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Dam Federal Jurisdiction!

Thomas E. Baker
Florida International University College of Law

DAM FEDERAL JURISDICTION!

by
James C. Hill*
and
Thomas E. Baker**

I. INTRODUCTION

From the outset, the reader should be familiar with our script. Our threefold purpose in writing this essay is to be at once descriptive, evaluative, and prescriptive. We shall describe briefly the decisions of the United States Supreme Court during the 1981 Term in the broad field of federal jurisdiction, and shall compare and constrast those decisions with the past decisions of the United States Court of Appeals for the Eleventh Circuit.[1] We shall evaluate roughly how those decisions singularly and collectively narrow and broaden the jurisdiction of our federal courts. In editorial fashion, we shall draw some conclusions and prescribe some solutions.

First, we limit our undertaking temporally. Because the work of the Supreme Court is said to take place during certain defined terms, commentators are likely to review the output of each term separately and sequentially, as if each term represents the initial organization of a court, its work, and the termination of that court. While, for convenience, we choose to follow this tradition, we recognize that the term, as such, has no particular significance in the development of the law. One could choose any date at random as a

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* Judge, United States Court of Appeals for the Eleventh Circuit. B.S., University of South Carolina, 1948; J.D., Emory University School of Law, 1948.

** Associate Professor of Law, Texas Tech University. B.S., Florida State University, 1974; J.D., Holland Law Center, University of Florida, 1977. I wish to express my appreciation to my fellow students and to our professor Paul M. Bator in the Federal Jurisdiction course at the Harvard Law School Program of Instruction for Lawyers 1982. My contribution to this essay was enriched by that experience.

[1] It should be noted that the new Eleventh Circuit has adopted the prior precedents of the former Fifth Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981). Hence, we will treat precedent of the new Eleventh Circuit without distinguishing between natural born and adopted case law. *See generally* Baker, *A Primer on Precedent in the Eleventh Circuit*, 34 MERCER L. REV. 1175 (1983); Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725 (1982); Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687 (1981).

beginning point, and discuss decisions of the Court from that date forward to another chosen date to equal purpose. Not having a better starting and ending date in mind, however, we set our time of inquiry as the 1981 Term.

Second, we limit our undertaking topically, addressing only those cases that concern jurisdiction of the federal courts. At first blush, it might appear that the determination of the threshold question—whether the Court has the power to decide the merits of the contentions of the litigants—is of relative unimportance. The casual observer might think that when the Court determines that it has no "jurisdiction" nothing of significance has been decided, that the only significant cases are those in which it exercises its power to decide. This impression results partly because the impact upon the law is more obvious when the Court actually decides substantive disputes between litigants. When the Court announces which side is "right"and which side is "wrong" the decision and the reasons given for the decision add to the growing body of the law. We submit, however, that often things are the other way around. In its constant task of defining (and, from time to time, redefining) "our federalism," the Supreme Court's delineation of the power of the federal courts to entertain and decide certain cases is of primary importance.

Jurisdiction itself is a quicksilver word. As we use it here, jurisdiction broadly spans three separate determinations: whether there is a cause of action, whether the federal court should be the decisionmaker, and whether the federal court can or should provide a remedy. The expansion of governmental action by federal courts is objectively discernable and has been much discussed. While such judicial lawmaking is often necessary and beneficial, it is hardly the purest expression of democracy. When the branch made up of the elected representatives of the people addresses an issue of national importance, it is addressed prospectively and it is proper that the courts apply its resolution to particular fact situations not precisely anticipated but clearly covered by what Congress intended. This ought not endorse, however, abdication by Congress to the courts. If Congress is confronted with a problem having no real—or politically satisfactory—resolution, it is inappropriate for

that branch to delegate the decision to the judiciary, the branch most removed from the people. Specifically relevant to our discussion, under our Constitution Congress is to define the jurisdiction of the courts. When it has been found to have done so merely by implication, one of two further implications must be drawn. Either Congress failed to resolve the issue and "passed the buck" to the judicial branch to make the law on its jurisdiction or, without the authority of the legislative branch, the judicial presumed to usurp the powers of the legislative. Neither is appropriate to the maintenance of our constitutional separation of powers.

When members of Congress sense the existence of a wrong not of national significance, their office does not permit them to effect a state remedy. If they nevertheless proceed to legislate, the implication is permissible that our national lawmakers do not trust their state counterparts to address issues appropriate to state resolution. The result is that federal courts are given caseloads better suited to state resolution and the task of supervising the practices of bill collectors, small lenders, and used car dealers who roll back odometers.

We submit, however, that the courts themselves play a role in the trend toward expansion of the caseload. Complaints filed suggest wrongs, although the existence of federal remedies for those wrongs may be in dispute. Judges are not insensitive to the existence of wrongs and may be quite ready to correct them if jurisdiction exists. Indeed, it is the duty of the judge to act if authorized; but it is usurpation to act without authority. The scope of federal court expansion of jurisdiction is directly related to the resolution, case by case, of these issues.

The cases we examine here may be seen as involving expansion versus contraction of federal court jurisdiction. While our overall thesis is apparent from the title we give this essay, it must not be dogmatic. Inappropriate expansion of federal court activity may be, as we suggest, unwise. Nevertheless, a court cannot and should not be reluctant to hear and decide those cases properly before it.

A final introductory disclaimer is in order. We do not endeavor here to either exhaust the subject of federal jurisdiction generally

or to treat comprehensively the doctrines we do discuss. Our modest descriptive purpose is to provide a capsule summary of the Supreme Court pronouncements of the 1981 Term. This essay is not meant, and should not be taken, to be a substitute for careful reading of and reflection on the decisions. Indeed, the opinions discussed here cover more than five hundred pages in the reports. As if this quantity of material were not enough to dissuade even the ambitious author, the precedential impact and policy significance of these decisions are truly imposing. The decisions of this term long will serve as grist for the mills of attorneys, judges, and commentators. Nor do we suppose that this was an atypical term. In fact, we believe that these decisions provide a representative collage. Federal jurisdiction is like an interminable motion picture with countless reels past and future. We wish to freeze a few frames from those reels and bring them into a narrow focus, out of our deeply held concern that the plot of this epic somehow has been lost.

In one basic sense, every federal court decision is a precedent in federal jurisdiction. At times overlooked, perhaps, is the constitutional reality that federal courts are courts of limited jurisdiction. This is the threshold "principle of first importance."[2] This truism bears emphasis: "Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act."[3]

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[2] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 17 (3d ed. 1976). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1-63 (2d ed. 1973) (discussing the development of the federal system) [hereinafter cited as HART & WECHSLER].

[3] Edgar v. Mite Corp., 102 S. Ct. 2629, 2646-47 (1982) (Stevens, J., concurring in part and concurring in the judgment). Federal courts simply are not common law courts. Early on Chief Justice Marshall eloquently explained:

> As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disdains all jurisdiction not given by the constitution, or by the laws of the United States.
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> Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.

Ex parte Bollman, 8 U.S. (4 Cranch) 23, 25 (1807), *quoted in Edgar*, 102 S. Ct. at 2646-47

Since the earliest days of our Republic, the first step in the solution of a question in federal jurisdiction has been an examination of Article III of the Constitution,[4] and the second step has required an examination of the act of Congress upon which jurisdiction has been sought to have been rested.[5] In this essay, we cannot catalogue every such implicit determination of jurisdiction. Instead, our emphasis is on those decisions that have systemic significance regarding Article III and the relevant act of Congress.[6] These decisions may be grouped by subject matter and will be discussed sequentially: Standing; Mootness; Legislative Courts; Admiralty Jurisdiction; Class Actions; Personal Jurisdiction and Venue; Federal Implied Rights of Action; Suits Against States and Sovereign Immunity; Civil Actions for Deprivations of Rights; Official Immunities; and Habeas Corpus.

II. STANDING

The federal power of judicial review may be invoked only by "a party [who] has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy"[7]—a party with standing.[8] Standing, of course, is determined by the specific circumstances of the individual situation. The law of standing, however, has profound ramifications for federal jurisdiction. Although standing rarely is an issue in private litigation, it becomes an important threshold question in public law litigation. Besides the great potential effect of the litigation of the merits in

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n.5 (1982) (Stevens, J., concurring in part and concurring in the judgment).

[4] *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 273, 274 (1809).

[5] *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 651, 652 (1849).

[6] We disclaim completeness as well. We do not discuss some of the term's decisions which meet even our artificial criteria. *See, e.g.*, United States v. Johnson, 102 S. Ct. 2579 (1982) (Held, Fourth Amendment decision applied retroactively); White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445 (1982) (Held, request for an award of attorney's fees under 42 U.S.C. § 1988 was not subject to the ten-day timeliness standard of FED. R. CIV. P. 59(e)). *See also infra* notes 118 & 170.

[7] Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[8] *See generally* HART & WECHSLER, *supra* note 2, at 150-214; 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 57.11 (2d ed. 1983); 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 65.17 (2d ed. 1982 & Supp. 1982-83); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1542 (1971 & Supp. 1982); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531, 3533, 3568 (1975).

such cases, the issue of standing in public law litigation may be viewed as a constitutional and judicial rheostat to federal court access. Public law litigiousness responds to changing perceptions of both the likelihood of prevailing and the opportunity to litigate itself.

The first of the term's three standing cases *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[9] involved the standing of taxpayers and citizens to sue on a claim that the federal government's transfer of surplus property to a church-related college violated the Establishment Clause of the First Amendment.[10] Proceeding under the Property Clause,[11] Congress enacted the Federal Property and Administrative Services Act of 1949[12] which authorized the Secretary of Health, Education and Welfare to dispose of "surplus real property . . . for school, classroom, or other educational use"[13] and further provided that the Secretary may sell or lease the property to nonprofit tax-exempt schools for consideration that takes into account "any benefit which has accrued or may accrue to the United States" from the transferee's use of the property.[14] In 1976, under these statutes and applicable regulations, the Secretary transferred a 77-acre tract to petitioner, a nonprofit educational institution operated by a religious order. The appraised value of the property was $577,500, but the Secretary's computation of a 100% public benefit allowance excused all payment. Respondents, a nonprofit organization, and four individual members-employees brought suit to challenge the conveyance on the ground that it violated the Establishment Clause.

Recognizing that the Court's prior decisions sometimes had failed to distinguish between the requirements of Article III and considerations of prudent judicial administration, the majority[15]

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[9] 454 U.S. 464 (1982).

[10] U.S. CONST. amend. I.

[11] U.S. CONST. art. IV, § 3, cl. 2.

[12] 40 U.S.C. §§ 471-544 (1976 & Supp. III 1979).

[13] 40 U.S.C. § 484(k)(1) (1976).

[14] 40 U.S.C. § 484(k)(1)(A), (C) (1976).

[15] Justice Rehnquist authored the majority opinion joined by the Chief Justice and Justices White, Powell, and O'Connor.

clarified the constitutional minimum:

> Art. III requires the party who invokes the court's authority to "show some actual or threatened injury as a result of the putatively illegal conduct of the defendant" . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[16]

This "injury in fact" requirement of Article III is multipurposed: a complete and actual factual setting is guaranteed; the decision to seek judicial relief is made by the individual with a direct stake in the outcome; and judicial restraint maintains the balance in a system of separated powers.[17] The majority went on to buttress the standing doctrine with prudential principles beyond Article III: a general rule against representative standing; a requirement that the grievance be individual and not general; and the requirement that injury must adversely affect the zone of interests of the substantive statutory or constitutional protection. The majority focused on the Article III *sine qua non* of standing—the injury in fact—to decide the issue in *Valley Forge*. Respondents' alleged injury was the deprivation of the fair and constitutional use of their tax dollar. The subcategory of taxpaper standing cases was thus engaged.[18] The general rule in taxpayer suits is that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer."[19]

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[16] 454 U.S. at 472 (citations omitted).

[17] *Cf.* Baker, *Constitutional Law*, 27 LOY. L. REV. 805, 805 (1981) ("The power of judicial review of the federal courts is thus circumscribed along three axes: judicial tradition, separation of powers and federalism.").

[18] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Flast v. Cohen, 392 U.S. 83 (1968); Doremus v. Board of Educ., 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923). *See generally* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968) (analyzing *Flast* and suggesting what the standard for standing should be); Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645 (1973) (suggesting that the *Flast* line of cases has rejected the traditional function of judicial rationing); Comment, *Standing to Contest Federal Appropriations: The Supreme Court's New Requirements*, 22 SW. L.J. 612 (1968) (discussing the implications of *Flast* on taxpayer standing).

[19] *Valley Forge*, 454 U.S. at 477 (citing Doremus v. Board of Educ., 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923)). Apparently, the majority was emphasizing the Article III injury requirement and not merely the prudential judicial principle that the

Valley Forge served to narrow the exception to the general rule that was first noted in *Flast v. Cohen*.[20] *Flast* conceded taxpayer standing if (1) the injury alleged is an unconstitutional exercise of the congressional power under the Taxing and Spending Clause,[21] and (2) the challenged enactment is shown to exceed a specific constitutional limit on the exercise of that power.[22] The *Flast* plaintiffs met both prongs; in that case, the challenged statute was an exercise of the congressional power to spend for the general welfare, and the Establishment Clause, on which plaintiffs relied, was designed as a specific limit on that power. The *Valley Forge* plaintiffs, in contrast, failed the first prong of the test for two reasons. First, they challenged the executive transfer of the property rather than the congressional authorization; and second, the authorizing legislation itself was a congressional exercise of power under the Property Clause rather than under the Taxing and Spending Clause. The majority rejected the court of appeals' theory that plaintiffs had citizen standing under the general "injury in fact" rubric.[23] The violation of some shared individuated right in governmental adherence to the First Amendment is not enough. Eschewing a standing spectrum keyed to the significance of the alleged constitutional nonobservance, the majority reasoned that the proper focus should be on the party seeking redress. An allegation of constitutional nonobservance without identification of any consequential personal injury does not establish standing, no matter how fervently advocated. Invocation of the Establishment Clause without alleging some economic or other injury does not meet the Article III threshold. That clause has no unique aura that would transfigure those who otherwise have no standing. The majority feared that the rejected approach eventually would confer standing on anyone who invoked an important right.[24]

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grievance be individual and not general.

[20] 392 U.S. 83 (1968).

[21] U.S. CONST. art. I, § 8.

[22] 392 U.S. at 102-03.

[23] *Valley Forge*, 454 U.S. at 486. *See also* Americans United for Separation of Church and State, Inc. v. U.S. Dept. of HEW, 619 F.2d 252 (3d Cir. 1980) (lower court opinion).

[24] 454 U.S. at 489-90. Justice Brennan wrote a dissent, joined by Justices Marshall and Blackmun, in which he traced the case development of citizen taxpayer standing. 454 U.S. at 490 (Brennan, J., dissenting). The Brennan dissent took issue with the majority's distin-

The term's second constitutional standing decision, *Larson v. Valente*,[25] also involved an Establishment Clause claim. A section of Minnesota's charitable contributions statute imposed extensive registration and reporting requirements only on those religious organizations that solicit more than fifty percent of their funds from nonmembers.[26] Plaintiffs, individual members of the Unification Church, sought a declaration that the statute on its face and as applied to them violated their individual First Amendment rights of free expression and free exercise of religion as well as Fourteenth Amendment equal protection guarantees. They further claimed that the law violated the Establishment Clause by discriminating among religious organizations.[27] The state officials named as defendants and responsible for implementing and enforcing the statute urged that plaintiffs lacked standing to raise the Establishment Clause claim. Defendants argued that the Unification Church was not a religious organization within the meaning of the statute and therefore would not be entitled to an exemption even if the fifty percent provision were declared unconstitutional. Thus, their argument was that plaintiffs had not demonstrated an injury in fact. The majority disagreed and concluded that plaintiffs had standing.[28] For purposes of the suit, the majority for several reasons deemed the Church a religious organization within the mean-

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guishment of *Flast*. *Id.* at 510-13. Relying on a reading of that precedent which was broader than the majority's and on the history and tradition of the Establishment Clause, the Brennan dissent concluded that plaintiffs had standing. *Id.* at 513.

In a separate dissent, Justice Stevens would have found standing based on the special importance of the Establishment Clause and the role the judiciary should play in its enforcement against executive and legislative violations. 454 U.S. at 514-15 (Stevens, J., dissenting).

[25] 456 U.S. 228 (1982).

[26] Minnesota Charitable Solicitation Act, MINN. STAT. §§ 309.50-309.61 (1969 & Supp. 1983).

[27] 456 U.S. at 232-34. Because the interpretation of the substantive protections of the First Amendment are the same whether state or federal action is involved, the Court often ignores the theoretical distinction between the First Amendment guarantees and their incorporated analogs. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Stromberg v. California, 283 U.S. 359 (1931) (Free Speech Clause).

[28] 456 U.S. at 238-39. Justice Brennan authored the majority opinion which was joined by Justices Marshall, Blackmun, and Powell. Justice Stevens concurred in a separate opinion, but agreed with the majority on the standing issue. 456 U.S. at 256 (Stevens, J., concurring). *See infra* note 29.

ing of the statute. No enforcement efforts had been made until soon after the addition of the fifty percent rule to the religious organization exemption. When the state endeavored to enforce the registration and reporting requirements, it expressly and exclusively relied on the then recently added fifty percent rule. Finally, in each prior litigative stage the state had joined issue on the merits of the fifty percent rule with the apparent notion that if the rule were upheld it would be enforced to require the Church to register and report. With this coloring of the facts, the starting point of analysis—the injury in fact requirement of Article III—was satisfied easily. The attempted use and threatened future application of the fifty percent rule amounted to a distinct and palpable injury. Plaintiffs would be unable to solicit contributions in the state without first complying with substantial registration and reporting requirements. That the Church eventually might be compelled to register and report on some basis other than the fifty percent rule did not frustrate the redressability requirement. If the rule were declared unconstitutional, then it could not be invoked as the sole basis for demanding registration and reporting—the very injury alleged would be redressed. Likewise, if the rule were declared unconstitutional, then the Church could not be compelled to register and report unless and until the state met its burden of demonstrating that the Church was not a religious organization within the meaning of the statute—a more burdensome task than making a showing under the fifty percent rule. In either situation a favorable decision would relieve plaintiffs of a discrete injury and afford substantial, meaningful relief. The majority then went on to decide the merits of the Establishment Clause issue in favor of the challengers.[29]

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[29] 456 U.S. at 244-55. In a separate concurring opinion, Justice Stevens specifically countered the dissent by emphasizing that invalidation of the fifty percent rule would require the state to demonstrate that the Church was not a religious organization if it persisted in efforts to require registration and reporting. The injury caused plaintiffs by the fifty percent rule was identified as the substitution of this more easily demonstrated basis for requiring registration and reporting. 456 U.S. 228, 256-57 (Stevens, J., concurring). Having agreed that plaintiffs had standing to challenge the fifty percent rule, Justice Stevens paused over the policy of avoiding premature constitutional adjudications. *Id.* at 257 (citing Rescue Army v. Municipal Court, 331 U.S. 549, 568-74 (1947); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). Justice Stevens concluded

The third standing decision, *Havens Realty Corp. v. Coleman*,[30] was a rather routine application of principles of statutory standing.[31] The Fair Housing Act of 1968 makes unlawful various discriminatory housing practices[32] and authorizes civil actions to enforce its provisions.[33] A class action, seeking declaratory, injunctive, and monetary relief, was brought against a corporate apartment complex owner and one of its employees based on their alleged racial steering in violation of the statute. Four plaintiffs brought suit: a genuine potential tenant who was black and who allegedly was told falsely that no apartments were available; a nonprofit corporate organization whose purpose was "to make equal opportunity in housing a reality" in the metropolitan area and that

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that the issues satisfied the policy of strict necessity in constitutional litigation. 456 U.S. at 257.

Justice White wrote a dissent, joined by Justice Rehnquist, in which he challenged the majority on the merits. 456 U.S. at 258-63 (White, J., dissenting).

Justice Rehnquist wrote a dissent on the standing issue which was joined by the Chief Justice and Justices White and O'Connor. He did not take issue with the majority's conclusion that the threat of application of the statute against plaintiffs was injury in fact. His dissent, however, did take issue with the majority on three factual bases. First the dissent explained that the state statute applied to plaintiffs as a charitable organization and not by virtue of the fifty percent rule which was an exemption. Second, the dissent characterized the state's enforcement efforts in the same way. Third, the dissent emphasized that plaintiffs had never shown and no prior court had found that the Church was a religious organization for purposes of the fifty percent rule. 456 U.S. at 264-67 (Rehnquist, J., dissenting).

As a matter of standing jurisprudence, the dissent focused on redressability. While plaintiffs satisfied the injury in fact requirement, they had not traced the injury to the challenged action. Since the registration and reporting requirement was triggered by the charitable status of the organization, the dissent deemed the fifty percent rule wholly inapplicable at that point in the litigation. Thus, the dissent concluded that plaintiffs had failed to show that a favorable decision on the fifty percent rule would redress the injury for which they sought relief. *Id.* at 269-70. The majority was wrong, according to the dissent, to expand the religious exemption to include all religious organizations irrespective of their fund raising practices when plaintiffs had not yet been qualified as a religious organization. Having failed to demonstrate that their injury or its remedy stemmed from the fifty percent rule, plaintiffs did not have standing to challenge it. *Id.* at 270-71.

[30] 455 U.S. 363 (1982).

[31] *See generally* Currie, *Judicial Review Under the Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1271-80 (1977) (addressing standing under the Water Pollution Control Act); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974) (suggesting the concept of standing is not needed); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) (analyzing standing based on a Special Function model).

[32] 42 U.S.C. § 3604 (1976).

[33] 42 U.S.C. § 3612(a) (1976).

operated a housing counseling service and investigated complaints concerning housing discrimination; and two individual employees of the nonprofit organization (one black and one white) who were employed as "testers" to investigate racial steering practices. The standing of the genuine potential black tenant was not challenged.

The Court deemed the standing inquiry regarding the other plaintiffs controlled by *Gladstone, Realtors v. Village of Bellwood*.[34] While Congress, of course, cannot exceed the Article III limits in granting standing, the Court has indicated a certain receptiveness to such statutory authorizations even when standing would be absent but for the legislation.[35] *Village of Bellwood* had applied this perspective to the Fair Housing Act of 1968. Having already divined the relevant congressional intent to extend the statutory cause of action to the full extent of Article III in *Village of Bellwood*, the Court in *Havens Realty* was faced with only the question of whether there was the constitutional minima—injury in fact.[36] The narrow inquiry was whether each plaintiff had alleged the sufferance of "a distinct and palpable injury" as a result of the defendants' actions.[37] Guided by the congressional intent to establish an enforceable right to truthful housing information, the Court distinguished the black tester from the white tester. Even though the black tester had approached the defendant expecting false information and without any intention of renting, he received allegedly false information that housing was unavailable. The white tester, on the other hand, was told housing was available and never suffered a misrepresentation. Thus, the former but not the latter allegedly had suffered the discriminatory injury in the precise form the statute prohibited. As testers, therefore, the former had standing and the latter did not.

The Court remanded the tester standing issue for further pleading and proof on an alternative theory, however. In addition to the

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[34] 441 U.S. 91 (1979).

[35] 455 U.S. at 372-73. *See also* United States v. Richardson, 418 U.S. 166, 178 n.11 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224 n.14 (1974); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972).

[36] 455 U.S. at 372. The prudential principles beyond Article III were thus rendered inapposite. *See supra* text accompanying notes 5-7.

[37] 455 U.S. at 372 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

direct first-party interest in truthful housing information, the two testers also alleged frustration of an indirect third-party interest in living in an integrated neighborhood. The loss of social, professional, and economic benefits resulting from improper steering practices would meet the Article III requirement of palpable injury. The Court remanded for further pleading and proof regarding the location of the particular neighborhood in which plaintiffs lived, their proximity to the situs of the alleged steering, and what appreciable effects were felt between the two areas.[38] Having abandoned any claim to representational standing, the nonprofit corporate organization had sufficiently alleged standing in its own right based on injury in the form of impairment of its housing counseling and referral services with the resultant drain on resources and frustration of purpose.[39]

Although we concede the truthfulness of Justice Douglas' observation that "[g]eneralizations about standing to sue are largely worthless as such,"[40] we nevertheless conclude that the three standing decisions are representative of the doctrine. To use the now too familiar cliche, the "bottom line" of the standing doctrine should not be forgotten: "[O]f one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."[41] Standing thus becomes very important for our concern here. There is a certain uneasiness engendered in any examination of standing cases, because the standing doctrine appears manipulatable and appears to have been manipulated, at least if one takes to heart the charges of dissenters. Indeed, this may be the only reconciliation of cases like *Valley Forge*

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[38] *Id.* at 375-78.

[39] *Id.* at 378-79. Justice Powell joined the opinion for the unanimous Court and wrote a separate concurrence. He agreed that a distinct and palpable injury was the Article III floor for standing. 455 U.S. at 382 (Powell, J., concurring). His concern was with vague averments of standing, a problem he suggested could be overcome by requiring an amendment of the complaint by granting defendant's motion for a more definite statement of claims. *Id.* at 383 (quoting Warth v. Seldin, 422 U.S. 490, 501-02 (1975); FED. R. CIV. P. 12(e)). Liberal pleading should neither unjustifiably add to the courts' work and the litigants' costs nor trivialize Article III. 455 U.S. at 384 (Powell, J., concurring).

[40] Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 151 (1970).

[41] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475-76 (1982) (footnote omitted).

and *Larson*, in which only one justice sided with the majority in both decisions.[42] Although the issue on the merits, in theory, does not control the standing issue, we are not convinced that such influence is not felt. The division in *Valley Forge*, for example, may be explainable in terms of Establishment Clause jurisprudence. The majority simply was unwilling to attribute the paramountcy to the Establishment Clause that the dissenters insisted *Flast* had established.[43] As a result, the *Flast* exception was narrowed and the Establishment Clause has not become a free ticket into federal court. This may be sound analysis in cases like *Valley Forge* that really involve an injury to ideology. Realistically, a transfer such as the one in that case does not affect and will not be affected by an individual's tax. The government presumably could have kept the property or transferred it to some nonreligious organization and the plaintiffs could not have made a federal case out of it.[44]

The division in *Larson* may be understood best, on another level, as a disagreement about timing of constitutional decisions. The majority viewed the timing question as judicially controlled; the Establishment Clause question raised by application of the fifty percent rule was the crux of the case and should have been decided irrespective of whether the Church was a religious organization within the meaning of the statute.[45] The dissent disagreed and would have allowed actual events to control the timing of decision by narrowly holding that "appellees at this point lack standing" to challenge the fifty per cent rule.[46]

The net effect of *Valley Forge* and *Larson* is difficult to measure. The former decision seems to narrow the *Flast* rule, a window into the federal courts that had been of uncertain dimension. The

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[42] *See supra* notes 24 & 29.

[43] "Plainly hostile to the Framer's understanding of the Establishment Clause, and *Flast*'s enforcement of that understanding, the Court vents that hostility under the guise of standing, 'to slam the courthouse door against plaintiffs. . . .'" 454 U.S. at 513 (Brennan, J., dissenting).

[44] *See id.* at 507 n.17. Justice Brennan made the obvious response to this argument in his dissent by suggesting that this is the very function of the Establishment Clause. *Id.* at 494-513.

[45] *See* 456 U.S. at 256-58 (Stevens, J., concurring).

[46] 456 U.S. at 269 (Rehnquist, J., dissenting).

latter decision seems to allow a federal court to set the constitutional agenda so as initially to decide constititutional questions that appear critical though not immediate.[47] This increased flexibility, at least potentially, would enlarge the case or controversy category.[48]

Although the least significant from a precedential point of view, *Havens Realty* may be the most significant of the three standing decisions for our purposes. The line of cases, of which this is the latest, renders inapplicable nonconstitutional prudential barriers to standing that would otherwise exist because of specific congressional intent to do so. While Congress may not go beyond the Article III minimum, the Court appears willing to defer to the legislature regarding when to apply other traditional judicial restraints.[49] Our concern is for relations between Congress and courts. Given the congressional prediliction for passing the difficult questions on to the federal courts, this principle should be underscored and refined. We draw three significant conclusions. First, given the history and tradition of such judicial restraints, such an expansive congressional intent must be specific and clear, if not explicit. Second, absent a specific and clear congressional intent, a court is free to erect prudential judicial barriers to refuse cases that otherwise satisfy Article III minima. Third, presumably Congress could reinforce these prudential barriers with more than silence by expressly invoking them in particular legislation.

As far as *Havens Realty* goes, it does not effect profound changes in Eleventh Circuit law. *Nasser v. City of Homewood*[50] relied on the *Village of Bellwood* decision and anticipated *Havens Realty*.[51] In *Nasser*, the Eleventh Circuit held that while Congress

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[47] We recognize, of course, that this is an interpretive reading of *Larson* and that to so state the principle makes it appear at odds with traditional standing lore. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936). Such tension long has been part of the standing doctrine, however, and a principled decision-making should take it into account.

[48] These two decisions, taken together, likely will not affect appreciably the prevailing doctrine in the Eleventh Circuit since they themselves worked no major change in the law. *See* ACLU v. Rabun County Chamber of Commerce, 678 F.2d 1379 (11th Cir. 1982).

[49] *See supra* notes 35-36 and accompanying text.

[50] 671 F.2d 432 (11th Cir. 1982).

[51] *Nasser* was decided less than one month after *Havens Realty* but did not rely on the precedent.

did intend to remove prudential limitations on standing, the Fair Housing Act did not extend standing "to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest."[52]

III. MOOTNESS

The mootness doctrine limits the judicial review power of the federal courts qua courts. The doctrine monitors the sequence of litigation events out of a traditional and constitutional concern for the very existence of a "case or controversy" itself. Once the matter is resolved, there is nothing on which the judgment of the court can operate. There is no judicial task that needs doing and no Article III jurisdiction.[53] Refusing to hear or dismissing disputes that have become moot serves the practical goal of preserving scarce judicial resources and the constitutional goal of limiting federal courts to judicial tasks. Conservation of judicial resources and maintenance of judicial integrity, in turn, serve to reinforce inherent limits on federal courts that underlie separation of powers and federalism.

Within a complicated framework of opinions, the Court struggled with the mootness doctrine in *Edgar v. Mite Corp.*[54] Since the

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[52] 671 F.2d at 437.

[53] *See* HART & WECHSLER, *supra* note 2, at 102-20; 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE, ¶ 23.04 (2d ed. 1982 & Supp. 1982-83); 6A J. MOORE, *supra* note 8, at ¶ 57.13; 5 C. WRIGHT & A. MILLER, *supra* note 8, at § 1238 (1971 & Supp. 1982); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 8, at § 3533; 16 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 8, at § 4015 (1975).

[54] 102 S. Ct. 2629 (1982). Three other decisions during the term also touched on mootness. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), has been discussed regarding standing. *See supra* text accompanying notes 30-34. Before reaching the standing issue in *Havens Realty*, the Court held the controversy was live despite the entry of a consent order regarding the genuine potential tenant and a letter agreement between plaintiffs and defendants reached prior to the grant of certiorari. 455 U.S. at 370-71. In Princeton Univ. v. Schmid, 455 U.S. 100 (1982), the Court dismissed the appeal as moot when the University had amended its regulations controlling solicitation and distribution of literature prior to the Court's review of the state supreme court's holding that the regulations were unconstitutional. The "capable of repetition yet evading review" exception to the mootness doctrine was applied in Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982). *See also* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2698-99 (1982) (applying standard of "serious and unsettled question" to a collateral order); Lane v. Williams, 455 U.S. 624, 633-34 (1982) (applying "capable of repetition, yet evading review" standard, but holding case moot).

mootness issue may be understood only in conjunction with the facts of a case and since *Edgar* also involved a major issue of constitutional law and federal jurisdiction, we begin with a factual summary. Appellee Mite Corporation was a Delaware corporation with principal offices in Connecticut. Appellant Edgar was the Secretary of State of Illinois who was responsible for administration of the Illinois Business Take-Over Act[55] that generated the controversy. The Illinois statute requires any tender offeror to notify the target company and the Secretary of plans to make a tender offer and of the terms of the offer twenty days before the effective date. During the twenty day period, the offeror may not communicate its offer to the shareholders, but the target company may provide information to its shareholders concerning the impending takeover offer. Applicability is triggered by the statutory definition of target company—either a corporation of which Illinois shareholders own ten percent of the class of securities subject to the takeover offer, or for which two of the following three conditions are satisfied: (1) the principal office is in Illinois; (2) the corporation is organized under Illinois law; or (3) at least ten percent of its stated capital and paid-in surplus are represented within the state. An offer becomes registered twenty days after filing with the Secretary of State unless a hearing to adjudicate the fairness of the offer is called. On January 19, Mite initiated a tender offer for all outstanding shares of a publicly held Illinois corporation by filing with the Securities and Exchange Commission the schedule required by the federal statute, the Williams Act.[56] Mite did not comply with the Illinois statute and, instead, sued in federal district court that day seeking (1) a declaratory judgment that the state statute was preempted by federal legislation and violated the Commerce Clause, and (2) a temporary restraining order plus preliminary and permanent injunctions prohibiting the enforcement of the Illinois statute.[57] There was no violation of Illinois law at the time the federal suit was brought. On February 1, the Secretary of State notified Mite that he intended to issue an order requiring it to cease and desist further takeover efforts. On February 2, the district

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[55] ILL. REV. STAT., ch. 121½, ¶¶ 137.51-137.70 (1979).

[56] 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981).

[57] 102 S. Ct. at 2633-34.

court issued a preliminary injunction prohibiting the Secretary from enforcing the Illinois statute against the particular takeover. Mite published its tender offer on February 5, under the aegis of the preliminary injunction. Four days later, the district court entered a final judgment in favor of Mite Corporation and permanently enjoined enforcement of the Illinois statute. On March 2, Mite announced it would not make the tender offer.[58] The final judgment was on review in the Supreme Court, which badly fragmented on the issue of mootness.

The euphemistically labeled "opinion of the court"[59] concluded that the case was not moot. The majority accepted the reasoning of the court of appeals that the case was not moot because the Secretary had indicated an intent to enforce the statute against Mite Corporation and a reversal of the final judgment would expose it to civil and criminal liability for making the February 5 offer under the preliminary injunction.[60] The next point was somewhat unsatisfactory. Recognizing that it was "not a frivolous question"[61] whether the preliminary injunction would be a complete defense in any such action, the majority sidestepped the issue and boldly asserted that the case was not moot because any such action would be foreclosed if the Illinois statute were declared unconstitutional, which it was under two different constitutional provisions.[62]

In a separate concurrence, Justice Stevens carefully considered the mootness issue by reaching the underlying question of the effect of the preliminary injunction.[63] He concluded that the case was not moot because the preliminary injunction did not grant ab-

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[58] *Id.* at 2634.

[59] Justice White delivered an opinion which was joined by the Chief Justice (Parts I, II, and V-B), Justices Blackmun (Parts I and II), Powell (Parts I and V-B), Stevens (Parts I, II, and V-B), and O'Connor (Parts I, II and V-B). 102 S. Ct. at 2633 n.*. Justice White discussed the mootness issue in Part II. On that issue, Justice White wrote for a majority which also included the Chief Justice and Justices Blackmun, Stevens, and O'Connor.

[60] *Id.* at 2635. *See* Mite Corp. v. Dixon, 633 F.2d 486, 490 (7th Cir. 1980) (lower court decision).

[61] 102 S. Ct. at 2635.

[62] Justice White's opinion held the Illinois statute unconstitutional under the Supremacy Clause and the Commerce Clause. 102 S. Ct. at 2639, 2643.

[63] 102 S. Ct. at 2644-46 (Stevens, J., concurring in part and concurring in the judgment).

solute and permanent immunity from any civil or criminal prosecution. Justice Stevens first looked at the February 2 preliminary injunction. It merely restrained the conduct of the Secretary of State without declaring the Illinois statute unconstitutional and without any express grant of immunity. He drew an analogy to the declaratory judgment procedure. A final declaratory judgment holding a state statute unconstitutional merely tests the validity of the statute and is always subject to reversal on appeal. It does not grant immunity to all action taken in reliance on the declaratory judgment. By comparison, a preliminary injunction that does nothing more than temporarily restrain conduct cannot accomplish more. Finally, Justice Stevens emphasized that federal courts are courts of limited jurisdiction: "There simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law."[64]

Because he believed that the Februray 2 preliminary injunction would have been a complete defense to any criminal or civil prosecution against Mite, Justice Marshall dissented and would have dismissed the case as moot.[65] Justice Marshall concluded that federal courts have power to issue preliminary injunctions that simply restrain local enforcement of a state statute upon condition that, if the statute later is held constitutional, the state is free to proceed against violations of the statute committed under the injunction. However, he would have held that federal courts also have the power to render such conduct permanently and absolutely immune and, absent contrary indications, that it should be presumed that the district court did so. Applying his presumption to the case *sub judice*, Justice Marshall would have held that there was no case or controversy and that the Supreme Court lacked jurisdiction to reach the merits.[66]

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[64] *Id.* at 2647 (footnote omitted).

[65] 102 S. Ct. at 2648. (Marshall, J., dissenting). Justice Brennan joined the dissent. Justice Powell expressed his agreement as well. 102 S. Ct. at 2643 (Powell, J., concurring in part).

[66] 102 S. Ct. at 2652 (Marshall, J., dissenting). Justice Rehnquist agreed that the case was moot but for another reason altogether. 102 S. Ct. at 2653 (Rehnquist, J., dissenting). Since the tender offer had died, the controversy between Mite Corporation and the Secretary of State had ended. There no longer was any need for an injunction. For Justice Rehn-

The issue debated in the side opinions no doubt will return for full decision, assuming that it was not presented in *Edgar*. This question has dramatic significance for federal jurisdiction. Should some future majority adopt the Marshall view, it would create a great pragmatic incentive for seeking preliminary injunctions and temporary restraining orders from the federal courts, not to mention the potential for disruption of the warp and woof of our federal fabric. Nowhere is it better emphasized that "questions as to the jurisdiction of the federal courts are not mere details of procedure, but go to the very heart of a federal system and affect the allocation of power between the United States and the several states."[67]

IV. LEGISLATIVE COURTS

Perhaps the most significant decision of the term dealing with federal jurisdiction involved the bankruptcy courts. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[68] the Court declared part of the Bankruptcy Reform Act of 1978[69] unconstitutional. That Act had wrought significant substantive and procedural changes in the law of bankruptcy and established a United States bankruptcy court as an adjunct court in each judicial district. Under the 1978 Act, bankruptcy judges are appointed for a term of years; they are subject to removal by the judicial council of the circuit on grounds of incompetence, misconduct, neglect of duty, or disability; and their salaries are set by statute subject to adjustment. The Act granted jurisdiction over "all civil proceedings arising under title 11 or arising in or relating to cases under [the bankruptcy title]."[70] It was this grant of jurisdiction that came under constitutional scrutiny along the familiar though

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quist, the mere possibility of some future enforcement action was insufficient to save the case from mootness, though he conceded that a controversy might ripen in such event.

[67] C. WRIGHT, *supra* note 2, at 205.

[68] 102 S. Ct. 2858 (1982).

[69] 11 U.S.C. §§ 101-151326 (Supp. III 1979). Commentators had grappled with the problem earlier. *See, e.g.*, Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws - Tax Procedures*, 88 HARV. L. REV. 1360, 1454-69 (1975); Comment, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

[70] 28 U.S.C. § 1471(b) (Supp. V 1981).

blurred line between Article I courts and Article III courts—an area of constitutional law noted for "its frequently arcane distinctions and confusing precedents."[71] The issue of constitutional jurisdiction was joined when Northern petitioned for reorganization in bankruptcy court and filed suit against Marathon seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress. Marathon sought dismissal on the ground that the act unconstitutionally conferred Article III judicial power on a legislative court.

From the history and precedent of an independent judiciary within a government of separated powers, the plurality[72] drew the guiding premise that Article III mandated that "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."[73] Logic, history, and precedent do not always require the principle of independent adjudication that lies at the heart of Article III. However, none of the three narrow, legitimate categories of Article I legislative courts—territorial courts or courts for the District of Columbia, courts martial, or tribunals for the resolution of public rights—applied to the bankruptcy scheme. The bankruptcy courts do not lie exclusively outside the states, they do not resemble courts martial in any way, and the rights they resolve cannot be

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[71] 102 S. Ct. at 2881 (Rehnquist, J., concurring in the judgment). The Court seems to have done its best to live up to its tradition in what the dissent labelled "one of the most confusing and controversial areas of constitutional law." 102 S. Ct. at 2883 (White, J., dissenting) (citing Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (Harlan, J., plurality opinion)). *See generally* HART & WECHSLER, *supra* note 2, at 375-418; 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶¶ 0.1, 0.3, 0.4 (2d ed. 1982 & Supp. 1982-83); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 8, at § 3528; 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 8, at § 4106.

[72] Justice Brennan announced the judgment of the court in an opinion joined by Justices Marshall, Blackmun, and Stevens. 102 S. Ct. at 2862.

[73] *Id.* at 2865. This is the level on which to appreciate the debate between the plurality and the dissent. *See infra* note 77. Each of the polar positions has attracted Supreme Court majorities. At one extreme, Article III is viewed as defining the judicial power of the *federal courts* which can be conferred only on courts and judges with Article III attributes. At the other extreme, Article III is viewed as defining the judicial power of the *federal government* which may be conferred by Congress on Article I courts as well as on Article III courts. *See generally* HART & WECHSLER, *supra* note 2, at 396-400; C. WRIGHT, *supra* note 2, § 11, at 29-38 ("constitutional" and "legislative" courts).

deemed public rights.[74] The plurality rejected the argument that the bankruptcy courts were Article I adjuncts of the district courts for two reasons. First, Congress does not have the same power to create adjuncts to adjudicate state-created rights as it does to adjudicate federal rights. Second, the functions of the alleged adjunct bankruptcy court were not limited in such a way as to maintain the essential attributes of the district court, the Article III court to which it was adjoined. The plurality held the jurisdiction provision unconstitutional, but declined to apply the decision retroactively by staying its judgment until October 4, 1982.[75]

The plurality's stay was designed to "afford Congress an opportunity to reconstitute the bankruptcy courts."[76] Just what Congress might do to garner majority approval was suggested in Justice Rehnquist's concurrence. Narrowing the holding to the actual facts before the Court, he would have held unconstitutional only so much of the jurisdictional statute that allowed bankruptcy courts to decide ancillary common law actions because the Constitution assigns such actions to Article III courts.[77] To date, nothing much

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[74] 102 S. Ct. at 2867-72. The plurality likewise rejected the argument that the congressional power over bankruptcy, U.S. CONST. art. I, § 8, cl. 4, carries an inherent power to create legislative courts. 102 S. Ct. at 2872-74.

[75] *Id.* at 2880. *See* Linkletter v. Walker, 381 U.S. 618 (1965) for an extensive discussion of the retroactive effect of judgments.

[76] 102 S. Ct. at 2880.

[77] *Id.* at 2882 (Rehnquist, J., joined by Justice O'Connor, concurring in the judgment). Chief Justice Burger wrote a dissenting opinion endeavoring to narrow the holding in this way. *Id.* (Burger, C.J., dissenting). The other two dissenters also agreed that this was the only issue that both Marathon had standing to raise and the court had jurisdiction to decide, though they would decide it differently. *Id.* (White J., dissenting). The Chief Justice and Justice Powell joined Justice White's dissent.

The dissent took the plurality to task on several counts. First, the fact that the claim against Marathon arose from state law narrows the broad holding of facial invalidity. Second, the state law/federal law distinction is unworkable in bankruptcy proceedings in which the two types of claims are greatly interrelated. Third, the plurality's reading of Articles I and III unduly denigrates Article I courts. *Id.* at 2883-86. Justice White also criticized the plurality's use of precedent to establish only three legitimate categories of Article I courts "[w]ithout a unifying principle." *Id.* at 2889. *See also id.* at 2871 n.25, 2873 nn.27 & 28, 2874 n.29. Rejecting the "simple tautology" that a court is either an Article I or an Article III tribunal by reason of its having Article I judges or Article III judges, the dissent would have recognized that the two types do the same work. *Id.* at 2892 (White, J., dissenting). Article III preserves a value in independent adjudication which must be balanced against relevant competing constitutional concerns and legislative responsibilities. This balance, according to

has happened despite an additional stay, which also has passed.

This decision will not affect the federal court system qua system. The various matters involved in bankruptcy proceedings will all be adjudicated within the system. The holding does have institutional significance, however, for the district courts. Part of the reason for the 1978 reform was the stress placed on the district courts by the tremendous volume of bankruptcy cases.[78] Given the nation's recurrent economic woes, bankruptcy may be one of the true growth industries we have. With the shifting of ancillary state law claims to the district courts, more cases are competing for those already scarce judicial resources.

There may be another lesson in federalism to be learned here. The apparatus for the administration of justice in the several state systems and in the federal court organization are, generally, along the same model. Usually, there is a trial court, an intermediate appellate court, and a supreme court. When one investigates the organization at the trial court level, however, there is a remarkable difference between what the federal system provides and what typically is provided in a state system. The states have created courts of trial jurisdiction for various purposes and the judicial officers who preside are quite different with respect to their duties, terms, and powers. There are trial courts of limited jurisdiction and some trial courts of specialized jurisdiction. There are combinations of limited and general jurisdiction trial courts that collectively wield the sovereign judicial power over initial dispute resolution. Among the states, the systems are quite diverse. Within particular states, the system may be at once complex and flexible. The power and prestige of the decisionmaker are commensurate with the decision. A wooden approach requiring that every decision within the Article III laundry list be made by an Article III judge is at once simplistic and inflexible. Modern federal court jurisdiction does not even remotely resemble what the framers had in mind, assuming that most of them envisioned any role for the federal trial courts.

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the dissent, would uphold the bankruptcy jurisdiction because there is ample Article III judicial review, bankruptcy adjudications have little political significance, and the area necessarily is so specialized. *Id.* at 2894-96.

[78] *Id.* at 2895 n.16.

The debate between the plurality and the dissent in *Northern Pipeline* resurrects the issue. If the plurality position, taken to its logical extreme, emerges, much flexibility in federal jurisdiction will be lost. A more sophisticated analysis would consider whether the constitutional value in independent adjudication applies to a particular decision. The answer to this inquiry depends on the inherent nature of the decision to be made and not on the federal, as opposed to state, status of the decisionmaker. On the other hand, if Congress knows that more Article III judges are needed to decide the issues, fewer ancillary additions to federal jurisdiction will be made. That would be good.

V. ADMIRALTY JURISDICTION

During this term, the Court clarified the meaning of a ten year old decision involving the rules for determining admiralty jurisdiction.[79] In 1972, in *Executive Jet Aviation, Inc. v. City of Cleveland*,[80] the Court had held that there was no admiralty jurisdiction over a suit for property damage to a jet aircraft that struck a flock of sea gulls upon takeoff and sank in the navigable waters of Lake Erie. The Court concluded that admiralty jurisdiction required a more significant relationship to traditional maritime activity. The decision engendered some confusion in the courts of appeals concerning pleasure boat accidents. Some courts, including the Eleventh Circuit, applied the *Executive Jet* logic to pleasure boats and found a significant relationship to traditional maritime activity if the accident occurred on navigable waters.[81] Other courts resisted.[82] The Supreme Court in a five to four decision came down

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[79] *See generally* HART & WECHSLER, *supra* note 2, at 904-07; 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN, & J. WICKER, *supra* note 71, at ¶ 0.64; 5 J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 38.35 (2d ed. 1982 & Supp. 1982-83); 7A J. MOORE & E. PELAEZ, MOORE'S FEDERAL PRACTICE ¶ .230 (2d ed. 1982 & Supp. 1982-83).

[80] 409 U.S. 249 (1972).

[81] *See* cases cited *supra* note 1 and *infra* note 82.

[82] *Compare* Richardson v. Foremost Ins. Co., 641 F.2d 314 (5th Cir. 1981), *aff'd*, 102 S. Ct. 2654 (1982) (admiralty jurisdiction includes accident between two power boats operating in navigable waters regardless of whether activity engaged in at the time of the accident was commercial or recreational) *with* Chapman v. United States, 575 F.2d 147 (7th Cir. 1976) (admiralty jurisdiction does not reach tort claim for accident on navigable waters involving pleasure boat once used for commercial transportation); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974) (law of admiralty extends to accident occurring in operation of

on the side of the Eleventh Circuit in *Foremost Insurance Co. v. Richardson.*[83]

The action was brought in federal court, assertedly under admiralty jurisdiction,[84] to recover for the death of an occupant of a pleasure boat resulting from a collision with another pleasure boat on a Louisiana river. The Court held that where the alleged wrong involved the negligent operation of a vessel on navigable waters there was a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction. The majority[85] rejected a commercial-pleasure boating distinction for three reasons: a perceived need for uniform rules of navigation; the potential impact for maritime commerce when two vessels collide on navigable waters; and avoidance of the confusion and uncertainty that would accompany such a jurisdictional test. Thus the character of the waterway, and not the character of the vessel, controlled the jurisdictional question.

We agree wholeheartedly with, and cannot improve upon, the critique of the majority opinion found in Justice Powell's dissent.[86] He viewed the case as a serious "erosion of federalism."[87] Justice Powell challenged the majority's rationale and chastised their extending federal admiralty jurisdiction to the millions of small pleasure boats in the country, thereby preempting state legislative power: "Federal courts should not displace state responsibility and choke the basis of federal concerns that in truth are only 'imaginary.' "[88] Such an extension of federal court jurisdiction is best left to the legislative process.[89]

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small pleasure craft in navigable waters); Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) (admiralty jurisdiction does not extend to claim for personal injury by water skier against allegedly negligent tow boat operator).

[83] 102 S. Ct. 2654 (1982).

[84] 28 U.S.C. § 1333(1) (1976). *See also supra* note 79.

[85] Justice Marshall wrote the majority opinion, joined by Justices Brennan, White, Blackmun, and Stevens.

[86] Justice Powell, joined by the Chief Justice and Justices Rehnquist and O'Connor, dissented and would have limited the admiralty jurisdiction to vessels involved in traditional maritime activity. 102 S. Ct. 2660-64 (1982) (Powell, J., dissenting).

[87] *Id.* at 2660.

[88] *Id.* at 2664.

[89] *Id.* at 2664 n.8. ("Congress has the power to hold hearings and to weigh factors beyond the proper competency of a court.") Congress has been responsive in the past. *See,*

VI. Class Actions

The class action device has been both highly praised and highly criticized. We choose not to enter that debate. Nor are we willing to evaluate the prudence of the procedural folderol surrounding the determinations when a class action is appropriate and how it should proceed. Given our present concern for the federal courts, the class action device is both the "good news and the bad news." In theory, a class action is an efficient way to determine the rights of many litigants simultaneously. In practice, the class action determination itself may produce substantial litigation, and discovery proceedings often result in serious drains on judicial resources. Most particularly, judicial rules concerning the availability of the device send signals to would-be plaintiffs and attorneys that affect their perceptions of the feasibility of litigation. Thus, a judicial decision that makes the class action device easier to invoke may be defended as an efficient way to proceed and, at the same time, may be attacked for fostering complex litigation. Such a rule was considered this term. In *General Telephone Co. of the Southwest v. Falcon*,[90] the Supreme Court unanimously rejected a class action judicial fiction called the "across the board" rule that the Fifth Circuit had originated and which had been followed in the Eleventh Circuit.[91]

After having been denied a promotion, a Mexican-American plaintiff sued his employer under Title VII.[92] He alleged that he had been passed over because of his national origin and that the employer's promotion and hiring policies discriminated against Mexican-Americans as a class. Under Federal Rule of Civil Procedure 23(b)(2), the district court certified plaintiff as a representative of a class of all Mexican-American employees of defendant and all Mexican-American applicants whom defendant had not hired. This certification followed the long established Fifth Circuit

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e.g., 46 U.S.C. § 740 (1976) (extending admiralty jurisdiction to damage or injury caused by a vessel on navigable waters, notwithstanding that such damage or injury was done or consummated on land).

[90] 457 U.S. 147 (1982). In hindsight, the Court's result now seems to have been foreordained by East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977).

[91] *See supra* note 1.

[92] 42 U.S.C. §§ 2000a-2000h-6 (1976 & Supp. V 1981).

rule that allowed any victim of employment discrimination to bring an "across the board" class attack on all unequal employment practices allegedly committed by the employer.[93] The Court returned to first principles of the class action device and Rule 23 to reject this approach.[94] Properly seen as an exception to the general rule of individual litigation, class treatment is an appropriate procedural device for economical and efficient handling of an issue potentially affecting each member of a group. The Court agreed with the underlying premises of the "across the board" approach—by definition, racial discrimination is a class discrimination. That recognition, however, did not determine the appropriateness of a class action or define the class. In employment discrimination cases, there is no presumption of Rule 23's specified "prerequisites of numerosity, commonality, typicality, and adequacy of representation."[95] Otherwise, every Title VII case would be a potential class action and the Court found no such congressional intent. There must be actual, not merely presumed, conformance with the requirements of Rule 23 in order to serve best the class action purpose of efficiency and economy. In *Falcon*, for example, the Court recognized a wide conceptual gap between individual discrimination and the actual existence of a group whose members have shared the same injury regarding either promotions or hiring.[96]

In our view, the decision in *Falcon* may best be understood as discarding a technique that suffered from a design defect. The "across the board" rule was designed as an economical technique for handling class certifications, but the Supreme Court correctly concluded that the rule had instead "promoted multiplication of claims and endless litigation . . . draining judicial resources as well

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[93] *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). At least the *Johnson* version of the rule was considered by the Supreme Court. It had not always applied ipse dixit. *See* Bradford v. Sears, Roebuck and Co., 673 F.2d 792 (5th Cir. 1982).

[94] *See generally* 3B J. MOORE & J. KENNEDY, *supra* note 53, at ¶¶ 23.01-.04; 7 C. WRIGHT & A. MILLER, *supra* note 8, at §§ 1751-54, 1759, 1761, 1765, 1771, 1785, 1789.

[95] General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 330 (1980).

[96] The majority remanded for further consistent proceedings. The Chief Justice dissented only to this disposition. He concluded that the record demonstrated that the suit was inappropriate for a class action. 457 U.S. at 161 (Burger, C.J., concurring in part and dissenting in part).

as resources of the litigants."[97]

VII. Personal Jurisdiction and Venue

Decisions regarding personal jurisdiction and venue also serve to increase or decrease the workload of the federal courts. A relaxation of these requirements creates a potential for an increase in litigation as two of plaintiffs' hurdles are lowered. Additionally, as the judicial gloss of statutes and rules of procedure thickens and hardens, such preliminary matters themselves become the object of increased litigation and judicial attention.

The Court faced an interesting question of federal jurisdiction in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee.*[98] As a sanction for failure to comply with discovery orders, Federal Rule of Civil Procedure 37(b)(2)(A) provides for "[a]n order that the matters regarding which the order was made . . . shall be taken to be established." The Court held that such an order may be entered establishing personal jurisdiction over a recalcitrant party who frustrated discovery seeking to establish jurisdictional facts. Plaintiff insured had sued an insurance broker and a group of foreign insurance companies to recover on a business interruption policy. When several of the excess insurers raised the lack of in personam jurisdiction as a defense, plaintiff sought to effect discovery. After defendants repeatedly failed to comply with orders to produce the requested information, the district court threatened to use the Rule 37(b)(2)(A) mechanism unless defendants complied by a certain date. When they did not, the district court made good on the threat. When the district court's order was upheld by the Third Circuit, the Supreme Court granted certiorari to resolve a conflict among the circuits. In contrast to the Third Circuit approach, the Eleventh Circuit rule was to require an independent basis for personal jurisdiction over the party punished under Rule 37.[99]

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[97] *Id.* at 163.

[98] 456 U.S. 694 (1982). *See generally* Sanctions Imposable for Violations of the Federal Rules of Civil Procedure (Federal Judicial Center 1981); Comment, *The Use of Rule 37(b)(2)(A) Sanction to Establish In Personam Jurisdiction*, 1982 B.Y.U. L. Rev. 103.

[99] The Fifth Circuit had established the rule that a Rule 37 sanction is valid if, and

In affirming the Third Circuit, the Court provided an exegesis on jurisdiction that is sure to end up in the procedure casebooks.[100] Harking back to fundamental principles of jurisdiction, the Court distinguished between jurisdiction over the subject matter and over the parties, both of which are the *sine qua non* of a valid order. Subject matter jurisdiction is two dimensional, being both a constitutional and statutory requirement of courts of limited jurisdiction. As a function of Article III, subject matter jurisdiction does not permit notions of consent, waiver, or estoppel. In contrast, personal jurisdiction is part of the filigree of the individual liberty entitled to due process of law. One consequence is that the right may be waived intentionally, or a defendant may be estopped from challenging personal jurisdiction for various reasons. Rule 37 is thus another incident of due process. A legal right is subject to procedural rules, the breach of which may extinguish the right. To state the new test is to reject the Eleventh Circuit's approach: due process is violated by a rule establishing legal consequences for a failure to produce evidence only if the defendant's behavior will not support the presumption that "the refusal to produce evidence [material to the administration of due process] was but an admission of the want of merit in the asserted defense."[101] On the facts before it, the Court determined that the district court did not abuse its discretion in invoking the legal presumption that is tantamount to a finding of a constructive waiver. By entering a special appearance, the defendant succumbed to the court's authority to decide the issue of personal jurisdiction pursuant to factfinding, and legal rules and presumptions. Once the standard satisfies the Constitution, such procedural rules do not violate, but rather are, due process.[102]

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only if, the court has personal jurisdiction over the party punished. Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981). *See supra* note 1. The Fourth and Eighth Circuits had followed the Third Circuit approach of *Compagnie des Bauxites*. *See* English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir. 1979); Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971).

[100] Justice White wrote the opinion of the Court which was joined by everyone but Justice Powell, who concurred in the judgment. 456 U.S. at 709 (Powell, J., concurring).

[101] 456 U.S. at 709 (quoting Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909)).

[102] Interpreting Rule 37, the Court found that the district court had not abused its

A second case, *Piper Aircraft Co. v. Reyno*,[103] shows how the application of the doctrine of *forum non conveniens* also may have a significant impact on federal jurisdiction. Too hospitable an attitude on the part of federal courts toward litigation that really belongs in other courts attracts more litigation of the same kind. What else but the doctrine of *forum non conveniens* could be the issue in a diversity wrongful death case involving an aviation accident that occurred over Scottish airspace, in which all of the decedents were Scottish, and in which all potential plaintiffs and defendants were either Scottish or English save for the plane and propeller manufacturers? Even the doctrine itself originated in Scotland.[104] A California probate court appointed plaintiff, who was the secretary of the lawyer who filed the suit, administratrix of the estate of the Scottish decedents. She had had no prior contact with those involved and admitted that the action was filed in the United States because its laws were more favorable to her case than were those of Scotland. The suit was removed[105] to a California federal district court and subsequently transferred to Pennsylvania.[106] The federal transferee court dismissed on the ground of *forum non conveniens*. On appeal, the Third Circuit held that dismissal is never appropriate when the law of the alternative forum is less favorable to the plaintiff.[107] The Supreme Court reversed, bringing the Third Circuit into line with other courts of appeals,

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discretion since the discovery order was specifically related to the jurisdictional facts at issue. *Id.* at 708-09.

Justice Powell reached the same result but took a different route. Since Rule 37 is not a jurisdictional grant and since federal courts are courts of limited jurisdiction, he reasoned that the district court could not have obtained personal jurisdiction except by application of the state long-arm statute. *See* 28 U.S.C. § 1652 (1976). Since the federal jurisdiction was derivative, the Powell analysis followed the due process line of cases restricting assertion of personal jurisdiction by the states. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). He rejected both some reworking of the minimum contacts test and the notion that Rule 37 is jurisdictional and, instead, concluded that the facts were a prima facie showing of minimum contacts under the Constitution. 456 U.S. at 712-14 (Powell, J., concurring).

[103] 454 U.S. 235 (1981).

[104] Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909-11 (1947), *cited in* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

[105] Removal was pursuant to 28 U.S.C. § 1441 (1976).

[106] 28 U.S.C. § 1404(a) (1976).

[107] 630 F.2d 149 (3d Cir. 1980).

including the Eleventh Circuit, that had considered the issue.[108] The majority concluded, "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[109] According to the majority, the Third Circuit approach had been expressly rejected in *Canada Malting Co. v. Paterson Steamship Co.*[110] which had predated the familiar balancing test articulated in *Gulf Oil Corp. v. Gilbert*[111] The Court found that *Gilbert* had also implicitly rejected the Third Circuit's determination that a possible change in law in either party's favor would control the *forum non*

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[108] 454 U.S. at 237. *See, e.g.*, Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980); Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); Anastasiadis v. S.S. Little John, 346 F.2d 281 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966) (see *supra* note 1).

The Third Circuit panel may have been bound by its own prior precedent. *See* Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980); DeMateos v. Texaco, Inc., 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

[109] 454 U.S. at 247. Since Justices Powell and O'Connor did not participate in the decision, Justice Marshall's opinion, joined by the Chief Justice, and Justices Blackmun and Rehnquist, was the opinion of the Court.

[110] 285 U.S. 413 (1932).

[111] 330 U.S. 501 (1947). The *Reyno* Court summarized the balancing test as follows:

> [A] plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or 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.

454 U.S. at 241. (citations omitted).

The Court also described the list of "private interest factors" concerning the litigants and "public interest factors" concerning the forum:

> The factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. at 241 n.6.

conveniens decision.[112] If this single factor controlled, the doctrine's emphasis on flexibility would be lost. The majority found no analogy between dismissals on grounds of *forum non conveniens* and transfers between federal courts under section 1404(a).[113].The latter is merely a change of venue, a federal housekeeping provision, designed to ensure just and efficient transfers. That section 1404(a) transfers should not result in a change in applicable law[114] simply does not translate to the common law doctrine. An unfavorable change in the law may be given substantial weight in the *forum non conveniens* analysis only when the change is so complete that the second law does not provide any adequate remedy whatsoever, so that a dismissal would not be in the interest of justice.[115]

Reyno conveyed our theme. One of the significant factors militating against the Third Circuit's approach was that deciding motions to dismiss for *forum non conveniens* would become difficult and complicated. The law of both the chosen forum and the alternative forum would be determined and compared so far as rights, remedies, and procedures were concerned. Qualitative appraisals of favorability would be required. All this would fly in the face of a doctrine partly designed to avoid comparative law entanglements. An approach that would freeze foreigners' lawsuits in American courts when dismissal would be disadvantageous would increase "[t]he flow of litigation into the United States . . . and further congest already crowded courts."[116]

VIII. Federal Implied Rights of Actions

One of the most unstable aspects of federal jurisdiction is the determination of whether a private party may maintain an action for damages based on the violation of federal legislation. Discerning the Court's approach in this area is as difficult as the Court's

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[112] *Id.* at 252-53 n.19.

[113] 28 U.S.C. § 1404(a) (1976).

[114] Van Dusen v. Barrack, 376 U.S. 612 (1964).

[115] The majority went on to affirm the district court's *Gilbert* analysis. 454 U.S. at 255. From this continuation, Justices Brennan, White, and Stevens dissented. *Id.* at 261 (White, J., concurring in part and dissenting in part); *Id.* (Stevens, J., dissenting).

[116] *Id.* at 252 (footnote omitted).

task must be to divine legislative intent.[117] Nonetheless, judicially created, or perhaps discovered, causes of action are yet another aspect of federal jurisdiction. The more willing the courts are to find such causes of action, the more willing litigants will be to find their way into federal court to invoke them.

The first of two major decisions[118] was *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran.*[119] *Curran* is one of those decisions that typifies this area; the Court split five to four, both sides applying the same precedents to the same record. The case itself involved the fascinating Commodity Exchange Act.[120] This complex legislative scheme has evolved over sixty years to regulate futures trading in agricultural products. The courts of appeals were divided on the question whether a private party could maintain an action for damages caused by a violation of the Act. When an investor sued a broker for fraud violations, the Sixth Circuit allowed the suit.[121] When investors sued an exchange, its officials, and

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[117] *See generally* 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.323[22] (2d ed. 1983 & Supp. 1982-83); 5 J. MOORE, J. LUCAS & J. WICKER, *supra* note 79, at ¶ 38.37.

[118] There were two other somewhat related decisions. Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982) (the Tucker Act, 28 U.S.C. § 1346(a) (2) (1976 & Supp. V 1981), which gives federal courts jurisdiction over certain suits against the government founded on express or implied contracts, does not confer jurisdiction over a suit by a former employee of the Exchange Service); United States v. Erika, Inc., 456 U.S. 201 (1982) (the Court of Claims has no jurisdiction to review the amounts of benefits payable under Part B of the Medicare program, 42 U.S.C. §§ 426(e), 1395u(b)(3)(C) (1974)).

[119] 456 U.S. 353 (1982).

[120] 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980). The Court described the Commodity Exchange Act as "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." 456 U.S. at 355-56 (quoting H.R. REP. No. 975, 93d Cong., 2d Sess. 1 (1974)). *See generally* Davis, *The Commodity Exchange Act: Statutory Silence is Not Authorization for Judicial Legislation of an Implied Right of Action*, 46 MO. L. REV. 316 (1981).

[121] Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982). The Seventh, Eighth and Tenth circuits seemed to agree. *See* Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Goldman, 593 F.2d 129 (8th Cir.) (district court's dismissal of defendant's counterclaim alleging violations by plaintiff of exchange and dealer association rules and fraud not reversible error where district court permissibly found that defendant had failed to prove fraud), *cert. denied*, 444 U.S. 838 (1979); Master Commodities, Inc. v. Texas Cattle Mgmt. Co., 586 F.2d 1352 (10th Cir. 1978) (if implied right of action exists under Commodities Exchange Act, willful or fraudulent conduct must be shown); Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977) (private damage actions allowable under Commodity Exchange Act).

merchants for damages resulting from unlawful price manipulation allegedly preventable by an exchange's proper enforcement efforts, the Second Circuit allowed the suit.[122] In *Curran*, the Court reviewed these decisions in order to resolve a conflict between them and the approach taken in the Eleventh Circuit where the implied right of action was denied.[123] Justice Stevens' majority opinion[124] carefully described the futures trading business, the statutory scheme of the Commodities Exchange Act, and the facts of the separate cases and concluded that an implied private right of action existed under the Act, even after the comprehensive 1974 amendments which did not provide for an express private remedy. His analytical starting point was the criteria identified in *Cort v. Ash*:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegatd to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[125]

Congress' failure to provide an express remedy did not, therefore, end the matter.[126] Rather, the legislative intent behind the 1974

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[122] Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom.* Clayton Brokerage Co. v. Leist, 456 U.S. 353 (1982).

[123] Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980), *vacated*, 456 U.S. 968 (1982).

[124] Justice Stevens was joined by Justices Brennan, White, Marshall, and Blackmun.

[125] 456 U.S. at 373 n.51 (citations omitted) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

[126] The Court stated that "the failure of Congress to [expressly provide a private cause of action] is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." 456 U.S. at 374 (quoting Cannon v. University of Chicago, 441 U.S. 677, 717 (1979)).

amendments became the Court's polestar and its examination focused on the state of the law at the time of enactment of the amendments. According to the majority, the federal courts had recognized an implied private remedy under the Act, which fact narrowed the inquiry to whether Congress intended to preseve the existing remedy. After reviewing the loosely defined legislative history of the 1974 amendments, including supplemental provisions to strengthen exchange rulemaking and enforcement, procedures for reimbursing victims of violations, and a jurisdictional savings clause that provided that the amendments would not supersede or limit federal or state court jurisdiction, the majority became convinced that Congress so intended. All this taken together convinced the majority that there was no need to " 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.' "[127] The four dissenting justices interpreted the entrails of legislative intent in precisely the opposite way.[128] The dissent charged, "The Court today asserts its fidelity to these principles [of inquiring into legislative intent] but shrinks from their application."[129]

The second decision in this area involved the somewhat different, but related, issue of whether Congress intended certain contracts to be enforced in federal court. Specifically, in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*,[130] the Court considered a provision of the Urban Mass Transportation Act of 1964.[131] Section 13(c) of the Act required a

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[127] 456 U.S. at 388 (quoting California v. Sierra Club, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in the judgment)). The Court went on to hold that plaintiffs had standing, that an action could be maintained against an exchange, and that conspiring price manipulators are subject to suit.

[128] 456 U.S. at 395 (Powell, J., dissenting). The Chief Justice and Justices Rehnquist and O'Connor joined the dissent.

[129] *Id.* at 398. The dissent quickly dismissed the lower federal court decisions as wrongly decided. It found the legislative history relied on by the majority to demonstrate a contrary legislative intent or, at best, a neutrality to the private right of action question. In addition, a jurisdictional savings clause relied on by the majority was irrelevant. Relying on a chart in the record of Senate committee hearings which indicated that civil money penalties were unavailable under the pre-1974 Act, the dissent concluded that what little indication of legislative intent existed showed an antagonism toward the private right of action.

[130] 457 U.S. 15 (1982).

[131] 49 U.S.C. § 1609(c) (1976).

state or local government to make arrangements to protect transit workers' collective bargaining rights before receiving federal financial assistance for the acquisition of a privately owned transit company. The defendant city entered into a "section 13(c) agreement" with the plaintiff union and converted a failing private bus company into a public entity. In 1975, after a series of collective bargaining agreements had been entered into and honored, the city renounced the newest agreement only three months into its term, claiming it was no longer bound. The plaintiff union brought suit in federal court, alleging a breach of the "section 13(c) agreement" and seeking damages and injunctive relief. The Sixth Circuit adopted the position taken by four other circuits[132] in concluding that plaintiff had standing to sue in federal court for breach of its collective bargaining agreement by virtue of section 13(c).[133] The Eleventh Circuit had taken the opposite view[134] and the Supreme Court agreed with the Eleventh Circuit in reversing *Jackson Transit Authority*. Distinguishing the private right of action line of cases of which *Curran* was the latest, the Court[135] reduced the issue to whether Congress intended such contract actions to sound in federal, rather than state, law. If, and only if, Congress intended section 13(c) agreements and related collective bargaining agreements to be creatures of federal law and further intended that rights and duties contained in those contracts be federal, did plaintiff's suit present a federal claim. The language of section 13(c) did not suggest a legislative intent to effectively emasculate the exemption under the National Labor Relations Act[136] that permits state law to govern relationships between local governments and unions representing their employees. Indeed, the legislative history was

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[132] Division 587, Amalgamated Transit Union v. Seattle, 663 F.2d 875 (9th Cir. 1981); Local Div. 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978); Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Util., 585 F.2d 1340 (7th Cir. 1978); Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

[133] Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Auth., 650 F.2d 1379 (6th Cir. 1981).

[134] Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327 (11th Cir. 1982).

[135] Justice Blackmun wrote the unanimous opinion.

[136] 29 U.S.C. § 152(2) (1976).

conclusive. The consistent theme running through the Secretary of Labor's testimony, the House and Senate hearings and reports, and floor debate was that Congress intended that such agreements be governed by state law applied in state courts. The Court concluded that section 13(c) was an accommodation of state law to collective bargaining, not a substitution of federal law for state labor law.[137]

Once again, we get mixed signals from the Supreme Court. The full *Cort* analysis was designed as a strict approach to the evaluation of legislative intent.[138] Indeed, since that decision, the implication of a right of action has been the exception rather than the rule, and when one has been implied the Court has narrowly interpreted the cause of action.[139] *Curran* may indicate a reversal in the trend or it may stand for nothing more than the proposition that five Justices were convinced on the particular legislative record. *Curran* arose under peculiar circumstances. Some courts already had detected the existence of a private right of action under the Commodity Exchange Act before its amendment. The Court might be said not to have been called upon to decide whether the private cause of action existed, but rather to decide whether the legislative

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[137] In an opinion joined by Justice O'Connor, Justice Powell separately concurred, emphasizing both the limited jurisdiction of the federal courts and congressional control over that jurisdiction. 457 U.S. at 29 (Powell, J., concurring).

[138] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982).

[139] *See* Middlesex County Sewerage Auth. v. Nat'l. Sea Clammers Assoc., 453 U.S. 1 (1981) (no implied private cause of action exists under Federal Water Pollution Control Act or Marine Protection, Research, and Sanctuaries Act independent of the provisions of the Acts); Texas Indus. v. Radcliff Materials, 451 U.S. 630 (1981) (no implied right to recover from a co-conspirator for antitrust violation); California v. Sierra Club, 451 U.S. 287 (1981) (no implied private cause of action for violation of Rivers and Harbors Appropriation Act); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (no private cause of action for back wages under a contract that has been administratively determined not to call for work under the Davis-Bacon Act); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) (limited cause of action to void contract under Investment Advisers Act); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied cause of action under § 17(a) of Securities Exchange Act); Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (Freedom of Information Act provides no private right of action to enjoin agency disclosure); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (no private cause of action under Title I of the Indian Civil Rights Act of 1968); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977) (a defeated tender offeror has no implied cause of action under § 14(e) of the Securities Exchange Act).

amendments had destroyed the prior judicially implied claim. Therefore, *Curran* may be viewed as an "implied repeal" case. If so, the *Curran* decision may be reconciled with the post-*Cort* trend against implication of private causes of action unless the legislative record is clear. Caution and reluctance are the judicial watchwords in this area.

Decisions such as *Curran* are subject to three profound criticisms beyond the accuracy of the resolution of the legislative intent question.[140] First, modern federal regulatory schemes are exceedingly complex, and a judicially created right of action may therefore prove counterproductive.[141] Second, to impose upon Congress the responsibility of expressly negating every federal court decision on pain of the implication of a cause of action skews the separation of powers and foists on Congress the burdensome extraconstitutional duties of monitor and vetoer.[142] Third, and most important for present purposes, many critics of and on behalf of the courts have complained that Congress has created jurisdiction in the federal courts for matters that ought not require an Article III judge, and that such jurisdiction has resulted in an overburdening of the courts and a consequent decline in the quality of justice afforded those properly there. There is a certain amount of duplicity, or at least some inconsistency, in taking this position and then turning around and implying causes of action. "It may be that what [the courts] do speaks so loudly that no one will hear what [they] say."[143]

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[140] *See* 456 U.S. at 408 (Powell, J., dissenting).

[141] *Id.*

[142] *Id.*

[143] Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1244 n.1 (5th Cir. 1978) (Hill, J., dissenting from the implication of a cause of action).

No decision this term involved an implied right of action under the Constitution itself. The Court seems to have been more lenient in implying constitutional causes of action. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (cause of action for cruel and unusual punishment under the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (cause of action for violation of the Due Process Clause of the Fifth Amendment); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (cause of action for illegal search and seizure under the Fourth Amendment).

IX. Suits Against States and Sovereign Immunity

In two decisions that are fascinating to federal judges, federal jurisdiction professors, and prosperous peripatetics,[144] the Court reconsidered the Eleventh Amendment bar and the statutory interpleader action. In 1978, in *California v. Texas*,[145] the Court had declined to exercise its original jurisdiction to settle the conflicting claims of California and Texas over the estate of Howard Hughes. Four Justices suggested in concurring opinions that the Federal Interpleader Act[146] might be the appropriate vehicle to resolve the dispute, since both states claimed Hughes as a domiciliary and both agreed that an individual can have but one domicile for purposes of state death taxes.[147] Threatened with the assessment and collection of death taxes in two states, the administrator followed the Justices' advice and filed an interpleader action for determinatin of Hughes' domicile, but the district court dismissed for lack of diversity.[148] The Fifth Circuit reversed, finding minimal diversity because the administrator was a citizen of Nevada; it also rejected the argument that the action was barred by the Eleventh Amendment.[149] In turn, in *Cory v. White*,[150] the Supreme Court reversed and remanded.

In a debate over precedents, the *Cory* majority[151] held that the Eleventh Amendment barred the action. The Court reaffirmed and relied on the 1937 case of *Worcester County Trust Co. v. Riley*,[152] which had unanimously held that a similar action was barred by

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[144] The three categories are mutually inconsistent. *Cf. supra* notes * & **.

[145] 437 U.S. 601 (1978).

[146] 28 U.S.C. § 1335 (1976). *See generally* 1A J. Moore, W. Taggart, A. Vestal, & J. Wicker, Moore's Federal Practice ¶ 0.201 (2d ed. 1981 & Supp. 1982-83); 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice ¶ 0.60 (2d ed. 1982 & Supp. 1982-83); 4 C. Wright & A. Miller, *supra* note 8, at § 1110; 13 C. Wright, A. Miller, & E. Cooper, *supra* note 8, at § 3524; Chafee, *Federal Interpleader Since the Act of 1936*, 49 Yale L. J. 377 (1940).

[147] Justice Brennan filed a separate concurrence. 437 U.S. at 601. Justice Stewart filed a concurrence in which he was joined by Justices Powell and Stevens. *Id.* at 602.

[148] Lummis v. White, 491 F.Supp. 5 (W.D. Tex. 1979).

[149] Lummis v. White, 629 F.2d 397 (5th Cir. 1980). *See supra* note 1.

[150] 457 U.S. 85 (1982).

[151] Justice White wrote for the majority which also included the Chief Justice and Justices Blackmun, Rehnquist and O'Connor.

[152] 302 U.S. 292 (1937).

the Eleventh Amendment. The *Riley* Court had in turn reaffirmed accepted rules: (1) "a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids,"[153] and (2) "generally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States."[154] Any tension between *Riley* and *Edelman v. Jordan,*[155] decided in 1974, was resolved in favor of the former decision. The *Cory* Court squarely rejected the Fifth Circuit's reading of *Edelman* that the Eleventh Amendment applies only to bar suits seeking a money judgment from the state treasury and held that the injunctive action seeking prospective relief was barred since there were no allegations that the state officers were acting contrary to federal or state law.[156] In a separate per curiam opinion, however, the Court decided that the dispute was one between two states and would be an appropriate exercise of its original jurisdiction.[157] Based on *Cory*, the Court reasoned that there was no other forum and the controversy was ripe for adjudication.[158]

A state's claim on treasure trove provided the Court with its

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[153] *Id.* at 296.

[154] *Id.* at 297. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908).

[155] 415 U.S. 651 (1974).

[156] Justice Brennan concurred in the judgment, suggesting that if *Riley* was not to be overruled and interpleader thereby was barred, the Court should exercise its original jurisdiction, even though he had joined the 1978 denial of California's motion for leave to file an original complaint in *California v. Texas.* 457 U.S. at 91 (Brennan, J., concurring in the judgment).

Justice Powell, joined by Justices Marshall and Stevens, dissented. He would overrule *Riley* and hold that due process bars double taxation of a single domiciliary so that the *Ex parte Young* exception to the Eleventh Amendment would control. 457 U.S. at 92 (Powell, J., dissenting).

[157] California v. Texas, 457 U.S. 164 (1982). The Supreme Court is granted original and exclusive jurisdiction of all controversies between states pursuant to 28 U.S.C. § 1251(a) (1976 & Supp. 1980).

[158] Justice Powell, joined by Justices Marshall, Rehnquist, and Stevens, dissented. Relying on the unanimous denial of California's motion to file a bill of complaint in 1978, the dissenters urged the lack of a ripe controversy since the two states would be true adversaries only if both were to obtain money judgments against the estate, the sum of which exceeded the value of the estate. 457 U.S. at 169 (Powell, J., dissenting).

third Eleventh Amendment case of the term in *Florida Department of State v. Treasure Salvors, Inc.*[159] Treasure Salvors had located the wreck of a seventeenth century Spanish galleon in international waters off the Florida coast. Under a state statute, Florida claimed ownership. The state and the company had negotiated contracts by which Treasure Salvors agreed to perform salvage operations in exchange for Florida's agreement to transfer seventy-five percent of the appraised value of all salvage to Treasure Salvors. There was no provision for transfer of title. Meanwhile, separate and unrelated legal proceedings established title to the lands, minerals, and other natural resources in the shipwreck area in the United States, as opposed to Florida.[160] Treasure Salvors then filed an admiralty in rem action seeking a declaration of title to the wreck, but was careful to name the galleon as defendant and not Florida. The United States intervened and unsuccessfully claimed ownership. The district court issued a warrant of arrest to gain custody over some of the valuable artifacts that remained in the custody of state officials. Although the warrant was addressed to these state officials, Florida resisted and invoked the Eleventh Amendment.

Unsuccessful in the district court[161] and the court of appeals,[162] Florida petitioned the Supreme Court to answer the question whether the Eleventh Amendment barred an in rem admiralty action seeking to recover property purportedly owned by a state. The Court's conclusion that the action was not barred followed from its tracing of three lines of lore in constitutional sovereign immunity.[163] First, the "well-recognized irony"[164] of *Ex parte Young*[165]

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[159] 102 S.Ct. 3304 (1982). Justice Stevens wrote the plurality opinion which was joined by the Chief Justice, and Justices Marshall and Blackmun. The historical background of this case was detailed in Treasure Salvors, Inc., v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). It was deemed "well worth repeating" in State of Florida, Dep't. of State v. Treasure Salvors, Inc., 621 F.2d 1340, 1341 (5th Cir. 1980). *See also* Lyon, *The Trouble with Treasure*, 149 National Geographic 787 (1976). It is not deemed so here.

[160] United States v. Florida, 420 U.S. 531 (1975).

[161] 459 F.Supp. 507 (S.D. Fla. 1978).

[162] 621 F.2d 1340 (5th Cir. 1980).

[163] *See generally* Baker, *supra* note 17, at 816-19.

[164] 102 S. Ct. at 3315.

permitted an action such as the one *sub judice* against state officers on the theory that either they acted beyond the scope of their authority, or the grant of authority itself was unconstitutional.[166] Thus fictively reconciled are the Fourteenth Amendment requirement of state action and the Eleventh Amendment bar of suits against the state.[167] The order to arrest the artifacts fit this fiction. Neither the fact that Florida decided to defend its agents/officers nor the purported adjudication of the state's rights frustrated the fiction that the suit was not against the state. Second, since the state officers had no colorable claim to possession of the artifacts and since the warrant only secured possession and did not finally adjudicate the state's rights, the Eleventh Amendment did not bar the warrant. Finally, the relief sought—the warrant of arrest—did not seek any attachment of state funds and would not impose any burden on the state treasury. Therefore, the warrant did not contravene the Eleventh Amendment.[168]

These three decisions do not have any profound significance for

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[165] 209 U.S. 123 (1908).

[166] The dissent called this "fantasy" and a "dubious proposition." 102 S.Ct. at 3324 (White, J., concurring in judgment and dissenting in part).

[167] *See* Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 663-64 (1974).

[168] Justice Brennan agreed with the outcome based on adherence to his own different interpretation of the Eleventh Amendment. 102 S. Ct. at 3322 (Brennan, J., concurring in part and dissenting in part). He believes that the Eleventh Amendment should be real literally not to apply to suits against a state brought by citizens of that state. *See* Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); Employees of the Dept. of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 309-24 (1973) (Brennan, J., dissenting). *Contra* Florida Dept. of State v. Treasure Salvors, Inc., 102 S.Ct. 3304, 3314 n.17 (1982).

Justice White, joined by Justices Powell, Rehnquist and O'Connor, concurred in the judgment insofar as it reversed the Fifth Circuit's determination that it had "jurisdiction to decide jurisdiction" by trying title to the artifacts to determine if the suit was one against a state. 102 S.Ct. at 3324 (White, J., concurring in part and dissenting in part). Justice White rejected the plurality's two fictions: first, that the *res* was somehow distinct from the action to determine state ownership and second, that the Eleventh Amendment was not transgressed because the state's claim to ownership was not formally adjudicated. *Id.* Instead, he deemed controlling Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), which held that when the officer's actions are limited by statute then actions beyond those limitations are considered individual and not sovereign actions. According to the dissent, the *Treasure Salvors* suit was nothing less than a suit against Florida without the state's permission and was barred by the Eleventh Amendment.

purposes of federal jurisdiction in its narrowest and most technical sense. Sovereign immunity doctrine, however, does involve important issues of federalism and access to federal courts that are appropriate to our major concerns in this essay.

X. Civil Actions for Deprivations of Rights

Perhaps there is no better example of the phenomenon here discussed than section 1983 of Title 42 of the United States Code.[169] As it has developed, this civil rights statute has become a constant source of friction between the state and federal court systems. Section 1983 was the subject of numerous decisions during the 1981 Term that may portend a dramatic reassessment of state and federal relations. We consider the six decisions along three lines: "under color of state law"; relevance of state remedies; and exhaustion of administrative remedies and comity.

A. "Under Color of State Law"

The "under color of state law" rubric of section 1983 seems to be the Fourteenth Amendment "state action" concept viewed "through a glass, darkly."[170] The doctrine of state action itself has

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[169] 42 U.S.C. § 1983 (1976 & Supp. IV 1980). Section 1983 states,

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

Section 1983 is derived from the Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871). The parallel jurisdiction provision, also derived from the 1871 Act, is now codified as 28 U.S.C. § 1343 (3) (1976 & Supp. V 1981).

[170] 1 Corinthians 13:12; United States v. Price, 383 U.S. 787, 794 n.7 (1966); *See* Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Lugar v. Edmonson Oil Co., 102 S. Ct. 2744 (1982). *Compare* Polk County v. Dodson, 454 U.S. 312, 322 n.12 (1981) (public defender not acting "under color of state law"), *with id.* at 334 n.5. (Blackmun, J., dissenting) (public defender should be considered joint participant with the state for purposes of suit under Section 1983). The Eleventh Circuit rule seems the same. *Cf.* Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

Obviously, there is no distinction between the state action and under color of state law requirements when the defendant is a public official or a private individual. Only when joint action between a public official and a private individual is alleged will there be a potential

been described as a "a conceptual disaster area."[171] Professor Tribe has turned this frustration into a framework:

> If the usual premise is reversed—if the state action cases are assumed *not* to reveal any general rule, and if the inquiry is redirected to consider *why* this anarchy prevails—it is possible to construct an "anti-doctrine," an analytical framework which, in explaining why various cases differ from one another, paradoxically provides a structure for the solution of state action problems.[172]

Pursuing this approach then, we turn to the Court's own efforts to explain its decisions.

In *Polk County v. Dodson*,[173] plaintiff filed a *pro se* complaint under section 1983 against his public defender, the public defender's office, and the county, alleging that she failed to represent him adequately in an appeal in the state supreme court by moving for permission to withdraw as counsel on the ground that plaintiff's claims were wholly frivolous. The state court granted the motion and the appeal was dismissed. The Supreme Court granted review to resolve a division among the courts of appeals on the issue of whether a public defender acts "under color of state law" when representing an indigent.[174]

As if it were not circular, the Court relied on the *Classic* definition that a person acts under color of state law when exercising

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for disparity between the two concepts. *See, e.g.*, Lugar v. Edmondson Oil Co., 102 S.Ct. 2744, 2749-51.

For a decision representative of current state law theory which is not separately treated in this essay, *see generally* Blum v. Yaretsky, 102 S. Ct. 2777 (1982).

[171] Black, *Forward: "State Action," Equal Protection, and California's Proposition 14 in The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 95 (1967).

[172] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978).

[173] 454 U.S. 312 (1981).

[174] The Fifth (and, therefore, Eleventh, *see supra* note 1) and Tenth Circuits had held that the state action requirement was not satisfied and the Third and Ninth Circuits seemed to agree. *See* Slavin v. Curry, 574 F.2d 1256 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972); Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). The Seventh and Eighth Circuits took the opposite position. *See* Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978).

power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[175] The Court[176] rejected the argument that the defender's employment relationship with the state controlled and satisfied the inquiry. Rather, the nature of the defender's function controlled. In the theory of our legal system and in the reality of the attorney-client relationship, the defense attorney—whether appointed or retained—serves a private function by advancing the undivided interests of the client. Cases holding liable state-employed doctors serving in supervisory capacities at state institutions were distinguished since those professional relationships involved no independent ethical obligation.[177] The Court declined to distinguish the public defender from the retained defense counsel since the same standards of professional responsibility applied to each and the Constitution obliged the state to respect the relationship between defendant and counsel irrespective of the funding source.[178] The Court, however, was careful to limit its holding to the performance of a lawyer's traditional functions as counsel for a defendant in a criminal proceeding. The Court also was careful to suggest that the color of law issue might be resolved differently for "certain administrative and possibly investigative functions."[179] Thus the complaint was dismissed.[180]

From the standpoint of this essay, Justice Blackmun's dissent

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[175] 454 U.S. at 317 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

[176] Justice Powell wrote for the eight Justice majority that included the Chief Justice and Justices Brennan, White, Marshall, Rehnquist, Stevens, and O'Connor.

[177] *See* Estelle v. Gamble, 429 U.S. 97 (1976); O'Connor v. Donaldson, 422 U.S. 563 (1975).

[178] The Court also suggested that the same analysis would apply to a private attorney assigned to represent an indigent. 454 U.S. at 318 n.7.

[179] *Id.* at 325 (citing Branti v. Finnkel, 455 U.S. 507 (1980)). *See also* Imbler v. Pachtman, 424 U.S. 409 (1976). Also left undisturbed were state tort law remedies for malpractice and criminal prosecutions for extortion by public defenders. *See* Ferri v. Ackerman, 444 U.S. 193 (1979); United States v. Senak, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973).

[180] In a separate concurrence, Chief Justice Burger emphasized the independence from governmental control which characterized the public defense position. 454 U.S. at 327 (Burger, C.J., concurring).

Justice Blackmun filed a "solitary dissent" in which he took issue with all that had gone before. *Id.* at 328 (Blackmun, J., dissenting).

envisioned no middle course between Scylla—a per se rule of dismissal of all section 1983 claims, even the most eggregious, against public defenders—and Charybdis—lengthy and involved hearings to determine subject matter jurisdiction by deciding whether the challenged conduct was a traditional function of an advocate or something else and therefore actionable.[181] Which course will be taken still remains to be seen. Considering just for the moment the large number of public defender-client relationships and the federal courts' experience with habeas corpus claims of ineffective assistance of counsel, the potential for litigation becomes obvious.

Next, in *Rendell-Baker v. Kohn*,[182] the Court concluded that plaintiffs, a former guidance counselor and five teachers, had not alleged state action and therefore had not stated a cause of action under section 1983 against their former employer, a nonprofit, privately operated high school for maladjusted students. Virtually all the students had behavioral problems and were referred to the school by some public agency that paid tuition for them. In recent years between ninety and ninety-nine percent of the school's budget came from federal, state, and local agencies. In addition to extensive regulation common to all schools, the defendant school was subject to special contract and grant regulations. The Court's inquiry began and ended with the issue whether the school's action in discharging plaintiffs could fairly be seen as state action. The answer was no; the Court discounted seriatim the factors urged as state action. An almost exclusive dependence on government funding did not distinguish the school from other private contractors who exclusively contracted with the government, no matter how signficant the public work undertaken nor how complete the financial dependence. State action was not made out by the extensive regulations, not even by the required agency approval of hiring decisions, since the decision to discharge plaintiffs was not itself

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[181] 454 U.S. at 328 (Blackmun, J., dissenting). He would have relied instead on the immunity doctrine for dismissing meritless complaints. *Id.* at 338.

[182] 102 S. Ct. 2764 (1982). *Compare* Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (5th Cir. 1982). Chief Justice Burger delivered the opinion of the Court, joined by Justices Blackmun, Powell, Rehnquist, Stevens, and O'Connor.

On the merits, plaintiffs alleged a *Pickering* claim. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Baker, *supra* note 17, at 842-45.

compelled or even influenced by the regulations. This limited role did not implicate the state as a concerted actor. Agreeing that the school performed a public function, the education of maladjusted students was not deemed so exclusively governmental as to satisfy the state action requirement. Finally, indistinguishable from many public service contractors, no symbiotic relationship existed between the government and the school. [183]

A most difficult "under color of state law" issue was raised in *Lugar v. Edmondson Oil Co.*[184] The section 1983 plaintiff was sued in state court by his creditor and the creditor sought prejudgment attachment of certain of plaintiff's property. On the basis of an *ex parte* petition with no prior notice or hearing, a clerk of the state court issued a writ of attachment, which subsequently was executed by the county sheriff. After a post-levy hearing, the state court dismissed the attachment for the creditor's failure to establish the alleged statutory ground that plaintiff was about to dispose of the property in order to defeat his creditors. Plaintiff then sued the creditor under section 1983, alleging a denial of due process in the entire sequence of events.[185] The majority applied a two step analysis. First, the claimed deprivation resulted from the creditor's exercise of the state rule for prejudgment attachments, which was obviously the product of state action. Second, the private party creditor's joint participation with the state officials in the seizure of the disputed property was sufficient to characterize the creditor as a state actor. These conclusions were reinforced by the due process line of garnishment and prejudgment attachment

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[183] Justice White concurred in the judgment for the narrow reason that there was no allegation that the discharge decision itself was based on some governmental rule or policy. 102 S. Ct. 2772, 2773 (White, J., concurring in judgment).

Justice Marshall, joined by Justice Brennan, dissented. They would have found the requisite symbiotic relationship based on the cumulative impact of the various indicia of state action that the majority improperly considered in isolation. 102 S. Ct. at 2773 (Marshall, J., dissenting). The dissenters accused the majority of "a return to empty formalism in state action doctrine." *Id.* at 2777.

[184] 102 S. Ct. 2744 (1982). Justice White delivered the opinion of the Court joined by Justices Brennan, Marshall, Blackmun, and Stevens. *Compare* Dahl v. Akin, 630 F.2d 277 (5th Cir. 1980).

[185] Whether plaintiff was challenging the creditor's use of the state procedure and/or the state procedure itself was an issue which remained somewhat unclear throughout the litigation. *See id.* at 2756 n.22. This issue sharply divided the Court.

cases[186] and the express purpose of the civil rights statute to reenact the protections of the Fourteenth Amendment. While allegations of misuse or abuse of the state procedures challenged only private action, plaintiff's procedural due process attack on the state procedures used by his creditor did present a valid cause of action under section 1983.[187]

This decision has profound ramifications regarding the concerns of our essay. As the majority recognized, the jurisdictional requirements "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power . . . [and] avoid[] imposing on the state . . . responsibility for conduct for which [it] cannot fairly be blamed."[188] The majority's approach, according to the Chief Justice, potentially "expands the reach of the statute beyond anything intended by Congress."[189] There must be some limiting principle behind the "under color of state law" rubric. Would a section 1983 cause of action be made out by a citizen wrongfully summoning the police to enforce a valid law? It remains to be seen if the Court will limit its holding so as not to include such private abuse of state process—as the majority professed and the dissent feared would not happen.[190] Finally, broadening both the scope of section 1983 jurisdiction and the defense of qualified immunity for those who invoke state procedures in good faith, as the majority

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[186] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[187] Chief Justice Burger wrote a separate dissent in which he characterized the creditor's actions as merely the private invocation of a presumptively valid prejudgment attachment procedure and not as state action. 102 S. Ct. at 2757 (Burger, C.J., dissenting).

Justice Powell, joined by Justices Rehnquist and O'Connor, wrote a strident dissent. 102 S. Ct. at 2757 (Powell, J., dissenting). He saw two fallacies in the majority's approach. First, private citizens' interaction with state officials in the pursuit of purely private ends does not render the private individuals state actors. Second, the joint participation standard for acting "under color of state law" is not satisfied when a private party does no more than invoke a presumptively valid state process for legitimate private ends. He would have concluded that plaintiff failed to state a cause of action under section 1983 because "independent, private decisions made in the context of litigation cannot be said to occur under color of law." *Id.* at 2761-62 (note omitted).

[188] *Id.* at 2754.

[189] *Id.* at 2757 (Burger, C.J., dissenting).

[190] *Compare id.* at 2756 *with id.* at 2763 (Powell, J., dissenting).

apparently does,[191] exacerbates the federalism-jurisdiction problem of concern here. The *Lugar* case is its own example. After five years of litigation the case is remanded for still further proceedings during which the creditor presumably may claim a good faith immunity.[192] The confusion in the jurisdiction area is unabated and all that is accomplished is the addition of another issue to drain judicial resources. On this score, the Court's efforts during the term were none too successful.

B. Relevance of State Remedies

The most important and most confused area of section 1983 jurisprudence involves the question: What significance should be afforded to alternative state remedies? While this theme runs through the next subsection as well, here we consider a jurisdictional catch-22.[193] The contradiction is marked by the convergence of two lines of cases. Some decisions have suggested that section 1983 is an inappropriate remedy for isolated events that do not amount to a structural defect in the law of the state.[194] Instead, the Court seems to say that the appropriate remedy is a suit under state law. At the same time, however, plaintiffs who have challenged the state system in its entirety sometimes have been turned away because they were asking for relief that was political rather than judicial.[195] Two terms ago, the Court wrote such a catch-22 chapter into the book on section 1983. During the 1981 Term, the Court seemed to re-write the chapter. Future developments in this plot will have the gravest significance for federal jurisdiction and federalism. All that can be accomplished in our review is to tell how this drama has unfolded in the first two acts and suggest some possible denouements.

The "catch-1983"[196] involves suits thought to state a claim for a

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[191] *See id.* at 2757 n.23.

[192] *See id.* at 2764 n.14 (Powell, J., dissenting).

[193] *See* Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187, 1189 n.5 (5th Cir. 1978); 3 J. CHOPER, Y. KAMISAR, & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 225-27 (1982).

[194] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

[195] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976).

[196] Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187, 1189 n.5 (5th Cir. 1978).

common law tort normally dealt with by state courts but that instead are couched in terms of constitutional deprivation.[197] Act one came during the 1981 Term in *Parratt v. Taylor*.[198] A state prison inmate mail ordered hobby materials worth $23.50. After delivery to the prison, the materials were lost when the normal prison procedures for handling mail packages were not followed. The prisoner sued in federal court under section 1983, alleging that the defendant prison officials had negligently lost the materials, thereby depriving plaintiff of property without due process of law in violation of the Fourteenth Amendment. The majority held that plaintiff had not stated a cause of action under section 1983.[199]

The Court began with the notion that the language, history, and judicial interpretations of section 1983 established a " 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind."[200] With the "under of color of state law" requirement as given, the Court considered whether plaintiff had been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States. Focus was on the Fourteenth Amendment due process clause *simpliciter*. There was clear color of state law; the lost materials were property; plaintiff suffered a deprivation. Nonetheless, the Fourteenth Amendment had not been violated; the plaintiff had been denied property but had been afforded the process due. The Court seemingly ignored the self-contradictorily labeled notion of substantive due process and looked only at the somewhat redundantly labeled

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[197] For an appreciation of the Fifth and Eleventh Circuits' approach, see Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980); Diamond v. Thompson, 523 F.2d 1201 (5th Cir. 1975); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968). *See generally* Heninger, *42 U.S.C. § 1983 and Common-Law Torts: An Analysis of Procedural Pitfalls*, 12 CUM. L. REV. 99 (1981); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

[198] 451 U.S. 527 (1981).

[199] The Court had previously granted certiorari twice on the issue whether mere negligence would support a section 1983 claim only to resolve the disputes on other grounds. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978). The third time was a charm. Justice Rehnquist wrote the opinion of the Court joined by the Chief Justice, and Justices Brennan, Stewart, White, Blackmun, and Stevens. Five Justices wrote separately.

[200] 451 U.S. at 535.

component of the Fourteenth Amendment called procedural due process. The deprivation did not occur as part of an established state procedure but was a random unauthorized act of an isolated state actor. Available post-deprivation state tort remedies were adequate and there were no practicable means to provide any pre-deprivation process. The potential state remedies would compensate plaintiff fully and therefore were deemed sufficient process under the Fourteenth Amendment.[201]

Thus, by the first act curtain, the plot had thickened. Instead of "who done it?" the question was "what had they done?" Four Justices wrote separately to emphasize that the Fourteenth Amendment due process protection had a substantive as well as a procedural component. Had a majority collapsed the distinction? Four Justices wrote separately to suggest narrowing interpretations keyed to negligence and property deprivations. Would a majority go further? The majority had emphasized the adequacy of the state tort remedy. Did that mean that a section 1983 action would lie whenever the state does not provide a tort remedy? Did that mean that the federal courts would be required to evaluate the adequacy of available state remedies as a jurisdictional inquiry in every suit under section 1983? By intermission the Court had "create[d] new uncertainties as well as invitations to litigate under a statute that already ha[d] burst its historical bounds."[202]

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[201] Five Justices were prompted to write separate opinions. Justice Stewart questioned if this was the type of deprivation countenanced by the Fourteenth Amendment but was satisfied that the procedure was all that was due. 451 U.S. at 544 (Stewart, J., concurring). Justice White wrote a separate concurrence to emphasize his agreement with Justice Blackmun. *Id.* at 545 (White, J., concurring). Justice Blackmun sought to narrow the reach of the holding to property deprivations negligently caused. He would have treated intentional torts and negligent deprivations of life and liberty as actionable. *Id.* (Blackmun, J., concurring). Justice Powell concurred in the result only. *Id.* at 546 (Powell, J., concurring in result). He would have held negligent official acts beyond the constitutional meaning of deprivation against which procedural due process applies. Justice Marshall agreed that a postdeprivation state tort cause of action satisfied the Fourteenth Amendment procedural requirements involving claims of negligent deprivation of property. He disagreed with the application *sub judice* because the defendants had failed to discharge their affirmative duty, as he viewed it, to inform the plaintiff about available state tort remedies. *Id.* at 554 (Marshall, J., concurring in part and dissenting in part).

[202] *Id.* at 553-54 (Powell, J., concurring in result).

Act two came in *Logan v. Zimmerman Brush Co.*[203] *Logan* is most significant for what the Court said *Parratt* did not hold. Appellant was discharged allegedly because of a physical handicap. A state statute prohibited employment discrimination unrelated to ability and provided an administrative remedy. The complainant was required to bring a charge of unlawful practice before the state commission within one hundred eighty days of the occurrence. The statutory scheme then gave the commission one hundred twenty days to convene a fact finding conference to obtain evidence, ascertain the parties' positions, and negotiate a settlement. If the state commission found substantial evidence of a violation and conciliation proved unsuccessful, the matter was set for a formal adversary hearing before an adjudicator who made findings and recommended a final disposition. Full commission review followed, and finally came state judicial review of any commission order. Appellant pursued these state administrative remedies by filing a timely *pro se* complaint with the commission. Apparently through oversight, the commission scheduled the fact finding conference five days after the expiration of its one hundred twenty day jurisdictional period. Although the commission denied the employer's motion to dismiss, the state supreme court held that the time period was mandatory and the commission had no jurisdiction to consider the complaint.[204]

On appeal, the Supreme Court reversed. Although *Logan* was not a section 1983 action, the Court did discuss *Parratt* due process. The complainant's state administrative adjudicatory procedures were tantamount to a state law cause of action and thus a species of property so as to trigger the due process inquiry into the adequacy of the procedure. Substantively, the state could create defenses and immunities or even eliminate the remedy altogether, for the legislative process would be all that is due. The state's in-

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[203] 455 U.S. 422 (1982). Justice Blackmun wrote the Court's opinion joined by the Chief Justice and Justices Brennan, White, Marshall, and Stevens.

[204] Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 82 Ill. 2d 99, 411 N.E.2d 277 (1980). As a matter of state law, the case is not terribly significant. The complainant had hired counsel and filed a second timely complaint. 455 U.S. at 426. After the litigation had begun, the state legislature changed the statutory provisions to allow the commission prospective discretion to hold a fact finding conference. *Id.* at 425 n.1.

terest in fashioning state law remedies is paramount to all federal interests except the due process protection of citizens against irrational state action. The one hundred twenty day jurisdictional limit, however, was a procedural part of the state scheme that denied appellant his due process. He was entitled to have the commission reach the merits of his complaint. *Parratt* due process—the availability of a post-termination tort action against the commission—was not enough. Here the state system itself deprived appellant of his property right. Appellant was not challenging the commission's negligent error but was attacking the significance attributed to the error by the state scheme. In such situations, absent a need for quick state action and given the practicality of a pre-deprivation hearing, a post-deprivation hearing was inadequate procedure. The state law remedy also was deemed inadequate because the independent tort action would be lengthy, speculative, and not make complainant whole so far as reinstatement and vindication from discrimination were concerned.[205]

Since section 1983 is designed to reach Fourteenth Amendment limits, *Logan* must be read to limit *Parratt* somewhat. How much remains to be seen. A plaintiff will make out a section 1983 cause of action if the attack is aimed at the administration or procedures themselves and the state scheme itself is unfair. Whether *Parratt* due process will be extended to liberty violations,[206] intentional violations,[207] and substantive provisions of due process remains to be seen. Initial indications are mixed.[208] *Parratt* due process implicates basic section 1983 assumptions.[209] Moreover, this area of section 1983 law has profound significance for the allocation of adjudicative responsibility between state and federal courts. Potentially, this line of cases could develop into a reevaluation of incorporation theory and substantive application of the Bill of

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[205] Justice Blackmun also wrote a concurring opinion, joined by Justices Brennan, Marshall and O'Connor, which reached the equal protection issue. 455 U.S. at 438. Justice Powell, joined by Justice Rehnquist, concurred in the judgment based on a narrow equal protection rationale. *Id.* at 443 (Powell, J., concurring in judgment).

[206] *Cf.* Paul v. Davis, 424 U.S. 693 (1976).

[207] *Cf.* Ingraham v. Wright, 430 U.S. 651 (1977).

[208] *See* Occhino v. Northwestern Bell Telephone Co., 675 F.2d 220 (8th Cir.), *cert. denied*, 102 S. Ct. 2971 (1982); Pantoja v. City of Gonzales, 538 F.Supp. 335 (N.D. Cal. 1982).

[209] *Cf.* Monroe v. Pape, 365 U.S. 167 (1961).

Rights to the states. All that can be said now is that "unnecessarily broad statements of doctrine [have done] more to confuse than to clarify our jurisprudence."[210] An increase in, rather than the professed purpose to decrease, litigation will be the inevitable result as lawyers, litigants, and courts struggle for consistency and clarity.

C. *Exhaustion of Administrative Remedies and Comity*

The last three section 1983 decisions involved formal, procedural requirements. Unlike the decisions discussed in the last subsection that did more to confuse than to clarify, the trilogy we consider here reinforced familiar themes.

In *Patsy v. Board of Regents,*[211] in rejecting a position that would have had five supporters but for nineteen years of case law, the Court echoed Justice Brandeis' earlier observation that "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[212] Sitting en banc the former Fifth Circuit had adopted a "flexible" rule of exhaustion of state administrative remedies.[213] Under this rule, a section 1983 plaintiff could be required to exhaust if the following conditions were met: (1) there was an orderly scheme for revew or appeal; (2) agency remedies would more or less make the plaintiff whole; (3) reasonably prompt relief was assured; (4) agency procedures were fair and not burdensome or empty; and (5) appropriate interim relief was available to prevent irreparable injury and preserve the litigant's rights.[214]

The issue whether exhaustion of state administrative remedies should ever be required under section 1983 had been debated in

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[210] 455 U.S. at 443 n. * (Powell, J., concurring in judgment).

[211] 457 U.S. 496 (1982).

[212] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[213] Patsy v. Florida Int. Univ., 634 F.2d 900 (5th Cir. 1981) (en banc). This "flexible" rule was also adopted as Eleventh Circuit precedent. *See supra* note 1. As a member of the court, Judge Hill joined the seventeen judge majority.

[214] *Id.* at 912-13.

the journals[215] and the federal reporters.[216] The Supreme Court majority in *Patsy*[217] concluded that it was "not writing on a clean slate,"[218] but rather that since *McNeese v. Board of Education*[219] in 1963 the Court had consistently rejected the argument that a section 1983 suit should be dismissed whenever the plaintiff had not exhausted state administrative remedies.[220] The Court declined to overrule these precedents that it deemed consistent with both the original legislative intent of section 1983 and the recent expression of legislative intent in the 1976 enactment of the Civil Rights of Institutionalized Persons Act.[221]

Our concern in this essay was crucial in the Supreme Court debate as well. According to the majority, even if an exhaustion requirement would lessen the section 1983 burden on federal courts, further goals of comity, improve federal-state relations, and provide state agency guidance in the federal court action, such policy considerations per se would not justify a judicial exhaustion requirement inconsistent with congressional intent. The majority, however, buttressed its position by underscoring the controversy over these policies and assumptions. An important reason not to have a judicial exhaustion requirement was the existence of diffi-

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[215] *See, e.g.*, Turner *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979); Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565 (1975); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974).

[216] The courts of appeal were divided. The Third, Fourth, Sixth, Eighth, and Tenth Circuits followed a no exhaustion rule. Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975). The First, Second, Seventh, and Ninth Circuits used a flexible approach. Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Gonzalez v. Shanker, 533 F.2d 832 (2d Cir. 1976); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976); Canton v. Spokane School Dist. # 81, 498 F.2d 840 (9th Cir. 1974); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[217] Justice Marshall delivered the Court's opinion which was joined by Justices Brennan, Blackmun, and Stevens. In a separate opinion, Justice O'Connor joined by Justice Rehnquist "[r]eluctantly" concurred. 457 U.S. at 517 (O'Connor, J., concurring). Justice White concurred in all but the Marshall discussion of the Civil Rights of Institutionalized Persons Act. *Id.* (White, J., concurring in part).

[218] *Id.* at 500.

[219] 373 U.S. 668 (1963).

[220] *See* cases cited 457 U.S. at 500.

[221] 42 U.S.C. § 1997-1997j (Supp. V 1981).

cult questions concerning the design and scope of such a requirement. The majority rejected the requirement in part because it would have an effect opposite to that which its proponents desired, stating, "These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies."[222] In dissent, Justice Powell joined debate with this point of view.[223] He found the chief merit of an exhaustion rule in helping to deal with the flood of section 1983 actions, noting, "Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources."[224] Thus, the full Court agreed there was a problem, but was divided on whether exhaustion was a solution. The Court would have agreed had Congress considered the issue and concluded that it was. Justice Brandeis concluded his comments regarding stare decisis and the wisdom against unsettling rules of precedent with an observation we think particularly apt: "This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation."[225]

In one of those increasingly rare decisions in which all the Justices agree with the outcome, the Court considered the somewhat related doctrine of *Younger v. Harris*[226] abstention. Exhaustion and abstention are functionally similar in that federal court consideration is not eliminated but only postponed, in part because of the possibility it may be rendered unnecessary by state procedures. *Middlesex County Ethics Committee v. Garden State Bar Association*[227] was such a situation. The case involved a state's procedures for attorney discipline promulgated pursuant to the state

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[222] 457 U.S. at 517.

[223] Justice Powell was joined, so far as he discussed exhaustion, by the Chief Justice. *Id.* at 519 (Powell, J., dissenting).

[224] *Id.* at 533.

[225] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[226] 401 U.S. 37 (1971).

[227] 457 U.S. 423 (1982). Chief Justice Burger wrote for the Court, joined by Justices White, Powell, Rehnquist, Stevens, and O'Connor.

constitution's authorization of the state supreme court to license and discipline attorneys. Under state rules, a local district ethics committee appointed by the state supreme court first considers a claim of unethical conduct by an attorney. If a complaint is issued, the attorney is served with a copy and has ten days to answer. Upon a prima facie determination of unethical conduct, a formal hearing is held, at which the attorney may be represented by counsel, discovery is available, and witnesses are sworn. The local committee may dismiss, issue a private reprimand letter, or forward a presentment to the statewide disciplinary review board, which also is court appointed. After a *de novo* review, the board makes formal findings and recommendations to the state supreme court, which mandatorily reviews all decisions beyond a private reprimand. The court permits briefing and oral argument whenever disbarment or suspension for more than one year is recommended. Plaintiff, a member of the state bar, was served by a local ethics committee with a formal statement of charges of violating certain disciplinary rules. Instead of filing an answer, plaintiff filed suit in federal court alleging that the disciplinary rules violated the Constitution. While the federal case was on appeal, the state supreme court *sua sponte* ordered and heard argument on the plaintiff's constitutional challenges and adopted a rule providing for interlocutory review of such challenges.

Plaintiff did not have to "exhaust" but the federal court had to abstain because of the strong policy against federal interference with pending state judicial proceedings. The ongoing administrative procedures were judicial in nature, implicated important state interests, and provided an adequate opportunity to raise constitutional challenges. Hence, absent bad faith, harassment or other exceptional circumstances, the federal court was required to abstain from interfering.

This case involved the intersection of exhaustion and *Younger* abstention in that the state court had created an agency adjunct. Given *Patsy,* decided the same day, a complainant in a state administrative scheme may sue immediately in federal court, but under the *Middlesex County* approach to *Younger* abstention, a person against whom the complaint is filed may have to go through

the state procedures before suing under section 1983. As a result, at least a few section 1983 cases will be postponed if not obviated.

The last considered section 1983 case involved principles of comity and state taxation. In *Fair Assessment in Real Estate Association, Inc. v. McNary*,[228] state taxpayers sued county and state tax officials alleging a denial of equal protection and due process resulting from unequal taxation of real property. The majority sought to resolve a conflict among the circuits[229] and to reconcile divergent Supreme Court decisions that alternatively recognized the important, sensitive nature of state taxation and emphasized the broad immediacy of section 1983 relief. The Court concluded that the federalism principle of comity—a proper respect for state functions—barred taxpayers' damage suits under section 1983 so long as the state remedies are plain, adequate, and complete.[230] More than the postponement of federal court consideration of an exhaustion requirement, the comity doctrine permanently diverts claimants to state remedies.[231] Section 1983 plaintiffs in this category seeking damages are barred from federal court except, of

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[228] 454 U.S. 100 (1981). Justice Rehnquist wrote the majority opinion joined by the Chief Justice, and Justices White, Blackmun, and Powell.

[229] The Court accepted the view of the First, Eighth, and former Fifth Circuits. *See* Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 622 F.2d 415 (8th Cir. 1980); Ludwin v. City of Cambridge, 592 F.2d 606 (1st Cir. 1979); Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973). The Court rejected the contrary Seventh Circuit view. Fulton Market Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

[230] The Court did not reach the question whether the Tax Injunction Act, 28 U.S.C. § 1341 (1976), standing alone would require the same result. However, in another case decided later in the term not involving section 1983, California v. Grace Brethren Church, 457 U.S. 393 (1982), the Court held that the Act barred federal court injunctions against collection of state taxes and declaratory judgments holding state tax laws unconstitutional.

[231] Justice Brennan, joined by Justices Marshall, Stevens, and O'Connor, concurred in the judgment. 454 U.S. at 117 (Brennan, J., concurring in the judgment). He could not agree that the case should be governed by the application of comity principles and determined that Congress meant for the federal courts to have jurisdiction. Although the Court could not displace section 1983 *sua sponte*, Justice Brennan conceded that less evidence of congressional intent would have justified federal court deferral. Upon review of the congressional purpose, however, he concluded that any preconditions to state court remedies should apply with full force and effect in federal court. Since plaintiffs had failed to exhaust state administrative remedies, they could not sue in state court under state law. The same was true in federal court.

course, for the ultimate Supreme Court review of state decisions.[232] The Court dismissed the argument that principles of comity did not apply to section 1983 because the actions were against individual state officers with the pragmatic recognition that permitting such suits would operate to suspend collection of state taxes.

XI. Official Immunities

In two decisions, the Court considered whether the President and the White House staff are immune from civil damage actions arising out of their official decisions on behalf of the government. The cases arose from common facts and presented the same issue, but were decided differently. The two decisions are the latest in a line of cases that has evaluated the immunity of governors,[233] judges,[234] legislators and their staffs,[235] prosecutors,[236] and other members of the executive branch.[237] While the two cases perhaps are of no great moment for federal jurisdiction purposes, the second of the two may be somewhat significant. Public interest law suits, which involve judicial challenges to executive and congressional policies, play a prominent role in the federal docket. The immunity doctrines are but one entry barrier the courts have erected in the name of separated powers. In such suits, the judiciary is not just deciding a dispute between two party litigants. Rather, the judiciary is required to consider the way the executive and legislative branches have performed. Consequently, public interest litigation tends to skew the separation of powers and has an immediate effect far beyond the actual case or controversy.

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[232] Taken together, *McNary* and *Grace Brethren Church* describe a certain jurisdictional symmetry. So long as the state remedy is adequate, challengers of state taxes seeking damages, an injunction or declaratory relief must go to state courts and state agencies. *See supra* note 230.

[233] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[234] Supreme Court of Va. v. Virginia Consumers Union, Inc., 446 U.S. 719 (1980); Stump v. Sparkman, 435 U.S. 349 (1978).

[235] Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972).

[236] Imbler v. Pachtman, 424 U.S. 409 (1976).

[237] Butz v. Economou, 438 U.S. 478 (1978).

The presidential immunity case was *Nixon v. Fitzgerald.*[238] The plaintiff was a management analyst with the Air Force in 1968 when he testified before a congressional committee about cost overruns and unexpected technical difficulties in the development of a new aircraft. In 1970, during the defendant's presidency, plaintiff was "R.I.F.-ed" during a departmental reorganization. After exhausting federal administrative remedies, plaintiff sued various Defense Department officials, White House aides, and President Nixon. After extensive protracted discovery and several judicial rulings, only the President and two White House aides remained as defendants to raise the threshold question of immunity.[239]

The Court recognized two alternative approaches.[240] First, a qualified immunity defense varied with the nature of the decisionmaker's official function and with the range of decisions for which good faith might be relevant. Second, an absolute immunity defense protected decisionmakers with especially sensitive responsibilities. The choice between the two was guided by the Constitution, federal statutes, history, and public policy. These guidelines mandated an absolute immunity for the unique office of President. Diversion by private lawsuits of such a sensitive and powerful decisionmaker could jeopardize the effective functioning of government. The prominence of the office would render the chief executive an easily identifiable target for such suits. Allowing such litigation would not serve broad public interests and would frustrate the system of separated powers. The scope of the President's

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[238] 102 S. Ct. 2690 (1982). Justice Powell wrote the Court's opinion joined by Justices Rehnquist, Stevens, and O'Connor.

[239] The case also involved an interesting application of the collateral order doctrine. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Because the unsettled immunity determinations resolved an important issue separate from the merits, the question was appealable to the District of Columbia Circuit Court and thus subject to Supreme Court certiorari jurisdiction under 28 U.S.C. § 1254. *See* Helstoski v. Meanor, 442 U.S. 500 (1979); Abney v. United States, 431 U.S. 651 (1977).

[240] The Court developed the immunity analysis in section 1983 suits concerning state executives and extended it to other state officers. Stump v. Sparkman, 435 U.S. 349 (1978) (judge); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor). The Court considered Butz v. Economou, 438 U.S. 478 (1978), to have imported the analysis onto the federal level.

absolute immunity would be coterminous with the outer perimeter of the responsibilities of the office. Finally, the immune President would be reined sufficiently by the threat of impeachment, informal checks, press scrutiny, congressional oversight, and reelection ambition. It followed then that plaintiff's suit was not allowable since a president was well within the outer limits of constitutional and statutory authority to prescribe the conduct of the service.[241]

So far as our theme is concerned, there is no historical record of numerous suits against the President.[242] However, a less than absolute immunity tied to the function, rather than to the office, "would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose."[243] More than a concern for the court system, the needs of the national governmental system simply outweighed the right of individuals to sue for damages.[244] Still, the net effect of the decision will reduce the federal caseload even if only by reducing the number of summary judgments.[245]

Of the two, the second decision may be more significant for present purposes, if only because it applies to a class of defendants with more than one member. *Harlow v. Fitzgerald*[246] involved two senior White House aides who allegedly conspired with the Presi-

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[241] Chief Justice Burger concurred separately to underscore the constitutional requirement of separation of powers. 102 S. Ct. at 2706 (Burger, C.J., concurring).

Justice White, joined by Justices Brennan, Marshall, and Blackmun, dissented. *Id.* at 2709 (White, J., dissenting). The dissent did not agree that the presidency must be cloaked with absolute immunity to operate effectively. It was error to attach such an immunity to the office and ignore the function actually being performed. Instead, the scope of immunity should be determined directly by the task performed.

Justice Blackmun, joined by Justices Brennan and Marshall, dissented out of a concern that the decision placed the President above the law. *Id.* at 2726. (Blackmun, J., dissenting).

[242] *Id.* at 2703 n.33.

Prior to Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), there was only one such suit against a president. 102 S. Ct. at 2706 n.1 (Burger, C.J., concurring) (citing Livingston v. Jefferson, 15 Fed. Cas. 660 (C.C. Va. 1811) (No. 8,411)). After *Bivens*, there were only a handful of such suits, most of which were treated as being frivolous. 102 S. Ct. at 2725 (White, J., dissenting).

[243] 102 S. Ct. at 2705.

[244] *Id.* at 2706 (Burger, C.J., concurring).

[245] *Cf.* 102 S. Ct. at 2725 (White, J., dissenting).

[246] 102 S. Ct. 2727 (1982). Justice Powell wrote for the Court and was joined by Justices White, Stevens, and O'Connor.

dent to violate plaintiff's constitutional and statutory rights. The Court began with the proposition that qualified immunity is the norm for executive officials.[247] The Court rejected defendants' argument that their immunity should be derived from the President's, and should therefore be absolute, in much the same way as congressional aides are shielded under the legislator's Speech and Debate Clause immunity.[248] Instead, under the Court's functional approach, immunity extends no further than its justification warrants. The public interest in the specific function, rather than the station of the decisionmaker, determines the immunity level. The burden of proof is on the official invoking an immunity. To invoke an absolute immunity, the official must demonstrate that the responsibilities of the position include functions so sensitive as to require a total shield and, in particular, that the act in question be such a protected function. As opposed to a general, total immunity, the special functions approach isolates sensitive areas such as national security and foreign policy for absolute immunity. In less sensitive, and consequently less protected, functions, a qualified immunity will suffice to defeat insubstantial claims without resort to trial. This is where the concerns of our essay held sway with the Court.

The Court balanced the alternative evils. At times, a damage action may be the only realistic remedy for officials' abuses. Still, unfounded suits obviously are costly to the individual office holder. Less obviously, unfounded suits generate social costs including litigation expenses, diversion of office holders, and deterrence of able individuals from accepting such positions. On balance, a qualified immunity would permit "[i]nsubstantial lawsuits [to] be quickly terminated."[249] To this end, the Court revamped the qualified immunity or "good faith" affirmative defense in one important aspect. Previous cases had recognized an objective and a subjective component of good faith. The Court eliminated the subjective component that had provided that there would be no immunity if

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[247] *See* Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[248] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972).

[249] *Butz*, 438 U.S. at 507-08 (1978), *quoted in Harlow*, 102 S. Ct. at 2737.

the official "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[250] This concern with "permissible intentions" had proved inconsistent with the purpose of preventing insubstantial claims from proceeding to trial. Therefore, the Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[251] Instead, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[252] This threshold objective immunity question should be determined on a summary judgment proceeding before discovery. Having announced this new approach, the Court remanded to the district court for further consistent proceedings.[253]

In our view, these immunity cases seem to be an appropriate device to stem two evil byproducts of litigiousness targeted at public officials. Those in office are rendered less effective and many others are discouraged from serving in government. By cloaking judges, prosecutors, members of Congress and their staffs, and executive officials in various degrees of immunity, many improbable suits are prevented or summarily handled.[254]

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[250] Wood v. Strickland, 420 U.S. 308, 322 (1975). *See also* Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

[251] 102 S. Ct. at 2738. The records in the two companion suits demonstrate the intrusive and costly nature of discovery in such cases.

[252] *Id.*

[253] Justice Brennan, joined by Justices Marshall and Blackmun, concurred with the substantive standard but disagreed that discovery should never be appropriate before an immunity determination. 102 S. Ct. at 2740 (Brennan, J., concurring).

Justice Rehnquist concurred with the Court's approach until a majority would be willing to reconsider *Butz v. Economou*. *Id.* at 2741 (Rehnquist, J., concurring).

The Chief Justice dissented and would have held that such aides enjoyed an absolute immunity derivative of the President's. *Id.* at 2741 (Burger, C.J., dissenting).

[254] Indeed, the only realistic criticism of the immunity decisions is that they did not go far enough in protecting these officials. Chief Justice Burger, who would have gone further in protecting presidential aides, noted that the decision created a disincentive for potential office holders and added to the Supreme Court's already overcrowded docket:

> In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases

XII. Relief in the Nature of Habeas Corpus

Last considered, but certainly not least significant, is habeas corpus. The past term saw a continuation of recent Supreme Court preoccupation[255] with the Great Writ, which has "become so inappropriately routine and commonplace in criminal litigation today that some might understandably refer to it as the 'Great(ly Abused) Writ.' "[256] Habeas corpus is central to our concerns here. The symptoms the writ suffers from are the result of the maladies of the system. As Justice Holmes once observed, "[H]abeas corpus cuts through all forms and goes to the very tissue of the structure."[257] We consider five decisions.

In *Rose v. Lundy*,[258] the Court adopted an exhaustion rule for section 2254 petitions even more rigorous than the Eleventh Circuit's,[259] while rejecting the Sixth Circuit's approach. After the pe-

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> may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. These potential risks inevitably will be a factor in discouraging able men and women from entering public service.

Id. at 2743.

[255] *See, e.g.*, Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977); Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 Iowa L. Rev. 233 (1979); Cobb, *The Search for a New Equilibrium in Habeas Corpus Review*, 32 U. Miami L. Rev. 637 (1978).

[256] Galtieri v. Wainwright, 582 F.2d 348, 365 (5th Cir. 1978) (en banc) (Hill, J., specially concurring).

[257] Frank v. Magnum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). *See generally* *Note, Developments in the Law - Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970).

[258] 455 U.S. 509 (1982). Justice O'Connor wrote the opinion of the Court, joined in total by the Chief Justice and Justices Powell and Rehnquist.

[259] The Eleventh Circuit rule, adopted from the Fifth Circuit, followed the Ninth Circuit's "total exhaustion rule." *See* Genter v. Wainwright, 678 F.2d 934 (11th Cir. 1982); Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976). A majority of the courts of appeals followed the opposite rule and allowed the district court to consider the exhausted claims in mixed petitions. *See* Katz v. King, 627 F.2d 568 (1st Cir. 1980); United States *ex rel.* Tratino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); Cameron v. Fastoff, 543 F.2d 971 (2d Cir. 1976); Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973); Brown v. Wisconsin State Dept. of Public Welfare, 457 F.2d 257 (7th Cir.), *cert. denied*, 409 U.S. 862 (1972); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Whiteby v. Meachem, 416 F.2d 36 (10th Cir. 1969), *rev'd on other grounds*, 401 U.S. 560 (1971).

titioner was convicted in state court, he unsuccessfully sought post-conviction relief in the state courts. He then filed a petition for a writ of habeas corpus under section 2254 of Title 28 of the United States Code. The district court granted the writ on grounds of exhaustion, notwithstanding that the petition also included claims that had not been presented in the state courts. After considering comity principles, legislative history, case precedents, and the policy of section 2254, the Court held that a district court must dismiss mixed petitions, leaving the petitioner with the choice of returning to state court to exhaust all claims or amending and resubmitting the habeas petition to present only exhausted claims to the district court.[260]

Our central concern here was also an important concern in *Lundy*. The Court was convinced that, rather than complicate or delay, the exhaustion requirement would encourage litigants to bring their claims to state court first and present the federal court with a single petition, in the process reducing wasteful piecemeal litigation.[261] In this way, the state courts will have the first opportunity to give full relief and the federal court will have the benefit of a complete record and the state court's consideration. The dissent, on the other hand, viewed the rule as merely delaying final disposition and imposing unnecessary burdens on state and federal courts alike.[262] Justice Stevens blamed federal judges for creating

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[260] In part III.C. of the opinion, the plurality urged that a petitioner who decides to proceed only with exhausted claims and deliberately sets aside unexhausted claims would risk dismissal of subsequent petitions concerning the set aside claim under 28 U.S.C. § 2254, Rule 9(b). *Id.* at 520-21.

Justice Blackmun took issue with the plurality's rationale and would have adopted a rule of dismissal of unexhausted claims in mixed petitions. *Id.* at 523 (Blackmun, J., concurring in the judgment).

Justice Brennan, joined by Justice Marshall, agreed with all but the Rule 9 portion of the plurality opinion. *Id.* at 533 (Brennan, J., concurring in part and dissenting in part).

Justice White agreed with Justice Brennan regarding Rule 9 and agreed with Justice Blackmun regarding the dismissal of only unexhausted claims in mixed petitions. *Id.* at 538 (White, J., concurring in part and dissenting in part).

Justice Stevens would have adopted a flexible rule of discretion allowing the district court to decide whether the presence of unexhausted claims renders inappropriate the decision of exhausted claims on the merits. *Id.* at 541-42 (Stevens, J., dissenting).

[261] *Id.* at 520.

[262] *Id.* at 539 (Stevens, J., dissenting).

the problem and for compounding the effect. He observed that "federal judges have at times construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal," thereby attracting more petitions into the federal courts and motivating the Court to create special restrictive procedural rules for coping with the crunch.[263]

Lane v. Williams[264] involved both the mootness doctrine[265] and habeas corpus. Petitioners pleaded guilty in unrelated state court hearings during which no mention was made of a three year parole term that state law mandated would follow their negotiated sentence. Each completed his prison sentence, was released on parole, and was then reincarcerated for violation of parole. While in custody, each petitioner sought federal habeas corpus based on the argued due process failure of the trial judges to advise them of the mandatory parole before accepting their guilty pleas. The district court granted the two petitions and, granting the prayer for relief, ordered their release as specific performance of the plea agreement actually entered. After an appeal to and remand from the court of appeals, the district court again granted the requested specific performance rather than setting aside the convictions and allowing new pleas. During the appeal, petitioners' terms expired and they were released. On this basis, the district court merely entered an order declaring that the expired mandatory parole terms were void.

The general rule is that an attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has run.[266] The Court declined to extend this rule to challenges to parole vio-

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[263] Justice Stevens cited nonretroactivity, the emerging "cause and prejudice" doctrine, and the exhaustion requirement as examples of this process. *Id.* at 547 (Stevens, J., dissenting).

[264] 455 U.S. 624 (1982). Justice Stevens wrote the majority opinion, joined by the Chief Justice and Justices White, Stevens, Powell, Rehnquist, and O'Connor.

[265] *See supra* text accompanying notes 53-67.

[266] *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968). The issue for decision should be distinguished from the distinct inquiry into whether the custody requirement is satisfied by being on parole. It is satisfied as long as the parole continues. *See* Jones v. Cunningham, 371 U.S. 236 (1963).

lations. No civil disabilities would result from the parole violation findings. A speculative concern for future poor employment prospects or increased sentences for as yet uncommitted crimes is not enough and would not be remedied by an order voiding the expired term. The Court concluded that "[t]hrough the mere passage of time, respondents have obtained all the relief that they sought."[267] One important variable in the Court's calculus was that "[c]ollateral review of a final judgment is not an endeavor to be undertaken lightly."[268]

In two other important habeas decisions, the Court extended the "cause and prejudice" approach inaugurated in *Wainwright v. Sykes*.[269] The first case, *Engle v. Isaac*,[270] involved three state prisoners who sought relief under section 2254 but who failed to comply with a state rule requiring contemporary objections to jury instructions.[271] Prior to January 1, 1974, state law provided that a murder defendant who pled self defense bore a preponderance burden of proof. In 1974, a change in the state criminal code provided that the "burden of going forward with the evidence of an affirmative defense is upon the accused."[272] For two years state courts as-

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[267] 455 U.S. at 633. Justice Marshall, joined by Justices Brennan and Blackmun, dissented and would have extended the general rule because there existed the possibility that collateral legal consequences would be imposed on the basis of the challenged parole violation. *Id.* (Marshall, J., dissenting).

[268] *Id.* at 632 n.13.

[269] 433 U.S. 72 (1977).

[270] 456 U.S. 107 (1982). Justice O'Connor wrote the majority opinion, joined by the Chief Justice and Justices White, Powell and Rehnquist.

Justice Blackmun concurred in the result without opinion. *Id.* at 135 (Blackmun, J., concurring).

Justice Stevens concurred in part and dissented in part. *Id.* at 136. He would have reversed on the merits under his analysis in Rose v. Lundy, 455 U.S. 509, 538 (1982) (Stevens, J., dissenting).

Justice Brennan, joined by Justice Marshall, dissented and accused the majority of "judicial activism." 456 U.S. at 137 (Brennan, J., dissenting). He urged that (1) the petitions should have been dismissed for lack of exhaustion; (2) since the claim did not then exist within the contemplation of constitutional law there could be no procedural default; (3) the majority improperly recast petitioners' claim. Although adhering to his dissent in *Sykes*, 433 U.S. at 99-100, he concluded that the Court's result was not supported by either the *Sykes* rationale or the majority's buttressing cost-benefit analysis. *See infra* text accompanying note 279.

[271] The state rule paralleled FED. R. CRIM. P. 30. 456 U.S. at 115 n.15.

[272] OHIO REV. CODE ANN. § 2901.04(A) (Baldwin 1975).

sumed that no change had been made in state procedures, but in 1976 the Ohio Supreme Court held that the 1974 provision placed only the burden of production, not the burden of persuasion, on the defendant.[273] Three unrelated state cases arose between 1974 and 1976 in which the defendant had failed to object to a jury instruction to the effect that a defendant who pled self defense had the burden of proving it by a preponderance of the evidence. Two of the three failed to raise the issue in their state appeals; the third was not permitted to raise the issue because of the state contemporaneous objection rule. Each unsuccessfully sought relief in the federal district court and the Sixth Circuit reversed in all three cases.[274]

The Supreme Court, however, reversed and remanded. The majority concluded that insofar as petitioners challenged the correctness of the self defense instructions under state law they alleged no deprivation of federal rights and were entitled to no federal relief. Petitioners had alleged a colorable constitutional claim, however, by arguing that, since self defense negates the elements of the crimes charged against them of voluntary, unlawful, and purposeful or knowing behavior, once the defendant raised the possibility of self defense, due process required that the state disprove the defense as part of its burden of proving the requisite mental state.[275] Nonetheless, because petitioners had not preserved this claim before the state courts, the Court first considered whether they could litigate the issue in a federal habeas proceeding. Extending *Sykes*, the Court held that a state defendant barred by procedural default from raising such a constitutional claim on state direct appeal could not litigate the issue in a section 2254 proceeding without showing cause for and actual prejudice from the default. The Court first rejected the argument that the *Sykes* rule

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[273] State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

[274] *See* Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980) (en banc).

[275] The Supreme Court has not so held, although the argument may be inferred from Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970). *But cf.* Leland v. Oregon, 343 U.S. 790 (1952). Some courts have accepted the argument on the merits. *See, e.g.*, Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979). Other courts have not. *See, e.g.*, Carter v. Jago, 637 F.2d 449 (6th Cir. 1980); Baker v. Muncy, 619 F.2d 327 (4th Cir. 1980).

should only apply to constitutional errors that did not affect the truthfinding function of the trial. Petitioners' two contentions for "cause" next required that the Court go on to explore the *Sykes* rule. Petitioners argued that they could not have known at the time that due process rights were implicated in assigning burdens of affirmative defenses and second, that a trial objection would have been a futile gesture under long standing state law. Under the *Sykes* principles, futility alone is not "cause" for failing to object at trial and bypassing the perceived unsympathetic state courts. Even a state court that has rejected the constitutional claim might reconsider and should have the opportunity to do so. Something beyond novelty may be "cause." Trial counsel need not demonstrate "extraordinary vision" nor object at every turn in hopes that there is somewhere, sometime, some hidden constitutional claim. Compliance with a state contemporaneous objection rule is a *sine qua non* to federal habeas relief only when trial counsel has "the tools to construct [a] constitutional claim."[276] This was so in the case before the Court. The seminal due process case was decided nearly five years before trial.[277] Thus the basis of the constitutional claim was available, other defense attorneys perceived and litigated the claim, and even commentators had recognized the theory. Federalism, comity, and finality mandated that so subjective an unawareness could not be considered cause for excusing the procedural default, at least so long as the constitutional guarantees of a fair trial and competent legal representation were satisfied. Having failed to establish cause, the first part of the *Sykes* conjunctive, petitioners would not be heard in federal habeas proceedings no matter how prejudiced they were by the alleged error.[278]

Concerns central to our essay once again played a role in the Court's analysis. The *Engle* majority took the opportunity to extend the *Sykes* rule for four additional reasons:[279] (1) both the in-

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[276] 456 U.S. at 133.

[277] *In re* Winship, 397 U.S. 358 (1970).

[278] *See infra* notes 281-93.

[279] The five reasons provided in *Sykes* included:

(1) "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding."

dividual and society have an interest in finality of convictions; (2) important and expensive resources are spent at the trial panoplied with procedural protections which are entitled to some prominence; (3) because retrials often are made more difficult, if not impossible, by the passage of time, a writ may be a practical reward of freedom; and (4) costs are exaggerated by a federal system with a post hoc national intrusion on primary state authority.[280]

The second related decision, *United States v. Frady*,[281] provided further opportunity to develop the *Sykes* doctrine. *Frady* involved the prejudice prong and petitions under section 2255 of Title 28 of United States Code. Petitioner was serving a life term for a murder committed in 1963 in the District of Columbia. The case began[282] with a motion under section 2255 seeking to vacate the sentence on the ground that petitioner was convicted by a jury erroneously instructed on the meaning of malice, which eliminated the possibility of a manslaughter verdict. The district court denied the motion because petitioner had failed to object at trial or to challenge the instruction on direct review and in prior motions. The court of appeals reversed under the plain error standard of Federal Rule of Criminal Procedure 52(b).[283] Clarifying past mixed signals,[284] the

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(2) A contemporaneous objection "enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question."

(3) "A contemporaneous-objection rule may lead to the exclusion of evidence objected to, thereby making a major contribution to finality in criminal litigation."

(4) The *Fay v. Noia* rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."

(5) A contemporaneous-objection rule "encourages the result that [criminal trials] be as free of error as possible."

Wainright v. Sykes, 433 U.S. at 88-90, *quoted in* Engle v. Isaac, 456 U.S. at 145-46 (Brennan, J., dissenting) (citations omitted).

[280] 456 U.S. at 120-21. Justice Brennan took the majority to task on each point. *Id.* at 150-51 (Brennan, J., dissenting).

[281] 456 U.S. 152 (1982). Justice O'Connor wrote for a seven justice Court (the Chief Justice and Justice Marshall took no part), and was joined by Justices White, Rehnquist, and Powell.

[282] Multiple prior appeals and motions to vacate or reduce sentence are chronicled in 456 U.S. at 157 n.4.

[283] 636 F.2d 506 (D.C. Cir. 1982). The Supreme Court was careful to note that its section 2255 precedents from the District of Columbia had national application. 456 U.S. at

Supreme Court appealed to the principle that a prisoner must clear a significantly higher hurdle on collateral attack than would obtain on direct appeal. The Court extended the "cause and actual prejudice" standard to section 2255[285] and held that the federal interest in finality required that on collateral attack of trial errors to which no contemporaneous objection or appeal argument was made, a petitioner must show "cause" excusing a double procedural default and "actual prejudice" resulting from the alleged error.[286] In the flip analysis of *Engle*, the Court focused on the prejudice component.[287] First, the Court defined prejudice in the context of errors in the jury charge as " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesireable, erroneous, or even universally condemned.' "[288] Next, the Court applied the standard to conclude that petitioner failed in his burden to show more than the mere possibility of constitutional error where the uncontradicted evidence in the record showed "malice aplenty" and petitioner had presented no colorable mitigation evidence. Simply stated, there was no risk of a fundamental miscarriage of justice.[289]

159-62. Rule 52 has been used guardedly in the Fifth and Eleventh Circuits. *See* United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980).

[284] *Compare* Henderson v. Kibbe, 431 U.S. 145, 154 (1977) *with* Davis v. United States, 411 U.S. 233, 240-41 (1973).

[285] *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

[286] 456 U.S. at 167-68. *See also Engle*, 456 U.S. at 135 (1982) (rejecting argument for plain error standard in section 2254 proceedings). The Court was careful to note, however, that Rule 52 would be relevant on a court of appeals direct review of the district court's section 2255 proceeding. 456 U.S. at 166 n.15.

[287] Having concluded there was no prejudice, the Court declined to analyze "cause." 456 U.S. at 168.

[288] 456 U.S. at 169, (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (citations omitted)).

[289] Justice Stevens concurred and adhered to his *Rose v. Lundy* analysis. 456 U.S. at 175.

Justice Blackmun concurred in the judgment. *Id.* (Blackmun, J., concurring in the judgment). He dismissed comity concerns and the policy of finality because the proceeding was under section 2255 and Rule 52 was a specific exception to the federal contemporaneous objection rule. Under the plain error standard, he found none.

Justice Brennan dissented, maintaining that Rule 52 applied to section 2255 proceedings relying on congressional intent. He also criticized the cause and prejudice analysis

Engle and *Frady* may be best understood as the latest efforts to narrow the *Fay v. Noia*[290] deliberate bypass rule or what, if anything, remains of it.[291] They are the latest in a series of decisions in which the Court has reemphasized the needs of the system.[292] Substantive rights have been balanced against procedural rules based on notions of federalism and finality. Although one may quarrel with the balance,[293] the need for some procedural order to allow the federal court system to cope with the deluge is painfully obvious.

So far as our essay is concerned, the last considered decision is a classic example of the need for procedural order. *Lehman v. Lycoming County Children's Services Agency*[294] involved section 2254 and a state court termination of parental rights. Petitioner voluntarily placed her three children in the legal custody of the county agency that placed them in foster homes. The agency brought proceedings in which the state court terminated petitioner's parental rights based on incapacity which did not involve misconduct. Three years later, petitioner sought relief in federal court under section 2254 and prayed for a declaration of the unconstitutionality of the state parental rights termination statute, a declaration that she was the children's legal parent, and an order releasing the children to her custody unless a state court determined that the best interest of the children required temporary state custody. The district court dismissed and the Third Circuit affirmed.[295] The Supreme Court granted certiorari to resolve a conflict among the circuits over the availability of a section 2254 rem-

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itself. *Id.* at 178 (Brennan, J., dissenting).

[290] 372 U.S. 391 (1963).

[291] What remains of the *Fay* approach is unclear. Presumably, a pivotal decision such as an attorney failure to take an appeal without consulting the client would not be the client's deliberate bypass. The Chief Justice has suggested that the decision not to have an attorney might be another example. *See* Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (Burger, C.J., concurring). Beyond such egregious examples, little else likely survives of the rule.

[292] *See* Engle v. Isaac, 456 U.S. 107 (1982); Sumner v. Mata, 449 U.S. 539 (1981); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Davis v. United States, 411 U.S. 233 (1973).

[293] *See* 456 U.S. at 178 (Brennan, J., dissenting).

[294] 102 S. Ct. 3231 (1982). Justice Powell wrote the opinion for the Court, joined by the Chief Justice and Justices White, Rehnquist, Stevens and O'Connor.

[295] 648 F.2d 135 (3d Cir. 1981) (en banc).

edy in such a situation.[296] The Court held that section 2254 does not provide jurisdiction in the federal courts to consider collateral challenges to state court judgments involuntarily terminating parental rights. The children were not within the custody of the state within the meaning of the statute.[297] Their foster parent custody is no different than that of natural or adoptive parents. The Court declined to expand the concept of custody to cover challenges of state child custody decisions based on alleged constitutional defects collateral to the merits.[298] General federalism, special solicitude for state interests in family law, and the exceptional need for finality in child custody disputes supported the decision. That English and many state procedures authorized habeas corpus in child custody matters was beside the point. "[R]eliance on what may be appropriate *within* the federal system or *within* a state system is of little force where—as in this case—a *state judgment* is attacked collaterally in a *federal* court."[299] The Court concluded that section 2254, "representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns."[300] Obviously, opening section 2254 to child custody disputes of all kinds[301] would have had a staggering impact on federal dockets, wholly apart from concerns of federalism and finality.

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[296] Besides the Third Circuit in the instant case, the First Circuit had held there was no such jurisdiction. *See* Sylvander v. New England Home for Wanderers, 584 F.2d 1103 (1st Cir. 1978). The Fifth and Eleventh Circuit rules were the opposite. *See* Davis v. Page, 640 F.2d 599 (5th Cir. 1981) (en banc); Rowell v. Oesterle, 626 F.2d 437 (5th Cir. 1980).

[297] The Court expressed "no view" concerning other state confinements in institutions. 102 S. Ct. at 3237 n.12.

[298] The holding did not concern direct review of final state court decisions. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

[299] 102 S. Ct. at 3239.

[300] *Id.* at 3240.

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. *Id.* (Blackmun, J., dissenting). Having independently examined the statute, legislative history, and precedents, he found no jurisdictional bar. Instead, he relied on the next friend rubric of habeas corpus jurisprudence to provide a prudential bar. *See* Weber v. Garza, 570 F.2d 571 (5th Cir. 1978). The district court should withhold the writ in all but the most extraordinary cases when the parent petitioner demonstrates, as next friend, that the writ would operate in the best interest of the child. Petitioner had not met this high threshhold.

[301] *Compare* 102 S. Ct. at 3238 n.15 *with id.* at 3242 n.6 (Blackmun, J., dissenting).

XIII. CONCLUSION

The decisions of this term highlight one important conclusion. The federal courts are in part to blame and on the whole unwilling or unable to stem litigiousness. Here we can do no more than note the problem, suggest who should be the problem solver, and identify a few broad guiding principles for the task.

A decade ago, Judge Friendly observed that the "federal courts now have more work than they can properly do—including some work that they are not institutionally fit to do."[302] In the past decade, the expansion has continued apace, fueled by congressional legislation, court interpretations, and a general increase in the volume of cases.[303] Functionally, such an exponential expansion is legitimate only so far as it is necessary to guarantee federal constitutional rights and protect other uniquely federal and paramount interests.[304] The expansion is illegitimate so far as it unnecessarily denigrates state court and administrative jurisdiction and needlessly adds to docket pressures and the delay and expense of federal court litigation.[305] These pressures are profoundly felt by the federal courts. Habeas corpus and section 1983 are two paradigms. Justice Stevens, dissenting in *Rose v. Lundy*,[306] wrote:

> The fact that federal judges have at times construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment has had two unfortunate consequences. First, it has encouraged prisoners to file an ever-increasing volume of federal applications that often amount to little more than a request for further review of asserted grounds for reversal that already have been adequately considered and rejected on direct review. Second, it has led this Court into the business of creating special procedural

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[302] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3-4 (1972); *See also* Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981).

[303] *See generally* Bartels, *Recent Expansion in Federal Jurisdiction: A Call for Restraint*, 55 ST. JOHN'S L. REV. 219 (1981).

[304] *Id.* at 220.

[305] *Id.*

[306] 455 U.S. 509 (1982). *See supra* text accompanying notes 258-63.

rules for dealing with this flood of litigation.[307]

Justice Powell, dissenting in *Patsy v. Board of Regents*,[308] made the same point about section 1983:

> Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the [exhaustion] rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe v. Pape* was decided, only 270 civil rights actions were begun in the federal district courts. In 1981, over 30,000 such suits were commenced. The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal-court litigants, including others who assert that their constitutional rights have been infringed.[309]

An important feature of the section 1983 explosion has been the exponential development of constitutional rights. Section 1983 has become the procedural vehicle for enforcing the broadened protections of the Bill of Rights and the Fourteenth Amendment.[310] Although the federal judiciary does more than its share, for example by implying causes of action,[311] Congress has expanded the federal jurisdiction expressly in a steady stream of legislation.[312] This symbiosis has caused some commentators to conclude that "[t]he search for judicial restraint in the foreseeable future is unlikely to be successful . . . because . . . the courts *must* intervene more often in an administrative society."[313] We believe, however, that the federal courts control some of their own destiny in the exercise of self restraint.

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[307] *Id.* at 547 (Stevens, J., dissenting).

[308] 457 U.S. 496 (1982). *See supra* text accompanying notes 211-25.

[309] *Id.* at 533 (Powell, J., dissenting) (citations and footnote omitted).

[310] *See supra* text accompanying notes 206-10. *See also* Bartels, *supra* note 303, at 231-33; *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

[311] *See supra* text accompanying notes 117-43; Bartels, *supra* note 303, at 226-31.

[312] Judge Bartels lists some of the most recent: Occupational Safety and Health Act of 1970; the Consumer Product Safety Act; the Toxic Substances Control Act; the Employee Retirement Income Security Act of 1974; the Federal Coal Mine Health and Safety Act of 1969; the Black Lung Benefits Act of 1972; the Fair Debt Collections Practice Act; and the Clean Air Amendments Act of 1977. Bartels, *supra* note 303, at 233-35.

[313] Grenias & Windsor, *Is Judicial Restraint Possible in an Administrative Society?*, 64 JUDICATURE 400 (1981) (emphasis in original).

While admittedly the federal courts are partly to blame for the problems of federal jurisdiction, the major impetus for reform and remedy must come from Congress. Unlike common law courts, the federal courts are courts of limited jurisdiction and "possess no warrant to create jurisdictional law of their own."[314] In one direction, "the established principle [is] that '[t]he jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation.' "[315] In the opposite direction much the same is true.[316] What the courts can accomplish is molecular compared to the molar power of Congress.[317]

How Congress should go about exercising its power is another question. We agree that "[p]alliative measures to combat the caseload crunch such as increasing the numbers of judges and staff or stimulating further procedural streamlining have seemingly reached the limit of their usefulness."[318] What Congress should do we cannot say. We can describe, however, how Congress should go about deciding what to do.

What must be avoided at all costs is the introduction of structural changes in a piecemeal fashion without a clearly conceived structural plan. We no longer can afford tinkering with federal jurisdiction. Wholly apart from the merits, recent congressional efforts at limiting federal jurisdiction to achieve substantive reform largely are wastes of legislative efforts.[319] Short run patchwork so-

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[314] Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, (1982) (Powell, J., concurring in the judgment).

[315] Jackson Transit Auth. v. Local Div. 8, Amalgamated Transit Union, 457 U.S. 15, 30 (1982) (Powell, J., concurring) (citations omitted) (quoting American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951)).

[316] In a few traditional areas, the abstention doctrine, for example, the federal courts do withdraw. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233-59 (1980).

[317] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[318] Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 61 (1981). Indeed, there is a peculiar irony in the growing concern for the bureaucratization of the judicial system which many expect to hold bureaucracies in check. *Id.* at 65. *See also* Higginbotham, *Bureaucracy - The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980).

[319] *See, e.g.*, Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts in The Supreme Court 1980 Term*, 95

lutions will only complicate the long run problems in federal jurisdiction. Congress should be reminded of one important reality that Frankfurter and Landis pointed out half a century ago: "The federal judicial system is one. Each member of the hierarchy of its courts has its specialized difficulties. But, in the large, the system articulates as a system."[320]

While we cannot disagree that the federal court system does articulate as a system, we must add one often overlooked point. In a federation, the federal and state court systems must be complimentary. The apparatus for the administration of justice in this country is not exclusively federal or state. No better example can be offered than federal collateral attacks on state criminal convictions. While our federalism provides for separate state and federal judicial systems, in the end it must be recognized that there is one apparatus for the administration of justice in this country. Just as the federal court system articulates as a system, so does the court system as a whole, federal and state.

Further, we submit that the protection of the constitutional rights of the citizens is not, ought not be, and cannot be the exclusive business of the federal courts. There simply are not enough federal judges and federal courts to see to the protection of all the people and all their rights. That is reason enough for the fact that state jurists are obligated to apply federal law and federal constitutional guarantees in their work. Indeed, how else can one expect the state judiciary to identify with and protect federal rights than by having a hand in their evolution.

In recent decades there has been a drawing apart of state and federal courts. There has been rapid movement in federal law—particularly in federal constitutional law as found and ex-

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HARV. L. REV. 17 (1981); Abraham, *Limiting Federal Court Jurisdiction: A "Self-inflicted Wound"?* 65 JUDICATURE 179 (1981). Have the Johnson Act of 1934 and the Tax Injunction Act of 1937 contributed anything to the long-run solution of federal jurisdiction? *See* 28 U.S.C. §§ 1341-1342.

[320] F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT - A STUDY IN THE FEDERAL JUDICIAL SYSTEM 2-3 (1928). One good example is diversity jurisdiction. *See generally* Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOKLYN L. REV. 197 (1982).

pressed by the Supreme Court. Having come from the federal courts, there may have been a tendency on the part of state judges to leave the protection of these rights to the federal courts where they were born. While this may be understandable, it is not defensible. No serious jurist, state or federal, would deny that state courts are charged with the implementation of the Constitution, as interpreted by the Supreme Court, just as are federal judges. We submit that no federal jurist would seriously maintain that the federal courts are quite adequate to the enforcement of constitutional guarantees and that state courts are not needed. Therefore, it is important that whatever cleavage may have developed be bridged as soon as possible. This will require that the state courts assume full responsibility in these areas and that the federal courts recognize the important role of the states and release responsibility to the states. Thus, judicial and congressional action that has resulted in a "grab" of judicial power based upon the unstated assumption that state courts will not or cannot discharge their responsibilities, ought to be reversed wherever the premise upon which the "grab" was based is seen to be disappearing.

Congress must develop a modern philosophy of federal jurisdiction steeped in the teachings of history, tradition, precedent and constitutional law. The history of federal jurisdiction has taken place somewhere between two extreme points of view. Judge Friendly described the extremes that mark the polar limits of federal jurisdiction as the minimum and maximum models.[321] The minimum model posits that "the best course is to put trust in the state courts, subject to appropriate federal appellate review, save for those heads of jurisdiction, by no means insignificant in case-generating power, where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts."[322] In contradistinction, the maximum model "would go to the full sweep of constitutional power" under Article III because "the federal courts provide a 'juster justice' than the state courts, [and] the more cases there [are] in federal courts, the better."[323]

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[321] *See generally* FRIENDLY, *supra* note 302, at 6-14.

[322] *Id.* at 8 (note omitted).

[323] *Id.* at 12 (note omitted).

We agree with Judge Friendly who concluded "no one in his senses would advocate either."[324] We also echo Professor Hart's three-decade-old observation made more critical by the passage of time: "The time has long been overdue for a full-dress re-examination by Congress of the use to which these [federal] courts are being put."[325] That the task will be difficult does not obviate the need. A systemic approach has been accomplished before,[326] and was attempted again recently.[327] It must be pursued now. What remains for us to do is to provide a few azimuths and identify some navigators to help Congress steer clear of Scylla and Charybdis.

We do not have a specific agenda. Rather, we assert two principles that have been lost and that must be re-emphasized if federal jurisdiction is to steer clear of the maximum model. The first is a straightforward "top-down" principle. If the federal court system is to function as an integrated system, decisionmaking power must remain at the base of the pyramid. We must reverse the inverse trend of appellate courts drawing power to themselves.[328] This seems so self-evident as to not need further elaboration. The second guideline for returning federal jurisdiction to a proper rate may be described as an "in-out" principle. The emphasis here is on the central concern of federalism.[329] No systemic examination of federal court jurisdiction can claim comprehensiveness without coming to grips with the present imbalance.[330] Justice Powell de-

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[324] *Id.* at 13. *See* REDISH, *supra* note 316, at 1-6.

[325] Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 541 (1954), *quoted in* FRIENDLY, *supra* note 302, at 4.

[326] *See, e.g.*, Circuit Court of Appeals Act of 1891, 20 Stat. 826 (1891).

[327] Proposed Federal Court Jurisdiction Act of 1973, *reprinted in* H. HART & H. WECHSLER, THE JUDICIAL CODE AND RULES OF PROCEDURE IN THE FEDERAL COURTS (1982 rev.).

[328] *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957); *but see* Godbold, *Fact Finding by Appellate Courts - An Available and Appropriate Power*, 12 CUM. L. REV. 365 (1981-82).

[329] "The happy relation of States to Nation - constituting as it does our central political problem - is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined." FRANKFURTER & LANDIS, *supra* note 320, at 2.

[330] "[M]odification of [federal] jurisdiction should be approached as part of an overall examination of federal and state court jurisdiction. Overcrowding permeates both systems, and the two systems interact to such a degree that one cannot be treated in isolation from the other. Instead of redistributing . . . litigation from one overburdened court docket to another, an overall rationalization should be sought to make both systems more efficient."

scribed the present imbalance in his dissent in *Foremost Insurance Co. v. Richardson*:

> No trend of decisions by this Court has been stronger—for two decades or more—than that toward expanding federal jurisdiction at the expense of state interests and state court jurisdiction. Of course, Congress also has moved steadily and expansively to exercise its preemptive power to displace state and local authority. Often decisions of this Court and congressional enactments have been necessary in the national interest. The effect, nevertheless, has been the erosion of federalism—a basic principle of the Constitution and our federal union.[331]

This trend must be countered in any systemic reappraisal of federal jurisdiction. Equilibrium must be restored.

By extolling the "top-down" and "in-out" principles, we do not mean to denigrate the constitutional value of redress. Chief Justice Marshall enshrined that value as a first principle in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[332] We do not mean to suggest that the achievement of uncrowded federal dockets is the only value to be pursued. We do mean to suggest, however, that making a federal case out of everything and allowing interminable reviews frustrates basic tenets of our federalism. Congress should realize that the Article III judicial power is a scarce resource and that demand for its uses outstrips its possible supply. Given this contemporary reality, Congress must seek to allocate these resources in some hierarchical fashion. We cannot give every federal right a federal remedy and maintain a *meaningful* "right of every individual to claim the protection of the laws." Such an ordering of federal rights is uniquely a political task for Congress.[333] Furthermore, after Con-

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Marsh, *supra* note 320, at 197.

[331] 102 S. Ct. 2654, 2660 (1982) (Powell, J., dissenting).

[332] 5 U.S. (1 Cranch) 137, 163 (1803).

[333] Jurisdictional hierarchies have been suggested before. *See* Homstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563 (1980-81). Congress has provided a hierarchy of sorts in defining various calendaring priorities for the courts of appeals. Appendix One of the INTERIM LOCAL

gress has committed the Article III resources to the most felt

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RULES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Oct. 1, 1981) provides:

PREFERENCES IN PROCESSING AND DISPOSITION OF CASES

The following categories of cases will be given preference in processing and disposition in accordance with the statutes shown. To assist the clerk in implementing this rule, counsel for any party to a civil appeal or review proceeding that has priority status shall notify the court on the appearance form of the preference.

(a) *Criminal and Criminal-related Proceedings*

(1) *Recalcitrant Grand Jury Witnesses* — orders of confinement. [28 U.S.C.A. § 1826]

(2) *Criminal Cases.* [FRAP 45(b)]

(3) *Habeas Corpus* — actions under 28 U.S.C.A. §§ 2241 and 2254 from judgments of state courts, and habeas corpus actions under the Immigration and Naturalization Act. 8 U.S.C.A. §§ 1105A(a)(9) and (b) and § 1503(c). [Action of Eleventh Circuit Judicial Council 10/81.]

(4) *§ 2255 Appeals* — actions under 28 U.S.C.A. § 2255 for relief from sentences of federal courts. [Action of Eleventh Circuit Judicial Council 10/81.]

(5) *Release in Criminal Cases* — orders setting conditions of the release. [18 U.S.C.A. § 3147 and FRAP 9.]

(b) *Civil Proceedings*

(1) *Extraordinary Writs* — petitions for extraordinary writs such as injunctions, mandamus or prohibition under FRAP 8 and 21. [Action of Eleventh Circuit Judicial Council 10/81.]

(2) *Federal Election Campaign Act* — actions under 2 U.S.C.A. § 437g. [2 U.S.C.A. § 437g(a)(11)]. Certified questions of constitutionality of the Federal Election Campaign Act under 2 U.S.C.A. § 437h are required to be expedited and heard by the court en banc. [2 U.S.C.A. § 437h(c)]

(3) *Freedom of Information Act* — actions under 5 U.S.C.A. § 552. [5 U.S.C.A. § 552(a)(4)(D)]

(4) *Norris-LaGuardia Act* — actions under 5 U.S.C.A. § 552. [5 U.S.C.A. § 552(a)(4)(D)]

(5) *Fair Housing Act* — civil actions, private or governmental. [42 U.S.C.A. § 3614]

(6) *Internal Revenue* — summons enforcement appeals. [26 U.S.C.A. § 7609(h)(2)]

(7) *Grant of Motions to Disqualify Counsel* — Action of Eleventh Circuit Judicial Council, 10/81

needs, Congress must not practice "deficit jurisdiction" even

(c) *Petitions for Review or Appeals — Agencies, Board, Commissions.*

(1) *National Labor Relations Board* — enforcement or review of orders. [29 U.S.C.A. § 160(i)]

(2) *Occupational Safety and Health Review Commission* — review of orders. [29 U.S.C.A. § 660(a)]

(3) *Commodity Futures Trading Commission* — orders denying, suspending or revoking the designation of a board of trade as a contract market. [7 U.S.C.A. § 8(a)]

(4) *Small Business Administration* — review of license revocation, license suspension, or cease and desist orders issued against small business investment companies. [15 U.S.C.A. § 687a(e)]

(5) *Secretary of Labor* — actions withholding certification of states pursuant to 26 U.S.C.A. §§ 3303(b) and 3304(c) of the Federal Unemployment Tax Act, of findings by the Secretary of Labor pursuant to 42 U.S.C.A. § 503(a), (b) and (c) which disqualify states for payment under the Act, if preference is requested. [26 U.S.C.A. § 3310 and 42 U.S.C.A. § 504]

(6) *Secretary of Treasury* — actions determining that a state's income tax laws do not qualify for federal collection under 26 U.S.C.A. § 6362, if preference is requested. [26 U.S.C.A. § 6363(d)]

(7) *Federal Communications Commission* — any proceeding to enjoin, set aside, annul or suspend any final order of the Commission brought pursuant to 47 U.S.C.A. § 402(a). [28 U.S.C.A. § 2349]

(8) *Secretary of Agriculture* — appeals from cease and desist orders regarding violations of the Federal Seed Act. (7 U.S.C.A. §§ 1599, 1600) [7 U.S.C.A. §§ 1599, 1600]. Appeals from cease and desist orders regarding violations of the Packers and Stockyard Act. (7 U.S.C.A. §§ 193, 194) [7 U.S.C.A. § 194(d)]. Petitions to enjoin, set aside, suspend or determine the validity of orders of the Secretary under the Perishable Agricultural Commodities Act, 1930. (7 U.S.C.A. §§ 499a - 499f and 499h - 499s) [28 U.S.C.A. § 2349]

(9) *Federal Maritime Commission* — all proceedings for judicial review of final orders and decisions of the Commission under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 (46 U.S.C.A. §§ 801-848) made reviewable by 46 U.S.C.A. § 830. [28 U.S.C.A. § 2349]

(10) *Nuclear Regulatory Commission* — any proceeding to enjoin, set aside, suspend or determine the validity of final orders of the Commission related to patent licensing or construction permits made reviewable by 42 U.S.C.A. § 2239. [28 U.S.C.A. § 2349]

(11) *Interstate Commerce Commission* — all proceedings for judicial review of final orders and decisions of the Commission made reviewable by 28

though it be politically expedient. Congress cannot spend more Article III judicial resources than exist without devaluing the resource itself. Jurisdictional impact statements must accompany new legislation with express reordering of the hierarchy.[334] Once the whole of federal jurisdiction is redrawn, Congress may make isolated adjustments more readily. Despite Learned Hand's remonstrance, justice is rationed. The real congressional concern must be how it is rationed.[335]

Finally, Congress should not go it alone. Whatever the vehicle for accomplishing the needed reforms, Congress should draw on existing organizational resources. These include the Administrative

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U.S.C.A. § 2321 [28 U.S.C.A. § 2349], and cease and desist orders based on violations of antitrust laws in 15 U.S.C.A. §§ 13, 14, 18 and 19. [15 U.S.C.A. § 21(e)]

(12) *Board of Governors of the Postal Service* — decisions approving, allowing or modifying decisions of the Postal Rate Commission. [39 U.S.C.A. § 3628]

(13) *Environmental Protection Agency* — orders of the Administrator under the Federal Environmental Pesticide Control Act of 1972 [7 U.S.C.A. §§ 136d(c)(4) and 136m]; and regulations promulgated by the Administrator establishing tolerances for or exempting pesticide chemicals under the Federal Insecticide, Fungicide or Rodenticide Act. [21 U.S.C.A. § 346a(i)(5)]

(14) *Federal Trade Commission* — cease and desist orders based on violations of 15 U.S.C.A. § 45 of the Federal Trade Commission Act, [15 U.S.C.A. § 45(e)] and on violations of antitrust laws in 15 U.S.C.A. §§ 13, 14, 18, and 19. [15 U.S.C.A. §Ie)]

(15) *Secretary of Health and Human Services* — orders of regulations related to the safety of additives under the Food, Drug and Cosmetic Act.

(16) *Federal Communications Commission, Civil Aeronautics Board,* and *Federal Reserve Board* — cease and desist orders based on violations of antitrust laws in 15 U.S.C.A. §§ 13, 14, 18 and 19. [15 U.S.C.A. §§ 21Ie)]

(17) *Railroad Retirement Board* — orders under the Railroad Unemployment Insurance Act. [45 U.S.C.A. § 355(f)]

[334] The Chief Justice has been a strong proponent of such impact statements and occasionally Congress has heeded the advice. *See* Bartels, *supra* note 303, at 238. *See also* Boyum & Krislov, *Judicial Impact Statements: What's Needed, What's Possible?*, 66 Judicature 136 (1982); Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest?*, 66 JUDICATURE 147 (1982); Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 JUDICATURE 122 (1982).

[335] *See generally* T. EHRLICH, RATIONING JUSTICE (1979).

Office of the Federal Court, the American Bar Association, the American Law Institute,[336] the Department of Justice,[337] the Federal Judicial Center, the Judicial Conference of the United States, and the Judiciary Committees of both houses. These and other groups as well as interested individuals must be given access to the deliberations. At the same time, we must be realistic. Federal jurisdiction cannot be revamped at a national town meeting. Some mechanism must provide some coherency and consistency to begin the political process. When all else has failed, and it has so far as federal jurisdiction is concerned, in this country we appoint a commission. In our opinion, a commission is the best way to proceed now. During the last Congress, Senators Thurmond and Heflin introduced a bill that would have created a federal "Jurisdictional Review and Revision Commission."[338] The proposal would have established a commission to study federal jurisdiction and report back with recommendations. Such an approach has worked before,[339] and we think it will work again.[340] We join our voices to the call for such a commission.

Our descriptive account demonstrates that we cannot expect the federal courts to remedy the problems with federal jurisdiction.

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[336] FRIENDLY, *supra* note 302, at 4. Academics have an important role to play. *See generally* Symposium, *Perspectives on the Administration of Justice*, 39 WASH. & LEE L. REV. 1 (1982).

[337] *See* Sarat, *The Role of Courts and the Logic of Court Reform: Notes on the Justice Department's Approach to Improving Justice*, 64 JUDICATURE 300 (1981); Symposium, 21 JUDGES' J. 3 (1982).

[338] S. 3123, 96th Cong., 2d Sess. (1980). *See* 126 CONG. REC. 12,766-68 (daily ed. Sept. 17, 1980) (text of bill and remarks of Sen. Thurmond).

[339] Experience with the Commission approach has not always led to progress, but the attendant interest and the development of concrete proposals has always gotten the debate off dead center. *See* 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); *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972). *See generally* Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 696-705.

[340] We are in select company in sharing this conviction. After this article was written, Chief Justice Burger suggested that "an independent, congressionally authorized body appointed by the three branches of government" be created to propose remedies for the docket-troubled federal courts. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 446 (1983).

The courts seem neither willing nor able to do so. The 1981 Term decisions are typical of this phenomenon. Judicial changes individually are marginal and collectively are offsetting. The federal courts close one sluice gate to stem the flow of litigation and open another somewhere else to let in a stream of cases. In whole, the flood of litigation is not averted. What is needed, to preserve the analogy, is the design and construction of a dam equal to the flood. Under the Constitution, Congress must be architect and builder. Our plea may be reduced to a federal jurisdiction haiku:[341]

> Do not damn the courts.
> Congress Commission study;
> Dam jurisdiction!

[341] *See Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229 (1979).