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Federal Courts at the Crossroads: Adapt or Lose

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FEDERAL COURTS AT THE CROSSROADS: ADAPT OR LOSE!

*Judge Robert M. Parker**

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It is beyond reasonable doubt that our federal courts, especially the courts of appeal, are in serious trouble.[1] Caseloads are at levels that fundamentally undermine the ability of these courts to administer justice, given the courts' current procedures and structural configuration; the courts of appeal, especially, are suffering from case overload—with nothing but worse times ahead if present courses are continued. Fifth Circuit Judge Carolyn Dineen King has well-described the paradigmatic situation in the second largest court of appeals:

> In the first eight months of the statistical year ending June 30, 1992, I turned out 159 opinions, or twenty per month. Effectively, we are required to turn out one opinion

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** Law Clerk to Judge Robert M. Parker, 1992-1994. B.A., Austin College, 1988; J.D., University of Texas School of Law, 1991.

1. As the Chief of the Long Range Planning Office of the Administrative Office of the United States Courts, Charles W. Nihan, has written in a paper developed for the Federal-States Jurisdiction Committee of the United States Judicial Conference:

> While expansion of the district court caseload was significant in the [19]60s, growth of the appellate caseload was explosive: between 1960 and 1970 the number of appeals commenced increased by almost 200%, a compound annual growth rate of 11.5%. . . .
>
> To deal with this flood of appeals, there were 97 authorized circuit judgeships in 1970, up 43% from 1960. However, expansion of authorized circuit judgeships did not approach the pace of caseload growth, and appeals per authorized circuit judgeships were more than double the 1960 level.
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> Paralleling the continued rapid growth of the district caseload, the level of appellate filings nearly doubled from 1970 to 1980, with 23,200 appeals commenced . . . . Caseload per judgeship increased by 46% to 176 as the number of authorized appeals judgeships expanded to 132.
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> Appellate growth showed a modest abatement in the 1980s as the number of appeals rose 76% to 40,898. The percentage of criminal appeals was again about 23%. At the same time the number of authorized judgeships expanded from 132 to 156, an increase of just over 18%. Consequently, despite the expansion of the appellate bench, per judgeship filings rose again by nearly 50% to 262.
>
> Total appeals commenced . . . . ha[ve] demonstrated remarkably steady and stable trend growth at the rate of 7.7% per year. This will, if continued, lead to a doubling of appeals commenced about every nine years.

Memorandum from Charles W. Nihan, Chief, Long Range Planning Office of the Administrative Office of the United States Courts, to Judge Robert M. Parker, attachment (May 6, 1994) ("Appellate Activity by Decade, 1950-1990") [hereinafter Nihan-Parker Memorandum] (on file with the *Mississippi College Law Review*). See *infra* apps. A and B for graphic displays of the above-described trends (also attachments to the Nihan-Parker Memorandum) (on file with the *Mississippi College Law Review*) (information source: Analytical Studies Group, Long Range Planning Office, Administrative Office of the United States Courts).

And yet, as is inevitable—and generally healthy—in important subjects of discourse, there are a few, well-intentioned and eloquent even though wrong, doubters. *See, e.g.*, Judge G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1936-38 (1993) (part of a special edition on alternative dispute resolution and procedural justice).

> almost every working day, based on a six-day work week, and to carefully review two other opinions. We also have a docket consisting of motions and petitions for rehearings that total 496 per judge per year, or 1.4 per calendar day. Our statistics show that the total number of judicial matters that each judge on this court works on per year is approximately 1,000. That number has more than quadrupled in the last thirty-two years.[2]

Judge Stephen Reinhardt, of the even larger Ninth Circuit, has expressed himself similarly:

> We seem to assume that judges can perform the same quality of work regardless of the number of cases they are assigned. That simply is not correct. Most of us are now working to maximum capacity. As a result, when our caseload increases, we inevitably pay less attention to the individual cases.
>
> I speak primarily about the courts of appeals. Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.[3]

Indeed, in addition to poor quality justice, a crisis in citizen confidence in the legal system, and an overthrow of our governmental principle of federalism, the federal case overload actually works to irrationally *increase* litigation as the coherence or predictability of "the law" devolves to a chaotic level.

In this Article we seek to establish that reformation of our federal court resource is needed—especially at the court of appeals level—in order to restore and conserve the federal court system within our constitutional scheme of

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2. Judge Carolyn Dineen King, Commentary, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 956 (1991) [hereinafter King] (citing Clerk's Report, tbl. 2—Fifth Circuit Court of Appeals Workload Per Active Judge on 66% Summary II Rate and 7 Weeks of Court—1991 (1992)). *See also id.* at 962-63 (referencing then-Justice Rehnquist's recognition in his 1976 remarks to the American Bar Association, of the jeopardy (even then) confronting the justice principle that each case be fully considered and understood by the judge):

> That principle is in serious jeopardy today. . . . In my view, no judge would specifically condone a two-track justice system: one for the haves and one for the have-nots. The problem is that a two-track system can slip into the *modus operandi* of even a conscientious but overloaded judge without the judge even being aware of it.

In this Article, we do propose a "two-track," appellate case management system for appeals; but it is not the irrational and unfair one described by Judge King—bifurcated according to whether a litigant is an economic "have" or an economic "have-not." Rather, our proposed appellate system is based on fair and reasonable adjudicatory principles relative to the judicial resources called for by the character of the case on appeal.

3. Judge Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52, 53 (Jan. 1993) [hereinafter Reinhardt] (adaptation of a letter Judge Reinhardt wrote on October 2, 1992, to Senator Joseph R. Biden, Jr. (D-Del.), Chair of the Senate Judiciary Committee, and Representative Jack Brooks (D-Tex.), Chair of the House Judiciary Committee).

government.[4] Efficiency for "efficiency's sake" does not motivate our suggested reforms, but we think federal court efficiency is essential to the vitality of the courts. A federal judicial system that is *inefficient*—as ours has become and is increasingly becoming—endangers the basic principles of our national justice resource: quality resolution of our country's most fundamental, important, and complex legal concerns within the context of the well-balanced governmental fabric of federalism. As the Chair of the Senate Judiciary Committee, Joseph R. Biden, Jr., aptly put it before a gathering of the Third Circuit Court of Appeals not long ago: "[P]racticality, efficiency, and time[li]ness all impact on whether or not we are able to assure equal justice under the law."[5] Or, as Judiciary Committee Member, Senator Charles E. Grassley, stated in his recent remarks before the Judicial Conference of the United States: "Changes are coming to the federal courts. And that is a good development. Because there is frustration and dissatisfaction with our legal system. It costs too much and it takes too long—those are the most common complaints by the users of our courts."[6] Thus, albeit as a justice "helper," efficiency is a central subject of our Article.

Like the February 16, 1993, Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning, we have reached two overarching conclusions:

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4. For our specific proposals regarding also-necessary, conjoint reformation of civil dispute resolution procedures in the federal district courts, see Judge Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905 (1993) [hereinafter Parker & Hagin] (lead article in a special edition devoted to issues of alternative dispute resolution and procedural justice). *See, e.g.*, *id.* at 1909 (citations omitted):

> Under the continued reign of the traditional civil litigation model, there is no reason to expect an abatement of these unwelcome [case overload, cost, and delay] attributes of civil dispute resolution. For example, the Administrative Office of the United States Courts forecasts that court of appeals caseloads (obviously, a function of district court filings) *will* nearly triple in the next twenty-five years. Meanwhile, filings in the district courts will triple. And filings in bankruptcy courts—whose decisions are, with a possible exception in the Ninth Circuit, appealable to the district courts and on up the federal court hierarchy—should more than triple.

See also Justice Sandra Day O'Connor, "Civil Justice System Improvements," Remarks Before the American Bar Association, at II (Dec. 14, 1993) (transcript on file with the *Mississippi College Law Review*) (citations omitted):

> Trial . . . is a notoriously expensive and arduous way of resolving disputes. Accordingly, not all courthouse doors ought to lead to the courtroom. Instead, there should be alternate routes—options—including such innovations as early neutral evaluation, mediation, negotiation, arbitration, mini-trials, and summary jury trials.
>
> . . . .
>
> At the same time that the courts and bar explore alternatives to litigation, we must continue reforming the traditional approach as well. In particular, discovery has been a great source of expense, delay, and, for attorney and client alike, irritation. . . . It seems clear that discovery is not doing what it was designed to do: While it consumes more and more time and resources, it appears to be contributing less and less to our system of justice. No one proposes doing away with discovery; but it is, I think we can all agree, a dysfunctional part of our legal system—one that warrants attention and reform.

5. Senator Joseph R. Biden, Jr., Remarks Before the Judicial Conference of the Third Circuit (Apr. 19, 1993) (transcript on file with the *Mississippi College Law Review*).

6. Senator Charles E. Grassley, Remarks Before the Judicial Conference of the United States (Mar. 15, 1994) (transcript on file with the *Mississippi College Law Review*). *See also* Judge Alvin B. Rubin, *Reallocation: A Two-Way Street*, *in* FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 123 (Cynthia Harrison & Russell R. Wheeler eds., 1989) [hereinafter Rubin] ("The common theme that runs through this discussion [about the federal appellate judiciary in the next century] is that, whatever peripheral problems may face the federal courts of appeals, the basic problem that must now be addressed is their caseload.").

1. Substantial change in both the structure of the federal courts and the manner in which they provide services to the nation is essential to maintaining the historical nature of the institution and continuing to play a vital role in our nation's affairs.

2. The Long Range Planning Committee should serve not only as a clearinghouse for suggestions such as the ones contained in this report, but it should also be the forum for extended debate on these and other issues.[7]

More specific, our position is that the necessary reform of the federal courts must be multi-faceted – that it must take place on several planes of our governmental system.[8] The critical keys to federal court conservation lie in federal-state jurisdictional reform, and in procedural and structural reformation of the courts of appeal.

The late Fifth Circuit Judge Alvin Rubin hit upon this fundamental truth before we:

> If the problem is caseload, there are only two basic ways to deal with it. One is to decrease the total number of cases that are filed in the district courts, thus decreasing the total universe of federal cases and hence the number of judgments from which appeals can be taken. The other is simply not to permit appeals from all of the final judgments and other decisions of district courts and administrative agencies that are now appealable. *This might be accomplished by requiring those who wish to appeal to the circuit courts to seek some sort of writ of review.* This might be applicable in all cases or only in some, such as diversity cases.[9]

We think it is clear that the achievement of federal court restoration and conservation requires that *both* these approaches be taken. Additionally, we think the certiorari-like, circuit-level writ of review mechanism should apply to *all* cases. Finally, we are of the opinion that structural reformation is also needed.

Our discussion proceeds as follows. In part I of this Article, we discuss the Report of the Court Administration and Case Management Committee of the Judicial Conference to the Long Range Planning Committee of the Conference [hereinafter the Report]. In the Report, the Court Administration and Case Management Committee of the Judicial Conference reported its findings, conclusions, and recommendations for the appropriate present and future role of the federal courts – in furtherance of debate and other forms of consideration necessary to inform the

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7. JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 1-2 (1993) [hereinafter COMMITTEE REPORT] (on file with the *Mississippi College Law Review*). The Report is reprinted in its entirety as Appendix C to this Article.

8. *See, e.g.*, COMMITTEE REPORT, *supra* note 7, at 3-4 (hereto attached as Appendix C, at 250) (citing Chief Justice William H. Rehnquist, Remarks to the American Bar Association's House of Delegates, at 10 (Feb. 4, 1992)):

> There is no single path to meeting the challenge facing us. We must continue to perform at our highest level of quality and efficiency and we must bring to bear the reserves of commitment and cooperation at all levels of government. In issuing his call for reexamination of the role of federal courts, Chief Justice Rehnquist has called on us to (1) recognize the benefits of renewed cooperation with the state court systems; (2) consider curtailing some federal jurisdiction; and (3) avoid adding new federal causes of action unless critical to meeting important national interests which cannot otherwise be satisfied through non-judicial forums, alternative dispute resolution techniques, or the state courts.

9. Rubin, *supra* note 6, at 123 (emphasis added).

Long Range Planning Committee's decision regarding the latter's forthcoming, comprehensive Long Range Plan for the federal courts.[10] In part II of our Article, we address what is wrong with the current, traditional mode of treating federal court problems – the dead-end course of incessant growth. Part III delineates general aspects of our recommended conservationist reform of the national court system: (1) efficiency, including differentiated case management mechanisms (case tracking devices) at the district court level; (2) a limited appellate court structure; and (3) jurisdictional restraint, both in terms of new legislative proposals and in terms of the divestiture of existing federal jurisdiction that is inconsistent with basic notions of well-balanced federalism. And in part IV, we focus on what we regard to be the cornerstone of restoration and conservation of the federal court system: the procedural imperative of differential *appellate* case management. We will explain how this appellate court device allows for the critically important, fair, principled deployment of the federal court resource by providing the courts of appeal with the capacity to distinguish between those cases deserving of the courts' plenary review and those not so deserving.[11] In part V, we discuss what the federal courts might need and be able to do, through their inherent powers, to preserve and conserve themselves should Congress fail to meaningfully reform federal court structures and procedures and curtail its own penchant for ever-expanding the jurisdiction of the federal courts. Finally, in part VI, we address the ultimate price to be paid for the shirking of federal court reform: the demise of quality adjudication in the federal courts and the overthrow of federalism.

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10. The Long Range Planning Committee of the Judicial Conference was established at the direction of Chief Justice Rehnquist. According to its mission statement, this Committee is "[t]o coordinate the planning activities of the judiciary and propose a long range plan to the Judicial Conference." WILLIAM H. REHNQUIST, CHARGE TO THE LONG RANGE PLANNING COMMITTEE (on file with the *Mississippi College Law Review*). More specific, the Long Range Planning Committee's charge is to:

> 1. Promote, encourage, and coordinate planning activities within the judicial branch.
> 2. Advise and make recommendations to the Judicial Conference regarding planning mechanisms and strategies, including the establishment of a coordinated judiciary planning process.
> 3. In consultation with and participation by other committees, members of the judiciary, and other interested parties, coordinate the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.
> 4. Evaluate and report on the planning efforts of the judiciary.
> 5. Based on advice from other Judicial Conference committees, judges and interested parties, prepare and submit for Judicial Conference approval, a long range plan for the judiciary and periodic updates to that plan.

Id.

11. *See, e.g.*, Judge Joseph F. Weis, Jr., *Restoring the Authority of the District Court*, *in* FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 97, 99 (Cynthia Harrison & Russell R. Wheeler eds., 1989) [hereinafter Weis]:

> What we should keep in mind is that there are two separate functions of the appellate court, the error-correcting function and the law-giving function. They do not always deserve the same treatment.
>
> Some of our problems are created by the fact that we now treat all appeals in the same way. Perhaps we need to be more discriminating in our procedures.

I. HIGHLIGHTS OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING

The Report to the Judicial Conference Committee on Long Range Planning by the Court Administration and Case Management Committee [the latter, hereinafter the Committee] recommends that any long range plan adopted should attempt to maintain a fundamentally limited Federal Judiciary. The hope expressed by this Report is that the number of Article III judges not exceed 1000.[12]

From an organizational standpoint, the Report recommends a federal court structure consisting of ten circuits, each containing one court of appeals and one district court, with each court of appeals being comprised of twelve judges.[13] From the procedural point of view, a two-track method of appellate review, closely resembling the process for petitioning the United States Supreme Court for certiorari, is recommended for the courts of appeal.[14] Under such a system, a *Track One* brief would be limited to fifteen pages—containing: a list of all parties unless the names appear in the caption of the case; a table of authorities; a jurisdictional statement; a short and concise statement of the questions presented for review; a concise statement of the material facts; and argument on the merits.[15] An appendix would contain the usual "judgments, opinions, orders, findings of fact, and conclusions of law" made by the district court, and appropriate record excerpts.[16] Track Two under this proposed system of appellate review is plenary review.[17] With respect to cases assigned to *Track Two* review by a court of appeals, the court might permit or require the parties to supplement the briefs filed in Track One to the extent ordered; permit fuller briefing of the questions presented for review;

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12. COMMITTEE REPORT, *supra* note 7, at 3-8 (hereto attached as Appendix C, at 250-52).
13. COMMITTEE REPORT, *supra* note 7, at 8-10 (hereto attached as Appendix C, at 252-53).
14. COMMITTEE REPORT, *supra* note 7, at 10-12 (hereto attached as Appendix C, at 253-54).
15. COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 254).
16. COMMITTEE REPORT, *supra* note 7, at 18, attachment B (hereto attached as Appendix C, at 259-60).
17. COMMITTEE REPORT, *supra* note 7, at 10-12 (hereto attached as Appendix C, at 254-55).

and/or permit or require the supplementing of the record by the parties.[18] The circuit court may consider Track Two appeals with or without oral argument.[19]

The Committee's recommendations recognize that historically, fairly, and efficiently, the federal courts have reflected the federalism-focused intent to provide a fundamentally-limited, distinctive judicial forum designed to perform tasks not ordinarily appropriate for the state courts.[20] The recommendations reflect a concern that this fundamentally-limited, distinctive role of the federal courts is being subverted by moves toward a blanket policy of assigning to the federal courts tasks historically assigned to state courts and cases not necessarily involving the protection of individual liberties, of national effect, or falling within certain categories of complexity best addressed by the federal courts.[21]

More specific, the Report expresses the Committee's studied concern that this apparently incessant drift toward unlimited federal court growth will alter the beneficial, and constitutional, balance of state and federal responsibilities, which will in turn alter the character of the federal bench—transforming the federal courts into creatures indistinguishable from state courts.[22] The Report reflects a consensus that continuation on the course followed over the past thirty years will soon result in a Federal Judiciary of unacceptable size with an attendant, unacceptably huge, supporting bureaucracy.[23]

Thus, the recommendation to limit the number of appellate judges on each circuit to twelve follows from the systemic fundamental that each federal circuit must create and sustain a "coherent body of circuit law," and that this predictability of law is "created and preserved by a body of judges [a circuit] small enough to function truly as a court."[24] The risk associated with the unpredictability that has been characterized as the now-too-common "law of the panel" is greatly enhanced in a

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18. COMMITTEE REPORT, *supra* note 7, at 19, attachment B (hereto attached as Appendix C, at 259-60).

19. COMMITTEE REPORT, *supra* note 7, at 19, attachment B (hereto attached as Appendix C, at 259-60). This is consistent with existing rules. *See* FED. R. APP. P. 34(a):

> Oral argument will be allowed unless
> (1) the appeal is frivolous; or
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

See also Judge John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts*, *in* FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 22, 24 (Cynthia Harrison & Russell R. Wheeler eds., 1989):

> [N]o amount of ingenuity will produce a scheme whereby a circuit judge can hear argument in 330 or more cases a year. The oral-argument tradition in appellate courts is inherently inefficient . . . . After 18 years of listening, I for one am ready to support a rule that there is a presumption against oral argument, that the norm should be appellate review on the papers. I make this suggestion mindful of the fact that such a rule would make more acute the public perception of the invisible, unaccountable judiciary. But the trend is inevitable, and articulation of the norm of appellate review on the papers would at least be candid.

20. COMMITTEE REPORT, *supra* note 7, at 3 (hereto attached as Appendix C, at 250).

21. COMMITTEE REPORT, *supra* note 7, at 3 (hereto attached as Appendix C, at 250).

22. COMMITTEE REPORT, *supra* note 7, at 4-5 (hereto attached as Appendix C, at 250-51).

23. COMMITTEE REPORT, *supra* note 7, at 6-8 (hereto attached as Appendix C, at 251-52).

24. COMMITTEE REPORT, *supra* note 7, at 9 (hereto attached as Appendix C, at 253).

large court of appeals (a "mega-circuit").[25] Intra-circuit conflicts are spawned and fostered in "mega-circuits."[26] And the "signal of unpredictability" thereby sent is, of course, unsettling to those who are supposed to follow, and base their affairs on the decisions rendered by the circuit courts: the public at large, the business community even more specifically, and the district courts.[27] This unpredictability of law generates *still more litigation;* such an unpredictable system of justice encourages parties to "roll the dice" to see what panel, or "lot," they draw.[28]

The Report's proposed two-track method of appellate review is designed to provide the judges on a court of appeals with sufficient information to dispose of a significant number of cases at the Track-One stage without further submission by the parties or additional costs to the litigants.[29] The Report takes the position that its recommended two-track, differential case management methodology is preferable to "pure" discretionary review.[30] In light of the fact that the federal courts of appeal historically have been courts concerned with error correction *as well as* law-giving, the Committee concluded that a pure discretionary review model of differential appellate case management would not adequately allow for the circuits' continued fulfillment of their error-correction function.[31] However, while we basically agree with the Committee's two-track, case differential recommendation, we think the increased efficiencies secured by the implementation of this particular two-track methodology, at best, serve as "stop-gap solutions" to the case overload problems facing the courts of appeal. We do not think this particular two-track proposal of the Report will be able to provide a satisfactory solution to the case overload problems confronting the courts of appeal for any significant period of time. We envision that in the near future the implementation of a pure discretionary review mechanism will be necessary – in order to preserve the essential nature of the courts of appeal by avoiding both of the otherwise inevitable, subverting federal circuit "non-options" of: (1) the merging of the courts of appeal into a set of internally-chaotic, monstrous, "mega-circuits;" and (2) the deconstruction and proliferation of the courts of appeal into a set of interactively-chaotic, atomic, "mani-circuits."

II. THE "MEGA," THE "MANI," AND OTHER GROWTH-ORIENTED PROPOSALS FOR RECONSTRUCTION OF THE UNITED STATES COURTS OF APPEAL

As the Chair of the House Judiciary Committee, Jack Brooks, well-noted in his May, 1993, remarks to the Federal Judges Association: "It is how we respond to th[e] growing 'disconnect' between [limited federal court] resources and [the fed-

25. *See* COMMITTEE REPORT, *supra* note 7, at 9-10 (hereto attached as Appendix C, at 253-54).
26. *See* COMMITTEE REPORT, *supra* note 7, at 9-10 (hereto attached as Appendix C, at 253-54).
27. *See* COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 254).
28. *See* COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 254).
29. COMMITTEE REPORT, *supra* note 7, at 10-11 (hereto attached as Appendix C, at 254).
30. COMMITTEE REPORT, *supra* note 7, at 11-12 (hereto attached as Appendix C, at 254-55).
31. COMMITTEE REPORT, *supra* note 7, at 11-12 (hereto attached as Appendix C, at 254-55).

eral courts'] constitutional obligation [to administer justice in a fair and efficient manner] that will define the future of the federal judiciary."[32]

The most often proposed federal appellate court "reform" measures are structural or organizational, and in one way or another they are growth-oriented.[33] Such growth-bound proposals usually take one of two basic forms: (1) the merging of the courts of appeal into an internally-chaotic, small set of monstrous "mega-circuits;" and (2) deconstruction and proliferation of the courts of appeal into an interactively-chaotic, large set of atomic "mani-circuits."

Further, within the "mega-circuit" fold, there are two rather distinct substrata of proposals most often advocated: (1) a "simple" increase in the number of judges in the currently-constructed circuits – e.g., the "Reinhardt proposal;"[34] and (2) the re-alignment of the current number of circuits into a very few circuits, of broader regional compass – e.g., the "Wallace proposal."[35]

Judge Alvin Rubin may have best summarized what is wrong with both the mega and mani-circuit proposals:

> We've tried all the easy solutions: dividing circuits, adding more judges and more staff, and utilizing mechanical aids like computers . . . . So we are left with finding some other method to solve the problem of expanding caseload – and with finding a solution to the other problems that are incidental to the caseload problem.[36]

The mega and mani-circuit proposals for "reforming" the courts of appeal share the infirmity of being but more of the same old easy "solutions" to which Judge Rubin referred – which have been often and fairly tried, but which have failed (and indeed, exacerbated the very institutional ailments they were supposed to cure or at least alleviate). We think it is clear that simply pursuing more of these inadequate measures will not turn their inadequacies into adequacies; two (or even more) "wrongs" will not "right" our federal courts of appeal.

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32. Representative Jack Brooks, Remarks Before the Federal Judges Association (May 19, 1993) (transcript on file with the *Mississippi College Law Review*). *See also* Professor Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 499 (1928) ("Nothing but good can come from a [periodic] re-examination of the purposes to be served by the federal courts.").

33. Similar strains of the growth-oriented appellate court proposals exist relative to the federal district courts. *See, e.g.*, Reinhardt, *supra* note 3, at 53 (stating, "I am less able to speak with authority concerning the district courts, although I suspect their problems are very similar to [those in the appellate courts] . . . and that there is a desperate need for additional district judges;" and prescribing in particular a doubling of the number of judges in the courts of appeal). But simple proposals for increased district court judgeships are likewise fundamentally flawed. We focus in this Article on the intermediate appellate court proposals because the intermediate appellate courts are suffering from threats to quality adjudication and federalism to an even greater extent than are the district courts, because such proposals are the ones most often heard, and because the suffering of the circuits upsets the entire federal court system. But, as we have already addressed in detail elsewhere, we think the district courts are also in need of significant reformation. *See* Parker & Hagin, *supra* note 4.

34. *See* Reinhardt, *supra* note 3.

35. *See* Judge J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913 (1983) [hereinafter Wallace].

36. Rubin, *supra* note 6, at 123.

A. The Demerits of "Mega-Circuits"

1. The Reinhardt Proposal

Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals has been a vocal proponent of an increased judge roll for caseload relief in the federal courts of appeal: "Simply put, our federal court system is too small for the job . . . . My proposal is simply that Congress double the size of the courts of appeal. I base this not on studies or statistics, but on practical knowledge and experience."[37] Of course, the Ninth Circuit is already the largest circuit in the nation.

We think Chief Eleventh Circuit, and Former (pre-divided) Fifth Circuit Judge Gerald Bard Tjoflat has eloquently explained what is wrong with Judge Reinhardt's proposal to drastically increase the federal circuit judge rolls.[38] As Chief Judge Tjoflat has written, mega-circuits—or in his phrase, "jumbo courts"—disturb the clarity and stability of the law, which in turn increases litigiousness and complicates the disposition of cases.

> Jumbo courts encourage litigants to demand more of the court's resources; litigants are more willing to bring (and defend) claims in the hope of exploiting the indistinct jurisprudence of the circuit or by drawing a sympathetic appellate panel. We can expect a court of appeals' filings-per-judge to increase as the number of judges on that court increases, further diminishing the benefits attributable to new judges.[39]

And, as Chief Judge Owen M. Panner of the District of Oregon has explained the district courts' quandary in the already "mega" Ninth Circuit: "[T]here is inconsistency in decisions and it is hard to keep up."[40] When the law is unstable, parties cannot know what to expect; their legal rights and entitlements depend largely on "the luck of the draw"—i.e., "on the trial judge (and ultimately on the three-judge appellate panel) that they draw."[41]

Further, as the Report explains, circuit judge collegiality is a critical element in our societal conception that vital decisions made by single individuals should be reviewed by others—e.g., by co-appellate panelists.[42] We agree that collegiality "helps to assure that the reviewers are speaking from shared values of the legal system even when they disagree on specific [processes and] outcomes."[43] And like the Committee, "we are confident that the diminution of collegiality in courts larger than twelve [judges] is a risk that the judicial system and the nation can ill afford."[44]

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37. Reinhardt, *supra* note 3, at 52, 53. *See also* Judge Jon O. Newman, *Are 1,000 Federal Judges Enough? Yes. More Would Dilute the Quality*, N.Y. TIMES, May 17, 1993, at A17; Judge Stephen Reinhardt, *Are 1,000 Federal Judges Enough? No. More Cases Should be Heard*, N.Y. TIMES, May 17, 1993, at A17.

38. Judge Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70 (July 1993) (a reply to Judge Reinhardt's January, 1993, article in the *A.B.A. Journal*).

39. *Id.* at 71.

40. *Id.* (quoting Chief Judge Panner).

41. *Id.* at 73.

42. COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 253-54).

43. COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 253-54).

44. COMMITTEE REPORT, *supra* note 7, at 10 (hereto attached as Appendix C, at 253-54).

In brief, we agree with this much of Judge Reinhardt's plea to the Chairs of the House and Senate Judiciary Committees: "a radical approach is necessary," "[t]ime is of the essence," and "it is time to start thinking 'big' [as] [i]ncremental [measures] will not solve our problem."[45] But we do not share Judge Reinhardt's view that the *type* of radical "reform" measure needed is essentially a compounding or exponential expansion of the tried-and-failed, "add (judges) and divide (circuits)," "business as usual" approach to the problems associated with the federal court caseload.[46] Nonetheless, as the Report emphasizes, the Committee's recommendation (which we embrace), to cap the size of the Federal Judiciary, is limited to tenured Article III judges.[47] The Report recognizes that "increasing the number of *magistrate [and bankruptcy]* judges may be essential to secure the case management efficiencies that will conserve more of the time of tenured judges for tasks constitutionally reserved to them."[48] Since magistrate and bankruptcy judges "are not guaranteed life tenure, their numbers may be more readily adjusted" as needs be.[49] The Report also reflects the expectation that the need for magistrate judges will grow if their roles continue to be expansively defined and they are actually utilized with regularity – as we think they should be.[50]

2. The Wallace Proposal

Ninth Circuit Chief Judge J. Clifford Wallace does not appear to share all the thinking of Judge Reinhardt on the subject of the proper, workable "shape" of the courts of appeal. But nonetheless, Chief Judge Wallace's big court proposal is a "mega-circuit" animal.

Chief Judge Wallace is not persuaded of the need to split the Ninth Circuit or that the general circuit structure needs to be limited to the ten circuits recom-

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45. Reinhardt, *supra* note 3, at 54.

46. Rather, we agree with the view expressed not long ago by Justice Sandra Day O'Connor, in her December, 1993, remarks to the American Bar Association's conference on problems of the civil justice system: The Summit on Civil Justice Improvements. As Justice O'Connor emphasized, the United States legal profession has served our country well in the past; and it can continue to serve the country well. Justice Sandra Day O'Connor, "Civil Justice System Improvements," Remarks Before the American Bar Association (Dec. 14, 1993) (transcript on file with the *Mississippi College Law Review*). But we cannot perform this service if we continue with "business as usual." *Id.* We also agree with Justice O'Connor's more specific comments encouraging the courts' evolution into comprehensive justice centers, or "multi-door courthouses;" and encouraging the seeking of "common ground" by those involved in civil justice improvement, problem-solving efforts. *See generally* Parker & Hagin, *supra* note 4.

47. COMMITTEE REPORT, *supra* note 7, at 8 (hereto attached as Appendix C, at 253).

48. COMMITTEE REPORT, *supra* note 7, at 8 (emphasis added) (hereto attached as Appendix C, at 253).

49. COMMITTEE REPORT, *supra* note 7, at 8 (hereto attached as Appendix C, at 253).

50. *See* COMMITTEE REPORT, *supra* note 7, at 8 (hereto attached as Appendix C, at 253). *See generally* FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 129-33 (1993) [hereinafter STRUCTURAL ALTERNATIVES]; *see generally* A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY (Admin. Office of the United States Courts, 1993). *See also* Justice William H. Rehnquist, Remarks Before the Annual Dinner of the American Bar Association (Aug. 9, 1976) (transcript on file with the *Mississippi College Law Review*) ("You will never convince most people that only a candidate for judicial office combining the talents of Justinian, Lord Mansfield, and Learned Hand is capable of deciding whether the finding of a Social Security examiner is supported by substantial evidence considered on the record as a whole."), *quoted in* King, *supra* note 2, at 962.

mended by the Report.[51] Instead, he favors an appellate system of four or five (very) large circuits, each containing however many judges are needed to meet the caseload demands.[52] He is not persuaded that such a system would generate administrative problems, and he is not persuaded that intra-circuit conflicts fostered by this structure would be a significant problem; he regards any intra-circuit conflicts increased by his restructuring proposal to be manageable.[53] He believes that with proper administration, such courts can be efficient, and that they would be capable of creating and sustaining the systemically-important "law of the circuit," therefore contributing to more uniformity of law.[54] And Chief Judge Wallace thinks a particularly beneficial aspect of his plan is the mitigation of *inter*-circuit conflicts.[55]

We do not share Chief Judge Wallace's faith in the manageability of the administrative unwieldiness and intra-circuit decisional conflicts his structural proposal would foster. The other most significant problem we have with his proposal is the same one we have with the "adding" of judges proposal made by Judge Reinhardt, as discussed above. We think that experience has well shown that adding judges simply contributes to a negative cycle of adding judges and adding federal jurisdiction (caseloads) – with all the concomitant compounding of legal uncertainty, administrative unwieldiness, and federalism-offending attributes of this tried-and-failed approach to the problems of structural and procedural inadequacy, and case overload, in the federal courts.

3. Civil Rights and Liberties and the "Mega-Circuit"

The "old (pre-division) Fifth Circuit," through the leadership of Judge John R. Brown – ably assisted by Judges Rives, Tuttle, and Wisdom – sent the clear, unmistakable message to the South that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 indeed reflected the law of the land and would be enforced.[56] The court was structurally small enough and had a caseload that permitted it to speak with one voice. That voice and its clear message of authority, or predictability, transformed the South. If the old Fifth Circuit had been a Wallace or a Reinhardt mega-circuit, we believe that all too often the law that would have been produced during that critical period would have been the "law of the panel" instead of the law of the circuit, and accordingly, that the authority of civil rights would have been greatly compromised – tragically resulting in much greater litigation resisting the implementation of equal rights for all the citizens of the South.

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51. *See, e.g.*, Wallace, *supra* note 35, at 940-41.
52. *See, e.g.*, Wallace, *supra* note 35, at 940-41.
53. *See, e.g.*, Wallace, *supra* note 35, at 941.
54. *See, e.g.*, Wallace, *supra* note 35, at 923-24.
55. *See, e.g.*, Wallace, *supra* note 35, at 928-32.
56. *See* JACK BASS, UNLIKELY HEROES 101-02 (1981).

B. The Demerits of "Mani-Circuits"

As a recent Federal Judicial Center Report to Congress and the Judicial Conference states: While "[t]here is widespread, though far from universal, sentiment for courts of fewer than fifteen active judgeships," the Center's "survey of federal judges discovered little sentiment . . . for most means to" the end of achieving and maintaining circuit courts of fewer than fifteen judges.[57] Circuit splitting was the "remedy" to appellate court growth problems in the Fifth and Ninth Circuits recommended in 1973 by the congressionally-created, multi-branch-membered, "Hruska Commission."[58] Some still claim this approach would achieve the generally desired, less-than-fifteen-judges circuit shape. But we think this approach is simply "part two" of what Professor Thomas Baker has described as the "add (judges) and divide (circuits)," misguided approach to circuit court structural reform (with the Reinhardt proposal for doubling the number of circuit court judges representing, in our view, "part one" of this "add and divide" double negative).[59]

A fundamental value furthered by regional federal circuit courts is the countering or ameliorating of parochialism inhering in more localized courts. As the Federal Judicial Center's recent report states: "Most observers fear that a large increase in the number of circuits will result in further 'balkenization' of the federal courts. A system of many small circuits dilutes the federalizing function of the courts of appeals."[60] Or as former Fifth Circuit Judge Thomas G. Gee has put it: "[A]re we to continue the splitting process until it becomes mincing, with a United

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57. STRUCTURAL ALTERNATIVES, *supra* note 50, at 113.

58. *See* Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (1973); Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973). This commission was chaired by Senator Roman L. Hruska, with Judge J. Edward Lumbard serving as Vice Chairman and Professor A. Leo Levin serving as Executive Director; Professor Arthur D. Hellman served as Deputy Executive Director; Bennett G. Gaines, Esq., served as Staff Attorney; and William F. Sheehan, III, Esq., served as Consultant to the Commission. Other members – four appointed by President Nixon, four by Chief Justice Burger, and four each from the Senate and the House of Representatives – were: Representative Jack Brooks; Senator Quentin N. Burdick; Representative Emanuel Celler; Dean Roger C. Cramton; Representative Walter Flowers; Senator Edward J. Gurney; Representative Edward Hutchinson; Francis R. Kirkham, Esq.; Senator John L. McClellan; Judge Roger Robb; Bernard G. Segal, Esq.; Judge Alfred T. Sulmonetti; Professor Herbert Wechsler; and Representative Charles E. Wiggins.

As Professor Thomas E. Baker has explained:

> The docket problems of the Fifth Circuit first became a concern two decades before Congress moved to divide [it] . . . . Between 1950 and the mid-1970s, the filings in the Fifth Circuit multiplied by a factor of nine and "Congress simply could not add judges fast enough." The court survived by exceeding norms of productivity and by implementing intramural procedural reforms that cumulatively transformed the intermediate appellate court.
>
> Responding to the urgings of Chief Justice Burger and others, Congress created the Commission on Revision of the Federal Court Appellate System, the so-called Hruska Commission. After extensive hearings, the Hruska Commission recommended in 1973 that Congress divide the Fifth Circuit and the Ninth Circuit.

Professor Thomas E. Baker, *On Redrawing Circuit Boundaries – Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 925 (1990) [hereinafter Baker] (quoting Professor Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 697 (1981)) (other citations omitted).

59. *See* Baker, *supra* note 58, at 947 ("The 'add and divide' approach undermines important characteristics of the federal intermediate appellate courts.").

60. STRUCTURAL ALTERNATIVES, *supra* note 50, at 114 (citing Judge John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980)).

States Court of Appeals for the Houston Metropolitan Area?"[61] We think the inevitable result of circuit splitting is an unacceptable dilution of the federalizing, contra-parochialism function of the federal courts of appeal.

We also think the deconstructionist, mani-circuit proposal will generate an unacceptably high level of inter-circuit conflicts – with the United States Supreme Court being decreasingly able to reconcile these conflicts, given the practical limits of its review capabilities – and hence, an unacceptably high level of legal incoherence.

Moreover, or at any rate, this deconstructionist, mani-circuit "reform" proposal is at best a "band-aid" "solution." The Fifth Circuit experience should have already taught this lesson. "Congress divided the former Fifth Circuit essentially because of its largeness – in geography, population, docket, and judgeships. Redrawing the circuit boundaries, however, did absolutely nothing to relieve the press of the caseload."[62] Indeed, the "new Fifth Circuit" reached its pre-division crisis level of filings in less than five years.[63] And today, the "new Fifth Circuit" is the second largest circuit in the land (just behind the Ninth Circuit). Meanwhile, the newly created Eleventh Circuit, carved out of the old Fifth Circuit, has seen fit to take a different, conservationist tack, which we think demonstrates prudence. In 1990, the Eleventh Circuit deemed it necessary to pass a preemptory, "formal and unanimous resolution . . . asking Congress *not* to add any more circuit judgeships, despite [the existence of] statistical-caseload justifications" for such new judgeships.[64] The Eleventh Circuit's resolution reflects the court's recognition that new judgeships would grow that court too large to work effectively.[65]

C. The Merits and Demerits of Adding Another Layer of Appellate Review

Another proposal, which has garnered some, but a significantly lesser degree of support than the mega-circuit and mani-circuit proposals, is to add another layer of federal appellate court structure – comprised of three district court judges from within the circuit – with discretionary review available at the traditional circuit level regarding the decisions rendered by *that,* new-level panel. The decisions rendered by these three-district-judge appellate panels would not have precedential value. This proposal is most similar to the appellate panel framework deployed

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61. Judge Thomas G. Gee, *The Imminent Destruction of the Fifth Circuit; Or, How Not to Deal With a Blossoming Docket*, 9 TEX. TECH L. REV. 799, 806 (1978).

62. Baker, *supra* note 58, at 927.

63. Fifth Circuit Clerk Gilbert Ganucheau, Remarks Before the Fifth Circuit Appellate Advocacy Seminar (Oct. 18, 1984), *in* 2 FIFTH CIRCUIT REPORTER 301 (1985).

64. Baker, *supra* note 58, at 928.

65. *See* Baker, *supra* note 58, at 928 n.56 and accompanying text (citing Chief Judge Paul H. Roney, Remarks Before the 1989 Judicial Conference of the Fifth and Eleventh Circuits (New Orleans, La., May 8, 1989); and Letter From Chief Judge Paul H. Roney to L. Ralph Mecham, Director of the Administrative Office of the United States Courts (Mar. 2, 1989)).

for some initial bankruptcy appeals in the Ninth Circuit – by virtue of the congressionally-authorized bankruptcy appellate panels (BAPs).[66]

We do regard this additional-appellate-level proposal as an improvement over the mega-circuit and mani-circuit proposals, and we think it could work. But we think this additional layer is unnecessarily inefficient in its growth orientation, given the superior viability and efficiency of our proposal for discretionary review at the traditional intermediate appellate court level.

III. General Aspects of Federal Court Restoration and Conservation

In this part of the Article, we address the general aspects of, or necessary conditions for, a holistically reformed, and restored, federal court regime. In part IV, we will address the most essential element of federal court restoration and conservation: differential appellate case management.

A. Efficiency at the Federal District Court Level

We urge adoption of the Report's recommendation that the district court structure be reformed so that each of ten generalist circuits (i.e., not including the additional, specialized courts in the federal system like the Federal Circuit Court, the Court of International Trade, the Court of Military Appeals, and the Court of Veterans' Appeals) be comprised of but one district of geographical boundaries coterminous with the boundaries of their respective circuits.[67] This restructuring of the districts constitutes an important systemic efficiency measure: the structural flexibility for district judges from all over the district to be sent where they are most needed – to be sent to the places within these districts most in need of judge-power, from places within the districts experiencing a relatively less pressing need for judge-power. This would be a more efficient use of trial judges than the "stay put, need be or not," status quo district court structure.

Even with this federal district court reformation, however, significant pretrial procedure (e.g., automatic disclosure), and especially, differential case management mechanisms (e.g., tracking and "ADR" techniques) are also needed in these "entry-way," source-of-appeals, courts of the federal system – in order for the federal courts to manage caseloads through the entire system in a manner consistent

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66. The BAPs in the Ninth Circuit are comprised of three, non-Article III, bankruptcy judges. The bankruptcy litigants in the Ninth Circuit have the choice of whether to submit their initial appeal to the BAP (comprised of bankruptcy judges from without the district from which the bankruptcy appeal is taken), or to a generalist, Article III district court judge (of the district from which the bankruptcy appeal is taken). *See generally* Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989). *See also* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), (d), 108 Stat. 4106 (to be codified at 28 U.S.C. § 158(b)) (providing for the establishment in each judicial circuit of a BAP, unless the circuit judicial council finds there are insufficient judicial resources available in the circuit, or that the establishment of the BAP would result in undue delay or increased cost to the parties; and providing that all appeals from bankruptcy courts in circuits establishing BAPs shall be heard by a bankruptcy appellate panel unless a party makes a timely objection to have the appeal heard by a district court).

67. *See* COMMITTEE REPORT, *supra* note 7, at 12-13 (hereto attached as Appendix C, at 255).

with the goal of distributing to each case, in a due, case-sensitive manner, the amount of resources it needs.[68]

We think Senator Charles E. Grassley made some very good points in his recent reprimand of the United States Judicial Conference relative to the institutional inconsistency in the Judiciary's position—i.e., criticizing Congress for creating new burdens on the federal courts by creating more and more federal causes of action, while at the same time preventing those in Congress who want to help relieve some of those burdens (in the form of providing the federal district courts with additional "ADR" methods of resolving disputes) from doing so.[69] As we have written in another law review article about the necessary reform of civil dispute resolution in the federal district courts in particular: "The much-needed, reformed system of civil adjudication will require the deployment of a battery of dispute resolution mechanisms."[70]

B. A Limited Appellate Court Structure

Further, for the reasons we have already addressed, we regard the appellate court restructuring recommendations contained in the Report to be necessary prerequisites to federal court restoration and conservation: (1) there should be ten generalist circuits; each comprised of one court of appeals (and one district court, as discussed above); and (2) each circuit court should have twelve judges.[71]

C. Fundamentals-Focused, Jurisdictional Restraint

We have discussed the Report's conclusion, with which we agree, that the federal court system must consist of a limited number of judgeships if it is to remain true to the governmental principle of well-balanced federalism and to the value of quality adjudication of society's most important and complex legal issues. A federal court system limited in size will certainly need its courts to be models of effective case management. No matter what structural and procedural reforms might be made to the federal courts, these will be inadequate to truly restore and conserve

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68. *See generally* Parker & Hagin, *supra* note 4. *See also* Justice Sandra Day O'Connor, "Civil Justice System Improvements," Remarks Before the American Bar Association, at II (Dec. 14, 1993) (transcript on file with the *Mississippi College Law Review*) ("To begin with, I think we can find broad agreement on the need to create what has been called the multi-door courthouse.") (citations omitted); *see also* William H. Rehnquist, *Chief Justice's 1993 Year-End Report*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1994, 1, at 3 (recognizing that, "[in 1993,] Congress and the courts made an effort at creative reform with the consideration and passage of several initiatives. These included adoption of the rules of procedure amendment package, which embodied new ways of managing discovery, and the extension of authorization for pilot arbitration programs.").

69. Senator Charles E. Grassley, Remarks Before the Judicial Conference of the United States (Mar. 15, 1994) (transcript on file with the *Mississippi College Law Review*) (Senator Grassley criticized the Judicial Conference for opposing even the extension of the mandatory, non-binding arbitration device for cases involving less than $150,000 to all federal district courts, for use in the courts' discretion, when the mandatory arbitration program in fact helps with "precisely the problem for which [the federal courts] rightly criticize the Congress—heaping more responsibility [on the courts]. Arbitration will remove some cases from your docket and get them resolved more quickly and efficiently."). *See also* Parker & Hagin, *supra* note 4.

70. Parker & Hagin, *supra* note 4, at 1911.

71. COMMITTEE REPORT, *supra* note 7, at 9-10 (hereto attached as Appendix C, at 253-54).

the federal courts for any significant period of time unless jurisdictional priorities are addressed in a manner reflective of fair and reasonable restraint.

The courts of appeal have very successfully utilized case management techniques that have over the past thirty years increased the average case disposition rate from 64.2 to 284.2 per judge.[72] These techniques include: the screening of cases for appropriate routing – to the oral argument or the summary disposition circuit calendar;[73] the utilization of local rules that permit summary affirmance on the basis of the district court's decision;[74] and the utilization of circuit staff counsel to prepare and submit groups of cases to a panel for disposition.[75] And, to a lesser extent, circuit-level pre-argument, or settlement conferences have had a positive impact.[76] We think the courts have stretched these appellate case management techniques to the point of exhausting their ability to render any additional significant contributions to the federal dispute resolution system.[77]

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72. *See infra* app. B.

73. *See, e.g.*, 5TH CIR. R. 34 I.O.P.:

> – Screening – Screening is the name given to the method used by the Court to determine whether cases should be orally argued or decided on briefs only. This is done under FRAP 34, supplemented as above [by Local Fifth Circuit Rule 34].
>
> Screening is performed by judges of the Court with assistance from the Office of Staff Attorney. When the last brief is filed, a case is sent to the Office of Staff Attorney for prescreening classification.
>
> . . . .
>
> Decision Without Oral Argument – When all panel members agree that oral argument of a case is not needed, the Clerk is advised that the case has been placed on the summary calendar.

74. *See, e.g.*, 5TH CIR. R. 47.6:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Loc.R. 47.6." or "ENFORCED. See Loc.R. 47.6."
>
> *See* NLRB v. Amalgamated Clothing Workers of Am., 430 F.2d 966 (5th Cir. 1970).

75. *See generally* STRUCTURAL ALTERNATIVES, *supra* note 50, at 129 (citing Professor John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859).

76. *See generally* FED. R. APP. P. 33 ("The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court."). *See also* STRUCTURAL ALTERNATIVES, *supra* note 50, at 40-42, and authorities cited therein on appeal diversion programs.

77. As the Chief of the Long Range Planning Office of the Administrative Office of the United States Courts, Charles W. Nihan, has put it:

> [C]ircuit judges complete far more work today, and complete it with equal dispatch, as they did in prior years. Indeed, if efficiency can be defined as the amount of work completed, then circuit judges have become steadily more efficient from 1960 to 1992. There is every reason to expect that this trend will continue in the short term but, eventually, circuit judges will be presented with a clear choice: (1) continue to dispose of more cases by changing fundamentally the nature of appellate review, (2) dispose of a steady number of cases and either let the backlog build or substantially increase the number of authorized circuit judgeships, or (3) adopt discretionary review.

Nihan-Parker Memorandum, *supra* note 1. *See also infra* apps. A, B, and D.

We think it is critical that Congress also exercise and sustain a measure of principled jurisdictional restraint. We submit that such fair and well-reasoned legislative (*first* branch) restraint is every bit as critical to a viable, well-balanced constitutional system of law as fair, well-reasoned, judicial (*third* branch) restraint. Much of the incessant growth suffered by the federal courts – felt (through a case "snowball"-like effect) most acutely at the intermediate appellate court level – is the result of an apparent modern congressional affinity for "resolving" every social concern by creating a new federal cause of action and "placing" the problem with the federal courts. We think this penchant has grown to the point of threatening the overthrow of federalism.

As Fifth Circuit Judge Carolyn Dineen King has explained:

> The primary reason [for the federal courts' present crunch of caseload explosion] is legislation which began in earnest in the 1960s. Congress decided that the cure for many things that ail us is federal legislation – creating rights and entitlements and providing the [federal court] mechanism to enforce or obtain them. It would serve no useful purpose for me to evaluate in the abstract whether the new rights and entitlements have served the country well – clearly some have, and undoubtedly some have not.[78]

Meaningful federal court reform requires separating the federal case "wheat" from the "chaff" – giving back to the state courts the power to resolve those conflicts localized within the particular states which they are willing and able to handle, as well as vigorously *supporting* state efforts to resolve the localized problems of law they encounter (for example, by increasing joint legal research and financing ven-

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78. King, *supra* note 2, at 956. *See also* Representative Jack Brooks, Remarks Before the Federal Judges Association (May 19, 1993) (transcript on file with the *Mississippi College Law Review*):

> One of the most disquieting aspects of our political debate over the past several years has been the willingness of some – when faced with serious and complex problems that have proved intractable at the state and local level – to decree a "solution" by elevating the matter to a federal offense.

See also Congress Focuses on Cost of Crime, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Mar. 1994, at 5 (quoting Senator Ernest Hollings, Chair of the Senate Appropriations Committee's Subcommittee on Commerce, Justice, State, The Judiciary, and Related Agencies: "We try to federalize every crime up here."); *id.* ("Hollings said that the debate over crime has become so highly politicized that he believes he could get the Senate to vote in favor of federalizing virtually any crime. 'It's gotten silly around this town,' Hollings said."); William H. Rehnquist, *Chief Justice's 1993 Year-End Report*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1994, 1, at 3:

> Recent [legislative] action on a crime bill also reflected a natural response to growing concerns about crime. Unfortunately, proposed legislative responses have expanded – unwisely, in my view – the role of the federal courts in the administration of criminal justice. The federal courts undoubtedly have an important part to play in the war against crime, but I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill.

Compare United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (holding the Gun-Free School Zones Act invalid as beyond the bounds of the Commerce Clause), *cert. granted*, 114 S. Ct. 1536 (1994) *with* United States v. Edwards, 13 F.3d 291 (9th Cir. 1993) (disagreeing with the *Lopez* court's Commerce Clause construction). *Compare also* United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993) (holding the Anti Car Theft Act, "carjacking" legislation invalid as beyond the bounds of the Commerce Clause) *with* United States v. Johnson, 22 F.3d 106 (6th Cir. 1994) (explaining and holding that while the *Cortner* district court may be right in viewing the "carjacking" statute as unwise and inconsistent with traditional notions of federalism, the statute is "not unconstitutional under current Commerce Clause doctrine").

tures with the states).[79] Such restored balance between the state and federal legislative and judicial systems is not simply necessary to the ability of the federal courts to work in a quality-consistent manner, as a volumetric matter. Such renewal is also crucial to the preservation of the fundamental governmental value of well-balanced federalism – with the federal courts being courts of essentially limited jurisdiction and the state courts being courts of general jurisdiction; nothing less than an overriding principle of our system of government under law.[80] For example, Resolution IX, adopted in February, 1994, by the Conference of (state) Chief Justices, announced the Conference's position that some provisions of the most recent national crime bill, if enacted, "would amount in the indiscriminate federalization of crimes, the needless disruption of effective state and local enforcement efforts, and the inefficient use of the special but limited resources of the federal courts" – all in contravention of the principle of federalism.[81]

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79. *See, e.g.*, THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite."). *See also Congress Focuses on Cost of Crime*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Mar. 1994, at 5 (quoting Justice Anthony M. Kennedy's recent testimony before the Senate Appropriations Committee's Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies):

> [Justice] Kennedy expressed special concern about the impact of death penalty cases on the courts of appeals. "If you have 50 or 60 federal death penalty crimes, you simply are going to block the courts of appeals of this country from being able to address other important issues for years while they digest, define, and understand these new criminal provisions," he said. Kennedy suggested instead of adding to the federal courts' criminal jurisdiction, that Congress provide additional support and resources to the states.

See also id. (quoting Second Circuit Judge John M. Walker Jr.'s recent testimony before the same subcommittee: "It seems to me that the states are capable of doing a good job. We should explore ways of strengthening state systems.").

80. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (O'Connor, J.). And the democratic principles underlying this scheme of dual sovereignty-power remain cogent. *See generally* Professor Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 4-10 (1988) (citations omitted) [hereinafter Merritt]:

> Contemporary thinkers identify at least four positive features of our federal system. . . . [First,] [a] dual system of government checks abuses of power in any branch of the system. [Second,] [s]tate and local governments increase the opportunities for citizens to participate actively in the democratic process and [third,] create diverse cultural and political environments. Finally, the distribution of power among fifty-one different governments enhances opportunities for innovation and experimentation.

See generally also id. at 9 (noting in particular, with respect to the experimentation value of federalism, that "[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment all originated in state legislatures").

81. *See Congressional Crime Legislation: Violent Crime Control and Law Enforcement Act of 1994*, Conference of Chief Justices, Res. IX (Feb. 10, 1994) [hereinafter Resolution IX] (on file with the *Mississippi College Law Review*):

> [T]he Conference of [state court] Chief Justices[ ] strongly believes that the problems of crime in our nation must be addressed in a meaningful way to provide resources and reinforcement for the efforts of state judicial, legislative and executive leaders to address the problems of crime in their jurisdictions; strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing State criminal law and procedures; and strongly opposes provisions of the proposed legislation which would require that the limited resources of the federal courts be expended in the prosecution and trial of ordinary street crimes, to the exclusion of interstate crime syndicates, corruption in public office, the vindication of individual constitutional rights and other traditional federal issues.

The commitment to federalism is important, as Justice Brandeis well recognized:

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.[82]

Or, as Justice Black later put it, the reason for restraining federal courts from interfering with state proceedings is reinforced by the vital consideration of "comity," that is:

> [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, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism[.]" . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history *and its future*.[83]

In short, we are in basic agreement with Judge Reinhardt's statement to the Chairs of the House and Senate Judiciary Committees, Representative Brooks and Senator Biden, that "[t]here are changes that could be made in several areas in our [federal court] jurisdiction that would be helpful."[84] But we think these changes in jurisdiction are *essential,* not simply helpful; and we regard them as imminently practical, and not, as Judge Reinhardt thinks, "impractical."[85]

We are unwilling to join in Judge Reinhardt's "assumption" that Congress will not be willing to make the necessary changes in its jurisdictional practices "to assist in ensuring fairness and justice in our federal courts, and permit the more orderly and efficient administration of the justice system."[86] We indeed harbor hope that Congress and the Judiciary will work well together toward the paramount national objectives of restoring and conserving our federal court resources. We are encouraged by the important, well-informed and Judiciary-sensitive work by leaders in both parties and on both sides of the Hill—such as Representatives Brooks, Edwards, and Hughes; and Senators Biden, Grassley, Heflin, and

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82. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Compare* Resolution IX, *supra* note 81 ("[T]he command of the 10th Amendment encourages each state to serve as a laboratory for development of legal remedies and principles in criminal and civil law, without intrusion of federal authority.").

83. Younger v. Harris, 401 U.S. 37, 44-45 (1971) (Black, J.) (emphasis added).

84. Reinhardt, *supra* note 3, at 53:

> I refer particularly to the flooding of the federal courts with run-of-the-mill narcotics cases that should more properly be handled in our state system. I also refer to the problems created by the recent adoption of sentencing guidelines and, even more so, by mandatory minimum sentences, which are often wholly inappropriate and frequently lead to unnecessary trials and appeals.

85. Reinhardt, *supra* note 3, at 53.

86. Reinhardt, *supra* note 3, at 53.

Hollings. Congress has been at the forefront in bringing the critically-important Civil Justice Reform Act of 1990 to bear on the problems of civil litigation costs and delay in the federal district courts. The development of Judicial Impact Statements as part of the materials considered relative to jurisdictional legislative proposals represents another step in the right direction—toward the making of consistently principled distributions of limited federal court resources.[87] We are encouraged by recent yeoman efforts by the executive branch, as well.[88] Yet, the courts are still in need of much more actual reform.

We think Congress must re-evaluate the "federal" crimes and causes of action currently on the books, and any proposed new "federal" crimes and causes of action, by a set of principles, or guidelines, like those called for by Senate Judiciary Committee Chair, Joseph R. Biden, Jr., last year in his remarks before the Third Circuit Judicial Conference. With foresight reminiscent of the keen vision he displayed with respect to the Civil Justice Reform Act of 1990, Senator Biden has set the appropriate agenda for much-needed legislative (jurisdictional) restraint:

> What we need is a principle means of evaluating proposed legislation. The first task is to identify what principles should properly fuel any proposal to change federal court jurisdiction. How then can we identify those cases that have the strongest claim to federal jurisdiction in a principled manner?
>
> The real question is, in my view, given the practical limits of federal court resources, what cases are of the highest priority? What cases have the very strongest

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87. *See, e.g.*, REPORT OF THE DIRECTOR, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 23-24 (1993):

> In this current period of serious economic and fiscal constraints, making sure that members of Congress and representatives from the executive branch remain fully aware of the consequences their proposals and initiatives may have on the operations and budget of the federal judiciary has become more important than ever. During the past fiscal year, judicial impact statements were prepared on a broad array of legislative proposals, enacted legislation, and executive branch initiatives including the Violence Against Women Act, the Family and Medical Leave Act, and the Court Arbitration Authorization Act.
>
> There were also numerous instances when legislation was placed on a "fast track" and the judiciary was strongly urged to provide an immediate response on the potential costs. In reaction to these requests, a "preliminary impact assessment" format was developed that presents a modified and condensed cost-estimate analysis. These preliminary impact statements ensure that an assessment of the impact a piece of legislation will have on the judiciary becomes a part of the record at a crucial point in the legislative process.

See also Crime Bill Elicits Strong Reactions From Diverse Groups, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Mar. 1994, at 4 ("In response to a request from Representatives Don Edwards (D-Calif.) and William J. Hughes (D-N.J.), the U.S. Sentencing Commission submitted its analysis of how the Senate crime bill would affect sentencing guidelines.").

88. *See Leaders of Three Branches Participate in Roundtable Discussions*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Apr. 1994, at 5:

> A unique Three-Branch Roundtable on State and Federal Jurisdiction was held in Washington, D.C., on March 7, 1994, under the auspices of the Office of the Attorney General. The roundtable participants, who represented the three branches of federal government, state government, and academe explored their overlapping and separate spheres as they apply to state and federal jurisdiction. . . .
>
> Roundtable discussion focused on the effect federalization of state civil and criminal law has on the justice system, the mission of the federal Judiciary, the principles used when considering the federalization of state law, and the mechanisms that exist or should exist for federal-state cooperation. . . .
>
> As a result of these discussions, working [exploration] groups were formed.

claim on the federal courts? It seems to me we must be careful to make the right choices.[89]

We think Senator Biden has well-described the need for a vigorous inter-branch and multi-faceted commitment to federal court problem-solving, and in particular, for a renewed sense of federalism and federal court conservation in the realm of jurisdictional legislating. Further, though, in order to ensure that the jurisdictional guidelines are not manipulated out of actual legislative existence, but rather, are indeed enforced (and remain *in* force), we submit that Congress must give these jurisdictional guidelines the "teeth" of a "give-to-get" mechanism representative of a real, unwavering congressional commitment to federalism and quality adjudication in the federal courts. In brief, we urge Congress to adopt fundamental guidelines like those we discuss next, and to tie its jurisdictional legislative actions to the reality of a limited federal court resource, so that "[w]hen the sun rises on new causes of action, it must set on some old ones."[90]

D. Proposed Jurisdictional Guidelines: Federal Court Fundamentals

Historically, fairly, and efficiently, the federal courts have reflected the intent of the Constitutional Framers to provide for a judicial forum that would perform distinctive tasks arising out of our special governmental structure – tasks not ordinarily appropriate under that structure for the state courts. The public looks to the Federal Judiciary for the performance of several discrete but critical tasks. We regard the following to be the fundamental principles (Federal Court Fundamentals) reflected in this country's conception of *federal* courts:

1. It is expected that federal courts will (a) *safeguard* (b) *significant,* (c) *national* interests, (d) in *need* of national safeguarding.

2. It is expected that federal courts will withstand purely parochial influences.

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89. Senator Joseph R. Biden, Jr., Remarks Before the Judicial Conference of the Third Circuit, at 22, 33 (Apr. 19, 1993) (transcript on file with the *Mississippi College Law Review*). *See also* Judge Charles Clark, Essay, *Mules and Wagons – A Plea for Jurisdictional Reform,* 14 MISS. C. L. REV. 263 (1994):

> Congress has used its plenary power time after time to put more and more jurisdictional loads on and add more and more judges and support staff to the federal court system. For over 100 years, this has been done without any effort to develop a clear policy for governing a federal judicial system that ought to be designed to serve federal needs.

As we have noted:

> The Civil Justice Reform Act of 1990 (CJRA) represents a necessary first step toward making our system of civil dispute resolution responsive to the needs of the people who use and support it: the taxpayers. Credit should go where credit is due. Senator Joe Biden, with single-minded determination, secured passage of this controversial legislation.

Parker & Hagin, *supra* note 4, at 1930-31 (citing Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. III 1991) (enacted as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 103(a), 104 Stat. 5090-96 (1990))) (other citations omitted). The great American philosopher, Mark Twain, taught: Even if you are on the right track, you'll get run over if you just sit there. So we are especially encouraged by Senator Biden's efforts to keep the courts *moving* – on the right track, toward true, systemic, federal court reform.

90. COMMITTEE REPORT, *supra* note 7, at 8 (hereto attached as Appendix C, at 253).

3. It is expected that federal courts will protect from state infringement those (a) *fundamental,* (b) *civil rights* by which the character of a free people is defined.

4. It is expected that federal courts will protect from state infringement those (a) *fundamental,* (b) *civil liberties* by which the character of a free people is defined.

And we are convinced that these basic federal court principles are being ever-increasingly subverted by the current transformation of the federal courts (of supposedly limited jurisdiction) into an incessantly-expanding, large, all-purposive institution.[91]

We submit that all federal jurisdictional legislation must be carefully considered according to the four sets of Federal Court Fundamentals identified above. We propose that these Federal Court Fundamentals be used as guidelines by Congress – as a tool by which to measure whether current or proposed "federal" crimes and causes of action should be kept or placed in the federal courts, or rather, whether they should be "sunsetted" or forgotten, respectively, as appropriate subjects of federal jurisdiction. For example, we think it becomes clear upon such analysis that the general diversity jurisdiction of the federal courts does *not* measure up. While some case-affecting, state-against-state bias may linger, such bias is surely not such as to justify the irrebuttable presumption of it reflected in the current, essentially blanket diversity jurisdiction of the federal courts.[92] We submit that this type of jurisdiction should at least be limited to the following types of cases: (1) those in which the party seeking to invoke such jurisdiction actually demonstrates that case-affecting, state-against-state prejudice, or local parochial influence against the diversity-seeking litigant or those substantially similar to the

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91. *See generally* Judge J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary,* 43 EMORY L.J. (forthcoming Fall 1994).

92. One study found fear of local bias against a nonresident litigant to be a factor in the decision to seek a federal forum through the device of diversity jurisdiction in only 4.3% of the cases so taken to the federal courthouse. Professor Marvin R. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases,* 47 IOWA L. REV. 933, 937-38 (1962). *See also* Judge Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism,* 78 VA. L. REV. 1671, 1687 (1992) (citation omitted):

> When federal judges make state law . . . judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function. . . . [T]here is no longer any valid basis to justify the fundamental incompatibility of diversity jurisdiction with the most basic principles of federalism.

litigant, exists;[93] and (2) instances of complex, multi-state, diversity litigation.[94] We think state prisoner civil rights filings constitute another ready example of cases falling without the federal courts' appropriate jurisdiction. Under our proposed Federal Court Fundamentals, especially under Fundamental One, these filings are shown to offend the principle that the federal courts should concern themselves with only the significant, national interests entrusted to them by Congress which are in *need* of *federal court safeguarding*. There is no reason to presume the states are incapable of safeguarding or disinclined to safeguard the rights of their prisoners. The supercilious presence of the federal courts in this area, also, is unwarranted, unwise, and undermining of federalism.[95] We think other immediately obvious examples of "federal" jurisdiction qualifying for divestiture from the federal courts under a Federal Court Fundamentals-type analysis are: Jones Act jurisdiction;[96] and student loan jurisdiction. But we are sure many more "federal" crimes and causes of action would be found wanting if viewed under a lamp like our proposed Federal Court Fundamentals.

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93. "Such provisions, dating back to the Act of March 2, 1867, 14 Stat. 558, were eliminated as 'unnecessary' in the 1948 revision of the Judicial Code." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 129 n.11 (4th ed. 1983).

94. *See, e.g.*, FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-43 (1990) [hereinafter FCSC REPORT] ("After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate this basis of federal jurisdiction, subject to certain narrowly defined exceptions [such as complex multi-state litigation]."). "Responding to mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion, this committee" was "appointed by [ ] Chief Justice [Rehnquist] at the direction of Congress." *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (effective Jan. 1, 1989). Specifically, the Federal Courts Study Committee was directed to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the federal judiciary." *Id.* § 102(b)(1)-(2).

The Study Committee conducted a fifteen-month study of the problems confronting the federal courts and presented a report of its analysis and recommendations. The Committee was chaired by Third Circuit Judge Joseph F. Weis, Jr., and its members were: J. Vincent Aprile II, Esq.; United States District Court Judge Jose A. Cabranes; Washington State Supreme Court Justice Keith M. Callow; First Circuit Judge Levin H. Campbell; Edward S. G. Dennis, Jr., Esq.; Senator Charles E. Grassley; Morris Harrell, Esq.; Senator Howell Heflin; Representative Robert W. Kastenmeier; United States District Court Judge Judith N. Keep; Brigham Young University President Rex E. Lee, Jr.; Representative Carlos J. Moorhead; Diana Gribbon Motz, Esq.; and Seventh Circuit Judge Richard A. Posner. William K. Slate II, Esq., served as Director of the Federal Courts Study Committee. Steven G. Gallagher, Esq., served as Counsel to the Committee. Others who served as Committee Staff or Reporters were: Professor Thomas E. Baker; Professor Sara S. Beale; Diana G. Culp, Esq.; Denis J. Hauptly, Esq.; Professor Larry B. Kramer; Professor Richard L. Marcus; Professor Thomas D. Rowe, Jr.; and Doctor Russell R. Wheeler.

95. *See, e.g.*, FCSC REPORT, *supra* note 94, at 48-50 ((1) recommending that Congress (a) amend 42 U.S.C. § 1997e to direct federal courts in state prisoner suits brought under 42 U.S.C. § 1983 to require exhaustion of state institutional remedies for a period of 120 days, if the court or the Attorney General of the United States is satisfied that the remedies are fair and effective, and (b) delete 1997e(b)'s minimal standards for state institutional remedies; and (2) noting that exhaustion is required before *federal* prisoners may file civil rights cases in the federal courts, and it has not proved an onerous burden on such prisoners even though there is no time limit for the Bureau of Prisons to act on prisoners' claims, as there would be under the Federal Courts Study Committee's proposal relative to state prisoners).

96. *See, e.g.*, FCSC REPORT, *supra* note 94, at 63 (recommending that Congress repeal the Jones Act of 1920 because it has essentially outlived its need: "The Jones Act . . . supplements the seamen's traditional actions for maintenance and cure and for the breach of unseaworthiness. Congress has since 1920 created a federal workers' compensation scheme in the Longshore and Harbor Workers' Compensation Act. We recommend that Congress amend it to include seamen.").

IV. THE REFORMATION ESSENTIAL OF A DIFFERENTIAL APPELLATE CASE MANAGEMENT MECHANISM

Finally, the cornerstone of systemic federal court reform is the introduction at the intermediate appellate level of the sort of differential case management tool we discussed at the outset—essentially, the two-track methodology recommended in the Report.[97] This sort of device will allow the courts of appeal the critical ability to more fairly and effectively distinguish between those cases in need of the appellate court's plenary review and those not in need of such circuit court attention. As Third Circuit Judge Joseph F. Weis, Jr. has put it:

> What we should keep in mind is that there are two separate functions of the appellate court, the error-correcting function and the law-giving function. They do not always deserve the same treatment.
>
> Some of our problems are created by the fact that we now treat all appeals in the same way. Perhaps we need to be more discriminating in our procedures.[98]

We think, though, that there is now no "perhaps" about the need for the courts of appeal to be more discriminating in their review procedures.

Discretionary review at the court of appeals level will restore an important institutional balance between the district and intermediate appellate courts. As Professor Charles Alan Wright, among others, has long been trying to teach: The "federal appellate courts ha[ve] assumed too many of the functions previously performed by the trial courts," and thereby, "appellate judges have been guilty in a sense of shooting themselves in the foot;" as, "[h]aving taken on these tasks," the appellate courts soon found themselves overloaded with work.[99] We think the introduction of the Report's recommended two-track, differential appellate case

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97. *See supra* notes 14-31 and accompanying text. *See also* COMMITTEE REPORT, *supra* note 7, at 10-12 (hereto attached as Appendix C, at 253-55). As we have discussed, however, while we urge adoption of the two-track mechanism recommended by the Committee's Report, we also think this mechanism will need to still further evolve in the near future into a "pure" discretionary review procedural device.

98. Weis, *supra* note 11, at 99.

99. Weis, *supra* note 11, at 97 (citing Professor Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957) [hereinafter Wright]). *See* Wright, *supra*, at 751:

> The principal means by which appellate courts have obtained such complete control of litigation has been the transmutation of specific circumstances into questions of law. Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.

See also LEON GREEN, JUDGE AND JURY 380 (1930):

> Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.

Judge Stanley Sporkin of the United States District Court for the District of Columbia recently captured this vision of necessary intra-branch, institutional balance especially well:

> In most cases it would seem that the role of the appellate judge is to determine whether the litigants have received a fair trial and whether the results comport with the law. A trial need not be perfect, nor in my view need the relief ordered be that which the reviewing judge would have decreed had that judge tried the case. What really should be strived for is a determination whether the lower court decision falls within the range of acceptable limits.

Judge Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 759 (1992).

management mechanism can perform the necessary recalibration of the appellate court/district court division of adjudicative tasks.

V. WHAT IF JUDGE REINHARDT IS RIGHT ABOUT THE LACK OF LEGISLATIVE (JURISDICTIONAL) RESTRAINT?: INHERENT JUDICIAL POWERS-PLANS OF ACTION

What if Judge Reinhardt is right? What if he is right in his "assumption" that Congress will not be willing to exercise restraint in its jurisdictional legislating?[100]

If Judge Reinhardt is proved right, we think the fundamental character of the federal courts and the constitutional structure of government will be so threatened that the Judiciary will have no choice but to institute some necessary reform measures on its own, through its inherent powers as a coordinate, judicial, branch of the national government. Such measures would certainly be much less effective than the true, systemic reform congressional action could achieve. For example, there really is not anything the Judiciary can do through its inherent powers to restructure the district and circuit courts. Still, the federal courts can, we think, make *some* meaningful strides toward necessary reform by drawing upon their powers of judicial independence – powers essential to their functioning as federal courts – in the areas of: (1) federal court jurisdiction; and (2) especially, differential appellate case management.

As Justice White explained for the Supreme Court in the 1991, *Chambers v. Nasco, Inc.* decision:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." . . . These powers are "governed not by rule or statute but by the control

100. Reinhardt, *supra* note 3, at 53 ("I assume that Congress will not be willing to make [the helpful] changes in those [available] areas to assist in ensuring fairness and justice in our federal courts, and permit the more orderly and efficient administration of the justice system.").

necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[101]

We think it is obvious, especially in an age of apparently incessant quantitative demands upon the federal courts, that the inherent powers of the courts include the power necessary to protect themselves, "to [effectively] administer justice, to promulgate rules for practice," and "to provide [fair] process where none [effectively] exists."[102] The federal courts also possess the power and the obligation to

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101. Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (White, J.) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (Johnson, J.); and Link v. Wabash Ry. Co., 370 U.S. 626, 630-31 (1962) (Harlan, J.)). *See also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (Brennan, J.) (emphasizing the fact that the Constitution establishes an independent judicial branch, and that our nation's tripartite, constitutional scheme of government is maintained by a system of checks and balances that serves " 'as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' ") (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam)); *see also id.* at 58 ("As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial branch."); *see also id.* at 64 n.15 ("[T]he Framers did not leave it to Congress to define the character of [the lower federal] courts – they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure."); *see also Ex parte* Peterson, 253 U.S. 300, 312 (1920) (Brandeis, J.) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties."). Indeed, we think various congressional directives to the Judiciary recognize, at least implicitly or effectively, the structural, inherent-power necessity of federal court "abstention" from the indiscriminate exercise of excessive congressional creations of federal court jurisdiction. *See, e.g.*, Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (aiming to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and *ensure* just, speedy, and inexpensive resolutions of civil disputes") (emphasis added). *See also, e.g.*, FED. R. CIV. P. 1 ("[These Rules] *shall* be construed to secure the just, speedy, and inexpensive determination of *every* action.") (emphasis added). *Compare* United States v. Bowe, 698 F.2d 560, 566 (2d Cir. 1983) (quoting Kovarik v. County of Banner, 224 N.W.2d 761, 763 (Neb. 1975)) (citations omitted) (emphasis added):

> We do not believe . . . that the Criminal Justice Act repeals or displaces a court's "inherent authority to do those things reasonably necessary for the administration of justice in the exercise of [its] jurisdiction," including the power to appoint counsel to represent indigents. The Criminal Justice Act simply *supplements* this inherent power by providing for the compensation of counsel for what had previously been gratuitous service.

102. *See, e.g.*, Professor Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1298 (1993) [hereinafter Mullenix] ("The inherent powers of the courts . . . include the powers of the judiciary to protect itself, to administer justice, to promulgate rules for practice, and to provide process where none exists.").

While we agree with much of what Professor Mullenix has written in *Unconstitutional Rulemaking*, we disagree with her ultimate conclusion(s). That is, while we might agree that "[t]he Civil Justice Reform Act represents a rare example of Congress involving itself deeply in the internal operations of the federal judiciary," *id.*, we do *not* regard this as evidence that the Act is "constitutionally defective." *Id.* at 1309-10. Indeed, we call here and elsewhere for more congressional measures of the type represented by the Civil Justice Reform Act – as the most effective means of ensuring the continued effective performance by the third branch of its traditional, inherent functions. *See supra* part III.C. (regarding the need for legislative (jurisdictional) restraint and a proposed Federal Court Fundamentals test for appropriate measures of federal court jurisdiction); *supra* part IV. (regarding the federal court reform imperative of a differential appellate case management procedural regime); Parker & Hagin, *supra* note 4, at 1930-33.

check against the thwarting of constitutional limits by the legislative and executive branches of the national government.[103]

A. An Inherent Judicial Powers-Plan for Jurisdictional Restraint

If Judge Reinhardt is right about the unwillingness of Congress to make significant reforms in its jurisdictional legislative practices, the federal courts may have to make do by drawing upon their own powers to preserve the overriding governmental principle of federalism and the value of quality adjudication. Fundamentally-balanced federalism requires that federal courts wield their powers with a sensitivity to the impact on the constitutional balance of power between the national system of government and the state systems of government.[104] This conception of federalism has spawned myriad federal court decisions: (1) announcing doctrines such as the doctrine of equitable abstention formulated in *Younger v. Harris,* the "abstention doctrines" formulated through Supreme Court cases,[105] and the "*Erie* doctrine" formulated in the Supreme Court case, *Erie Railroad Co. v. Tompkins*;[106] or (2) interpreting rules such as the Eleventh Amendment and the Anti-Injunction Act, which govern the relationship between the federal courts and the states."[107] And so, while the "general rule" (rhetorically, anyway) is that

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103. *See, e.g.*, Merritt, *supra* note 80, at 18-19:

> Permitting a majority of Congress to override constitutional limits on state autonomy . . . disregards the express language of Article V. Under that provision, changes in the constitutional balance of powers may be achieved only by a constitutional amendment garnering support from two-thirds of the members of Congress, as well as three-fourths of the states. A bare majority of Congress is never sufficient to amend the Constitution.

See also id. at 20 ("The Constitution requires the courts to set aside legislation violating express constitutional commands. If the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review.") (criticizing in particular Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Blackmun, J.)) (footnote omitted).

104. "[Q]uestions of jurisdiction are really questions of power between States and Nation." Conversation Between Justice Louis D. Brandeis and Professor Felix Frankfurter, in Chatham, Mass. (June 28, 1923) (Frankfurter Papers, Library of Congress) (available on microfiche from the Library of Congress), *quoted in* Professor Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697, 703 (1993) [hereinafter McManamon].

105. The doctrine of jurisdictional "abstention" can be seen to have first reached full expression in the Supreme Court's 1941 *Railroad Comm'n v. Pullman Co.* decision. 312 U.S. 496 (1941) (Frankfurter, J.). Since *Pullman*, the Court has consistently expanded the notion of abstention to avoid deciding many cases concerned with or intersecting with state law. *See* Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) (Powell, J.); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (Brennan, J.); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (Brennan, J.); Huffman Ltd. v. Pursue, 420 U.S. 592 (1975) (Rehnquist, J.); Younger v. Harris, 401 U.S. 37 (1971) (Black, J.); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) (Frankfurter, J.); Burford v. Sun Oil, Co., 319 U.S. 315 (1943) (Black, J.). *Compare generally* American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) (Scalia, J.):

> Under the federal doctrine of *forum non conveniens*, "when an alternative forum has jurisdiction to hear [a] case, and when . . . the *'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,'* the court may, in the exercise of its sound discretion, dismiss the case," even if jurisdiction and proper venue are established.

Id. at 985-87 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v. (American) Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947))) (emphasis added) (alterations in original).

106. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (Brandeis, J.).

107. McManamon, *supra* note 104, at 703-05.

Congress, not the Judiciary, defines the scope of federal jurisdiction within constitutionally permissible bounds,[108] and accordingly, that the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging,"[109] this general principle does not eliminate, and the categorical assertions based upon it do not call into question the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted.[110] Indeed, "there are some classes of cases in which the [judicial] withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.' "[111]

The development in the federal courts of relatively distinct abstention doctrines illustrates especially well the inherent powers of the courts to respond to the excessive enlargement of federal court jurisdiction by Congress.[112] As Professor Barry Friedman has put it: "No area proves more troublesome to proponents of the congressional control and obligation theories [of federal court jurisdiction] than the abstention doctrines. . . . Abstention cases reflect pure common-law judicial decisionmaking about whether to refrain from exercising the jurisdiction granted by federal statutes."[113] It is true that the courts have seen fit to confine the applicability of the abstention doctrines—i.e., utilizing them only as extraordinary and narrow exceptions to a general duty of the federal courts to adjudicate the controversies placed before them by acts of Congress.[114] However, close attention to the basic principles infusing the abstention doctrines illuminates that, should Congress continue to create "federal" crimes and causes of action exceeding the bounds of federalism and federal court adjudicative ability, the federal courts will have no choice but to concomitantly expand the exercise of their inherent, "abstention" powers—so as to "check" the inefficient, Judiciary-subverting and federalism-thwarting excesses of the Legislature.

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108. *See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (Sutherland, J.).

109. *See* Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (Blackmun, J.) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (Brennan, J.)).

110. New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (Scalia, J.) (citing Professor David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570-77 (1985)).

111. *Id.* at 359 (quoting Younger v. Harris, 401 U.S. 37, 45 (1971) (Black, J.)).

112. *See generally* Grode v. Mutual Fire, Marine and Inland Ins. Co., 8 F.3d 953, 958 (3d Cir. 1993) (quoting 28 U.S.C. § 1331 (1982)) (emphasis added):

> Acting pursuant to its authority under Article III of the United States Constitution, Congress has mandated that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." However, the Supreme Court has carved out several limited exceptions where federal courts should abstain from exercising this grant of jurisdiction due to *overriding principles of federalism, comity, and judicial economy.*

113. Professor Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 17 (1990) [hereinafter Friedman].

114. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-14 (1976) (Brennan, J.) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.").

We are not advocating that the courts use their inherent powers "to dismiss . . . suit[s] *merely because* a State court could entertain" them.[115] Rather, we are simply acknowledging that if Congress fails to exercise some measure of restraint in its jurisdictional legislating, the federal courts may well be forced to react to such excess in a manner squarely recognizing that the cases Congress has placed within the federal court system are *not* properly before them. The abstention doctrines comprise just one especially well-established, distinct but evolving, *aspect* of the Federal Judiciary's inherent, separate-branch power to fulfill its fundamental obligation of confining its reach within the bounds of federalism, comity, and sound judicial administration (for the sake of rendering quality adjudications). And, as the particular evolutionary patterns of the abstention doctrines illuminate, this general inherent power of the Judiciary is as flexible as needs be.[116] We think the federal courts must be prepared to increase their utilization of their inherent "abstention" powers if Congress persists in increasing the number of essentially nonfederal, "federal" causes of action and crimes to the point of regularly, systematically subverting federalism and the Judiciary's very adjudicative

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115. *See* Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result) ("[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit *merely because* a State court could entertain it.") (emphasis added). *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (Black, J.) ("The concept [of federalism] 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.").

116. For example, as Professor Mary Brigid McManamon has noted:

> Justice Black's prophesy [in *Younger*] that the slogan ["Our Federalism"] would be important to our Nation's future has come true. While the word "federalism" is supposedly neutral, the Supreme Court has increasingly used it in the last twenty years as a basis for deferring to the States at the expense of federal jurisdiction. This increased deference has been dubbed "the new judicial federalism" and has caused lively debate among late-twentieth-century jurists.

McManamon, *supra* note 104, at 705 (citing her searches of: LEXIS, Genfed library, Courts file (June 25, 1991); WL, Allfeds database (June 25, 1991); and WL, Allfeds-old database – for the proposition that the concept of federalism has been cited in reported federal opinions approximately 4000 times in the last 20 years, while it was only cited about one tenth that many times in the two preceding centuries) (other citations omitted). *See also* Friedman, *supra* note 113:

> To be sure, the [Supreme Court] reports are replete with statements in dicta affording lip service to Congress's power to control the jurisdiction of the federal courts. But what the Court states rhetorically and what the vast body of Supreme Court decisions indicate, are two completely different matters. . . . [T]he Court often refers to the "virtually unflagging obligation" of the federal courts to exercise congressionally-conferred jurisdiction. But equally often, the Court disregards that supposed obligation. Thus there is an apparent gap between the traditional scholarly approach to federal jurisdiction, and the fabric of jurisdictional decisions woven by the Court.

Id. at 9-10 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983) (Brennan, J.)). *See also* Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545, 552 (1991) (footnotes omitted):

> Although inherent powers originated with the creation of the courts themselves, the inherent powers doctrine has received attention only in recent years. The reason is linked to the close relationship between modern courts and their inherent powers. As court duties and functions have increased – requiring added fiscal expenses and resources – courts have stretched their inherent powers to cover the growth.

ability.[117] Indeed, in our view, bedrock constitutional principles of checks and balances and separation of powers, at least, will in fact obligate the federal courts to refuse to join in such legislative subversion of the country's basic governmental structure.[118]

In short, we join Professor David L. Shapiro in rejecting the unduly broad and rigid, "pure congressional control" notion—i.e., "that in the absence of explicit statutory language, there is a strong if not conclusive presumption that statutory jurisdiction conferred" upon the federal courts "over the merits of a controversy *must* be exercised."[119] In the view of those who believe in this congressional control proposition which we reject: "[J]udicial failure to fulfill this obligation constitutes 'judicial usurpation of legislative authority.' "[120] But the view we share with Professor Shapiro is quite different from this. We are of the view that "history, tradition, and policy support the existence of" a measure of "judicial discretion to interpret and apply jurisdictional grants and to refrain from reaching the merits of a

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117. *See, e.g.*, Resolution IX, *supra* note 81:

> [B]y imposing on States federal standards and programs, the [Senate version of the most recent crime bill in the national legislature] would curtail the selective use of pretrial detention, sentencing and parole; and would invalidate principles of substantive state law – areas in which States have a constitutional responsibility under the principles of federalism and a long and proven history of successful initiatives; and . . . in addition to contravening principles of federalism, this legislation is further flawed because it: 1) assumes without foundation that states have been unresponsive and ineffective in addressing crime; . . . and 4) disrupts funding of state criminal processes by favoring police and corrections with federal funds while disregarding the need this creates for commensurate resources for courts, prosecutors, and defense counsel.

See also Congress Focuses on Cost of Crime, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Mar. 1994, at 5 (quoting the recent testimony of Justice David H. Souter before the Senate Appropriations Committee's Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies: "I'm afraid I don't have very much optimism that federal courts can become courts of unlimited criminal jurisdiction without incapacitating the ability of those courts to do what they do well now."). *Compare* United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (holding that the Gun-Free School Zones Act in the full reach of its terms is invalid as beyond the power of Congress under the Commerce Clause), *cert. granted*, 114 S. Ct. 1536 (1994) *with* United States v. Edwards, 13 F.3d 291 (9th Cir. 1993) (disagreeing with the *Lopez* court's Commerce Clause construction). *Compare also* United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993) (holding that Congress lacked power under the Commerce Clause to enact the Anti Car Theft Act of 1992) *with* United States v. Johnson, No. 93-5974, 1994 WL 140293 (6th Cir. Apr. 22, 1994) (explaining and holding that while the *Cortner* district court may be accurate in viewing the "carjacking" statute as unwise and inconsistent with traditional notions of federalism, the statute is "not unconstitutional under current Commerce Clause doctrine").

118. *See, e.g.*, Friedman, *supra* note 113, at 58-60; *id.* at 62 n.6 ("To the extent that any two branches are in agreement, the third branch ought . . . to consider its position very carefully.").

Moreover, as we have already mentioned, we think other, *congressionally-imposed* Judiciary powers and obligations actually recognize, implicitly or in effect, the structural, inherent power necessity of federal court "abstention" from the indiscriminate exercise of excessive congressional creations of federal court jurisdiction. *See, e.g.*, Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (aiming to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and *ensure* just, speedy, and inexpensive resolutions of civil disputes.") (emphasis added). *See also, e.g.*, FED. R. CIV. PRO. 1 ("[These Rules] *shall* be construed to secure the just, speedy, and inexpensive determination of *every* action.") (emphasis added).

119. Professor David L. Shapiro, Commentary, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 VA. L. REV. 1839, 1844-45 (1992) [hereinafter Shapiro] (responding to Professor Martin H. Redish's article, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992); as well as to Professor Redish's book, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991)).

120. Shapiro, *supra* note 119, at 1844-45 (quoting MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 49 (1991)).

controversy even when the existence of jurisdiction is clear."[121] For us, judicial "discretion on matters of jurisdiction is not only ubiquitous but desirable. . . . [D]iscretionary rules reflecting considerations of efficiency and comity [are] the result of the proper exercise of judicial authority."[122] Professor Barry Friedman has also well-described our view: Contrary to the strict teachings of the congressional control school of thought, this nation's history has been one that encompasses changing conceptions of the role of the Supreme Court, and the need for and responsibility of lower federal courts. And fixed theories of federal jurisdiction cannot readily take into account these changing conceptions. What Professor Friedman terms the [inter-branch] "dialogic" approach, on the other hand, not only has room for such changing norms, but actually facilitates them.[123] The premise of this dialogic approach is that the constitutional text is broad enough to leave largely unresolved questions of how far Congress may go in controlling federal jurisdiction and, conversely, to what extent the federal courts may resist such

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121. Shapiro, *supra* note 119, at 1845 (citing Professor David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 566-70 (1985)).

122. Shapiro, *supra* note 119, at 1845-46 (citation omitted). *Compare* American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) (Scalia, J.):

> Under the federal doctrine of *forum non conveniens*, "when an alternative forum has jurisdiction to hear [a] case, and when . . . the *'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,'* the court may, in the exercise of its sound discretion, dismiss the case," even if jurisdiction and proper venue are established.

Id. at 985-87 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v. (American) Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947))) (emphasis added) (alterations in original).

123. Friedman, *supra* note 113, at 3. *See also* Professor Barry Friedman, Continuing Commentary, *Federal Jurisdiction and Legal Scholarship: A (Dialogic) Reply*, 85 NW. U. L. REV. 478 (1991) [hereinafter Friedman, *A (Dialogic) Reply*].

control or assert themselves in defining the scope of federal jurisdiction.[124] And the governmental reality is that

> [t]his uncertainty is resolved on a case-by-case basis through an elaborate dialogue between the branches. *At times the dialogue is cooperative,* with one branch or the other seeking assistance in developing jurisdictional lines. *At other times the dialogue is educative,* with one branch teaching the other where it believes appropriate lines ought to be drawn. *And at some times it is more grave, like an elaborate game of*

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124. *See* Friedman, *supra* note 113, at 52; *id.* at 52-53 (citations omitted):

> When determining whether to create federal courts and allocate cases to them, one might rightfully be concerned about such issues as protection of federal rights and interests, considerations of comity and federalism, caseloads and the extent of judicial resources, and the need for uniformity. An important practical difference between the dialogic and the traditional models is which branch takes these considerations into account in fashioning federal jurisdiction. Under the traditional model, Congress bears sole responsibility for making this multi-factored analysis – often, for example, weighing the need to protect federal rights against any federalism or comity concerns implicated by federal court intervention. Under the dialogic model, however, responsibility for weighing these factors is shared.

See also Friedman, *A (Dialogic) Reply, supra* note 123, at 490-91 (responding to Michael Lewis Wells, Continuing Commentary, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991)):

> Wells criticizes the dialogic approach for permitting an analysis of "many factors" when to him only two factors – structure of government and individual rights – are the ones that matter. For example, Wells denigrates the notion that federal caseload and "overworked federal judges" could possibly be as important as his "basic principles of political life." . . . [But c]aseload, uniformity, and the few other factors I mention actually are all about individual rights and the structure of government. If overworked federal judges are hearing diversity cases or federal drug cases, they are not giving close attention to equal protection cases. . . . When the Court adopts an abstention doctrine, it is choosing to hear certain cases over others, and when Congress passes jurisdictional statutes, it is doing the same. Wells's "basic principles" tend to be the overriding goal, but the real world debate is carried out in terms of these "lesser" practical factors, factors that mean everything to his "basic principles."

Compare PHILLIP CHASE BOBBITT, CONSTITUTIONAL FATE 59-73 (1982) ("Prudential Argument"); *id.* at 63 ("[A] court's first responsibility is to decide whether it should decide."). *Compare also id.* at 74-92 ("Structural Argument"); *id.* at 74 ("Structural [constitutional] arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures."); *id.* at 91-92 (citing CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969)) (emphasis added):

> Structural arguments have not yet received the acceptance and attention they merit. This is perhaps partly a reflection of a narrow-minded formalism that persists in law schools and can be observed wherever one hears the clipped citation of a case which is, by its very mention, supposed to resolve a serious question. There are doubtless other reasons why [Professor Charles L. Black, Jr.'s] *Structure and Relationship in Constitutional Law* is so much cited but so little applied. The *future, however* – once law professors have integrated the structural method into their own – will see more of structural approaches. As government *qua* producers gain more importance in our lives, and hence as intergovernmental questions are brought to prominence, structural arguments will become more useful.

> *"push-shove,"* in which the branches resist one another's view of when the exercise of federal jurisdiction is appropriate.[125]

Certainly, we think the necessary jurisdictional reform measures can be most effectively and economically achieved by the branches working in accordance with the "cooperative" and "educative" modes of the dialogue described by Professor Friedman—as opposed to the less efficient, "push-shove" mode.[126] Nonetheless, we submit that plain prudence compels the federal courts to be prepared to heed the call for deployment of their unilateral, inherent powers should congressional restraint fail to materialize. The Judiciary must be prepared to act on its own, to "save itself"—to fulfill its inherent responsibility to preserve quality adjudication, federalism, and a well-balanced system of checks and balances within the nation's constitutional scheme of courts and government.

B. An Inherent Judicial Powers-Plan for Implementing a Differential Appellate Case Management Mechanism

At the very least, absent more effective cooperation from Congress, the Judiciary must be prepared to draw upon its inherent powers to reform its own, appellate case management procedures—by implementing local circuit rules enabling fair differentiation between those cases in need of plenary review at the intermediate appeal level and those not in need of such circuit attention.[127] As we have discussed above, while we view the tracking mechanism recommended by the Report to be imperative—and the most viable appellate case differential management

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125. Friedman, *supra* note 113, at 49 (citations omitted) (emphasis added). *See also* Judge Frank M. Coffin, *Working With the Congress of the Future*, *in* FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 201 (Cynthia Harrison & Russell R. Wheeler eds., 1989):

> It is safe to say that the happiness, effectiveness, stability, and independence of the federal judiciary depend to a very large extent on Congress. If it is sensitive and responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, long continued suspicion, underfunding, petty harassment, minute oversight, and capricious additions to workload can be the equivalent of a constitutional amendment repealing Article III.

See also id. at 211:

> The Founding Fathers wrought soundly and, despite some foreshadowing by Montesquieu, contributed an original concept to government, separation of powers. But in our complex age, for each power to fulfill what was originally expected of it, there must be communication, the sense of a community of interest, and sensitivity toward the needs and problems of each other. This offers to us, as we enter our third century, a challenge to ingenuity, patience, and understanding.

126. *See generally* LESTER C. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 12, 122-23 (1980) ("Once a goal has been legislated into law, the fight has just begun. To a great extent the time delays and uncertainty that this process creates have a more adverse effect on the economy than the regulations themselves.").

127. *See, e.g.*, Mullenix, *supra* note 102, at 1298 ("The inherent powers of the courts . . . include the powers of the judiciary to protect itself, to administer justice, to promulgate rules for practice, and to provide process where none exists."); Professor Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 448 n.80 (1982) ("Federal courts have inherent power to make rules for the orderly conduct of their business."). Compare also the following, consistent, *congressionally-imposed* judiciary powers and obligations: Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (aiming to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and *ensure* just, speedy, and inexpensive resolutions of civil disputes") (emphasis added); FED. R. CIV. PRO. 1 ("[These Rules] *shall* be construed to secure the just, speedy, and inexpensive determination of *every* action.") (emphasis added).

mechanism for the time being—we also think that further evolution, to a "pure" discretionary review regime, will be necessary in the near future.

VI. THE PRICE OF SYSTEMIC INACTION: R.I.P. FEDERALISM AND QUALITY ADJUDICATION IN THE FEDERAL COURTS

The compelling situation confronting the federal courts requires systemic plans of action. The February 16, 1993, Report recommends federal court reform measures capable of restoring and conserving the basic values of federalism and quality adjudication within the federal court system. We think the recommendations of the Report should be implemented.

At a minimum, Congress should act immediately to impose a period of procedural and structural *experimentation* upon the federal courts of appeal, which would allow the various, contending procedural and structural circuit reform measures discussed in this Article to be tried and monitored for empirical purposes by an independent research group—e.g., the Rand Corporation (as is being done now with respect to the Civil Justice Reform Act of 1990 in the federal district courts).[128] After a set, significant period of such experimentation in the circuit courts, and after the results of the pilot programs are analyzed by the independent research agency, Congress should find which pilot program has proved worthy of enactment as the new procedural and structural paradigm for the entire federal court institution—as the regime most capable of preserving the fundamental characteristics of the federal courts over the long term.

However, if Congress fails to so attend to the needs of federalism and quality adjudication in the federal courts, we think the Judiciary must be prepared to draw upon its inherent powers as a co-equal branch of the national government, to take the then-necessary court reform measures that are available to it in an effort to *save itself* (preserve federalism and fair, effective adjudication in the federal court system). We have tried to communicate through this Article our vision of how the Committee's Report could be used as a set of inherent judicial power plans of action for "self-help" federal court reform should congressional cooperation in such reform efforts fail to materialize.

If both Congress *and* the Federal Judiciary fail to take action sufficiently consistent with the Report, we think the Republic will soon suffer the utter loss of federalism and quality adjudication in the federal courts. Should such fundamental atrophy occur, the best that could be hoped for is that Congress would go ahead and abolish what will then amount to but an unaffordably redundant, mere pretense of a dual justice system—by forthrightly creating and maintaining a unitary system of justice that at least has some hope of administering justice in an effective, more quality-consistent fashion, even if not in a federalism-consistent one. We can see no reason to pay but costly "lip service" to our constitutional scheme of justice and maintain a two-fold, essentially indistinguishable and inefficient

128. *See generally* Parker & Hagin, *supra* note 4, at 1930-32.

system of courts – which is all we will have if we permit the federal courts to stay their current course on and over the precipice of federalism.

APPENDIX A

Appeals Filed per Authorized Judgeship

	Total	Criminal	Civil	Prisoner Petitions	Other Civil	Other Appeals
1960	57.3	9.2	34.1	4.5	29.6	14.0
1961	53.9	7.9	32.3	5.2	27.1	13.7
1962	61.8	9.9	35.4	7.0	28.3	16.6
1963	69.7	12.4	39.5	9.2	30.3	17.8
1964	77.2	13.4	46.3	11.3	34.9	17.6
1965	86.7	15.7	52.1	13.2	38.9	19.0
1966	81.6	16.6	47.1	12.6	34.6	17.9
1967	89.8	18.9	50.8	15.2	35.7	20.1
1968	94.0	21.6	52.3	17.9	34.4	20.1
1969	105.6	25.9	62.1	21.6	40.5	17.7
1970	120.2	27.4	72.2	25.4	46.8	20.6
1971	131.8	33.0	78.4	26.1	52.2	20.5
1972	149.8	41.0	86.6	27.0	59.6	22.2
1973	161.1	45.9	91.5	29.2	62.3	23.7
1974	169.4	41.9	97.2	29.1	68.0	30.4
1975	171.7	43.2	97.9	25.1	72.7	30.7
1976	189.8	47.9	107.3	25.2	82.1	34.6
1977	197.1	48.8	113.2	26.1	87.1	35.1
1978	195.0	46.3	115.1	22.9	92.1	33.7
1979	153.2	31.1	92.6	20.9	71.7	29.5
1980	175.8	33.4	112.5	27.9	84.6	29.9
1981	199.7	33.2	128.9	32.7	96.2	37.7
1982	211.7	36.1	142.3	36.6	105.7	33.3
1983	224.5	36.3	153.4	40.4	113.0	34.8
1984	238.6	37.0	164.6	45.2	119.4	37.0
1985	213.8	32.0	151.1	41.9	109.2	30.8
1986	219.8	32.9	155.7	44.8	110.9	31.2
1987	225.5	33.7	163.7	54.4	109.3	28.1
1988	240.5	38.5	171.0	59.3	111.7	31.0
1989	254.7	51.4	172.9	61.3	111.6	30.4
1990	262.2	60.9	173.8	63.7	110.1	27.5
1991	251.7	59.6	164.4	63.3	101.1	27.7
1992	275.6	65.6	179.5	70.5	109.0	30.5
1993	298.0	71.2	190.3	75.0	115.3	36.5

Source: Long Range Planning Office, Administrative Office of the United States Courts

APPENDIX B

Terminations per Authorized Judgeship

	Total	Consolidation	Procedural	Merit
1960	57.9	3.3	15.2	39.4
1961	55.2	3.3	15.9	36.0
1962	53.4	3.0	13.3	37.1
1963	64.2	5.1	18.5	40.7
1964	73.1	7.8	19.7	45.5
1965	74.0	7.0	21.5	45.5
1966	74.7	7.2	21.0	46.4
1967	85.5	9.5	25.3	50.8
1968	85.2	9.2	27.9	48.1
1969	92.9	9.4	30.7	52.8
1970	110.3	11.1	35.9	63.3
1971	127.5	14.1	35.0	78.4
1972	142.6	14.2	40.4	88.0
1973	155.8	16.0	40.6	99.2
1974	159.0	20.0	51.9	87.1
1975	164.9	19.8	51.5	93.6
1976	169.3	19.2	53.8	96.4
1977	183.3	23.9	41.9	117.5
1978	182.6	29.6	61.8	91.2
1979	143.1	24.4	48.1	70.9
1980	158.2	20.5	57.4	80.4
1981	189.9	26.8	70.9	92.2
1982	212.0	31.8	83.8	96.4
1983	217.1	31.7	85.3	100.1
1984	236.3	29.9	97.8	108.5
1985	201.2	17.1	79.2	104.9
1986	216.5	18.3	81.6	116.7
1987	220.8	17.2	85.0	118.6
1988	230.1	17.3	89.8	122.9
1989	239.6	18.8	96.9	123.9
1990	246.9	21.2	91.0	134.7
1991	248.0	24.6	87.4	136.0
1992	257.1	23.3	95.1	138.7
1993	284.2	22.2	108.9	153.1

Source: Long Range Planning Office, Administrative Office of the United States Courts

APPENDIX C

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING

[Note: The report has been edited to conform to *Mississippi College Law Review* publication standards – ed.]

The federal Judiciary has accepted the challenge to devise a long-range plan that will provide for the needs of the federal court system, the public, the bar, and litigants for the foreseeable future. The vision we collectively bring to this endeavor should address the issues that underlie the trenchant question posed by the Chief Justice:

> What should be the future role of the federal courts?. . . . The question transcends the personal concerns of sitting federal judges. It involves, instead, the kind of federal court system we will bequeath to our children and grandchildren.[1]

The Judicial Conference Long-Range Planning Committee, in moving to confront this challenge, has asked the Conference's standing committees to consider a host of long-range planning questions falling within their respective mandates. Some of these questions, particularly those relating to the structure and governance of the federal courts, have occupied much of the time and resources of the Court Administration and Case Management Committee for the past year. We have reached two overarching conclusions:

1. Substantial change in both the structure of the federal courts and the manner in which they provide services to the nation is essential to maintaining the historical nature of the institution and continuing to play a vital role in our nation's affairs.

2. The Long Range Planning Committee should serve not only as a clearinghouse for suggestions such as the ones contained in this report, but it should also be the forum for extended debate on these and other issues.

The Court Administration and Case Management Committee therefore submits this report to the Long Range Planning Committee and requests that Committee to initiate the debate and other forms of consideration necessary to inform its decision on incorporating the recommendations in its Long Range Plan.

In the course of our work, we held a conference in which we heard from the distinguished people listed in Attachment A. They provided the committee with a wide variety of perspectives on how well the federal courts are meeting the de-

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1. Chief Justice William H. Rehnquist, Remarks at Kastenmeier Lecture, University of Wisconsin-Madison, at 10-11 (Sept. 15, 1992).

mand for modern dispute resolution and on various opportunities to strengthen the courts' continued capability for meeting that demand.

The work of the committee has been greatly assisted by its reporter, Professor Francis McGovern, by William Eldridge of the Federal Judicial Center, and by Fred Russillo of the Administrative Office of the United States Courts.

I. SIZE OF THE FEDERAL JUDICIARY

Recommendation: The size of the tenured Article III federal Judiciary should be limited to the present number of authorized judgeships, along with any increases for which need has been established by the Judicial Conference at the time of the adoption of a Long Range Plan, but not to exceed 1000 Judgeships.

This recommendation recognizes that, historically, the federal courts have reflected the framers' intent to provide a judicial forum that would perform the distinctive tasks arising out of our distinctive federal structure—tasks not ordinarily appropriate under that structure for the state courts. We believe this role is being threatened by moves toward a policy of assigning to the federal courts tasks that are perceived as, in some undefined way, "better" for the federal courts, rather than essential to the maintenance of the traditional capability to handle cases of national effect, cases involving protection of individual liberties, and certain categories of complex cases. The concomitant of this shift has been a growth in the size of the federal judicial establishment that portends serious changes that some are just beginning to appreciate and that others are deeply concerned about.

There is no single path to meeting the challenge facing us. We must continue to perform at our highest level of quality and efficiency and we must bring to bear the reserves of commitment and cooperation at all levels of government. In issuing his call for reexamination of the role of federal courts, Chief Justice Rehnquist has called on us to: (1) recognize the benefits of renewed cooperation with the state court systems; (2) consider curtailing some federal jurisdiction; and (3) avoid adding new federal causes of action unless critical to meeting important national interests which cannot otherwise be satisfied through non-judicial forums, alternative dispute resolution techniques, or the state courts.[2]

A. Effects of Unlimited Growth

1. Altering the Beneficial Balance of State/Federal Responsibility

In addition to federal court growth resulting from increases in population and the complexity of business enterprises, growth is strongly affected by the changes in the nature of the tasks being assigned to the federal courts. Effects cannot be thoroughly separated and assigned to these two related causes. We must note, however, that a particularly troubling effect is the change in the relationship between federal and state courts. As the federal courts take on more and more aspects of courts of general jurisdiction funded by the federal government, we risk

2. Chief Justice William H. Rehnquist, Remarks to A.B.A. House of Delegates at 10 (Feb. 4, 1992).

disturbing the complementary relationship that has served the nation well. It is simply not possible to supplant the state courts' role and, at the same time, retain the benefits that have been realized from two systems, each doing its own job under an overall system of divided, balanced responsibilities. We believe those benefits are already at risk.

2. Altering the Character of the Federal Bench

The traditional work of federal courts has drawn to the federal bench men and women who have been very good at the tasks that make the federal courts distinctive forums. Some of the growth in the federal courts' workload can be accounted for by increased filings in the distinctive categories of litigation that have traditionally characterized our dockets, but our experience suggests that a very substantial portion of recent growth can be accounted for by categories that are not part of the traditional distinctive docket. Diluting the distinctiveness of the judicial work and the attendant commonality of interests among the judges drawn to the work is bound to change the character of the courts, the quality of output, and the influence of the institution. Such changes in the institution brought on by continued growth will undoubtedly adversely affect our ability to attract the talented people who have traditionally been drawn to these special courts.

This is not an argument grounded in elitism or status. It is simply a near-truism that persons with shared aspirations focusing on a discrete and special function are likely to develop from their shared experience a keen appreciation for what their institution can do. They recognize opportunities for reshaping processes without reshaping the institution they serve. They can assess the potential for innovation with due regard for preserving everything necessary to maintain the distinctive role for which we are deeply concerned. If we are right in our belief that size is a threat to this special federal court character, it behooves us to take every reasonable step to neutralize the threat.

3. Management Burdens Arising From a Large Staff Substructure

Growth of the federal courts' workload has also produced an attendant growth of support personnel that has been necessary, but is nonetheless alarming when we consider the drain on judge time required for administrative and management responsibilities. The following table shows growth in court support staff over the past twenty-one years:

Judgeships and Support Personnel – 1970 & 1991*
[Ratio of Support to Judgeships in ( )]

	Total Judgeships	Support Personnel in Individual Courts	Support Personnel in Administrative Office
1970[3]	498	6,641 (13.3)	198 (0.4)
1991[4]	816	20,946 (25.7)	881 (1.1)

* The newly established Federal Judicial Center was just beginning to form its staff in 1970. In 1991 it had 119 employees, a ratio of 0.15.

Substantial supporting staff will remain an essential resource to a smooth-running court operation. The committee believes, however, that the proposals advanced in this report would significantly reduce administrative burdens on judges. First, a sharp reduction in the number of districts would simplify structures and eliminate duplicate positions at several levels. Second, the installation of professional managers would relieve judges of administrative duties while reserving to them authority over policy issues arising from administrative matters.

B. How Big is TOO Big?

Various approaches to forecasting future growth arrive at markedly varying estimates. In this committee's view, we do not need to appraise the methodological controversies nor settle on some future time at which an unacceptable growth will be reached. We believe the courts have already reached a threshold requiring action. If we merely continue the growth shown in the above table, with no increase in the rate, in twenty years we will have 1338 judges supported by nearly 35,000 employees in the individual courts and 1700 in Washington. Such growth arising from increasing federalization of state law will fundamentally change the nature of the institution, which has in the past been limited to handling complex cases, cases that have a national interest, and protecting individual liberties. We can expect, however, that the increases would be even greater since growth in judgeships over the past twenty years has been held down through extraordinary efforts by judges and staff to handle increasing workloads without proportionate increases in judgeships. While we expect to continue the search for efficiency, we cannot expect that effort to meet the caseload rises we have seen in recent years.

It is in this context that we arrive at our recommendation that the number of federal judgeships be limited to the number now in service plus any additional judgeships already determined to be needed before the limits take effect.

3. Data provided by the Administrative Office of the United States Courts.

4. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR tbl. 28 (1992).

The committee recognizes that a federal court system with a fixed limit on judgeships will require the courts to become models of case management simply to manage the likely increases in filings within present jurisdictional structures. If fixed limits are approved, Congress will have to address jurisdictional priorities whenever it is urged to create federal causes of action that will add to caseload burdens. When the sun rises on new causes of action or crimes, it must set on some old ones.

The committee's recommendation to cap the size of the federal judiciary is limited to tenured Article III judges. We recognize that increasing the number of magistrate judges may be essential to case management efficiencies that will conserve more of the time of tenured judges for tasks constitutionally reserved to them. Since magistrate judges and bankruptcy judges are not guaranteed life tenure, their numbers may be more readily adjusted. The need for bankruptcy judges will fluctuate with the status of the economy. We expect the need for magistrate judges to grow if their role continues to be expansively defined.

II. The Organization of the Federal Courts

The proposals presented next are intended to implement the goals described above and the reorganization of district courts described below. The committee believes that capping the number of district judges, congressional restraint on new causes of action, and new caseload management approaches will permit the achievement of the overall package of recommended changes in acceptable time frames.

A. Regarding Courts of Appeal

Recommendation: There should be ten circuits; each comprising one court of appeals and one district court.

The committee recommends that the circuits be realigned, to create ten circuits that will evenly distribute the national appellate caseload.

Avoiding continued increase in the number of circuits is a major goal of this committee's proposal. More circuits mean more intercircuit conflicts creating pressure on the Supreme Court to bring uniformity to our body of federal law. We have considered alternatives such as specialized appellate courts and a single, national court of appeals. Despite the benefits to uniformity of national law that would be facilitated by these suggestions, we are persuaded that the percolation of law that is afforded by consideration of issues in multiple circuits outweighs the benefits that accompany either national or specialized courts of appeal.

Recommendation: Each court of appeals should have twelve judges.

If circuits are to be retained, each must have a coherent body of circuit law. The law of the circuit, with its attendant predictability, can best be created and preserved by a body of judges small enough to function truly as a court. We believe the functional limit to such a court is twelve.

Large courts of appeal present too great an opportunity for producing law of the panel rather than law of the circuit. The opportunity for intracircuit conflicts is even greater. The resulting signal of unpredictability is unsettling to the public, the business community, and the district courts. Unpredictability generates more litigation, thereby fueling the problem rather that solving it.

Collegiality is fostered by a court of manageable size. Collegiality should not be viewed simply as a factor in the quality of professional life desired by judges. It is rather a critical element in our conception that vital decisions made by single individuals should be reviewed by others. Collegiality, at its best, helps to assure that the reviewers are speaking from shared values of the legal system even when they disagree on specific outcomes. We are confident that the diminution of collegiality in courts larger than twelve judges is a risk that the judicial system and the nation can ill afford.

Recommendation: There should be a two-track method of appellate review.

The committee is persuaded that applying case management techniques, such as those in the model shown in Attachment B, will enable the courts of appeal to afford each case the attention it requires, provide due consideration of the merits, and conserve judicial time. Under the proposed model, each case would begin on Track One. Parties would provide a fifteen page brief that identifies the parties, pertinent orders from the court below, questions presented for review, argument and authorities relied upon, and appropriate record excerpts. The court should be able to dispose of a significant number of cases at this stage without further submission by the parties or additional costs to the litigants. Cases that are not appropriate for disposition on Track One may at any time be scheduled for plenary (Track Two) review with or without oral argument.

The committee recognizes that practices in some courts of appeal already embrace some elements of this model. The committee believes, however, that regularization through rules and formal practice will, when combined with results from other recommendations, contribute sufficient economies for the courts to reduce membership to twelve judges in each of the ten circuits through attrition while responding adequately to caseload demands. The committee has also considered the alternatives of pure discretionary review or the creation of an appellate division of the district court. Each of these alternatives has merit. But the fact that the courts of appeal have traditionally been courts concerned with error correction has prompted the committee to reject the alternative of pure discretionary review. The creation of an appellate section of the district court is a workable solution, but would probably require additional district judges.

The committee does believe that the benefit to be realized from limiting the number of circuits to ten and the number of appellate judges in each circuit to twelve is such that the committee would urge adoption of either pure discretionary review or the creation of a district court appellate division if the recommended case management approach is rejected or unavailing.

The committee also considered and rejected the creation of a unified circuit-district bench, an intermediate appellate court, and various proposals for resolving inter-circuit conflicts.

Recommendation: There should be an appellate council comprising the court of appeals sitting as a committee of the whole with the chief judge of the court of appeals presiding.

Administrative matters affecting a court of appeals would be the responsibility of the circuit appellate council. This recommendation, along with a companion one below regarding district courts, reflects the view of the committee that the administrative issues and needs of the two courts are distinctive and not readily perceived or addressed by judges with limited or no experience in the other forum. Accordingly, this recommendation and its companion below would create one body in each court to handle the duties assigned to the existing circuit councils under 28 U.S.C. § 332.

B. Regarding District Courts

Recommendation: Each circuit should have one district court with boundaries coterminous with the circuit.

The federal trial court is presently fragmented into ninety-four districts with many times that number of formal and informal subdivisions. Boundaries of the districts often reflect happenstance, evolutionary growth, and once-upon-a-time rational factors that have disappeared or been forgotten. What cannot be ignored is that the proliferation of districts and their subdivisions brings attendant cadres of administrative staff, repeated in structure, if not in number, in all the districts. The committee is convinced that so many districts and repetitive staff are unneeded and place an administrative drain on judge time available for judicial tasks.

Disparities in the critical elements of district operations are well known: caseloads, pace of dispositions, productivity, and resources are uneven. Comparably efficient administration is difficult, if not impossible, to achieve across ninety-four districts under the best of conditions. And we do not have the best of conditions. Judges rise to chief judgeship by longevity—a qualification likely to reflect skill at judicial tasks honed by experience; but each new chief arrives with virtually no experience in confronting the administrative problems of a court.

The most critical feature of the proposal for circuit-wide districts is the greatly facilitated flexibility it affords in providing judge power where it is needed. Today, retirement of a judge in a modestly burdened court will provide a new judge and a senior judge to that court while judges in a nearby heavily-burdened court will face continued overwork and growing backlogs. The committee's recommendation will not provide a panacea to this problem, but it will surely afford much improved opportunity for addressing such disparities within the proposed districts.

Recommendation: There should be a district council in each circuit comprised of a minimum of five district judges or at least one from each state in the circuit, one bankruptcy judge, and one magistrate judge.

As mentioned above in discussion of the courts of appeal, the committee believes that administrative and operational problems and opportunities in the trial and appellate courts are sufficiently different to warrant separate governance structures. This recommendation is grounded in such conviction.

C. Selection of Council Members and Council Chair

We propose that council members representing states should be selected by all active district judges residing in the state. When fewer than five states make up a circuit, the district judge representatives needed to meet the complement of five should be selected by all the active district judges in the circuit.

Bankruptcy judges will choose one of their number to serve, as will the district's magistrate judges.

Each council member should have five years experience. Each member should serve for a five-year term. And the chair of the district council should be selected by the elected council members.

D. Duties of the Council

1. The council should function much like a board of directors: setting policy; approving or modifying budgets; guiding the planning for the district as it relates to facilities and resources; and assigning judges to the areas of greatest need.
2. The district council should have responsibility for selecting a professionally-qualified, district court administrator or district executive who would be given authority to manage the administrative affairs of the district court under direction of the council.

E. Regarding Joint Responsibilities of the Court of Appeals and the District Court

Recommendation: There should be a seven-member committee in each circuit to handle disciplinary matters, including complaints filed under 28 U.S.C. § 372(c). This disciplinary committee should be comprised of three members of the court of appeals selected by the appellate council and three members of the district court selected by the district council. The chief judge of the court of appeals should serve as chair.

The committee recognizes that 28 U.S.C. § 372(c) calls for procedures in which complaints against a judicial officer are not disposed of entirely by the court colleagues of the officer complained of. Accordingly, we have recommended a procedure that retains the basic elements of the current statutory scheme. We believe this procedure should continue to provide assurance to the public that complaints are reviewed and acted on without undue influence arising from close working relationships among the review participants.

Attachment A
to the Report of the Judicial Conference Committee
on Court Administration and Case Management to
the Judicial Conference Committee on Long Range Planning

Judges

Honorable Thomas F. Hogan
Judge, United States District Court for the District of Columbia
Chair, Judicial Conference Committee on Intercircuit Assignments

Honorable Robert Nicholson
Justice, Supreme Court of Western Australia

Honorable Judith W. Rogers
Chief Judge, District of Columbia Court of Appeals
(now Judge, United States Court of Appeals for the District of Columbia Circuit)

Honorable Deanell R. Tacha
Judge, United States Court of Appeals for the Tenth Circuit
Chair, Judicial Conference Committee on the Judicial Branch

United States Department of Justice Representative

Honorable Kenneth W. Starr
Solicitor General of the United States
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Attachment B
to the Report of the Judicial Conference Committee
on Court Administration and Case Management to
the Judicial Conference Committee on Long Range Planning

Appellate Case Management Model

Track One

In each case, Appellant shall file the following with the court of appeals.

A. A Track One brief containing:
   1. A list of all parties unless the names appear in the caption of the case;
   2. A table of authorities;
   3. A jurisdictional statement;
   4. A short and concise statement of the questions presented for review;
   5. A concise statement of the facts material to the questions presented for review;
   6. A concise argument of the merits of the appeal.

B. An Appendix containing:
   1. The judgments, opinions, orders, findings of fact, and conclusions of law of the district court pertinent to the appeal;
   2. Record excerpts pertinent to the questions presented for review.

The Track One Appellant's brief shall not exceed fifteen pages, excluding the Appendix with record excerpts.

In each Track One case, Appellee's filings are as follows.

A. A Track One reply brief containing:
   1. A list of all parties unless the names appear in the caption of the case;
   2. A table of authorities;
   3. A jurisdictional statement;
   4. A concise statement of the facts material to the questions presented for review;
   5. A concise argument of the merits of the appeal.

B. An Appendix containing:
   1. The judgments, opinions, orders, findings of fact, and conclusions of law of the district court pertinent to the appeal;
   2. Record excerpts pertinent to the questions presented for review.

The Track One reply brief shall not exceed fifteen pages, excluding the Appendix with record excerpts.

Track Two

Track Two shall be plenary review. In any case assigned to Track Two review, the court of appeals may permit or require the parties to:

1. Supplement the briefs filed in Track One to the extent ordered;
2. Permit full briefing of the questions presented for review; or
3. Supplement the record or file the complete record.

The court of appeals may consider Track Two appeals with or without oral argument.

APPENDIX D

Appeals Terminated per Authorized Judgeship, 1960-1993