption that the courts will carry the ball—the court, it is submitted, oversteps the Constitution's boundary line when it usurps that duty by construing the law to

²⁴ See, e.g., Securities Exchange Act of 1934, §§ 10(b), 21, 15 U.S.C. §§ 78j(b), 78u (1976).

²⁵ Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

²⁶ See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964), wherein the Court implied a private cause of action under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n (1976). See generally Comment, *An Analytical Framework for Implied Causes of Action: Section 17 of the Securities Exchange Act and Redington v. Touche Ross & Co.*, 59 B.U.L. Rev. 157 (1979).

²⁷ See Cannon v. University of Chicago, 441 U.S. 677, 746 n.17 (1979) (Powell, J., dissenting). Implication of a private right of action "runs contrary to the established principle that [t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." *Id.* at 747 (quoting American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951)). Additionally, implication "conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Id.* See Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922). Indeed, although the Constitution "gives to the inferior courts the capacity to take jurisdiction . . . it requires an act of Congress to confer" such jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

²⁸ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁹ See U.S. CONST. art. I, § 8.

express such an intent.

No federalism concerns are implicated, however, when the court construes a provision like section 14(a) of the Securities Exchange Act of 1934 to provide a private cause of action,³⁰ since the federal courts were already granted exclusive jurisdiction over its enforcement. Nevertheless, a recent decision of the Supreme Court, *Maine v. Thiboutot*,³¹ does give rise to questions concerning the allocation of judicial business between state and federal courts.

In that case, Mr. and Mrs. Thiboutot proceeded through administrative channels against the State of Maine under a state law claim of right. They alleged that they had been deprived of welfare benefits, to which they were entitled under the federal Social Security Act, because of the state's erroneous interpretation of certain provisions relating to dependent children. Subsequently, the Thiboutots amended what had originally been a solely state law action to include a pendent section 1983 claim.³² They asserted their supremacy clause contention that the federal standards contained in the Social Security Act must prevail over the State of Maine's regulations under that Act. The Maine state court construed section 1983 to allow the Thiboutots a cause of action under the Social Security Act—held not to be a "civil rights" law in *Chapman v. Houston Welfare Rights Organization*³³—with the result that the Thiboutots were able to receive attorney's fees under section 1988 of the Civil Rights Attorney's Fees Award Act of 1976.³⁴

Reviewing the Maine Supreme Court's construction of the scope of section 1983, on the State of Maine's petition for a writ of certiorari, the Supreme Court concluded that the phrase "and laws" as used in section 1983 referred to violations of *any* federal

³⁰ See *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964).

³¹ 100 S. Ct. 2502 (1980).

³² 100 S. Ct. at 2503. Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (1976 & Supp. III 1979).

³³ 441 U.S. 600, 620-23 (1979).

³⁴ See 100 S. Ct. at 2503. Pursuant to the Civil Rights Attorney's Fees Award Act of 1976, the "prevailing party" in any action under section 1983 may receive "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976).

statutory enactment.³⁵ It was not, as the State of Maine argued, limited to laws providing for the equal rights of citizens. This seems inconsistent with the Court's decision in *Chapman*. There, section 1983's companion jurisdictional statute, section 1343(3), was held to afford the federal courts a jurisdictional base for civil rights actions only.³⁶ Sections 1983 and 1343(3) were originally part of a single enactment.³⁷ Indeed, as enacted in 1871, their coverage was "coextensive."³⁸

It would appear, therefore, that the scope of section 1983 should go no further than providing a cause of action for civil rights cases. The import of *Thiboutot*, however, is that the Supreme Court has inferred a legislative intent to provide an express private right of action in favor of persons aggrieved by a state's administration of any one of a multitude of federal/state cooperative programs. It follows as well that attorney's fees under the new 1976 Act could be awarded to any prevailing section 1983 plaintiff, whether he prevailed on a civil rights or on a statutory claim.³⁹ Moreover, the fact that a plaintiff prevailed on the basis of a negotiated consent decree, rather than on a final adjudication, was held in *Maher v. Gagne*,⁴⁰ a companion case to *Thiboutot*, to be an insufficient ground on which to deny the award.⁴¹

The practical consequences of the holdings in *Thiboutot* and *Gagne* are worth examining. Plaintiffs seeking review of state welfare determinations have always been able to bring their suits in state courts, as did the *Thiboutots* in this case, with the potential for federal review by means of a writ of certiorari. *Thiboutot* now assures plaintiffs of a cause of action under which to bring their suits in federal courts in the first instance, without the necessity of appending their Social Security Act claim to a "not insubstantial" constitutional claim.

³⁵ 100 S. Ct. at 2504-06.

³⁶ 441 U.S. at 620. The *Chapman* Court held that § 1343 "does not confer federal jurisdiction . . . unless . . . [an] Act may fairly be characterized as a statute securing 'equal rights' within § 1343(3) or 'civil rights' within § 1343(4)." *Id.*

³⁷ See Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified in 28 U.S.C. § 1343(3) (1976) & 42 U.S.C. § 1983 (1976 & Supp. III 1979)).

³⁸ See 441 U.S. at 616.

³⁹ Indeed, the *Thiboutot* Court awarded § 1988 attorney's fees, reasoning that such fees "are available in any § 1983 action," and that "[s]ince we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit." 100 S. Ct. at 2506.

⁴⁰ 100 S. Ct. 2570 (1980).

⁴¹ See 100 S. Ct. at 2575; *id.* at 2577 (Powell, J., concurring).

Notably, since *Thiboutot* involved a construction of section 1983, not the Social Security Act, its enlargement of the scope of section 1983 to provide a cause of action to enforce compliance with *all* statutory rights deriving from federal/state cooperative programs is of significance beyond the welfare cases. The Court has freed plaintiffs from the task of demonstrating that Congress intended to provide a cause of action with respect to the specific law under which they seek relief.

Before *Thiboutot*, for example, there was a split among the circuits as to whether a private cause of action existed under the Rivers and Harbors Appropriations Act.⁴² After *Thiboutot*, section 1983 will provide aggrieved individuals with a general cause of action in both federal and state courts. They will have the added incentive of a potential award of attorney's fees, under the Attorney's Fees Award Act of 1976, should they prevail. Moreover, plaintiffs proceeding under section 1983 need not exhaust administrative remedies.⁴³

Thiboutot's expansive interpretation of section 1983 poses a threat to the balance of federal/state relations. The federal courts may now sit in judgment on the decisions and actions of state and local officials who administer complex regulatory programs, without prior review and without an opportunity for correction by the local governmental bodies who exercise immediate supervisory responsibility over such officials.

Another consequence of *Thiboutot* is that state and local officials, and their governmental bodies, will ultimately bear the brunt of defending against suits that allege a wrongful denial of federal/state cooperative program benefits. This is because plaintiffs will tend to sue state officials rather than their federal counterparts,

⁴² The Rivers and Harbors Appropriations Act, 33 U.S.C. §§ 401-467 (1976), provides, *inter alia*, for joint federal and state action in the construction of bridges, canals, and dams. The Ninth Circuit has held, and the Fourth Circuit has implicitly recognized, that a private cause of action exists under the Act. See *Riggle v. California*, 577 F.2d 579, 582-83 (9th Cir. 1978); *Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen*, 404 F.2d 1001, 1002-04 (4th Cir. 1968). The Third, Fifth, and Seventh Circuits, however, have held that a private cause of action does not exist under the Act. See *Williamson Towing Co. v. Illinois*, 534 F.2d 758, 761-62 (7th Cir. 1976); *Intracoastal Transp., Inc. v. Decatur County*, 482 F.2d 361, 366 (5th Cir. 1973); *Red Star Towing and Transp. Co. v. Department of Transp.*, 423 F.2d 104, 106 (3d Cir. 1970).

⁴³ *Morgan v. LaVallee*, 526 F.2d 221, 223 (2d Cir. 1975). See *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). In *Steffel*, the Court held that claims premised on § 1983 need not exhaust state judicial or administrative remedies before federal jurisdiction under § 1343(3) exists. *Id.*

since *Thiboutot* leaves unchanged the required showing that the enabling act of the cooperative program provides for private actions against such officials. State and local officials are provided with certain protections from liability in the form of good faith immunity or absolute immunity.⁴⁴ Additionally, states themselves may be protected, by sovereign immunity, from retroactive damage awards.⁴⁵ In light of the Court's recent decision in *Owen v. City of Independence*,⁴⁶ however, municipalities "will be strictly liable for errors in the administration of complex federal statutes," without the defense of good faith.⁴⁷

Aside from the additional financial burden on the states, one must seriously question on federalism grounds whether an intrusion of this magnitude into state and local affairs is a healthy development. In the context of an alleged deprivation of civil rights, federal review in the first instance may be an important safeguard to the exercise of those rights. When entitlements under complex federal/state programs are involved, however, the unstated premise that state courts or administrative bodies are inadequate to the task of judging conflicts under the supremacy clause cannot hold.

⁴⁴ See, e.g., *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials and officers are qualifiedly immune from § 1983 damages); *Imbler v. Pachtman*, 424 U.S. 409, 417-24 (1976) (absolute immunity from § 1983 damages for prosecutors who, acting within the scope of their authority, initiate criminal prosecution); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (qualified immunity from § 1983 damages for local school board members).

⁴⁵ See *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). The Supreme Court "has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Id.* Although unconsenting states are immune from retroactive awards, courts may, "consistent with the Eleventh Amendment," grant prospective injunctive relief. *Id.* at 677. See also U.S. CONST. amend. XI, which provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Id. But see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976). *Fitzpatrick* held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456.

⁴⁶ 445 U.S. 622 (1980). The *Owen* Court refused to confer either qualified or absolute section 1983 immunity upon a municipality. *Id.* at 638. The Court reasoned that immunity was only justified when it had been "established at common law" and was "compatible with the purposes of the Civil Rights Act." *Id.* Municipal corporations, the Court concluded, had no tradition of immunity. *Id.* See Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?: Owen v. City of Independence*, 55 ST. JOHN'S L. REV. 153, 160 (1980). Thus, *Owen* represents but another example of "the modern trend in section 1983 jurisprudence to expand the coverage of that statute." *Id.*

⁴⁷ 100 S. Ct. at 2513 n.10 (Powell, J., dissenting).

The federal issues simply do not predominate in such cases. On the contrary, federal involvement is often limited to the appropriation of funds. Moreover, even when federal standards are set for the state administrative agencies, there are internal checks in the disbursement of funds process to assure compliance with those standards.

In summary, it is noted that Congress, with increasing frequency, has passed laws which confer benefits on various groups of persons. In some statutes, notably the Civil Rights Act of 1964, the legislature has explicitly codified its intent that individual citizens vindicate their rights under those laws by means of private lawsuits. In others, Congress has indicated that enforcement should lie exclusively in one of the several agencies.⁴⁸ In still others, Congress has remained silent, and the Supreme Court has taken it upon itself to imply a private cause of action.⁴⁹ In *Thiboutot*, however, the Court in one stroke created a private cause of action under all congressional enactments involving state action, thus making Congress' *actual* intent irrelevant.⁵⁰ This may represent an unconstitutional self-delegation to the Court of Congress' power to expand the scope of federal question jurisdiction.

Expanded Interpretation of Constitutional Rights

Another device for the expansion of federal jurisdiction is the interpretation of constitutional rights. Thus, the federal courts

⁴⁸ See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The *Transamerica* Court held that Congress had intended the SEC to have the exclusive authority to enforce section 206 of the Investment Advisors Act of 1940. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979).

⁴⁹ See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The *Cannon* Court held that a private right of action may be implied under § 901(a) of Title IX of the Education Amendments of 1972. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

⁵⁰ In an appendix to his dissent in *Thiboutot*, Justice Powell set forth a list of statutes that, after *Thiboutot*, may give rise to § 1983 liability. 100 S. Ct. at 2519-21 (Powell, J., dissenting). See, e.g., Small Business Investment Act of 1958, § 602(d)(1), 15 U.S.C. § 636(d) (1976 & Supp. III 1979); Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. §§ 461-470t (1976 & Supp. III 1979); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (1976); Education Amendments of 1978, 20 U.S.C. §§ 2701-3510 (Supp. III 1979); Federal Highway Legislation, 23 U.S.C. §§ 128, 131 (1976 & Supp. III 1979); Energy Conservation and Production Act of 1976, 42 U.S.C. §§ 6801-6892 (1976 & Supp. III 1979); Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1618 (1976 & Supp. III 1979). Laws involving the construction and management of water projects would also be impacted by *Thiboutot*. See, e.g., Water Supply Act of 1958, § 301, 43 U.S.C. § 390b (1976); Boulder Canyon Project Act, §§ 4, 8, 43 U.S.C. §§ 617c, 617g (1976); Rivers and Harbors Act of 1899, § 9, 33 U.S.C. §§ 401-467e (1976 & Supp. III 1979).

have enlarged the scope of their jurisdiction by means of their construction of such open-ended terms as "due process" and "freedom of speech," as appears from various decisions in cases brought under section 1983. Section 1983, by itself, confers on citizens no substantive rights. It only enables judicial vindication of rights otherwise provided by the Constitution or laws of the United States.

For example, the first amendment has been held to safeguard the rights of students to wear armbands in protest over the Vietnam War,⁵¹ to distribute information on birth control through school newspapers,⁵² and to engage in off-campus printing and distribution of obscene publications.⁵³ The Supreme Court has also affirmed the existence of a right to privacy, located in the penumbral regions of the first amendment and other constitutional guarantees.⁵⁴

Furthermore, section 1983 has become the vehicle for suits which would ordinarily be state tort actions, but which instead are brought "[u]nder the rubric of the due process or cruel and unusual punishment clauses"⁵⁵ Of course, not every such claim

⁵¹ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513-14 (1969).

⁵² *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960, 970 (5th Cir. 1972). *Shanley* held that the first amendment rights of students could only be curtailed if the exercise of such rights would "materially and substantially" interfere with school activities. *Id.*

⁵³ *Thomas v. Board of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980).

⁵⁴ *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 (1973), wherein the Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *id.*; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), holding that the right of privacy of an unmarried person guarantees freedom to obtain contraceptives without governmental interference; *Griswold v. Connecticut*, 381 U.S. 479, 486 (1975), which overturned a statute that had prohibited the use of contraceptives by married persons.

⁵⁵ *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1171-73 (1977). *See, e.g., Russ v. Ratliff*, 538 F.2d 799, 800 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), involving a section 1983 suit by a widow, relying upon a pendent state claim for wrongful death, to recover damages for the shooting death of her husband by a policeman; *Curtis v. Everette*, 489 F.2d 516, 517 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), involving a section 1983 suit by a prisoner, relying upon a pendent state claim for assault, to recover damages for the failure of prison personnel to restrain a fellow prisoner from assaulting him. Indeed, it is arguable that section 1983 is "supplanting state tort law and that the federal courts are displacing the state courts from their rightful positions as the primary arbiters of basic standards of duty and conduct." *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1173 (1977).

can form the basis for a "constitutional tort," as the Supreme Court emphasized in *Ingraham v. Wright*⁵⁶ and in *Paul v. Davis*.⁵⁷ The *Davis* case has been justly criticized for its inconsistency with other of the Court's precedents, and its failure to recognize that a person's reputation carries as much, if not more, of a property interest than, for example, a welfare entitlement.⁵⁸ But *Davis*, notwithstanding, it remains true that a wide range of tortious state action will provide a plaintiff with a claim for relief in federal court.

Finally, civil rights violations have been held to occur when prison authorities fail to provide inmates with a complete list of books actually available in the prison library;⁵⁹ when two or more pretrial detainees are confined in single occupancy cells;⁶⁰ when officials refuse to notarize or mail the legal papers of inmates on the basis of their personal belief that the form used is improper;⁶¹ and when prisons fail to provide Jewish inmates with Kosher food if they so request it.⁶²

LEGISLATIVE EXPANSION

The jurisdiction of the federal courts was, of course, expanded by the congressional enactment of a number of familiar statutes in which an explicit right of action was created. These include the Occupational Safety and Health Act of 1970,⁶³ the Consumer Prod-

⁵⁶ 430 U.S. 651 (1977). In *Ingraham*, two junior high school students alleged a right of action under section 1983 for an otherwise authorized disciplinary paddling. *Id.* at 653. The Court declined to apply the cruel and unusual punishment clause of the eighth amendment to "traditional disciplinary practices in the public schools." *Id.* at 669.

⁵⁷ 424 U.S. 693 (1976). In *Davis*, two police officers, attempting to inform local merchants of possible shoplifters, distributed a leaflet which warned of the shoplifting activities of, among others, the plaintiff. *Id.* at 694-95. Dismissing the plaintiff's section 1983 due process clause action, the Court held that the fourteenth amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701.

⁵⁸ See, e.g., Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 203-09 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 86-104 (1976).

⁵⁹ *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 129-30 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds*, 441 U.S. 520 (1979).

⁶⁰ *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 398-99 (2d Cir. 1975).

⁶¹ *Bryan v. Werner*, 516 F.2d 233, 237-38 (3d Cir. 1975).

⁶² *Kahane v. Carlson*, 527 F.2d 492, 495-96 (2d Cir. 1975).

⁶³ Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.).

uct Safety Act,⁶⁴ the Toxic Substances Control Act,⁶⁵ the Employee Retirement Income Security Act of 1974,⁶⁶ the Federal Coal Mine Health and Safety Act of 1969,⁶⁷ the Black Lung Benefits Act of 1972,⁶⁸ the Fair Debt Collections Practice Act,⁶⁹ and the Clean Air Act Amendments of 1977.⁷⁰ Last spring alone, Congress enacted seven additional statutes providing for additional federal jurisdiction to determine disputes either in the first instance or on review of administrative orders.⁷¹

The responsibilities thrust upon the federal courts pursuant to the enactment of this plethora of statutes deprive the bench of time and judicial efforts which should be reserved for the more important litigation arising under the Civil Rights Act of 1964.⁷² Through both explicit and judicially implied causes of action, the Civil Rights Act exposes to federal judicial scrutiny, *inter alia*, public accommodations,⁷³ public facilities,⁷⁴ public education,⁷⁵

⁶⁴ 15 U.S.C. §§ 2051-2081 (1976 & Supp. III 1979).

⁶⁵ 15 U.S.C. §§ 2601-2629 (1976 & Supp. III 1979).

⁶⁶ Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.).

⁶⁷ 30 U.S.C. §§ 801-878, 951-62 (1976 & Supp. III 1979).

⁶⁸ 30 U.S.C. §§ 901-945 (1976 & Supp. III 1979).

⁶⁹ 15 U.S.C. §§ 1692-1692o (Supp. III 1979).

⁷⁰ Pub. L. No. 95-95, 91 Stat. 685 (codified in scattered sections of 42 U.S.C.).

⁷¹ *See, e.g.*, Social Security Disability Amendments of 1980, 94 Stat. 441 (codified in scattered sections of 8, 26, 42 U.S.C.); Deep Seabed Hard Mineral Resources Act, 94 Stat. 553 (to be codified in scattered sections of 26, 30 U.S.C.); Federal Trade Commission Improvements Act of 1980, 94 Stat. 374 (codified in scattered sections of 15 U.S.C.); Civil Rights of Institutionalized Persons Act, 94 Stat. 349 (to be codified in 42 U.S.C. § 1997-1997j); Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 974 (codified in scattered sections of 16, 26, 42, 46 U.S.C.); Central Idaho Wilderness Act of 1980, 94 Stat. 948 (codified in scattered sections of 16 U.S.C.); Asbestos School Hazard Detection and Control Act of 1980, 94 Stat. 487 (to be codified in 20 U.S.C. §§ 1411, 3601-3611).

⁷² 42 U.S.C. §§ 2000a to 2000e-17 (1976).

⁷³ 42 U.S.C. § 2000a-3 (1976). Section 2000a-3 creates an explicit private cause of action:

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title [discrimination in places of public accommodation], a civil action . . . may be instituted by the person aggrieved

Id.

⁷⁴ 42 U.S.C. §§ 2000b to 2000b-3 (1976). Section 2000b-2 implicitly provides that a section 1983 remedy is available to combat discrimination in access to public facilities. 42 U.S.C. § 2000b-2 (1976).

⁷⁵ 42 U.S.C. § 2000c to 2000c-9 (1976). Section 2000c-8 provides that a section 1983 remedy is available to obtain relief for "discrimination in public education." 42 U.S.C. § 2000c-8 (1976).

public and private institutions,⁷⁶ employment,⁷⁷ and sex discrimination in federally assisted educational institutions.⁷⁸

Another significant legislative enactment was effected in December 1980, when the President signed into law P.L. 96-486, which eliminated the \$10,000 minimum amount in controversy requirement for general federal question cases.⁷⁹ The impact of this change on the federal docket will be felt in the following manner. Plaintiffs seeking to adjudicate their rights under federal/state cooperative programs may now enter the federal courts basing their cause of action on section 1983 and jurisdiction on section 1331(a), without having to append their welfare contentions to claims of potentially doubtful "substantiality."⁸⁰ Thus, the combined effect of P.L. 96-486 and the decision in *Thiboutot* will be to open the federal courts to suits under any of the multitude of federal/state entitlement programs, without regard to the amount in controversy.

PENDING REMEDIES

The question is posed: where and when will the expansion end? On February 27, 1977, President Carter submitted to Congress a special message on reform of the civil justice system. Among other things, he proposed the abolition of diversity jurisdiction, a requirement of compulsory submission to arbitration of tort and contract cases involving less than \$100,000, and the creation of an intermediate appeals court with expanded jurisdiction for patent and trademark cases. This last proposal creating a new court was passed in 1980 as part of a bill establishing a new Court of International Trade with jurisdiction over "dumping" cases and

⁷⁶ 42 U.S.C. §§ 2000d to 2000d-6 (1976).

⁷⁷ 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Section 2000e-5(b) creates an explicit private cause of action for employment discrimination. To initiate proceedings, however, a charge must be filed with the Equal Employment Opportunity Commission "by or on behalf of a person claiming to be aggrieved." *Id.* § 2000e-5(b). If the charge is dismissed by the Commission, the aggrieved party may institute a civil action. *Id.* § 2000e-5(f)(1).

⁷⁸ 20 U.S.C. § 1681 (1976). Although no explicit right of action is provided in section 1681, the Supreme Court has implied such a cause of action. *See Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).

⁷⁹ Pub. L. No. 96-486, 94 Stat. 2369 (to be codified in 28 U.S.C. § 1331).

⁸⁰ *See, e.g., Hagans v. Lavine*, 415 U.S. 528, 542 n.10 (1974); *Riddick v. D'Elia*, 626 F.2d 1084, 1088 (2d Cir. 1980). A divided panel in *Riddick* upheld the substantiality of a claim under the Social Security Act. *Id.*

countervailing custom duty determinations.⁸¹

Following the President's lead, a number of bills have been introduced over the past three years which would have a significant impact on the jurisdiction of the federal courts. Several bills, for example, would both "abolish diversity of citizenship as a basis of jurisdiction of Federal District courts,"⁸² and "abolish the amount in controversy requirement in Federal question cases."⁸³ Although the amount in controversy requirement has now been eliminated,⁸⁴ the more significant change abolishing diversity jurisdiction has little hope of being enacted. Another reform, the Court Annexed Arbitration Act, would enact the President's proposals concerning compulsory arbitration.⁸⁵ This procedure has already been tried on an experimental basis with success in some of the district courts.⁸⁶

As a means of further restricting the jurisdiction of the federal courts to review state court proceedings under the writ of habeas corpus, a bill has been proposed "to change the jurisdiction for the consideration of, and the standards for the granting of, writs of habeas corpus by federal courts upon the application of persons in custody pursuant to judgments of the State courts."⁸⁷ The bill would place a three-year limit after final judgments within which habeas petitions must be brought, and would provide a more stringent standard for the petitioner to meet before he would be afforded review of any factual issues decided by the state trial court.⁸⁸ The bill will be a curb on complete federal review in this area.⁸⁹

⁸¹ Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (to be codified in scattered sections of 5, 16, 19, 26, & 28 U.S.C.).

⁸² H.R. 130, 96th Cong., 1st Sess. (1979).

⁸³ H.R. 2202, 96th Cong., 1st Sess. (1979).

⁸⁴ Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (to be codified in 28 U.S.C. § 1331).

⁸⁵ The Court Arbitration Act is designed "to encourage prompt, informal, and inexpensive resolution of civil cases in the U.S. district courts by the use of arbitration." See Comments of Senator DeConcini upon introducing S. 373, reprinted in 125 CONG. REC. S1253 (daily ed. Feb. 7, 1979). Under the bill, a district court can adopt rules mandating arbitration. *Id.* at S1254.

⁸⁶ See S. REP. NO. 96-74, 96th Cong., 1st Sess. 4, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1472-73.

⁸⁷ H.R. 7997, 96th Cong., 2d Sess. (1980).

⁸⁸ See *id.*

⁸⁹ Habeas corpus review already has been curtailed by the Supreme Court. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court barred a federal habeas corpus court from considering a claim not asserted at trial in compliance with state procedural requirements,

CONCLUSION

If unreasonable expansion of federal jurisdiction is to be halted, there must be more cooperation between the judiciary and Congress in fixing and defining more precisely the jurisdiction of the federal courts. By reason of the transfer to state courts of a number of criminal cases, there has been some decrease in the number of criminal prosecutions in the federal system, but the time demands of the Speedy Trial Act of 1974⁹⁰ have mandated a priority treatment of such cases which, in turn, has delayed the trial of civil causes. This delay, coming at the same time as the increased jurisdiction over civil cases caused by judicial and legislative action in new and complex fields of law, has made it impossible for civil litigants to obtain their day in court within a reasonable time. The effect has been that the number of pending cases of the United States District Courts has increased from 93,000 to 190,000 in the last ten years. It appears that most of the increased jurisdiction covers relief already available in state courts and, therefore, raises the question of its necessity and whether or not its effect will be to convert federal courts as special courts of limited jurisdiction to courts of general jurisdiction similar to the state courts.

Serious consideration must now be given to the following remedies if there is to be any halt or restraint in further increases of federal jurisdiction. First and foremost of the suggested reforms is the elimination of diversity jurisdiction. Since 1965, proposals have been made by the American Law Institute recommending a substantial modification of the diversity jurisdiction of the federal courts.⁹¹ Chief Justice Burger, in a 1979 report on the federal judiciary, stated that diversity is "an anachronism that should be eliminated."⁹² The Chief Justice noted that "[w]ith the increasing volume and greater complexity and novelty of cases reaching the

"absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." *Id.* at 84. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court denied state prisoners habeas review, in federal courts, of alleged fourth amendment violations, so long as such prisoners had had a full and fair opportunity to litigate their claims in the state courts. *Id.* at 494.

⁹⁰ Pub. L. No. 93-619, 88 Stat. 2076 (codified in scattered sections of 18, 28 U.S.C.).

⁹¹ See, e.g., ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1301-1307 (1968).

⁹² Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A.J. 358, 362 (1979). As early as 1973, the Chief Justice called for the abolition of federal diversity jurisdiction. See Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1126 (1973).

district courts, those courts should be relieved of cases in which they must apply, not federal, but state law."⁹³

A second reform entails the preparation of congressional impact statements prior to the enactment of new legislation. Up to the present, Congress has repeatedly passed statute after statute creating new federal rights without making any effort to assess the impact of the imposition of these new responsibilities on the courts. In this manner, Congress is expanding federal jurisdiction to cover relief already available in state courts. Indeed, Chief Justice Burger has deplored the failure of Congress to require its committees, in reporting out legislation, to provide impact statements that analyze the effect of proposed legislation on the federal bench.⁹⁴ Although the impact statements requested by the Chief Justice have seldom been prepared by Congress, it so happens that such a study was prepared in connection with the proposed Veterans Administration Adjudication Procedure and Judicial Review Act.⁹⁵ The study estimated that review of the Veterans Administration disability determinations would lead to 4,600 new civil filings annually in the district courts, which in turn, it is estimated, would require the time of eight to ten additional judges, twenty additional government attorneys, and additional supporting personnel.⁹⁶

A third area for improvement lies wholly within the realm of the federal judiciary. Thus, the courts must exercise restraint in

⁹³ Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A.J. 358, 362 (1979). Reasoning that state judges are "better equipped" to apply state law than federal judges, and that the quintessential purpose of state judicial systems is to decide state law, Chief Justice Burger advocated the elimination of federal jurisdiction premised solely on diversity of citizenship. *Id.* See generally Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1 (1978). *But see* Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403 (1979). Several arguments offered to forestall the abolition of diversity jurisdiction are that the caseload burden of state courts would be increased; diversity jurisdiction is a "social service of the federal government;" diversity was formulated by the founders of the nation and is now well-established; by promoting interaction between state and federal judicial systems, diversity encourages states to remain aware of, and ultimately, to emulate the federal rules; this very interaction "encourages the federal system to borrow state improvements and experiments;" and a federal court is likely to be more convenient for an "out-of-stater," and perhaps, more impartial. *Id.* at 405-10.

⁹⁴ Welcoming Remarks of Warren E. Burger—American Law Institute, Hyatt Regency Hotel (June 10, 1980).

⁹⁵ H. 6271, 96th Cong., 2d Sess. (1980).

⁹⁶ Statement of Deputy Assistant Attorney General Paul Nejelski before the Senate Commission on Veterans' Affairs (Aug. 31, 1977). See generally Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 14 & n.38 (1978).

expanding federal remedies—via implied rights of action, for example—in new and complex fields of law.

Recognizing the problems of federal jurisdictional expansion, Senators Thurmond and Heflin introduced a bill⁹⁷ to create a “Federal Jurisdictional Review and Revision Commission” which, if reintroduced and passed under the Reagan administration, would establish a commission to study the relationship between the federal and state courts, and report back with recommendations to the President, Congress, and the Judiciary.⁹⁸ Such a study is long overdue.⁹⁹

⁹⁷ S. 3123, 96th Cong., 2d Sess. (1980).

⁹⁸ See 126 CONG. REC. S12766-68 (daily ed. Sept. 17, 1980) (text of bill and remarks of Sen. Thurmond).

⁹⁹ As this issue went to press, a “judicial emergency” in the United States District Court for the Eastern District of New York was declared by the Chief Judge because of the vacancies left unfilled for over a year coupled with a backlog in the calendar. N.Y.L.J., May 12, 1981, at 1, col. 4. As a result, trials of civil cases were suspended to allow the court to comply with the demands of the Speedy Trial Act for criminal cases. *Id.*