PAPERS OF THE ROSCOE POUND FOUNDATION

PRESERVING ACCESS TO JUSTICE:

The Impact on State Courts of the Proposed Long Range Plan for the Federal Courts

Report of the 1995 Forum for State Judges

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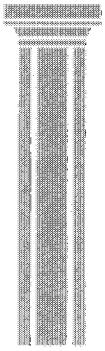
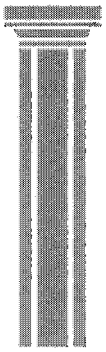


To provide against discord between National and State jurisdiction, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent and yet sufficiently combined was and will be arduous.

—John Jay, First Chief Justice of the United States

[The Proposed Long Range Plan for the Federal Courts] *honors the competence of state court judges and affirms the primary role of state courts in our nation's judicial system. This has its attractions, especially for those of us who populate state benches. What could be more affirming to our egos or enhancing to our sense of self-importance? But as is often the case with appeals to the ego, there is a catch. The parties making the appeal want something and that something in this case is that they want us to do some of their work .... We should not be so entranced by the ego-affirming music that we neglect to protect our interests.*

—Justice Willis P. Whichard, Supreme Court of North Carolina



CONTENTS

EXECUTIVE SUMMARY

On July 15, 1995, seventy appellate judges from twenty-nine state courts met with Yale Law School scholars and trial lawyers from around the United States to discuss the implications of the *Proposed Long Range Plan for the Federal Courts* (referred to as the *Proposed Plan* in this report), which was issued by the Judicial Conference of the United States in November 1994.

Many of the recommendations of the *Proposed Plan* outline a radical realignment of the current balance between federal and state court systems. At the heart of the plan is a series of far-reaching proposals that, according to the published rationale, would help to alleviate caseload pressures on federal judges by transferring several categories of controversies, comprising tens of thousands of cases (diversity-of-citizenship cases, criminal cases, and many employer-employee suits, to name a few), from federal to state court jurisdiction. If adopted, such changes would amount to a major shift in the 200-year history of federalism in the United States—a shift that would raise fundamental questions of legislative responsibility and the continuing ability of the states to afford access to justice for their citizens.

Forum participants considered how these recommendations, if implemented, would affect the administration of justice in their states' courts. They also discussed how state judges might appropriately focus their responses to the *Proposed Plan*, which were nearly all negative.

The Yale scholars presented papers that analyzed the constitutional issues implied in the *Proposed Plan* and also looked at practical questions of implementation, particularly the additional burdens that would be imposed on state courts whose caseloads are already heavier than those of federal courts, while their financial resources are far more precarious.

- Professor Jed Rubenfeld argued that any congressional attempt to force state courts to hear federal cases against the will of the state legislatures would raise serious constitutional problems that would be difficult to resolve, and he suggested that Congress would put at risk the U.S. dual judicial system if it were to force state courts to enforce federal legislation on a broad scale.

- Professor Harlon Dalton characterized the underlying goal of the *Proposed Plan* as an attempt to conform the federal justice system to a vision of a judiciary "deeply engaged in facilitating economic activity but decidedly chary when it comes to vindicating the statutory rights of individuals." He found the *Proposed Plan* perfectly congruent with current intentions to hand a host of federal responsibilities back to the states—intentions that will overwhelm states that do not have the resources to support them.

In small-group discussions and at a closing plenary session, the judges responded to the papers and set forth their views. A clear consensus emerged from the dialogue along the following lines:

- State court systems are already stretched to the limit and are unable to handle the additional cases that would be divested by the federal courts. The state court judges

were confident that they were qualified to hear these cases, but they stressed that shortages of financial resources and personnel are now endemic in the state systems.

- The judges believed it is unrealistic to expect to receive adequate federal funding to help them handle the potential additional caseloads in state courts. Even if the funding were forthcoming, the judges were reluctant to accept moneys that might carry with them encroachments on a state's autonomy.

- The prospect of trying federal cases in state courts raised unresolved questions about uniformity of decision and—in criminal cases—lines of authority involving sentencing, incarceration, and supervision of probation.

- The recommendations were seen as a serious threat to the quality of justice available to citizens of the United States and a potential barrier to our Constitutional guarantees of justice for all. The pressure of fiscal constraints and overwhelming caseloads that would follow the massive transfer of cases to state courts raised fears that access to courts would be curtailed, particularly to poor and disadvantaged citizens.

- Many judges voiced a determination to alert their state associations of judges and lawyers to what they perceived as the threat posed by the *Proposed Plan* and to make their fears known to their federal legislators.

FOREWORD

The Yale Law School is pleased to participate, as both sponsor and beneficiary, in this series of forums on current issues in state court jurisprudence. These forums provide a unique venue: state court judges, legal scholars, and practicing attorneys rarely have the opportunity to explore together some of the timely questions that have practical as well as theoretical significance to our system of justice.

While the judges value the opportunity to exchange ideas with their counterparts from other state courts and with the Yale faculty members, those of us from Yale who participate in these forums are among their chief beneficiaries. We are also enriched by these forums and bring back to the law school an experience of permanent value.

Many of the proposals presented in the *Proposed Long Range Plan for the Federal Courts* raise momentous questions about the future of judicial federalism in the United States. The *Proposed Plan* outlines a course that portends a major restructuring of the relationship between state and federal court systems, in part through a sharp cut in the diversity-of-citizenship and federal-question jurisdictions of the federal courts. It would profoundly affect the administration of justice in every corner of our nation. What is perhaps most curious about the *Proposed Plan* is its blindness regarding the consequences of such a cut for the country's state court systems. What we have in the *Proposed Plan*, I believe, is another symptom of "federalitis," an overemphasis on the federal component of our complex hybrid judicial system and a consequent failure to appreciate the full systemwide consequences that a basic change in this one component would bring for the system as a whole.

The papers my colleagues Harlon Dalton and Jed Rubenfeld prepared for the Forum examine the practical, conceptual, and ethical questions that the *Proposed Plan* raises from the perspective of the state courts, which are an especially important part of our judicial scheme. Professors Dalton and Rubenfeld have helped us to grasp more clearly what my economist friends might call the externalities that the *Proposed Plan* may impose on our state courts. The response of the state court judges, whose views of the *Proposed Plan* are grounded in everyday reality, has been enlightening to those of us in the academic community. We are proud to have played a role in the important discussion that this Forum has helped to promote about the future of state court jurisprudence in the new and radically different federal system envisioned by the *Proposed Plan*.

Anthony T. Kronman
Dean, Yale Law School

PREFACE

The relationship between state and federal courts is now under severe scrutiny by the federal judiciary. This year's Pound Forum opened a debate about the impact on state courts of a far-reaching, perhaps revolutionary plan, that seeks to challenge and redefine the 200-year history of judicial federalism in the United States. Appellate state court judges from every region in the country considered the possible consequences of the recommendations of the *Proposed Long Range Plan for the Federal Courts* drafted by a panel of federal judges.

The *Proposed Plan* is congruent with the trend toward the devolution of the federal government that we now see in many other areas, but it raises major questions facing the American legal system. Can state courts continue to provide access to justice if the *Proposed Plan* is implemented? What will happen to our balanced system of judicial federalism should the federal courts divest themselves of much of their business, as the *Proposed Plan* suggests they should? The assumption underlying the divestiture of other federal programs is that the private sector will step in, as in the case of supporting cultural activities, or that the programs will be no longer needed, apparently as in the case of welfare recipients. But justice, in fact, cannot be privatized. The dispensation of justice is not a mandated program but a constitutional given. It is not a commodity subject to the operation of free market forces.

The Forum was designed to ensure that the voices of state court judges would be heard in the national discussion about how justice will be apportioned in the United States. The papers the scholars presented focused on ways in which the *Proposed Plan* would impinge on state courts. They raised constitutional concerns and, at the same time, examined the practical ramifications of some of the specific recommendations set forth in the *Proposed Plan*.

Judges and scholars brought different perspectives to these issues, yet they arrived at a consensus that some aspects of the plan would unsettle the long-established balance between federal and state court systems and impose undue hardships on citizens of states whose courts are already burdened by heavy caseloads and severe fiscal constraints. The responsibility to provide justice—to ensure that all citizens have access to the courts—is the very cornerstone of our American polity and central to our vision of judicial federalism. It was a deeply abiding sense of this responsibility that informed the views expressed in this report.

Roxanne Barton Conlin
President, The Roscoe Pound Foundation

SECTION I
BACKGROUND OF THE *PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS*

In November 1994, the Committee on Long Range Planning of the Judicial Conference of the United States (the policymaking organ of the federal judiciary) released to the bench, the bar, and the public a "Draft for Public Comment" of its *Proposed Long Range Plan for the Federal Courts.* (Because the public comment draft had been the subject of nationwide commentary, it was designated the standard version for discussion at the 1995 State Judges Forum in July 1995. It is the document referred to throughout this report as the *Proposed Plan.*[1])

The panel of federal judges serving on the committee, named by Chief Justice Rehnquist, included four appellate judges, three district judges, a bankruptcy judge, and a magistrate judge. After a period of public comment and three public hearings held across the country, a revised version was submitted to the Judicial Conference in March 1995. The Judicial Conference in turn adopted it in December 1995 as the *Long Range Plan for the Federal Courts.*[2] Although the comment period and the Judicial Conference evaluation period led to a number of changes in the *Proposed Plan* (the most immediately noticeable of which are the changes in the number of recommendations from 98 to 101 and finally back to 93), the Judicial Conference accepted the vast majority of the recommendations made in the public comment version, which is discussed herein.[3]

Genesis of the Proposed Plan

The impetus to the changes outlined in the *Proposed Plan* was the perception of an "impending crisis" caused by dramatic increases in the caseloads facing federal judges. According to the federal judges' summary of statistics available to them, nearly 280,000 cases were filed in federal district courts in 1993, and the committee projected that by the year 2020, more than 1 million new cases would be filed annually—a prospect characterized as "nightmarish."[4]

The *Proposed Plan* provides a great deal of data to document the rise in federal court business, but it does not present comparative figures for state courts. According to the most recent data collected and analyzed under the auspices of the State Justice Institute, however, 35 million cases were filed in state trial courts in 1993. (This figure does *not* include some 55 million traffic and ordinance violations that also appeared on state court dockets. It does include 13 million criminal cases, nearly 20 million civil and domestic relations cases, and approximately 2 million juvenile cases.)[5]

State courts of general jurisdiction "handled 85 times as many criminal cases and 27 times as many civil cases as the U.S. District Courts, with only 14 times the number of judges."[6] The overwhelming imbalance between federal and state court caseloads has been vividly pointed out by the Hon. Judith Kaye, Chief Judge of New York State, who noted that in 1993 more than 200,000 cases were filed in New York City's Family Court alone.[7]

While federal appellate judges are under pressure from expanded dockets, most state appellate court caseloads also continued to increase in 1993. Although the total number of appeals filed in state courts throughout the country was slightly less than it had been in 1992, the number of appellate cases rose in all but a few states, most of which have no intermediate appellate courts. The most recent state data reveal that "half of the courts of last resort and half of the intermediate appellate courts were unable to clear their dockets."[8]

Despite these challenges to the state courts' ability to do their work, the *Proposed Plan* focused on the plight of the federal judiciary. In comparing its own mission to anticipate and plan for the future to that of "futures commissions" and long-range planning groups already in place in many state court systems, the committee asserted that the state courts' task was far simpler, primarily because "state courts exist to serve all the justice needs of a geographic area." Citing Alexander Hamilton's dictum that "national and state systems are to be regarded as ONE WHOLE,"[9] the *Proposed Plan* was formulated on the assumption that the federal courts "supplement and only rarely supplant the role that state courts must assume without question." Indeed, the role of the federal courts envisioned in the *Proposed Plan* is one that is limited and special.

The Unique Place of the Federal Bench in 'Judicial Federalism'

The concept of "judicial federalism" enunciated in the *Proposed Plan* is that the jurisdiction of the federal courts "should complement, not supplant, that of the state courts."[10] Within this narrow scope, however, the federal courts should be reserved for cases of "clear national import and interest." The federal judiciary can also claim to have a distinctive nature of its own, the drafters of the *Proposed Plan* assert. By virtue of their life tenure, federal judges are independent. In addition, they are notable for their excellence ("the tallest trees in the forest"), are supported by great resources, have sufficient time for "contemplation and reasoned decision," and carry with them "the prestige of the office."[11]

For these reasons, the *Proposed Plan* rejects the obvious solution of appointing additional federal judges to handle anticipated caseload increases. According to one forecast, the projected caseload in 2020 would require at least 4,000 federal judges—nearly a 500 percent increase over the current total of 846.[12] Such a prospect, according to the *Proposed Plan*, would undermine the consistency of federal decisions. "Federal law would be babel, with thousands of decisions issuing weekly, and no one judge capable of comprehending the entire corpus of federal law, or even the law of his or her own circuit."[13]

Even worse, however, would be the destruction of the federal courts as collegial bodies. The *Proposed Plan* cites one judge's cry of "despair " as he contemplates such a court in the twenty-first century: "It will not be a court: it will be a stable of judges, each one called upon to plough through the unrelenting volume, harnessed on any given day with two other judges who barely know each other."[14]

It is this vision that impels the drafters of the *Proposed Plan* to set forth recommendations designed to ensure that the federal courts will indeed be courts of limited jurisdiction.

Recommendations

The *Proposed Plan* outlined ninety-eight specific recommendations for changes in the operation of the federal court system. Some of these would, if adopted, effectively move thousands of federal cases into the state courts. Three recommendations were the major focus of concern at the Forum.

1. ***Prosecuting a significant number of federal crimes in state courts.***[15]
   The federal judiciary would divest itself of routine criminal cases according to the principle that "criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution would not be appropriate." Those instances would be limited to a few categories, including offenses against the federal government, widespread state or local government corruption, and "sophisticated criminal enterprises requiring federal resources or expertise to prosecute."

2. ***Transferring most ERISA (Employee Retirement Income Security Act), FELA (Federal Employers' Liability Act), and maritime injury (Jones Act) cases from federal to state courts.***[16]
   The rationale for shifting these cases was based on two grounds. One, a relatively small number of such cases were actually filed in federal courts (a total of 15,286 in 1993, as opposed to civil filings totaling almost 230,000). Two, these cases do not require any special expertise in federal law and could well be adjudicated "on principles of contract and trust law developed from state legislation and common law."[17] In short, says the *Proposed Plan*, state court judges are fully competent in such matters.

3. ***Virtually eliminating diversity-of-citizenship jurisdiction.***[18]
   Almost all cases involving citizens from different states would be shifted from federal dockets to state courts. The judges characterized the federal diversity docket as "a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law."[19] They reiterated their belief that state courts are fully capable of providing justice to nonresidents, and that local prejudice, the "historical purpose" for diversity jurisdiction, was no longer a significant factor requiring federal intervention. There was also concern among Forum participants about a reference in the *Proposed Plan* to experimentation with fee-shifting arrangements in "particular categories of cases."[20]

Resources

How would states pay for the additional work imposed by measures that would shift jurisdiction out of the federal courts? Acknowledging that significant resources would be required to support the additional caseload in state courts, the *Proposed Plan* recommends that "federal financing and other assistance should be provided to state courts, prosecutors, and agencies to permit them to handle the increased workload."[21]

The drafters of the *Proposed Plan*, again citing Hamilton's vision of federal and state courts as a "harmonious and consistent WHOLE," go on to state that "no reduction in federal jurisdiction should be undertaken without also ensuring the states' capacity to handle the extra

burden."[22] But the *Proposed Plan* goes no further than stating the need for a commitment on the part of the Congress to "provide states with the necessary financial resources" should its recommendations go into effect. Whether Congress would be receptive to allocating funds for the operation of state courts in this era of budgetary constraint is not discussed.

Current Status of the *Proposed Long Range Plan for the Federal Courts*

Since the Forum was held, several developments have occurred, principally involving the *Proposed Plan*'s proposals to eliminate some diversity-of-citizenship cases from the federal courts, expand fees for filings and other uses of the courts, and experiment with a "loser pays" regime.[23] To date, three of its concepts have appeared in pending federal legislation, but none have yet been enacted into law.

Filing Fees and Diversity Jurisdiction

At the request of the Administrative Office of the United States Courts, Senator Orrin Hatch of Utah has introduced legislation in the United States Senate (S. 1101) which, if passed, would implement some of the *Proposed Plan*'s proposals on diversity jurisdiction (Recommendation 5) and user fees (Recommendation 87). A similar bill, H.R. 1989, has been introduced in the House of Representatives.

Section 202 of S. 1101 would establish a user fee system for the federal courts. It would increase civil action filing fees from $120 to $150, and would allow the first $90 to be deposited into a fund to offset appropriated funds for court maintenance and operations.

Section 304 would eliminate diversity-of-citizenship jurisdiction of cases with any in-state plaintiff, but would not limit a defendant's right to remove state cases to federal court. Section 309 would increase the amount-in-controversy requirement for diversity cases from $50,000 to $75,000, and index future increases to the consumer price index. Such an increase might be expected to curtail the diversity caseload somewhat. Past increases in the amount-in-controversy requirement (e.g., the 1958 increase to $10,000 and the 1989 increase to $50,000) were followed by a decrease or leveling off of diversity cases.

The chairs of three Judicial Conference subcommittees testified in support of the bill at a hearing of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts on October 24, 1995, but as of the publication time of this report, no votes had been taken on S. 1101. In comments in a recent issue of *The Third Branch* (the newsletter of the Administrative Office of the United States Courts), Senator Hatch explained that he introduced S. 1101 "by request ... so that Congress could have the Judiciary's legislative suggestions on record as proposed." He made no predictions on the bill's prospects.

Fee-Shifting and 'Loser Pays'

Recommendation 33 of the *Proposed Plan* suggested experimenting with a "loser pays" rule in certain unspecified federal cases. Although S. 1101 does not touch on the "loser pays" proposal, separate legislation pending now in both houses of Congress (H.R. 988 and S. 672) would implement a limited rule requiring nonprevailing parties to pay prevailing

parties' attorney fees and costs under certain circumstances if an "offer of judgment" made under Rule 68 of the Federal Rules of Civil Procedure was not accepted.

The seldom-used Rule 68 offer-of-judgment procedure is available only to defendants and may be invoked at any time up to ten days before trial. Rule 68 applies only to costs, not attorney fees; shifts costs if the plaintiff receives any judgment less than the amount offered by the defendant; provides no equitable cap on fee-shifting and no discretion for judges not to shift fees to avoid unfairness; cannot be avoided by preemptive motion; and applies to all "claims."

In contrast, H.R. 988 and S. 672 would apply to diversity cases in federal courts; would exempt claims seeking equitable relief; and would allow courts, in their discretion, to exempt claims that present novel issues of law or fact or important issues affecting nonparties. H.R. 988 passed the House on March 7, 1995, but as this report goes to press, neither it nor S. 672 has received any attention in the Senate, where the "loser pays" concept is said to have very limited support.

"Loser pays" also lacks critical support elsewhere. On April 7, 1995, following the bill's passage, President Clinton told a Dallas meeting of the American Society of Newspaper Editors that he would veto any "loser pays" legislation that comes to his desk. "'Loser pays' will keep ordinary citizens from exercising their rights in courts," he said, "just as the poll tax used to keep ordinary people of color and poverty from exercising their right to vote."[24]

The Forum

Approximately seventy judges representing twenty-nine states participated in the Forum. Their discussions were based on two papers written for the occasion by Yale Law School professors Jed Rubenfeld and Harlon Dalton. The papers were distributed to participants before the meeting, and authors presented their views to the audience in the form of an informal talk. Each presentation was followed by a commentary by a distinguished appellate court judge. Justice Charles Wells of the Supreme Court of Florida commented on Professor Rubenfeld's paper, "The Federal Question," and Justice Willis P. Whichard of the Supreme Court of North Carolina responded to Professor Dalton's paper, "Judicial Federalism and Individual Rights."

After each presentation and its respective commentary, the judges separated into five groups to discuss the issues raised in the paper. The small-group sessions were led by Fellows of The Roscoe Pound Foundation. Professors Rubenfeld and Dalton visited each group to share in the discussion and respond to specific questions. At the plenary session that closed the Forum, the moderators summarized the judges' views of the issues discussed.

According to ground rules set prior to the discussions, judges' comments were not for attribution in the published report of the Forum. With candor the order of the day, the dialogue was freewheeling and spirited.

Section I • Endnotes

[1] A more detailed discussion of the *Proposed Plan* is provided in Appendix A to this report. ("Overview of the *Proposed Long Range Plan for the Federal Courts,*" excerpted from The Roscoe Pound Foundation's *Civil Justice Digest*, vol. 2, no. 1 [Winter 1995]). Comments on the *Proposed Plan* submitted by the Association of Trial Lawyers of America are provided in Appendix B.

[2] Copies of the finalized plan are available from the Long Range Planning Office, Administrative Office of the United States Courts, One Columbus Circle, NE, Washington, DC 20544.

[3] Appendix B translates the numbering of recommendations for all three versions of the *Proposed Plan.*

[4] *Proposed Plan* at 16; Table 7.

[5] B. Ostrom and N. Kauder, *Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project* (National Center for State Courts, 1995), viii.

[6] Ibid.

[7] Judith Kaye, "Federalism Gone Wild," *The New York Times*, Dec. 13, 1994, at p. A29.

[8] Ostrom and Kauder, ix, 54.

[9] *Proposed Plan* at 1, citing *The Federalist* No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[10] *Proposed Plan* at 19.

[11] *Proposed Plan* at 6.

[12] *Proposed Plan* at 16.

[13] *Proposed Plan* at 17.

[14] *Proposed Plan* at 17, n. 2, citing Jon O. Newman, "1,000 Judges—the Limit for an Effective Federal Judiciary," 76 *Judicature* 188 (1993).

[15] Recommendation 1, *Proposed Plan* at 20–21.

[16] Recommendation 11, *Proposed Plan* at 29.

[17] Id.

[18] Recommendations 5 and 6, *Proposed Plan* at 23–26.

[19] Id. at 26

[20] Recommendation 33, *Proposed Plan* at 49–50.

[21] Recommendation 13, *Proposed Plan* at 31.

[22] Id.

[23] See Appendix A for more detailed discussion.

[24] *The New York Times*, April 8, 1995, at A1.

SECTION II
PAPERS, ORAL REMARKS, AND RESPONSES

The Federal Question

by Jed Rubenfeld

Professor Rubenfeld considered issues of constitutionality and responsibility raised by the Proposed Plan's *recommendation to prosecute some federal crimes in state court and to transfer from the federal docket cases not deemed of sufficient national importance for federal concern. He examined the constitutional issue using a possible scenario that a state might resist the imposition of additional federal cases by limiting its own jurisdiction so as to exclude, for example, federal criminal cases or appeals of social security cases.*

Noting that the U.S. Supreme Court has never held that Congress has the power to regulate state court jurisdiction, he argued that any congressional attempt to force state courts to hear federal cases against the will of the state legislature would raise serious constitutional problems that would be difficult to resolve.

The question is not whether state courts are competent to handle federal law adjudication, Professor Rubenfeld said, but who should ultimately bear the burden of doing justice under federal law, the magnitude of which now reaches unprecedented heights. He suggested it is Congress, which would put at risk our dual judicial system if it were to force state courts to enforce federal legislation on a broad scale.

There is a proposal abroad to divest the federal courts of a significant portion of their federal-question jurisdiction—that is, their jurisdiction over cases arising under federal law.[25]

No judge can fail to sympathize with efforts to reduce caseloads. Should this federal caseload-reducing proposal become a reality, state judges in particular will no doubt find themselves especially moved—again and again.

This federal question is at once both new and old. It is new because, if today's proposals were to be followed, they would mark, with perhaps one exception, the first time in the nation's history that the steadily increasing federal-question jurisdiction of the federal courts had been forced into a significant retreat.[26] It is old because the basic problem at issue is the problem of why the United States has dual federal and state judicial systems at all. Many other federated nations—for example, Canada, Australia, Switzerland, and Malaysia—don't have full-blown, coexisting local and national judiciaries. What ought the responsibilities of our distinctive federal judiciary to be?

I want to get at these questions, new and old, by asking what would happen if these proposals went forward and if, as does not seem too far-fetched, some states sought to resist the gift the federal judiciary had passed along to them. The question then would be twofold: (1) Can the states be forced to hear the federal questions deemed too insignificant for the federal judiciary? and (2) Should they?

A. The Proposal

The proposals have come from a number of sources, taking a number of forms. For example, a draft report issued late last year by a committee of the United States Judicial Conference[27] contains a variety of recommendations to curtail the federal-question jurisdiction. These recommendations include: (1) on the criminal side, prosecuting some or many federal crimes in state courts;[28] (2) on the civil side, paring down the federal-question jurisdiction so that federal courts are deciding only "cases of clear national import,"[29] if necessary even to the point of "limit[ing] review to constitutional issues."[30] Singled out as particularly ripe for elimination from the federal civil docket are Social Security cases, Employment Retirement Income Security Act (ERISA) cases, and federal-law employment cases.

Going still further, Judge Richard Posner's proposal to cut down the federal-question jurisdiction[31] would channel many *constitutional* cases to state courts as well.[32] "It is a mystery to me," writes Judge Posner, referring here to a great number of equal protection and due process claims against state actors, "why such cases should be litigable in federal courts."[33]

Given their focus on burgeoning caseloads,[34] it is a bit disconcerting, although not too surprising, to find little discussion in the draft *Proposed Plan* or in Judge Posner's book concerning the effect of their proposals on state courts. The *Proposed Plan* includes a few hortatory pleas for increased federal funding of state justice systems, but little more.

Judge Posner, to his credit, does acknowledge the consequences for state courts. Although, perversely enough, the unthinkable caseloads already burdening state judges become for the efficiency-minded Judge Posner an argument in favor of his position. You state judges are already so numerous and so overburdened, Judge Posner suggests, that reallocating cases from federal to state courts would add relatively small per-judge costs for you, while generating relatively large benefits to the suppliers and consumers of federal justice.[35]

But the heaping of additional burdens on our already overtaxed state judiciaries (which already are obliged to adjudicate innumerable federal questions) is not the only reason—nor even the principal reason—that these federal-question proposals should give us pause. There is a small additional matter, a matter of political and constitutional responsibility, that needs to be thought through.

B. Constitutionality

Let's begin, then, by asking whether states can, constitutionally, refuse jurisdiction over federal-question cases. Take a concrete but hypothetical scenario. Suppose the U.S. Attorney for the Southern District of New York begins initiating prosecutions for low-level federal drug offenses in New York courts.[36] On the civil side, suppose at the same time that New Yorkers denied benefits by the federal Social Security Administration begin bringing suit in state court as well.

But let's also imagine that the New York state legislature has just enacted a comprehensive set of judicial reforms, among them the Caseload Reduction Act of 1995. The Act provides

that henceforth the courts of New York will not be courts of general jurisdiction but, like the federal judiciary, courts of limited, statute-based jurisdiction. The Act goes on to specify various heads of jurisdiction. On the criminal side, it creates jurisdiction over narcotics offenses, but only if the quantity of narcotics allegedly at issue exceeds in value a certain dollar amount. On the civil side, as it happens, the Act specifically denies to any New York court jurisdiction over civil suits challenging denial of welfare benefits of any kind. As a result, state judges dismiss most of the U.S. Attorney's criminal prosecutions and all the Social Security suits for want of jurisdiction.

Let's stop here a moment, before introducing any congressional statutes into the picture. Is there an argument that New York has already acted unconstitutionally, regardless of any efforts by Congress to make state courts hear these cases? There is such an argument, but I'm not sure it's a good one.

Now, I will take it as a premise here that nothing in the Constitution requires the states to have courts of general jurisdiction. This is a proposition with venerable authority behind it;[37] there are conceivable challenges to it, but the challenges seem to me rather a stretch.[38] At any rate, I shall take the proposition here to be a given. To be sure, if a state actor has allegedly violated the Constitution, or has deprived a person of liberty or property, due process might require that state courts be open to offer redress.[39] But unless the Privileges and Immunities Clause or the Republican Guarantee Clause is to be revived in a heretofore unheard-of fashion, I do not believe any constitutional provision offers much of a hook for the claim that states must supply courts of general jurisdiction.

But doesn't the Supremacy Clause oblige state judges to enforce federal law? Couldn't it be said that the Caseload Reduction Act violates the Supremacy Clause?

It is well established that the Supremacy Clause prohibits a state court from disclaiming jurisdiction over federal-question cases if the court is one of general jurisdiction or if in any event it is open to the same or similar types of cases under state law.[40] This duty is usually framed as an obligation on the part of state courts not to "discriminate" against federal law. In a state court whose doors are open to all claims or to comparable state law claims, a "cause of action must not be discriminated against because it is a federal one."[41]

But in our hypothetical cases, a charge of discrimination will be difficult to make. New York, through its Caseload Reduction Act, has abolished its judiciary's general jurisdiction and has taken its courts out of the business of welfare administration and minor narcotics offenses altogether, both state and federal. Where is the discrimination?

Yet it might be said that something worse than discrimination is going on. The core principle of the Supremacy Clause, someone might say, is that state courts must enforce federal law even when it conflicts with state policy. But jurisdictional statutes involve policy judgments too. Thus the Caseload Reduction Act, when it comes to narcotics offenses, can be seen as a substantive decision to decriminalize low-level narcotics use. And rights of action for welfare benefits can be seen as reflecting a policy judgment concerning the status of welfare as entitlement. Hence, the argument goes, if Congress has chosen to criminalize low-level narcotics offenses, and if Congress has chosen to make denials of welfare benefits

appealable in court, New York can't use a jurisdictional device to prevent its courts from enforcing federal law. Thus, even if it is formally neutral between state and federal law, the Caseload Reduction Act does indeed violate the Supremacy Clause.

The logic of this argument has some appeal, but it is actually quite problematic, because it suggests that a state court violates the Supremacy Clause whenever it dismisses a federal cause of action in deference to its own jurisdictional limitations under state law. As if a litigant might go to state small claims court or state probate court, file his $50 million antitrust suit, and insist that the state court is constitutionally bound to hear his claim just because it is a federal claim. If you reply that small claims or probate limitations on jurisdiction are no problem and must be respected so long as the state supplies other courts to hear the claims that cannot be heard in small claims or probate, then you are contradicting my initial premise: you are now saying that states *are* constitutionally required to create courts of general jurisdiction. Or, at a minimum, you are saying that a state which wanted to have a judiciary of limited jurisdiction would also have to provide a state court of federal questions.

But the Supreme Court has never gone this far. It has never held that the Constitution requires states to create courts vested with the entire federal-question jurisdiction, but only that the Supremacy Clause requires state courts to hear federal suits when they already exercise jurisdiction over the same or similar types of suit under state law.[42]

So let's assume that New York's Caseload Reduction Act of 1995 is not unconstitutional on its face. The harder question arises when we add to the picture *Congress's* Caseload Reduction Act of 1995, which expressly provides, let's say, (1) that a U.S. Attorney shall have the authority to bring low-level federal narcotics prosecutions in the state courts and (2) that individuals denied federal social security benefits shall have a right of appeal in the trial courts of the state in which they reside. We might even imagine that Congress had made the state courts' jurisdiction over these two classes of cases exclusive.

At this point, it is no longer a question of whether New York's Caseload Reduction Act violates the Supremacy Clause on its face. Now New York's Act squarely conflicts with a federal statute. As a result, it is now indisputable under the Supremacy Clause that New York's law must yield, provided of course that Congress's Caseload Reduction Act is constitutional. But is it?

No modern Supreme Court case has decided whether Congress can compel a state court to hear federal-question cases of a kind that the court has no jurisdiction to hear under state law.[43] Although nineteenth-century and early twentieth-century authorities repeatedly stated that Congress had no such power,[44] modern views of Congress's powers are, as we know, quite different from what they used to be, and indeed, a reader of Supreme Court opinions from about 1940 to about 1990 might well have concluded that the flourishing of Congress's powers, coupled with the atrophy of federalism doctrines, had cleared away all obstacles to Congress's drafting state courts to perform federal business.

In 1992, however, the Court handed down its extraordinary decision in *New York v. United States*,[45] which struck down a federal law requiring state legislatures either to regulate the disposal of radioactive waste in certain ways or to take title to the waste themselves. In broad

language, the Court held that Congress cannot "'commandeer' state governments into the service of federal regulatory purposes."[46] Justice O'Connor's majority opinion relied principally on an analysis of framers' intent coupled with strong state-sovereignty presumptions. "State governments," held the Court, "are neither regional offices nor administrative agencies of the federal government."[47] "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[48] As a result, the "federal government may not compel the States to enact or administer a federal regulatory program."[49]

To be sure, *New York v. United States* involved an effort by Congress to act upon state legislatures, not state judges, and there is language in the case specifically recognizing that different rules might apply in these two contexts.[50] But the relevant passage does not definitively say anything more than that the nondiscrimination line of cases described above—which do in effect allow Congress to force a state court to do federal business so long as the court does business of the same or similar sort under state law—remains undisturbed.[51] Consequently, the issue to be decided is whether *New York v. United States* would apply were Congress to try to go further and impress state courts into federal service, even in the face of contrary state jurisdictional limitations such as our hypothetical New York Caseload Reduction Act.

Because Justice O'Connor's opinion relied so heavily on an originalist analysis, commentary on this issue has concentrated on whether Congress was originally intended to be able to regulate state judges (even though it was not intended to regulate state legislators). A 1993 essay claimed that Congress was originally understood to have a compulsory power over state judges,[52] but a superior account published early this year effectively undermines that conclusion and documents a consistent position among early American jurists and legislators to the effect that Congress had no power to impose jurisdiction upon state courts.[53]

The question, then, would seem to turn on whether the "commandeering" of state courthouses is somehow less of an intrusion into state sovereignty than a "commandeering" of state legislatures. The argument has been made that it *is* less of an intrusion, on the theory that judges, who do not set their own agenda, are not exercising sovereignty as fully or paradigmatically as do representative assemblies expressing the will of the people, and that judges, being individuals, are more amenable to supervision and correction than a multimember popular body.[54]

But these arguments have all ignored a crucial point. They proceed as if judges alone occupied state courthouses. I am not referring here to the legions of administrative and law-enforcement personnel required to make modern courthouses function, who would also be pressed into federal service if Congress could force federal questions onto state judiciaries. I am referring to juries.

Juries too are popular, multimember representative bodies. The historic role of the jury as representative of the people within the judicial system is well established. When we imagine a United States Attorney bringing a federal prosecution in a New York court, what we have to imagine is not only a New York judge being required to make evidentiary rulings, resolve motions, etc., but a jury representing the people of New York being called upon to pronounce guilt. And in a situation where the people of New York have already disclaimed

criminal jurisdiction over the kind of offense at issue, then we have to imagine a jury representing the people of New York, acting in the name and under the flag of the State of New York, being called upon to condemn a defendant for conduct that New York does not recognize as criminal.

To be sure, these concerns would not weigh so heavily in the case of state suits seeking federal Social Security benefits. But this sort of suit would trigger another concern, expressed even more emphatically by the Court in *New York v. United States*. The more administrative the lawsuits, the more applicable would seem to be the Court's holding that "the federal government may not compel the States to enact *or administer* a federal regulatory program."[55] This result is not a paradox but a reflection of the dual nature of what goes on in modern courthouses: in one room, the issuance of a verdict expressive of popular judgment in a case of vital local concern, while in the next, the processing of paper within a much larger regulatory bureaucracy. In either event, the principles announced in *New York v. United States* seem to apply.

C. Responsibility

Even if states could constitutionally be forced to provide courts to adjudicate federal questions, or if they did not resist the imposition of additional federal cases upon their judicial dockets, there would remain the question of whether this development would be responsible.

Let me clarify what I mean by responsibility. I am not interested here in the claim that curtailing the federal courts' jurisdiction somehow runs afoul of great American ideals such as access to justice. I call this the trial lawyers' objection, because they are the ones who usually make it. I have no doubt that they make this argument with the purest of motives, as all of us lawyers make all of our arguments. And I am sure that if the Association of Trial Lawyers in America (ATLA) votes to condemn the proposals in the Judicial Conference's draft *Proposed Plan,* it will take care not to repeat the error of the Oregon Bar Association, which once issued formal resolutions stating that, after careful review, they were supporting the American Law Institute's (ALI's) proposal to increase federal jurisdiction but that they were condemning every one of the ALI's proposals that tended to diminish federal jurisdiction. The Oregon Bar's mistake was that it issued these resolutions before the ALI had actually come up with any proposals increasing or decreasing federal jurisdiction. In any event, the claim that all restrictions on the federal courts' jurisdiction are un-American is simply too general to be of use here.

Nor am I interested in the argument that state courts cannot be trusted with too much federal-question adjudication. Although this line of objection is fairly common, it is not one I adopt. It basically raises empirical questions: would the state courts adjudicate the transferred federal law cases less well on one or another vectors than federal courts, and if so, would the expected costs of that consequence outweigh the benefits expected from a sharply reduced federal docket? I know of no data indicating answers to any of these questions, and I have no interest in speculating on them one way or another.

The issue of responsibility I want to discuss is not empirical. It is the issue at the root of what troubled the Court in *New York v. United States*, deserving consideration whether or

not we agree with outcome or historical analysis in that decision. It is the issue of who should bear the burden for the massive federalization of American law that has occurred over the course of this century.

No one knows with certainty the causes of the explosion in federal court filings, but one thing is pretty clear: the phenomenon is related in significant part to the increasing penetration of federal law, both statutory and constitutional, into our daily lives.[56] There are far more federal rights today than ever before. This is the reason, to cut to the chase, that for the first time in American history federal courts may beat a retreat from federal law.

The expansion of federal rights is primarily the result of two factors: Congress's increasing federalization of areas of law previously left to states and the Supreme Court's expansion of Fourteenth Amendment protections. Unlike some, I do not quarrel with either of these developments. I do not believe that the current extent of Congress's Commerce Clause power is unconstitutional, and I support most of what the Court has done with the Fourteenth Amendment. The question is, given the increasing federalization of American law, is it proper for Congress to absolve itself of the responsibility to provide a judiciary to interpret and enforce this law?

This is a matter of money, but not just a matter of money. The numerosity of a judiciary and unconscionable delays of justice impose high but intangible costs on a society. As of now, state justice systems have borne these costs to a far greater extent than has the federal system, for the reason that states have been the governments of general jurisdiction and have therefore provided judiciaries of general jurisdiction, with the result that state courts labor under caseloads far more onerous than those of their federal colleagues. The point is not that states cannot handle any further additions to their judicial dockets. The point is that, if Congress is to become a government of general jurisdiction, it ought to bear the costs of providing a judiciary of general jurisdiction— a more numerous, less efficient, less prestigious judiciary. These are not pleasant consequences, but they ought not to be fobbed off onto state systems, relieving federal legislators of the accountability for an important ramification of their actions.

It is not just a question, however, of Congress's responsibility. It is also a question of the responsibilities of the federal courts. What is the proper role of the federal judiciary in our system?

Throughout the nineteenth century and for the first half of this century, under the doctrine of *Swift v. Tyson*,[57] the Supreme Court arrogated to the federal judiciary the power to develop a national common law. This was a body of law which, under the then-current understanding of the commerce power, would have been beyond the power of Congress itself to enact and would otherwise have been regarded as involving matters for state legislation. But in the hands of the federal courts, this national common law proved, beginning with the case of *Lochner v. New York*,[58] to include liberties of contract and property that neither Congress nor the states could overrule.

It is no coincidence that *Erie Railroad v. Tompkins*,[59] which overturned *Swift*, was decided precisely at the time when the *Lochner* era was repudiated and when the expansive reading of Congress's commerce powers first took off. In the 160 years prior to *Erie*, the real judicial

action lay in common-law adjudication. Indeed, the federal courts didn't even have a general federal-question jurisdiction until 1875 (and then only with amount-in-controversy limitations),[60] but this lack didn't count too heavily, because it was in the common-law cases that judicial decisions vital to the nation were being made. But when the era of common-law liberty gave way to the age of federalization, federal law adjudication became the central locus of judicial decisionmaking in matters of vital national concern. We can hardly be surprised, then, that it was only when this development finally took place that the Supreme Court found its way at last to *Erie*, which in its rightly praised symmetry and simplicity recognized state courts as ultimate arbiters of all state law and federal courts as ultimate arbiters of all federal law.

As a result, *Erie* ushered in an era in which the diversity jurisdiction would become essentially a source of awkwardness and irritation for the federal courts, and the federal-question jurisdiction would become definitive of their real mission, which for the last fifty years has been to interpret and enforce the rights and duties created by Congress's sweeping legislation and the Supreme Court's equally sweeping doctrines of equality, civil rights, and privacy. So we arrive at the present pass, where the federal courts have come to feel that all this federalization is becoming too much for them, and where they seek to be rescued from the obligation to say what the law of the United States is.

But *Erie* was correct, and its solution to the puzzle of "judicial federalism" will not be improved upon. When Judge Posner finds it "mysterious" that some constitutional and statutory federal questions should be litigable in federal court, of course he too would be correct, if the sole concern were whether state courts could do just as good a job of adjudicating them. But that is not the sole concern. What is mystifying Judge Posner is in reality a basic tenet of all good government: namely, the fundamental responsibility of the sovereign to create institutions of its own to resolve disputes and to do justice, with as much speed and wisdom as humans are capable of, under its own laws. The federal courts have discharged this responsibility about as well as anyone could have hoped. They profit from it in the importance it has conferred upon them, and they suffer from it too. But that is their destiny: to live or die with the Constitution and the rest of federal law.

When the federal courts begin closing their doors to more and more federal statutory and constitutional questions, then it really will be a mystery why we have a dual judicial system at all.

Response by Justice Charles T. Wells, Supreme Court of Florida

Justice Wells focused on the massive caseloads handled by state courts, noting that the state court judiciary does the yeoman's work of administering justice in the United States. Taking as his model data from the Florida court system, he cited new caseload pressures generated by recent crime legislation in his state, legislation that has parallels in states throughout the country.

He asserted the need for judges and lawyers involved in state court jurisprudence to make the case at the national level that the continued functioning of state court systems must be of primary importance in future plans for reform.

Although Justice Wells concluded some accommodation is called for in the face of rising caseloads at every level, he also warned that it would be a serious mistake to ease the federal burden at the expense of states.

It seems to me that one of the things that we as state court judges need to make clear in this debate is that we are not sitting around eating bonbons down in Tallahassee. We don't have tea and crumpets every afternoon at 4:00. We have a massive caseload in our state courts in which we, I would submit, are serving the administration of justice in a way that is unsurpassed on the federal level.

The Increased Pressure of Crime Legislation on State Courts

In the past year, the Florida Supreme Court issued over 400 written opinions in cases. We have 55,000 lawyers within the jurisdiction of the discipline of the Florida Supreme Court. We have over 600 judges in Florida. We have an exceedingly heavy caseload. Almost 400 people are on death row. Our state legislature, as many of yours have, just passed a bill mandating that all people convicted of felonies in Florida serve 85 percent of their sentences. That will greatly increase the number of trials in the criminal courts in my state and many of yours.

I have been at New York University (NYU) this week meeting with judges from around the country in their great program for appellate judges, and I know that is not an uncommon story around this country as to the caseload in our state courts. The thing that strikes me is that if we don't deliver the message of the work that is going on in the state courts, who is going to do it? Who is going to do it if you and I who sit in those courts or the lawyers who are in those courts on a daily basis don't explain to the Congress that the real salvation of the administration of justice in this country is in the functioning of the state courts, and that, if you tamper with that, you are tampering with the very institution that keeps the fabric of the communities in this country together?

There is going to be a great deal of additional pressure on the federal courts: Congress is acting to impact the federal courts in ways such as passing a federal crime bill that contains 79 capital crimes. You and I know what a devastating impact on our caseloads those cases have in states that have capital punishment. This is going to exacerbate what at present is a heavy caseload at the state level.

Shifting the Balance Between State and Federal Court Systems

But certainly the answer cannot be to take away the responsibility that has been the genius of our entire system—the counterbalancing tension between branches of government. I think what Justice O'Connor (a former state court judge) said in *New York v. United States* is something that all of us should note and put in our arsenal in debating this subject. She said that where the federal government compels states to regulate, the accountability of both state and federal officials is diminished.[61] If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view.

That view can always be preempted under the Supremacy Clause if it is contrary to the national opinion, but in such a case, it is the federal government that makes the decision in full view of the public, and it will be federal officials who suffer the consequences if the decisions turn out to be detrimental or unpopular. But where the federal government directs the state to regulate, state officials bear the brunt of public disapproval while the federal courts who devise the regulatory program may remain insulated from the electoral ramifications of their decisions.

Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate. It seems to me that, in all of our experience, it is one of the things that is self-evident is that, with the degree of special-interest lobbying that goes on in the legislative branches of our government, that the place that is the most dangerous is in the Congress because that is the most difficult place to put your finger on who is and how those special interests are operating. And they are present in all of our state capitals. The tension between the judiciary and the legislature in correcting problems that come out of special-interest legislation is much more direct and efficient and effective at the state level than it is at the federal level and that has been, in my judgment, our experience over the last twenty-five years.

All of us who are concerned about the administration of justice have to come to some accommodation that makes sense, but we must not attempt to mitigate problems at the federal level by exacerbating them at the state level.

Judicial Federalism and Individual Rights:

Some Reflections on the *Proposed Long Range Plan*

by Harlon Dalton

Professor Dalton described the ostensible organizing principle of the Proposed Plan*—the recognition of the primary role of state courts in our federal system—as appealing. He characterized its underlying goal, however, as an attempt to alter the basic legal landscape in accordance with a vision of a judiciary "deeply engaged in facilitating economic activity but decidedly chary when it comes to vindicating the statutory rights of individuals."*

The increased workload on state courts that would result from implementing the Proposed Plan*, he argued, would force state courts to either turn away litigants now served by the federal courts or divest themselves of some of the cases they now handle. Although the* Proposed Plan *called for increased federal assistance to state courts to cope with their new responsibilities, the realistic prospect for such aid is dim.*

Professor Dalton placed the Proposed Plan *within the context of the ongoing national debate over the role and size of the federal government, noting that for many ideologues, the public call for a balanced budget is actually motivated by a desire to dismantle the welfare state. The* Proposed Plan*'s recommendations are perfectly congruent with current intentions to hand a host of federal responsibilities back to the states. But these responsibilities, he concluded, will overwhelm states that do not have the resources to support them.*

The *Proposed Plan*'s organizing principle—"judicial federalism"—is exceedingly attractive. It honors the competence of state court judges and affirms the primary role of state courts in our nation's judicial system. Taken at face value, the *Proposed Plan* simply seeks to curb federal usurpation of state court prerogatives and to handle the remaining federal business more efficiently. What could be more appealing?

There is a second theme that runs through the *Proposed Plan,* one not nearly so lofty, namely the extraordinary caseload pressure under which federal judges labor. Oddly, nowhere in the 115 pages of the draft is there an explicit discussion of the caseload pressures under which *state* courts labor. This omission would be unsurprising in a report directed solely at federal courts were it not for the drafters' express recognition that "the national and state systems are to be regarded as ONE WHOLE."[62] Between them, the state and federal courts handle the whole of the nation's judicial business. To the extent that business remains constant, any effort to address federal caseload pressures through limitations on federal jurisdiction will necessarily generate additional burdens at the state level. After all, state courts of general jurisdiction cannot simply close their doors.

The *Proposed Plan* implicitly recognizes this fact in Recommendation 13, which urges Congress to "consult with state authorities in defining any new limits on federal jurisdiction; and [provide] federal financial and other assistance ... to state courts, prosecutors, and agencies to permit them to handle the increased workload that would result from the reduction or elimination of existing federal ... jurisdiction."[63] One can certainly imagine a world in which Congress elects to underwrite the operations of state courts, but alas we live on Earth. The hard truth is that for so long as the nation is committed to balancing the federal

budget within the next decade, savings from cuts in programs will rarely be devoted to new spending. I daresay the drafters of the *Proposed Plan* were well aware of this reality. They frankly acknowledge that "[b]ecause of budgetary constraints that will severely reduce discretionary federal spending, future Congresses will not likely permit the judicial budget to grow to fund the projected judgeship needs of the next several decades."[64] If that is so, future Congresses will be even more disinclined to fund an expanded *state* judiciary.

Equally "fantastic" (as in "fantasy") is the expectation that Congress would "consult [meaningfully] with state authorities in defining any new limits on federal jurisdiction." How, then, would state courts deal with the fallout from a shrunken federal judiciary? This brings us back to the issue of caseload. If it so happens that state court systems are underworked and underutilized, then they can readily absorb the additional workload by simply cinching up their belts. But let's just suppose, for the sake of argument, that state court judges, prosecutors, public defenders, probation departments, and the like are already frightfully overburdened, and that they are staring at caseload projections that leave them feeling weak at the knees. And let us further assume that there are not scores of empty courthouses lying around. Under those conditions, what options would states have if the *Proposed Plan* were brought into fruition?

Not surprisingly, they mirror those available at the federal level. One option would be to provide cut-rate justice by taking the very same steps feared by the *Proposed Plan*'s drafters. Freeze salaries; defer courthouse maintenance; limit library acquisitions; write fewer, shorter, and less well-researched opinions; draft more restrictive rules of procedure; mandate pretrial mediation in civil cases; suffer previously intolerable delays in the civil cases that go to trial; accept more lenient plea bargains in criminal cases; penalize defendants who opt to go to trial and are convicted; limit civil appeals; limit oral argument; rule more frequently from the bench; economize on deliberations.[65]

A second option would be to appeal to the legislature for more funds. But there is little reason to believe that state legislators would be appreciably more generous than their federal counterparts, especially at a time when the states are being asked to take over a large number of ever-expanding programs previously managed and financed at the federal level. A third option would be to restrict access to the courts. The *Proposed Plan* charts the way:[66] higher user fees, greater use of administrative and quasi-judicial alternatives to adjudication, legislative forbearance from creating new rights of action, and selective repeal of existing rights of action.

To be sure, each state could determine for itself which restrictions to impose. However, unlike the feds, no state could simply refuse to entertain a particular class of cases. That goes for claims arising under the laws of the United States as well as for homegrown claims. Nor could any state refuse to entertain cases that, prior to the enactment of the *Proposed Plan,* would have been heard in a federal court. Quite apart from the inherent difficulty of determining which cases would have been brought in which court, so long as a right of action exists, the state courts must welcome it. Therefore, instead of imposing limitations on jurisdiction, relief for state courts would require repeal of the underlying causes of action. In sum, legislatures would face the Hobson's choice of either (a) allowing the judiciary to deteriorate; (b) substantially increasing funding, in part by raising taxes; or (c)

cutting back on access to the courts. Quite likely, most would opt for a combination of (a) and (c).

Let us leave the ugly world of grubby practicality and return to the lofty world of ideas, in particular the idea of "judicial federalism." A respectable argument can be made that this concept is just a makeweight, and that the proposed reengineering of the federal courts is driven solely by the clash between a rapidly expanding caseload[67] and the desire to maintain a small and intimate judiciary (especially at the appellate level). I, however, am inclined to believe that the *Proposed Plan* is as much driven by ideology as by pragmatics.

Like most magic phrases, "judicial federalism" has no fixed or stable meaning. On its face, it invites discussion of "the role of the federal courts *vis-a-vis the state courts*."[68] However, as used throughout the *Proposed Plan*, the phrase does more than merely comprehend the relationship between court systems. It also embodies a particular vision of the role of courts in governing our lives. The vision that emerges from the *Proposed Plan*'s commentary, specific recommendations, and underlying assumptions is of a judiciary that is deeply engaged in facilitating large-scale economic activity but decidedly chary when it comes to vindicating the statutory rights of individuals. For example, Recommendations 8 and 9 would shift many if not most benefit and regulatory cases out of the courts and would dramatically limit judicial review of Social Security disability claims. Recommendation 11 would close federal agency and court doors to "disputes involving economic or personnel relations or personal liability arising in the workplace." Recommendation 5(f) would limit federal court jurisdiction, in actions brought to vindicate federal statutory rights, to matters that "involve a clear need for national uniformity on an issue that, in light of experience, cannot be dealt with satisfactorily at the state level." The accompanying commentary suggests that "[t]he burden to satisfy this showing should be a high one if the federal courts are to be preserved for their historical purpose."[69] At the same time, Recommendation 5(e) preserves federal-question jurisdiction over commercial disputes that have a substantial interstate or international bearing. Finally, Recommendation 6 would eliminate diversity jurisdiction except in a narrow class of cases. Alternatively, it would eliminate diversity jurisdiction in the plaintiff's forum state and limit jurisdiction in the defendant's forum state to cases in which large amounts of money are at stake.[70]

In order to understand the ideological uses to which "judicial federalism" can be put, it is helpful to reflect on the parallel national debate regarding the proper size and scope of government writ large. We all know the basics. How large should "government" be? What functions should it perform? Who should come under its protective wing? Politicians understand the rhetorical value of stumping for a smaller, less intrusive government, even if they act in ways that run contrary to that vision. Former President Ronald Reagan, for example, dined out on the notion of "getting government off the backs of the people" even as he increased its size and reach. In this respect, politicians simply mirror the public. Polls consistently show that public sentiment in favor of a smaller, more "underweening" government tends to fade rapidly once you begin to talk about specifics.

Yet we seem on the verge of taking steps that would actually transform the role of government in our lives. The engine of that change is not the highflown rhetoric of politicians but rather the power and appeal of a simple idea—balance the budget; pay as you go. That idea

has broad intuitive appeal. It captures the fancy of a broad spectrum of the electorate and of politicians as dissimilar as Senators Paul Simon and Phil Gramm. We do not yet know whether it "has legs" and whether the current momentum will survive the authorization and appropriations processes, but the idea already has exhibited remarkable staying power.

For many citizens of the Paul Tsongas stripe, balancing the budget is simply a matter of fiscal prudence and the moral responsibility we bear for succeeding generations. For others, however, it is intimately connected to the project of revolutionizing what government can and cannot do. Quite simply, the drive to balance the budget—in tandem with increased privatization, deregulation, and tax reduction—serves the interests of those who would shrink the government to the point that "social engineering" becomes well nigh impossible. If all goes well, we will return to the "night watchman" state where laissez-faire is the order of the day and every tub rests on its own bottom.

Of course, few propose simply abandoning the needy, ignoring the environment, tolerating the fact that people are injured by the negligence or incompetence of others, or leaving those who have been denied equal opportunity without recourse. It's just that "Washington isn't the solution to every problem" to borrow a phrase that is filling the airwaves these days. We need to "empower people to help themselves," we are told. Failing that, the search for answers turns to the private sector, the market, and to state and local governments.

Initially, this was music to the ears of the nation's governors and legislators. It was about time Washington started "handing responsibility back to the states." And wasn't it good news that their competence was finally being appreciated. It didn't take long, however, for savvy state officials to realize that what they were being "handed back" was not only the responsibility to design and administer programs but also the obligation to pay for them. Sure there is the promise that funds will be transferred from the federal fisc to the states in the form of block grants, but it has become increasingly evident that such grants will be appreciably smaller than the aggregate program funding they replace. Moreover, such grants are unlikely to grow over time at a rate that keeps pace with programmatic needs.

Granted, part of the logic of handing responsibility back to the states is that they can run programs more efficiently as well as more effectively. Thus, more can be done with less. However, there is a deepening suspicion in the various state capitols that even when such efficiency gains are taken into account, the federal transfer funds will be woefully inadequate. As a consequence, states will either have to raise additional revenues, make the kinds of program cuts that Congress has been unable or unwilling to do, or cut back on state services, including monitoring and enforcement of health, safety, and civil rights laws.

All of this should serve as a cautionary tale as we contemplate wholesale changes in the role of the federal courts. At this particular moment, the judiciary is less of a lightning rod than it has been in the near past. It was not that long ago that a considerable chunk of the public was exercised over the fact that some courts had "taken over the schools" when local school boards demonstrated a persistent unwillingness to comply with court orders. Similar, though less voluble, concerns were raised about the role of courts in placing prisons and other public institutions into receivership. Attempts were made to deprive federal courts of jurisdiction in particular classes of cases and to prohibit them from ordering certain remedies, such as

school busing. These days, the public focus is less on limiting civil rights remedies (perhaps because the Supreme Court has taken up the cudgel) than on limiting recoveries in products liability and medical malpractice cases.

To its credit, the report encasing the *Proposed Plan* does not explicitly target any particular class of litigants for extinction. It does, however, propose massive relocation. Recommendation 9, for example, says that "[w]here constitutionally permissible, Congress should assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding." Recommendation 8(a) urges that "[t]he adjudicative process for Social Security disability claims ... be improved by ... limiting the scope of appellate review in the Article III courts." Recommendation 11 asks Congress to "refrain from providing federal agency or court jurisdiction over disputes involving economic or personnel relations or personal liability arising in the workplace." The specific "implementation strategies" focus on eliminating federal jurisdiction over work-related, personal injury actions, "such as" FELA and Jones Act cases; abolishing concurrent federal jurisdiction over routine ERISA benefits claims; and designating state courts as the "primary forum" for review of benefit denial claims arising under "any new cooperative federal-state" national healthcare program. However, the language of the recommendation is broad enough to encompass employment discrimination cases such as those arising under the Americans with Disabilities Act (ADA) of 1990.[71]

My concern for the future of civil rights enforcement is not misplaced. As noted earlier, Recommendation 5 calls for the elimination of federal jurisdiction over statutory claims unless they meet the high burden of demonstrating that they "involve a *clear need* for national uniformity on an issue that, in light of experience, *cannot be dealt with satisfactorily* at the state level."[72] Even more worrisome, as the director of the Bazelon Center for Mental Health Law noted in his statement to the Committee on Long Range Planning, "[t]he text supporting Recommendation 12 [regarding Congressional judicial impact statements] and the accompanying box, appear to suggest that the Committee believes that federal civil rights causes of action have contributed significantly to the increase in caseload and will, in the future, severely overburden the federal courts."[73] Although the drafters' discussion is nominally targeted at the entire panoply of federal legislation, more than half of the statutes singled out in the "side bar" box concern the enforcement of civil rights. Quoting once again from the Bazelon Center statement:

> *There is no basis to believe that the laws cited have proved a burden on the courts. Two of the laws only concern attorneys' fees, and thus create no independent cause of action at all.... Another law cited, the Civil Rights of Institutionalized Persons Act, creates a cause of action only for the United States, and the Justice Department files only a handful of such cases annually. The Family and Medical Leave Act has so far not spawned much litigation, and few people predict many cases will be filed under the law in the future. And the Americans with Disabilities Act has hardly led to the flood of cases opponents predicted while making its way through Congress.*[74]

Please note, these changes (implicit as well as explicit) are not proposed in the name of a smaller judiciary that intrudes less in the lives of ordinary citizens. The drafters do not say

that change is needed to unleash the market. Rather, the recommendations are justified by an appeal to "judicial federalism." Like "balance the budget" and "pay as you go," "judicial federalism" is a principle that is hard to argue with. In challenging the jurisdictional aspects of the *Proposed Plan,* one risks being cast as hostile to the framers' intent regarding the primary role to be played by state courts and disrespectful of the competence of the men and women who sit on them. My concern, of course, is exactly the opposite—to ensure that state judges not be placed in a jurisdictional and fiscal vice that makes it impossible for them to provide quality justice and remain sane in the process.

There is, of course, much salutary in the idea that Congress should forbear from usurping the state courts' functions, just as there is much value in the idea of balancing the federal budget. But we must take care lest these worthy ideals become siren songs that promise pleasure but deliver only pain. Doubtless there will be many state judges who, like their gubernatorial and legislative counterparts, are so entranced by the music that they neglect to protect their own interests. But I am betting that most of you will recognize that if the federal and state court systems are truly to be regarded, in Hamilton's words, as "one whole," then a plan to restructure the lesser half should not proceed without considerable input from you.

Additional Oral Remarks of Professor Harlon Dalton

In additional oral remarks at the Forum, Professor Dalton suggested that the Proposed Plan *may have an agenda beyond its stated goal of affirming the primary role of state courts in the national judicial system. He said that the* Proposed Plan*'s recommendations are motivated not simply by alarm over caseload pressure. If they were, he noted, the federal judges would also have expressed concern for the caseload of state court judges.*

A primary interest of the federal judiciary, he said, is the preservation of a small, intimate, and prestigious federal bench. But he suggested that beneath the principles of "judicial federalism" extolled in the Proposed Plan, *its drafters were interested in limiting the scope not only of the federal courts but of state courts as well. Thus, full implementation of the* Proposed Plan *would force state courts to close their doors to litigants who now have access to the federal courts.*

Professor Dalton urged the judges to emphasize the importance of access to justice in responding to the Proposed Plan *and to assert the concept, enunciated but not elaborated in the* Proposed Plan, *of a cooperative federalism in which the federal government and the states work together to ensure that the entire system of justice is open and effective.*

Beyond Caseload Pressure

What is driving the *Proposed Long Range Plan for the Federal Courts*? What is driving the desire to restructure the federal judiciary? Of course, caseload pressure is a significant part of it. One might argue about the reality of that caseload pressure, and others who are much better with numbers than I am, including ATLA in its written comments on the *Proposed Plan*,[75] have done that quite admirably. But even if one accepts that the federal courts are experiencing a caseload crunch, it is strange that the concern expressed in the report for caseload pressure does not extend to caseload pressure felt by the people in this room. After all, the report does recognize that the federal judiciary and the state judiciary are interlinked as part of one massive judicial system.

Caseload pressure is clearly not the whole story. Suppose Congress were willing to be responsible—willing actually to pay the full cost of adjudicating the rights that it creates. Would the proposers of the *Proposed Plan* be happy? I think not, because even if Congress were willing to pay for more federal judges, more magistrates, more clerks, and more courthouses, that would still be objectionable. The drafters of the report are primarily or at least largely interested in maintaining a small, intimate federal judiciary, especially at the appellate level.

Indeed, the report describes the prospect of 1,200 federal appellate judges by the year 2020 as frightening and even nightmarish.[76] It is not surprising for a bench that is populated at this moment, or could be populated if it were fully staffed, by 167 people, roughly the number of people in this room. One of the recommendations calls for carefully controlled growth with respect to the federal judiciary. The drafters of the *Proposed Plan* don't simply rely on reducing demand for federal judicial resources; they also want to attack the problem on the supply side as well.

Why are they interested in a small and intimate federal bench? If you read the *Proposed Plan*, you get the same answer in various ways, but there seems to be a connection, in the minds of its authors, between smallness and excellence. Justice Wells suggested this morning that state courts in fact provide excellent justice. But if one reads the report, one would assume that that is somehow tied with a limited jurisdiction and with a total aggregate number under 200. Indeed, the report says that because of its size and selection process, among other things, the federal appellate bench has been able to attract the "tallest trees in the forest."[77] I guess that makes the state judiciary scrub brush. The report also says that it is important to have a jurisdiction limited enough so that judges can become sufficiently expert about subject matter and procedure.

The report says that a small and intimate bench is necessary in order to afford justices time for contemplation and reasoned decision. Now I trust nobody would object to time for contemplation and reasoned decision, but perhaps the negative pregnant is that if you had more time, you would spend more of it eating bonbons as Justice Wells suggested this morning.

Finally, the report says quite explicitly that the desire for a small and intimate federal bench is related to the question of prestige. And, indeed, small size sometimes does confer prestige. The *Proposed Plan* also suggests that a larger federal judiciary would have some effects in terms of structure. But the *Proposed Plan* also states that "the greatest loss" that would flow from an enlarged federal judiciary "would be in the notion of courts as collegial bodies."[78] It quotes Judge Jon O. Newman, Chief Judge of the Second Circuit, who said: "When I contemplate our court in the middle of the next century ... I despair. It will not be a court; it will be a stable of judges, each one called upon to plow through the unrelenting volume, harnessed on any given day with two other judges who barely know each other."[79] That is the awful specter that this report seeks to avoid.

The Fig Leaf of 'Judicial Federalism'

In addition to (1) caseload pressures and (2) the desire for a small and intimate, excellent federal judiciary, it seems to me that the *Proposed Plan* is driven by a third force: the mantra of "judicial federalism." The phrase really has that sort of quality—a siren song, really—but what does "judicial federalism" really mean? Several different themes are sounded in the *Proposed Plan.*

One (the one that is calculated to appeal to the folks in this room) is that state courts are primary: the federal constitution says so. Federal courts merely fill in where necessary to complement the work that you do. This sounds alluring.

But there is also a second—a kind of jarring counterpoint—in the *Proposed Plan.* It is that state courts are primary, but federal courts are *special.* State appellate judges are in effect the field hands, those who are suited to the stable and the plow that Judge Newman talked about, whereas federal appellate judges are the house hands, the ones who know the difference between a parlor and a privy.

I am concerned that the principle of "judicial federalism" will be used as an intellectual fig leaf for limiting what courts—state and federal—can do and on whose behalf they do it. If

the proposal were implemented in its totality, that is exactly what would happen, that there would be profound effects on what courts could do and for whom.

So I think it is important to look at the broader debate about the size for the federal government, in part because judicial restructuring is simply a subset (I mean judges are a subset of one of the three branches of government), but also because the broader debate about the nature of federal government is more advanced at this point. We have been at it longer, and we can learn some early lessons from that debate.

One of those lessons is that lofty principles often mask strong ideological commitments. I know this should not be news to anyone in this room, but nevertheless, we have seen in the debate over the role of the federal government principles often substituting for—or at least carrying the weight for—deep-felt ideological views.

A second lesson from the broader debate about the nature of the federal government is that the devil is in the details. This, of course, is true in most of life, but it is certainly true in this debate. Governors who signed on early to the notion of shrinking the federal deficit and giving power back to the states are, day by day, having second thoughts or at least questions about what it is that they have signed onto. They have come to realize that part of what enabled states to balance their own budgets is the fact that the federal government did not balance its own. They have come to ask some questions about block grants like how much money will be there, how much less will we receive in the aggregate from block grants than we did from categorical programs. Will, in fact, these block grants grow with population? Of late there has been a fair amount of talk about the formulas that will be used in terms of deciding on the level of block grants, who will be the winners, and who will be the losers.

So the governors and state legislatures are suddenly becoming much less entranced with the mantra of shrinking the federal deficit and giving power back to the states now that they have had the opportunity to look at the details. I suggest to you that you might want to look at the details of the proposed long-range report for restructuring the federal judiciary.

What should state judges do about all this? This morning Justice Wells suggested that it is important to get the word out, particularly to Congress, that state courts also labor under back-breaking caseloads. And I agree. But in terms of the broader public debate, I worry that that sounds like special pleading. It is very important to find some resonant themes to attach your special pleading to.

Professor Jed Rubenfeld offered one such theme: the responsibility principle, namely that a Congress that creates rights has a responsibility to assure adequate resources to adjudicate them. That seems to me to be a strong principle to raise and raise again as we debate the draft report and the final report that will follow. I would like to offer two additional principles.

Cooperative Federalism and Access to Justice

The second of the three principles is lifted directly from the bowels of the *Proposed Plan*. It is the principle of cooperative federalism—not "judicial federalism," but *cooperative* feder-

alism. In characterizing the recommendations to follow, the *Proposed Plan* makes a remarkable statement.[80] It is remarkable in two ways. I think it is absolutely on the mark, yet it is a total mischaracterization of the recommendations that follow.

The report says that sound "judicial federalism" can be obtained in large part by means of a cooperative federalism in which the federal government and the states work together to promote effective civil and criminal justice systems. But that theme is, in fact, picked up in only three of the ninety-eight recommendations that follow.

One of these, Recommendation 97, is merely a general instruction that "positive communication and coordination between the federal courts and their state counterparts should be enhanced."

The other two recommendations are more specific. Recommendation 3 says that federal and state policy makers should get together and decide who prosecutes what. Recommendation 13 actually says that the federal authorities should consult with state authorities in defining any new limits on federal jurisdiction. Recommendation 13 also says that Congress should provide financial and other assistance to the states to permit them to handle the increased workload that is sure to follow as a result of implementation of the *Proposed Plan*.

That is an important starting point for the debate. It seems to me that the people in this room ought to remember Recommendation 13. If you insist on putting teeth into that Recommendation—that the federal government consult with state governments to arrive at any changes in jurisdiction and to provide financial and other assistance to deal with increased caseload—I do not think the money will be forthcoming. Trying to hold Congress to Recommendation 13 might force legislators to take a sober second look.

It seems to me that while that sober second look is taking place, a third principle ought to be elevated in the debate, and that is access to justice, because underneath all of this is the question of who gets to have a day in court. Bob Dylan had a song once, the basic message of which was, "you have got to serve somebody." That is something that I deeply believe.

Ultimately, this debate should turn on the question, "Whom do you serve as justices?" Indeed, as you frame your responses to the *Proposed Plan*, I think it is important that you understand that, yes, you serve yourselves and, like the federal judiciary, are entitled to worry about the size of your caseloads and having ample time for deliberation. But ultimately, both you and the federal judges serve the people, and it is important to look at the people whose rights and lives would be deeply affected if this proposal were implemented in its totality.

Response by Justice Willis P. Whichard, Supreme Court of North Carolina

Justice Whichard examined the unique qualities of the U.S. dual system of justice in an historical context, noting its origins in the early days of the Republic, when the problem was seen as preserving state sovereignty in the face of overwhelming federal power. He cautioned, however, that the current shift, which he saw as the abdication of federal responsibility in favor of state power, is not in the best interests of state courts.

Most state constitutions require open access to courts, which, unlike their federal counterparts, cannot close their doors even in the face of heavy caseloads and diminishing resources. But because resources would be unavailable to state courts, either from Congress or state legislatures, access to justice would inevitably be restricted. State court judges' reservations about the Proposed Plan, *he said, are based not only on the caseload issue, but on their fears that their ability to do justice would be impaired should the* Proposed Plan*'s recommendations be adopted.*

Justice Whichard advised state judges to make their voices heard, not only as individuals, but through larger bodies, including state-federal judicial councils, the National Conference of Chief Justices, and the State Justice Institute. The goal, he concluded, is to develop a new form of "judicial federalism" within which both court systems can carry out their responsibilities to uphold the law.

If we look at the outset at the institutional setting in which judges function, we are confronted with the fact that the American legal scene is one of the most complicated in the world. The presence of multiple jurisdictions is a significant factor in this. We have fifty-two entities whose courts, along with their legislatures, are constantly generating something called law.

This fact alone would result in a complicated system, but then we impose on these fifty-two entities a federal system. The result is that no matter where you stand, sit, or lie in this country, you are living under two court systems and, in some instances, two bodies of substantive law. Each of these two systems has a constitution that the courts must interpret and apply.

Shifting Federal Responsibility Back to the States

As Professor Rubenfeld noted in his paper, many of the federated nations do not have full-blown, coexisting local and national judiciaries. As he also noted, the problems with this dual system are not new.

In the early history of the Republic, the problem was lingering questions as to whether the several states had relinquished all their sovereignties. At the first convention in my state to consider ratification of the federal constitution, Samuel Spencer, who was one of the state's three original judges, expressed the fear that the federal courts would be oppressive in their operation. He wished them to have nothing to do with "controversies to the decision of which the state judiciaries might be fully competent, nor with such controversies as must

carry the people a great way from home."[81] Judge Spencer would have liked the *Proposed Long Range Plan for the Federal Courts.*

During pendency of the great controversy over whether a state could be sued by a citizen of another state, one writer posited that if such a suit could be maintained, the states would indeed have relinquished all their sovereignties. The states would, he said in a letter from Philadelphia, published in many newspapers of the day, have become mere corporations upon the establishment of the national government. For a sovereign state, the writer said, can never be sued or coerced by the authority of another government. That question was, of course, resolved against the states by the majority of the U.S. Supreme Court in *Chisholm v. Georgia*[82] but subsequently in their favor by the passage of the Eleventh Amendment.

It is perhaps difficult for us today to relate to the genuineness and thoroughness of the concern in the early days of the Republic about an overweening federal power stripping the states of their residual sovereignty. Yet we would undoubtedly be equally concerned if the federal courts were now attempting to arrogate unto themselves some of our traditional prerogatives.

It seems instead that we have come full circle, and that the problem is the prospect of an abdication of federal responsibility and a concomitant enhancement not only of the powers but, more importantly, of the responsibilities of the states. This perception is sufficiently widespread that, in the wake of a recent U.S. Supreme Court decision, a *New York Times* story actually suggested that the Court was verging on reinstating the Articles of Confederation.[83]

In this context, we come to the *Proposed Plan* and to Professor Dalton's comments on it. He first notes that it honors the competence of state court judges and affirms the primary role of state courts in our nation's judicial system. This, as he notes, has its attractions, especially for those of us who populate state benches. What could be more affirming to our egos or enhancing to our sense of self-importance? But as is often the case with appeals to the ego, there is a catch. The parties making the appeal want something, and that something in this case is that they want us to do some of their work. As the professor concludes, we should not be so entranced by the ego-affirming music that we neglect to protect our interests.

Unlike the federal courts, as Professor Dalton says, state courts of general jurisdiction cannot simply close their doors. I suppose most of you labor, as I do, under a state constitution that requires access to the courts for the redress of injuries. "All courts shall be open," the North Carolina Constitution says, and has said since 1776, and "every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law.[84] My court, of course, interprets that provision, but the language quoted is both explicit and extensive, allowing little "wiggle room" on legally cognizable claims.

The Problem of Resources, Caseloads, and Access to Justice

The question then becomes one of infrastructure, staffing, and operating resources. With sufficient buildings, personnel, and funding, we can, of course, do most anything. But the prospects for enhanced resources are hardly bright. The *Proposed Plan* speaks of Congress

providing federal financial and other assistance to state courts, prosecutors, and agencies to permit them to handle the increased workload that would result from the reduction or elimination of existing federal jurisdiction. The reality, though, is that with both the executive and legislative branches of the federal government ostensibly committed to balancing the federal budget in the next few years, and given that the courts have relatively little influence in the way of lobbying for limited resources, significant new federal assistance to state courts in the near future is unlikely. And there is a further issue of whether indeed we want it.

The same is true at the state level. There is little reason to believe that state legislators would be appreciably more generous than their federal counterparts, especially at a time when the states are being asked to take over a large number of ever-expanding programs previously managed and financed at the federal level. Apart from a massive infusion of new funding, additional personnel, and perhaps new courthouses, it is difficult to perceive how an already-overwhelmed criminal justice system can do more than it is already doing.

Neither the federal nor state governments at this time have the resources to spare that they will readily devote to state courts for the handling of enhanced caseloads resulting from the closing of the federal courts to certain categories of cases. As Professor Dalton suggests, the greater likelihood is that both legislative bodies will opt for allowing state judiciaries to deteriorate, and, to the extent constitutionally permissible, for cutting back on access to the courts.

Finally, Professor Dalton raises the prospect of a diminished role for government, thereby lessening the range of matters coming into the courts. If all goes well, he depicts some as saying, we will return to the night watchman state where laissez-faire is the order of the day and every tub rests on its own bottom. I think it was the historian Thomas Carlyle who referred to this state of affairs as anarchy plus a constable.

It is true that we seem to be in a time when anyone who thinks government can do anything is a liberal, and anyone who thinks government should do anything is an ultraliberal. It is probably fair to conclude that we are retreating somewhat from the relative welfare statism of the past two-thirds of a century. But to translate this perception into any substantial reduction in the caseloads of the federal and state courts is probably fanciful and altogether too facile a conclusion. I think indeed the results could be quite the opposite, and they can only be described with confidence as uncertain.

I realize that a single anecdotal commentary on relative caseload pressures is probably meaningless. I give you just one, nevertheless, from a person who in recent years has sat on both a state supreme court and a federal circuit court of appeals. This judge's assessment was that while the federal caseload is greater, the federal government gives its jurists greater resources with which to process it, and as a consequence, the federal job is the less demanding one. Assuming the accuracy and general applicability of that observation, it would hardly recommend a shifting of responsibility from the less to the more burdened.

We are inclined to say that we have our hands more than full, and we do not want added layers of responsibility flowing our way from the federal courts. But I also think our anxieties about the plan are both more altruistic and more profound. They involve concerns regarding both justice and modern federalism.

I first read the ATLA critique of the *Proposed Plan*[85] at my mountain home on Sunday morning of the Fourth of July weekend. The basic thrust of that critique, it seems to me, is a concern for justice and access to justice. I looked out the window as I read the critique, and beyond the river that flows behind my house, I could see nothing but fog. I was reminded of Dickens's novel *Bleak House*, which opens with the Chancellor sitting in Lincoln's Inn with the fog all around him.[86] The reader soon perceives that the fog is symbolic of the whole English system of equity jurisprudence at the time. It was not a system in which litigants could obtain justice, at least not expeditiously or inexpensively.

Appropriately, perhaps, the Sunday school lesson that morning was about Amos, and I wondered what he would have to say about all this. Undoubtedly he would say, just as he did in his time, let justice roll down like the waters and righteousness like a mighty stream. But how would he define justice? Justinian[87] perhaps attempted a definition in his third precept of law: "to give to every one his due."[88] That sounds good, but it seems to me that it answers little, because opinions diverge on just what everyone's due is.

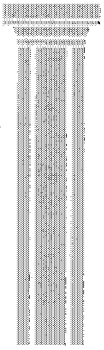
Toward a Responsible Judicial Federalism for the Twenty-First Century

Certainly there can be divergence of opinion on the implications for justice of the allocation of caseloads between the state and the federal courts. In addition to a concern for justice, I think we should share a concern for late twentieth century federalism. "There are ... two governments to which we owe obedience," Justice James Iredell[89] told the grand jury for the circuit court in Annapolis in the 1790s, "the state government to which we particularly belong, in all instances which concern the interests of the state alone; and the government of the United States in all instances which concern the interests of the union at large."

Each of these governments, he said, deserves our equal confidence and respect. Both are restricted within those bounds which the people have thought proper to prescribe, and neither can violate, without violating a most sacred duty, the peculiar province of the other.[90] The chief justice at that time, John Jay, had expressed similar sentiments. The nation, Jay said, was not composed of "detached and distant territories," but was "one connected, fertile, wide spreading country." It "should never be split," he said, "into a number of unsocial, jealous and alien sovereignties."[91]

That, I should think, remains the goal. The last thing we should want is to see the *Proposed Plan* split the state and federal courts, in Chief Justice Jay's words, into "unsocial, jealous and alien sovereignties." As former Chief Justice John Marshall and others saw it in the early days of our country, the ultimate search of statecraft is a search for balance and moderation. As I see it, notwithstanding the many strident voices that would pull us to counter extremes, that is still the case today. None of us in either system should want a return to the Articles of Confederation, nor should we want the courts of any level of our federal system to abdicate their prerogatives and responsibilities at the expense of another.

We should want a system of strong states within a strong federal union, with the courts of each doing their respective jobs in interpreting, applying, and upholding the laws of each and with the governments, i.e., the legislative bodies of each, providing adequate staffing and



funding to achieve that end. Professor Dalton is right in concluding that no plan to restructure the federal court system should proceed without input from the state courts. Individual judges and courts should be involved, as should such larger entities as state-federal judicial councils, the National Conference of Chief Justices, the National Center for State Courts, and the State Justice Institute.

In cooperation with similar federal entities, perhaps we can work through the fog and arrive at solutions that ensure both justice for litigants and a functional form of judicial federalism for the third American century. To that end, let the dialogue continue.

Section II • Endnotes

[25] The federal courts' general federal-question jurisdiction is granted in 28 U.S.C. § 1331(a).

[26] The exception would involve the infamous, lame-duck Federalist Judiciary Act of 1801. See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 92 (granting general federal-question jurisdiction to the federal courts), repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

[27] Committee on Long Range Planning, Judicial Conference of the United States, *Proposed Long Range Plan for the Federal Courts: Draft for Public Comment* (November 1994), hereafter referred to as the *Proposed Plan*.

[28] See *Proposed Plan, supra* note 3, at 20–23.

[29] *Proposed Plan, supra* note 3, at 19.

[30] Id. at 108.

[31] Richard Posner, *The Federal Court: Crisis and Reform* (1985).

[32] See id. at 169–97.

[33] Id. at 188.

[34] See *Proposed Plan, supra* note 3, at 11–18 (projecting that federal caseloads will quadruple within 25 years); Posner, supra note 7, at 59–94. Strangely, a comparison of the *Proposed Plan*'s and Judge Posner's figures seems to suggest that federal district court filings have actually stabilized in the last ten years, although the *Proposed Plan* nowhere mentions this. Posner reports that in 1983, 277,031 cases were filed in federal court; according to the *Proposed Plan*, the total figure in 1994 was 281,740—an increase of less than 2 percent in eleven years. Compare Posner, *supra* note 7, at 64 (Table 3.2), with *Proposed Plan*, supra note 3, at 10 (Table 3). It may be that these two numbers are not comparable. In any event, it is difficult to assess the *Proposed Plan*'s projection (according to which federal filings will reach about 370,000 by 2000 and over 1 million by 2020), which starts with the 1994 figures and projects forward on the basis of growth rates since 1940. Judge Posner, in 1985, offered a similar projection, starting with the 1983 figures and projecting forward on the basis of growth rates since 1960: so calculated, federal filings were going to rise to almost 500,000 by 1993 (and 700,000 by 2000). Posner, *supra* note 7, at 93. No such rise occurred. These remarks should not, of course, be taken to imply that I am dubious about the existence of a caseload problem in the federal judiciary. I am merely dubious about the projections.

[35] See Posner, *supra* note 7, at 180.

[36] Such prosecutions, recommended by the draft *Proposed Plan*, would be impossible under current law, which gives federal courts exclusive jurisdiction over federal criminal prosecutions. See 18 U.S.C. § 3231; *Proposed Plan, supra* note 3, at 23.

[37] See, e.g., *Kenney v. Supreme Lodge*, 252 U.S. 411, 414 (1920) (Holmes, J.) ("the Constitution does not require the State to furnish a court"); *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice) ("The states, in providing their own judicial tribunals have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure."); "Note, Utilization of State Courts to Enforce Federal Criminal and Penal Statutes," 60 *Harv. L. Rev.* 966, 971 (1947) (describing the "traditional doctrine").

[38] It might be said, for example, that a state's allowing violations of law to go without any judicial recourse would itself be state action contrary to due process. On such an argument, states would be under a constitutional obligation to vest the entirety of state judicial power in one or another court (a strange federalist twist on an old debate within federal courts scholarship). The argument seems, however, to ignore (1) the fact that the federal government labors under identical due process constraints, which have never been understood to prevent Congress from limiting the jurisdiction of the federal judiciary; and (2) the probability that states would be relying on alternative dispute mechanisms for any legal violations that had been rendered jurisdictionally unredressible in court. Perhaps such alternative dispute mechanisms might have to satisfy minimum constitutional standards. The point, however, is that nothing in the Constitution requires the states to have *courts* of general jurisdiction.

[39] Cf. *Parratt v. Taylor*, 451 U.S. 527 (1981); *General Oil v. Crain*, 209 U.S. 211 (1908).

[40] See *Howlett v. Rose*, 496 U.S. 356, 369 (1990); *FERC v. Mississippi*, 456 U.S. 742, 760 (1982). The leading case remains *Testa v. Katt*, 330 U.S. 386 (1947).

[41] *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945).

[42] See, e.g., *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case"). Even in *Testa v. Katt*, the case with the broadest implications for state court duties to hear federal claims, the Court expressly stated that it was dealing with a case in which the "same type of claim arising under [state] law would be enforced by [the state's] courts." 330 U.S. 386, 394 (1947). As noted above, exceptions might apply if a state actor has been accused of acting unconstitutionally, or if a formally neutral state jurisdictional statute works some special prejudice as applied to federal rights. See *Felder v. Casey*, 487 U.S. 131 (1988).

[43] See Charles A. Wright, *Law of Federal Courts* 290 (5th ed., 1994); cf. *American Nat'l Red Cross v. Solicitor General,* 505 U.S. 247, 112 S. Ct. 2465, 2477 (1992) (Scalia, J., dissenting) (stating that an effort by Congress to authorize a litigant "to enter state court without establishing the independent basis of jurisdiction appropriate under state law" "would present serious constitutional questions").

[44] See, e.g., *Claflin v. Houseman,* 93 U.S. 130, 141 (1876) (upholding state court adjudication of federal cases) ("Not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State") (quoting *Houston v. Moore,* 18 U.S. [5 Wheat.] 1, 27 [1820]); *Prigg v. Pennsylvania,* 41 U.S. (16 Pet.) 539, 619 (1842) (Story, J.) ("every state is perfectly competent, and has the exclusive right, ... to deny jurisdiction over cases"); *Stearns v. United States,* 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1827–40) (Thompson, Supreme Court Justice, sitting as Circuit Justice) ("Congress cannot compel a state court to entertain jurisdiction in any case"); see also *Brown v. Gerdes,* 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); Charles Warren, "Federal Criminal Laws and the State Courts," 38 *Harv. L. Rev.* 545, 546 (1925) (arguing for a return of some federal prosecutions to state courts) ("While Congress has no power to *force* jurisdiction upon a State Court, it has the power to *leave* jurisdiction to a State Court") [original emphasis].

[45] 505 U.S. 144, 112 S. Ct. 2408 (1992).

[46] Id. at 2428.

[47] Id. at 2434.

[48] Id. at 2423.

[49] Id. at 2435.

[50] "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate." Id. at 2430.

[51] At first blush, the language quoted in the preceding note might seem an express acknowledgment of a plenary congressional power to direct state judges' actions as distinct from state legislators' actions. Read closely, however; the language clearly avoids that conclusion. The cases Justice O'Connor is distinguishing here are not cases holding that Congress has the power to regulate state court jurisdiction. On the contrary, they are the cases mentioned previously, which hold only that state courts already vested with the appropriate jurisdiction under state law may not discriminate against federal suits. See id. at 2429. Moreover, the "federal 'direction'" of state judges that Justice O'Connor acknowledges here is not Congress's direction but, by her own words, the Constitution's. *That* direction is more suggestive of the nondiscrimination principle than of a principle of congressional power to regulate state court jurisdiction. It is certain at least that a majority of the *New York* majority did not believe the Court's reasoning had validated congressional regulation of state court jurisdiction. Justice O'Connor, Chief Justice Rehnquist, and Justice Anthony Kennedy all joined Justice Antonin Scalia in his post-*New York* statement that "serious constitutional questions" would be raised if Congress sought to force state courts to hear cases beyond their state-law jurisdiction. See note 19 *supra* (quoting Justice Scalia's dissent in *American Red Cross*).

[52] See, e.g., Saikrishna B. Prakash, "Field Office Federalism," 79 *Va. L. Rev.* 1957, 2007–32 (1993).

[53] Michael G. Collins, "Article III Cases, State Court Duties, and the Madisonian Compromise," 1995 *Wisc. L. Rev.* 39, 135–58. Professor Collins's research reveals, for example, that William Paterson—framer, original proponent of the Supremacy Clause, drafter of the first Judiciary Act, and Justice of the Supreme Court—expressly noted in 1789 that Congress "cannot compel [state judges] to act—or to become our Officers." Collins, *supra,* at 153 (quoting Paterson's "Notes for Speech on Judiciary Act" [June 23, 1789]). Many of the framers undoubtedly did contemplate broad state court jurisdiction over federal questions, but not as a matter of congressional imposition. The prevailing assumption was that state courts would willingly exercise this jurisdiction—indeed insist on it—as a check against federal power. See Akhil R. Amar, "A Neo-Federalist View of Article III," 65 *B.U.L. Rev.* 205, 256 n. 165 (1985). When American jurists and legislators in the post-founding period considered the possibility of Congress trying to force state courts to hear federal cases against their will, they consistently repudiated the idea. See, e.g., sources cited *supra* note 20; see also *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738, 821 (1824) (Marshall, C.J.) (state courts "may be closed to any claim asserted under a law of the United States"); 1 James Kent, *Commentaries on American Law* 377 (1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case."); Collins, *supra,* at 151–54 (noting that Representatives both favoring and opposing the Judiciary Act of 1801 agreed that there was "no way of compelling" state courts to hear federal questions). By the first decades of the nineteenth century, state courts had already begun refusing some (particularly criminal) federal-question jurisdiction as an intrusion into their sovereignty. See Warren, *supra* note 20, at 577–81. The United States Supreme Court during this period supported the state courts' power to do so. Id.

[54] See Deborah J. Merritt, "The Guarantee Clause and State Autonomy," 88 *Colum. L. Rev.* 1, 66 (1988); Prakash, *supra* note 28, at 2033–35; cf. *FERC v. Mississippi,* 456 U.S. 742, 784–85 (O'Connor, J., concurring and dissenting).

[55] *New York*, 112 S. Ct. at 2435 (emphasis added).

[56] See, e.g., Posner, *supra* note 7, at 80–81; Henry J. Friendly, *Federal Jurisdiction: A General View*, 16–26 (1973).

[57] 41 U.S. (16 Pet.) 1 (1842).

[58] *Lochner v. New York*, 198 U.S. 45 (1905).

[59] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[60] See Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 960–66 (3d ed., 1988).

[61] 505 U.S. 144, ____; 112 S. Ct. 2408, 2424.

[62] *Proposed Plan* at 1, citing *The Federalist* No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[63] *Proposed Plan* at 31.

[64] *Proposed Plan* at 17.

[65] See *Proposed Plan* at 16–18.

[66] See, e.g., Recommendations 2, 9, 11, 12, and 33.

[67] The rate of expansion and its precise causes is very much in dispute. See, e.g., Appendices I and II to the "Comments on the *Proposed Long Range Plan for the Federal Courts*" (Dec. 30, 1994) submitted by the Association of Trial Lawyers of America to the Committee on Long Range Planning of the Judicial Conference.

[68] *Proposed Plan* at 4.

[69] *Proposed Plan* at 24.

[70] Specifically, Recommendation 6(c) would "otherwise limit[ ] diversity jurisdiction by (1) requiring litigants to undertake a more rigorous showing that the jurisdictional amount-in-controversy requirement has been satisfied; (2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or (3) excluding punitive damages from the calculation of the amount-in-controversy requirement."

[71] To be sure, Recommendation 11 makes an exception for the "enforcement of substantive federal requirements." It is hard to know what that language means. Arguably, every FELA, ERISA, Jones Act, and ADA action involves an attempt to enforce the substantive policies embodied in the respective statutes. To read the exception that broadly, however, would eviscerate the recommendation.

[72] Emphasis added.

[73] Statement, dated Dec. 9, 1994, at 7.

[74] Id.

[75] See Appendix A.

[76] *Proposed Plan* at 16.

[77] *Proposed Plan* at 6.

[78] *Proposed Plan* at 17.

[79] *Proposed Plan* at 17, n. 2, citing Jon O. Newman, "1,000 Judges—the Limit for an Effective Federal Judiciary," 76 *Judicature* 188 (1993).

[80] *Proposed Plan* at 20.

[81] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippincott Co., 1907), 4:136.

[82] 2 U.S. (2 Dallas) 419 (1793).

[83] Linda Greenhouse, "Focus on Federal Power," *The New York Times*, May 24, 1995, at p. 1, commenting on *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 131 L. Ed. 2d 881 (1995).

[84] N. C. Const., art. I, § 18.

[85] See Appendix B.

[86] Charles Dickens, *Bleak House* (Oxford University Press ed., 1989), 1.

[87] Byzantine emperor, 482–565.

[88] Book I, Title 1, 3. Thomas Cooper, *The Institutes of Justinian with Notes* 6 (New York: John S. Voorhies, 1852).

[89] James Iredell (1751–99) served as an Associate Justice of the United States Supreme Court from 1790–99.

[90] Griffith J. McRee, *Life and Correspondence of James Iredell* 2:387 (New York: D. Appleton and Co., 1858).

[91] *The Federalist* No. 2, at 9 (John Jay) (J. Cooke ed., 1961).

SECTION III
THE JUDGES' RESPONSES TO THE *PROPOSED PLAN*

Small Group Discussion Excerpts

The proposed shift of federal court cases to the states was for the most part viewed with concern, dismay, and even outright hostility by the state court judges who participated in the Forum. Their reservations centered on what they viewed as a scenario designed by the federal judiciary to save its own system at the expense of the state courts; the intolerable caseload increase that would inevitably follow any significant transfer of jurisdiction; a host of potential logistical, legal, and constitutional questions that would inevitably surround trials of federal cases in state courts; a dismantling of the traditional framework of judicial federalism in which federal and state court systems were balanced; and fears that the recommendations would lead to serious restrictions on access to justice, particularly among poor litigants.

These feelings were fueled by a strong sense of state pride and identity, independence, and professionalism as jurists. The judges frequently spoke of their belief in the special nature of state courts and their apprehension that these unique characteristics might be eroded if the lines between state and federal jurisdiction were obliterated. Their views, which were often expressed with pungency during the Forum, are summarized and excerpted in the following pages, with some editing for clarity.

Perceptions of Elitism on the Part of the Federal Judiciary

State judges were fully aware of the federal court caseload and acknowledged that the grinding pressure of handling routine criminal cases is demoralizing. They were also sympathetic for the plight of federal judges ("they see themselves simply as robots") whose caseloads are generated by the federalization of drug crimes coupled with mandatory sentencing guidelines. "If there were no war on drugs," one state judge remarked, "I doubt that we would have this draft plan." But the state judges also expressed some resentment of what they saw as the federal judiciary's assumption of primacy. Even then, they described their own reaction as part of the "sibling rivalry that we always have with our federal brothers and sisters that causes us to complain sometimes about the relationship."

Discussion Excerpts

- The *Proposed Plan* struck me as being somewhat arrogant. They don't want more judges, because the more there are, the less prestigious the office becomes. "So what shall we do with the caseload? Dump it somewhere."
- Is it too simple to suggest that the things they want to shift are the things they don't want? They are not shifting anything they are interested in. They just want to get rid of what they regard as not worthy of their attention.
- They look at someone sitting there earning $139,000 and think, "It is a travesty, it is an abuse of the taxpayers for me to handle this slip-and-fall that involves diversity jurisdiction or this dispute of $1,000 worth of Social Security benefits."

- The whole proposal is to perpetuate the federal judicial system as a system of a few judges who are going to handle only important cases involving a lot of money or broad national implications. Under the *Proposed Plan*, it would be an elitist system. It already is, but it will be even more so.
- You delegate all run-of-the-mill cases.
- If it is not important enough, they will pass it to the second line.
- Without regard to what it does to our workload, our town, our ability to do what we are trying to do.
- It makes the state judiciary subservient.

- If you double the size of the federal judiciary, they are only half as important, and I think that is probably what is going on.

The Caseload Burden

The disparity between the caseloads of federal and state judges elicited a nearly unanimous response on the part of the judges. They were disturbed at the prospect of having to cope with even larger caseloads to relieve the federal courts of some of their burden.

Discussion Excerpts

- There is a longer line outside the state courthouses, particularly in urban areas in this country, than in the federal courts. What they are in effect saying is, make the federal line even shorter and the state court line longer.
- The federal judges have identified what they regard as some busywork aspects of their jurisdiction, and they look at the bar charts indicating increasing caseloads in tough areas dealing with the death penalty, with many more crimes being created, and they are saying: "We are still going to be in the piecework business. We can only make a sewing machine run so fast. We have just got to take a few of the pieces off the stack."
- We are jealously protective of our current condition in our state, in which you can get to trial in a year. If you file in July, you will be trying a case the next July or blood will flow from the presiding judges. They are blistering in their enforcement of that rule, so to think of waiting five years for a state trial is simply inconceivable to a lawyer or judge in our state. They just won't give that up.
- We cannot handle any more cases. Our court, according to the national sample of state courts, has the highest or next-highest caseload and has had for years. We are writing over 300 opinions per judge per year. The quality of justice is obviously not there. We are not brilliant people—I am not, anyway—and we are just trying to get the work done. So adding more cases without adding more resources is totally intolerable. But

what about the systemic thing? One of the things I question is, what about uniformity?

- We sit in panels of three, and there is a definite attitude toward not increasing the number of judges. We have been sort of putting our thumbs in the dike. We used to have one law clerk. We now have two law clerks. We have several more staff attorneys, and what I see happening that really disturbs me is judges are getting further away from the decision-making process.
- In the time that I have been on the court that I sit on, when I got there it was a four-judge court, and a newly created position made it five, and that was twenty-one years ago, and now we are ten, and every one of those additions to our judicial strength I supported, went to the legislature and argued for them. I never felt diminished on account of it. There was so damn much work to do; we had to have more people.
- I see the *Proposed Plan* as elitism. For many years we used to refer to federal judges as the caseload cry babies. They were always crying about their caseloads, and when you compare theirs with most of the state judges, it is about one-third or even less than what we state judges have.
- Let us assume that both the federal and state systems are overloaded, that something needs to be done. Congress can diminish the jurisdiction of the federal courts, which in effect would dump more on the states. But what can the state legislatures do to dump jurisdiction back to the federal courts?
- Our courts are as overwhelmed, certainly in the criminal field, as are federal courts, with drug cases and domestic violence. I am not sure we can handle much more of those kinds of cases. What we are talking about ultimately is how we administer justice. Does the system need to be changed because we can no longer handle the volume of cases?
- Our federal judges *are* overloaded. The feds are so screwed up because of their sentencing guidelines that it takes years to get a civil case to trial.
- The federal courts are just inundated with drug cases, and it is exacerbated by the mandatory sentencing guidelines, because the incentive to plead isn't there any more. Defendants might as well go to trial and take their chances. It would be far more realistic, if the federal judges are concerned about their dockets, to take a look at the kinds of crime they are dealing with.
- We are already experiencing some transfer of cases, and we are experiencing another very subtle ploy in that direction and that is certifying questions from the federal court to the state court, which increases our load at the state supreme court level, and I suggest gives litigants time for settlement.
- One phenomenon that keeps the civil calendars governable in our state, and I was wondering if this prevails anywhere else, and that is the use of private judging—retired judges who, when they reach retirement age nowadays, retire and go out as private judges at a very substantial hourly fee. Now, there are pluses and minuses to that. The plus is that it does reduce the civil calendar substantially. The minus is that only litigants of substantial means can afford to hire the private judges. But our retired judges are making a lot of money these days, and it is having a significant effect on the civil calendar.
- I think that, even for diversity cases, in my state there would be resistance to the *Proposed Plan.* The caseload is so overwhelming in state courts that even if we put a

couple more cases into the system, I think it would have a very telling effect. So, I think there would be resistance.

- Certainly in our jurisdiction it is very, very different between the federal and the state courts. If you bring a case in the federal court in our jurisdiction, lawyers can basically sit down with the judge and decide when the case is going to be tried, and it is not a very long time. You can get a date within a very small number of months in federal court. The reports indicate that the federal courts are handling one one-hundredth of the case numbers of the state courts.
- I will work at 4,000 cases in one year in one form or another—not necessarily plenary appeals, but extraordinary writs, motions. They have names, and they are cases, and I look at about 4,000 a year.
- I don't think it is a question of money. They couldn't pay me another $40,000 or $50,000 and get more than I am doing and what other judges are doing in my state without a real suffering of the quality of justice.
- It is irritating to think we are considering all this because federal judges think they work too hard. It is not extravagant to say that overall these proposals are kind of arrogant.
- I am willing to assume that there is a staggering caseload in federal court, but it would seem to me that the principal way of solving it would simply be to add more judges and retain the jurisdiction in the federal system.
- I believe that from the point of view of the federal judiciary, there has to be some solution to their problem. It is not clear to me that it is worse than ours. I think we naturally resent a certain perceived cavalierness in their suggestion that we need to work harder, but things are going to be just as bad in the federal courts as they are in many states soon, if they are not already. There has to be some long-range solution to that.
- If you want to see who has got the real problem with caseloads, it is the state courts, not the federal courts. If you transfer what they want to transfer to the state courts, there will be chaos.

Diversity Jurisdiction

A significant number of the state judges saw diversity cases as a special category that properly belonged in state courts, where they had been originally. They had no doubts that state judges were fully equipped to handle these cases and did not think the relatively small number of additional cases that would result from eliminating diversity jurisdiction would overwhelm their dockets. Many judges expressed pride that parties no longer needed to be afraid that they would not get fair treatment as outsiders.

However, several state judges suggested that, even though states could digest diversity cases, the federal judges probably would want to keep those that involved large sums, large corporations, and "very interesting issues. They don't want to let go of them. What they want to get rid of are the tiny drug deals, Social Security, and ERISA—things that take a lot of time and are not very interesting."

Discussion Excerpts

- I think it would be all right if we would eliminate diversity jurisdiction and let those cases go back to the state courts where they should have been in the first place, but any further encroachment upon the state judiciary would be unwise and counterproductive.

- Diversity doesn't make any sense in our modern society. When I see issues like mortgage foreclosures being dealt with in federal courts, that doesn't make a lot of sense.

- I would accept the elimination of diversity jurisdiction, which never should have been in the federal courts in the first place. It is generally purely a matter of state statutory or common law. The reason for diversity jurisdiction, that a litigant of one state could not get justice in the court of another, probably is not a valid proposition any more and hasn't been for years.

- I think that diversity is probably the one category that is the most difficult for Congress to do away with because I think the institutional litigation interests are the most interested in diversity jurisdiction and always have been.

- In our jurisdiction, a lot of the defense lawyers, even though they represent corporate entities, don't have any desire to go to federal court anymore than the plaintiff lawyers do, except they tell us that their clients insist on going there.

- I won't join in on abolishing diversity. I think the federal government has more money than we have and shouldn't slough that off onto the state courts. I like the idea of some reform within the federal system. Use the magistrate judges. Let them have broader jurisdiction. Appoint more judges.

- If diversity jurisdiction were abolished, there might be philosophical or aesthetic reasons why that would be unpleasant, but I don't think the incremental burden on the state judiciary would be that great. That doesn't worry me nearly as much as forcing into state jurisdiction matters that are by their very nature federal.

- I think diversity ought to stay where it is. We are certainly competent, as we are competent to handle federal questions, but it would simply be foisting it off on a system that is far busier than the federal courts are.

- In my state, there have been approaches from the federal courts to get rid of diversity cases, and one of the arguments is, "You state court judges have so much work now that this will be such a small addition that you can handle it." I think that is the straw that breaks the camel's back.

- A lot of federal judges I talk to would like to keep diversity. Those are their most interesting cases. They want to get rid of the criminal cases.

- I don't think we ought to be hearing federal law questions, but the one area it does make sense to shift back are diversity cases. We have long since passed the old-fashioned idea that the state courts couldn't be fair. It seems to me that we ought to welcome those cases. Maybe "welcome" is not the right word, but we ought not to resist taking them back.

A Question of Resources

The state judges were certain that no additional funding would be forthcoming from Congress to support the costs of shifting cases into state courts, which already labor under extremely tight budgets. This was a major sticking point in their rejection of the *Proposed Plan*'s recommendations. They likened the imposition of additional federal cases to the unfunded mandates sometimes imposed on states, and they firmly allied themselves with their governors and state legislatures who opposed them. A number of judges had reservations about accepting federal money even if it were offered, believing that such funding would inevitably entail federal interference with state autonomy and independence.

Discussion Excerpts

- If the state courts are going to accept the caseload of the federal courts in a substantial way, it has to be accompanied by adequate funding to the states. But nobody here feels it is a realistic possibility.
- This *Proposed Plan* would be devastating to us. We cannot get the financing now out of our legislature to do the things we need to do, much less take on cases from the federal courts.
- Every state that I know of has got local funding problems. An increase in our caseload would exacerbate that to the point that I think there would be a real breakdown.
- The suggestion that the federal government would pick up some of the costs that would devolve to the state courts is ludicrous. At this moment, the Congress has zero-budgeted the State Justice Institute, from which many state courts derive great financial benefits to supplement what their own funding authorities won't give them.
- This is a terrible idea whose time has not come. I would be opposed to any funding from the federal government, because if they give you money, they are going to try to get control. I do not want control from the state legislature, and I do not want control from the federal legislature.
- I think the federal government won't fund the state courts. Would you really want them to? They don't give you a dime without telling you how to spend it. Do we really want the Congress of the United States telling us how to operate our state courts? I think not.
- The federal circuit judges have two law clerks and total access to computer research. We cannot use Lexis without special permission because of the cost. We can no longer buy *Shepard's Citations* because we have a $400-a-year book allowance and *Shepard's* now costs $450.
- No one ever went to jail voluntarily. He had to go through a judge. The public just does not understand that every time the politicians pass a law making something a felony, we have to build more prisons. We have to have more prosecutors, more judges, and perhaps more courthouses. And nobody wants to pay for it.
- I hope my state judicial system never accepts a penny from the federal government. If you do, you become their absolute lackeys. When that happens, the state court system has become totally federalized. It is the same old story: "Either pass this law or you don't get the highway money. Pass this law or you don't get the welfare money. If you don't have sentencing guidelines, you don't get the federal money. You cannot put your people in the federal penitentiary." That is the most frightening part of it.

- My own personal concern is less with how we are all going to bear the cost of this additional burden than it is with the potential eroding of the federalist court system.

Blurring the Line Between Federal and State Law

The judges were very concerned about technical problems that might arise in prosecuting federal cases in state courts. For example, would federal prosecutors bring indictments and try criminal cases? (At least one judge predicted that the Justice Department would not view this prospect with any enthusiasm: "If there is any more elitist organization than federal judges, it is federal prosecutors, and I cannot imagine a single U.S. Attorney who is going to willingly go to state court to prosecute crimes. It is just not going to happen.")

Others cited knotty issues posed by state constitutions (some of which declare that all officers who conduct business in the state court system must be state officials) as well as problems of sentencing, jail sites, and probation supervision that would further complicate the trial of federal crimes in state courts. A number of judges also raised questions about lack of uniformity of federal law if it were enforced in fifty different venues.

Discussion Excerpts

- I don't have any problem with taking on the workload that we have to take on as a result of state-created rights, but it seems to me that it is not our responsibility to provide the institutions that interpret and apply statutes that are enacted by Congress.
- If criminal cases are transferred to state courts, are the defendants going to be sentenced to a federal or a state institution? Are they going to be monitored by a federal or state probation department? Are they going to be entitled to federal or local public defenders? This is a whole ramification other than caseload. These are ramifications beyond caseload concerns.
- What about uniformity? If you are going to have fifty states trying these cases, you are going to have a lot of different attitudes toward the federal laws that we are going to be implementing. I see a great problem in achieving uniformity.
- If somebody is convicted, where do we sentence them? What authority does a state judge have to send a federal convict to a federal prison system?
- The *Proposed Plan* makes it sound like a compliment to the state courts. They are saying: "You folks are now free of sex discrimination. You have women judges. You have minority judges. You are able to read and apply the federal Constitution in addition to your own constitutions."
- You are going to have a tremendous lack of uniformity in the fifty states as to how these federal laws are going to be enforced because we are all going to be looking at our state constitutions. We are going to be looking at our own standards of practice and review and there is not going to be any consistency from one state to the next. Uniform federal rules are going to be history.

Access to Justice

The subject that elicited perhaps the deepest concern on the part of the judges was access to justice and the quality of justice dispensed by a system that is stretched to the limit. They shared with the federal judiciary "a feeling that justice is no longer being done in great masses of cases," and worried that a massive transfer of federal cases to state courts would lead to a significant closing of the courts, particularly to poor citizens. A particular proposal that worried the judges was the *Proposed Plan*'s reference to a "loser pays" rule akin to the "English Rule," under which the loser in civil litigation is liable for the winner's attorney fees and costs. (Recommendation 33, *Proposed Plan* at 49–50)

Discussion Excerpts

- This has got to have the effect of cutting down accessibility to courts in general, whether the federal or the state courts. I think the people who drew up this plan are smart enough to know that.
- The authors of the *Proposed Plan* know that chaotic trial court dockets in state after state mean that moving employment law cases to state courts will lead to a lack of enforcement of employment law policy. What we are talking about is not merely a transfer of cases, but a squeezing of the balloon. Truly it is a withdrawal of the federal policy itself—that these rights, now announced and described with remedies in federal law, are simply going to go into thin air because they will not be enforced in the state courts.
- We are accepting the proposition that the problem being addressed is the caseload of the federal courts. I am not sure I accept that. I think the problem may be much bigger. We are withholding from the American people lots of federally given rights. Nobody is going to get up in Congress and say, "We are going to have to repeal all the employment legislation that we passed." But that is going to be the effect if there is no forum left for people to litigate these questions.
- Our state is cutting down on funds for indigent defense, and when we pointed out that there are some constitutional rights involved here and we have to fund it, they said, "Okay, we will decriminalize all of these little misdemeanors and that way we won't have to appoint a lawyer."
- If these cases get dumped onto the states, we aren't going to be able to handle them. There is going to be justice denied—to poor people.
- The target in the headlights of the *Proposed Plan* is the jury system. State courts provide juries that provide money damages, and Corporate America doesn't like it. So, I think we are being naive to think that this is just addressing the caseload of the judiciary.
- I was at the NYU program for appellate judges two weeks ago, and a speaker there was pushing the "loser pays" notion. It certainly seems to me that the inevitable consequence of a universal application of the English Rule is that plaintiffs will be deterred from pursuing claims for relief. They are, generally, the people who can least afford to go to court. Defendants, who tend to have more money, will benefit from a "loser pays" rule. It would be an unfair windfall to defendants to impose the English Rule, and I think historically that is exactly why we have rejected it over and over and over again.

- Access to justice doesn't mean cutting out claims. Access to justice doesn't mean reducing the load on courts by automatically defeating people's claims. I think there comes a point where you substitute numbers for the quality of justice.

Reshaping 'Judicial Federalism'

The judges considered what the *Proposed Plan* called "judicial federalism." They had serious reservations about any recommendations that would unsettle the long-standing balance between federal and state courts and redefine the responsibilities that have traditionally been assumed by each system.

Discussion Excerpts

- I vote for two systems. It gives uniformity. It also gives states the opportunity to deal with their own internal problems, and traditionally this is the way it has worked.
- Should we have a dual judicial system at all? I think we should. Federal courts have a very important role to play, and that is to enforce federal constitutional rights. There are some things they do better than state courts. But to try civil cases, and domestic relations, and damage suits—they have no business doing that. It takes away from what they do well and what they really should do.
- My concern is less with how we are all going to bear the cost of this additional burden than it is with the potential eroding of the federal court system.
- There should be a federal judicial system that vindicates federally created rights.
- If it is going to be one system, then it would be the state courts and the U.S. Supreme Court and nothing else in between—which might not be a bad idea.
- If there is going to be one system, it will have to be the federal system.
- I am not sure there is universal opposition to the *Proposed Plan.* There are some state court judges who take the states' rights view and believe that they should have a significant impact on the development of federal law. Some states don't have the big caseloads. And some of them might see it as a real opportunity to contribute to the development of the body of federal law.
- Perhaps those judges who feel that they are going to have an impact on federal questions should realize that the cases we will be getting are the routine garden-variety low-level cases that the federal courts do not want. We are not going to be getting the big cases that allow us to make great changes in jurisprudence.
- I don't have a problem with the ability of state court judges to deal with federal questions. I think they could do that as admirably as anybody else. But I think federal courts ought to deal with the federal questions.
- I don't have any problem with taking on the workload that we have to take on as a result of state-created rights, but it is not our responsibility—although we would be competent to do it if we had the time—to provide the institutions that interpret and apply statutes that are enacted by Congress.

- To me, devolution means devolving upon the states powers that rightly belong to the states that have been deserted sometime in the past by the federal government. Devolution does not mean to me giving to the states responsibilities that are legitimately those of the federal government and not of the states. When true devolution takes place it seems to me that the way in which that ought to be funded is by the federal government freeing up a part of the tax base in the various states, rather than continuing to serve as the tax collector for all levels of government. If the money hits Washington, they will find something to do with it. The federal government wouldn't relinquish those funds or at least a sufficient amount of them to permit the states to perform all the responsibilities that have been foisted upon them.

- The truth of the matter is that we are facing an effort on the part of some to completely federalize the judicial system in the United States. They think of us as being not very bright, not very independent, and not very well-motivated, and that the best thing that can happen is that we become instruments of the federal court system.

- I think state court judges feel that they are responsible for seeing that rights given to citizens by the state are addressed in the system of justice in the state, and to me, this proposal smacks of the federal judiciary not really having that sense of responsibility.

o o o o o

- If Congress creates a statute with either rights or criminal sanctions, then shouldn't it be up to the federal judiciary to handle that?

- There are commitment problems, too. You know the federal judges have lifetime tenure, which gives them the luxury of making unpopular decisions. Most state trial courts do not have that. For example, would the civil rights laws have been enforced the same in Mississippi state courts as in the federal courts?

- You make a law, you make sure it gets enforced, make sure people do what they are supposed to do. I cannot ignore history. If I didn't have the benefit of history maybe I could say, "Leave it all up to the states, and we will be fine," but I know what happens when it is left up to the state. So, if the federal government makes a law, they need to enforce it.

o o o o o

How Might State Judges Respond to the *Proposed Plan*?

Finally, the judges considered what practical action state judges could take in response to the *Proposed Plan*. Several of their statements evidenced pessimism over whether the activist plan to change the federal courts, should it emerge from the political process as proposed legislation, could be opposed successfully. Several judges observed that Congress has not always shown an understanding of the realities of the state court systems. There was general agreement, however, that the very existence of the *Proposed Plan* calls for organized responses by the state judiciary.

Discussion Excerpts

- What is demonstrated in the *Proposed Plan* is a very active position. In other words, the federal judges have become advocates of what they perceive to be in their best interests. I don't think we have reached that point yet, and that is probably the most important decision that we as state judges can make. Whatever the issue that is being discussed, we have a stake in it, and it is time for us to become advocates—after all, we do 95 percent of the country's judicial business. So I think it is time that the state courts find a way to come together and participate in what is essentially a political discussion and participate in a way that is reasonable but very firm. This sort of conference is the rare event at which we can even get together to talk about it. There is a solution by court systems generally, and state judges particularly, coming to grips with it just like the federal judges have.
- The first thing to do, of course, is gather the facts, but that brings up the very practical question: Does Congress respond to facts? Does Congress respond to reason? Their activity with regard to state judiciary and state awards, and the state court system, and their treatment of laws generally in the last few years will tell you without any doubt that they could care less about the facts. Congress is totally irresponsible with regard to what is reasonable. The Crime Bill, all of the major legislation they have passed in the last three years, is totally irresponsible from the standpoint of state court systems.
- My guess is that state court judges probably have a measure of clout and influence with the state legislatures. And my concern is that not only do state judges need to educate themselves about the nature of this proposal but, also, to move collectively to understand that your voice at the federal level is what is really called for, because I don't think that the people in Congress who are going to be considering this proposal have a lot of interest in listening directly to state judges about this plan. They are concerned about the nature of their federal court system because the proposal comes from a desire to see what would be an ideal *federal* court in twenty or fifty years. They are not considering the state court picture.
- The nice thing about Congress is that it is made up of people from your home bases, and your representatives have to listen to you as much as other citizens.
- I think it would be apparent to the Congress that it is philosophically driven by a small group of the federal judiciary.
- My state has a seventy-day rule. What about translating the crisis from one that is defined by the *Proposed Plan* to one of our own choosing? What if, in fact, criminal defendants start to get discharged because the system cannot accommodate them? Is that acceptable to anyone as a response, letting that happen, if in fact it needs to happen as a way to apply public pressure on the Congress?
- I think with the states what is needed is a wake-up call. We need someone like Paul Revere.

Closing Plenary Session

For the closing plenary session, each of the five small discussion groups was asked to reduce its thoughts to two sentences each, to be announced by the group leader. Their conclusions follow.

Group One

It is in the best interest of future generations that we support a system of strong states within a strong federal union with the courts of each doing their respective job interpreting, applying, and upholding the laws of each and with the government of each providing adequate staffing and funding to achieve that end. We do not want to see our federal courts abdicate their prerogatives and responsibilities, nor do we want to see our state courts become a garbage dump for the federal system.

Group Two

State judiciaries would resist the transfer of cases from the federal system to the state system for one or more of the following reasons: it would result in collapse of the state system; financial ruin would follow the states' receipt of this new litigation load; there is serious concern over whether state judges could hear cases brought by federal prosecutors; there is serious concern as to how and where state courts could sentence convicted federal defendants; there is natural suspicion of any device that would decrease any judge's caseload; there is concern that there may in fact be a hidden agenda behind the *Proposed Long Range Plan for the Federal Courts* related to the failure of efforts to control substance abuse and lack of genuine concern for rights of litigants; there are questions about the need for the *Proposed Plan* if, in fact, the number of federal trials is decreasing and the number of federal judges is increasing; and, finally, there is concern that the proposals amount to an unfunded mandate. Second, if there is a real concern for the federal courts being overloaded and what to do with that overload (and this is doubtful), the solution may be to give the federal magistrate judges more jurisdiction over the cases that federal judges now have and let them have the cases that the federal judges, appointed by Congress, do not want to be bothered with.

Group Three

The *Proposed Plan* exhibits elitism and even arrogance and an abdication of responsibility, and it raises constitutional questions as to whether or not the states can be permitted to handle the problems it describes. We believe the majority of the states would attempt to resist this event through legislative advocacy; failing that, they would do their best to handle the increased caseload, but serious delay and even chaos could result.

Group Four

The transfer of a selected portion of the federal courts' caseload to state courts would have to be accompanied by adequate federal congressional funding. The likelihood of adequate funding from either the U.S. Congress or state legislatures is slim to none.

Group Five

The proposals outlined in the *Proposed Plan* will impact the caseload of the state courts. There is a lot of work in the federal system, but there is also a lot of work in the state system, and an overload in one area does not justify moving it to another overworked area. Because, however, there is little defense against case dumping, the group believed the *Proposed Plan* should be abandoned.

In an open discussion period following the announcement of the discussion groups' reactions, the following general comments were also made.

Discussion Excerpts

- As you read the report, there is focus about the caseload and work of federal courts and how the federal courts should be preserved and maintained. But I would not find an iota of consideration of the day-to-day burden that is carried by the state courts and how the state courts are underfunded and understaffed, yet they do the great bulk of the judicial work in the United States. I think the work of the Long Range Planning Committee was faulty, and I would suggest that we focus on its failure to address the state caseload question as a procedural defect. Judges should be concerned with that.
- The judges that I talked to in the State of Oregon included members of our Supreme Court, and they did not even know the *Proposed Plan* was being considered. There was very little information available to the organized bar that this was even being considered, and the period of comment was closed long before most members of the bar, and most members of the judiciary, even knew it was under study.
- There is some suspicion that Congress would not provide the money necessary to do the additional work. That is not the big problem with me. I don't want Congress's money, and I would not like our Forum to be understood as accepting the federal courts' work in exchange for more money. There is a more important fundamental issue there.
- The other comment I will make is that most of the observations and suggestions assumed that Congress responds to reason and common sense and is concerned about these matters that are so important to us. I suggest that the basic rule by which Congress deliberates is, it is a political issue. We have to come together and use our not inconsiderable influence and do more than just pass resolutions and say it is really sad that they are dumping their cases on us.

Civil Justice Digest

NEWS, RESEARCH & COURT DECISIONS ON THE U.S. CIVIL JUSTICE SYSTEM

PLANNING FOR THE FEDERAL COURTS: WHAT IMPACT ON THE STATES?

In December, the Long Range Planning Committee of the Judicial Conference of the United States released for public comment its *Proposed Long-Range Plan for the Federal Courts*. The 150-page document makes 98 separate recommendations for changes in the operation of the federal courts, some of which would, if adopted, shift thousands of federal cases into the state courts. Some of the *Proposed Plan*'s recommendations would require enabling legislation, but the Committee deems some within the existing authority of the federal bench.

Beginning with a statement of "core values" for the federal judiciary, the *Proposed Plan* discusses future caseload projections and suggests appropriate responses to them and other changes, including: elimination of much of the existing diversity-of-citizenship jurisdiction (Recommendation 5); elimination of most employment-related litigation from the federal courts (Recommendation 11); experimentation with a "loser pays" rule in some civil cases (Recommendation 33); increased use of alternative dispute resolution programs (Recommendation 38); enhanced court resources (Recommendation 53); improved continuing judicial education (Recommendation 81); "user fees" for some court services (Recommendation 87); education on the operation of the federal courts for jurors awaiting assignments (Recommendation 93); and possible organization of courts along subject matter lines (*Proposed Plan* at 108-110).

Comments of the Association of Trial Lawyers of America and other organizations and individuals are summarized on the following pages.

ATLA Comments

Responding to the *Proposed Plan* on behalf of ATLA, president Larry Stewart of Miami, Florida, acknowledged that "the issues considered by the Committee, and the proposals embodied in the *Proposed Plan*, should be of critical concern to all Americans." However, he emphasized that,

> to ATLA, the greatest single issue before the courts—one which lies behind the entire *Proposed Plan*—is access to justice: a fundamental and essential right in a civilized and democratic society. *ATLA believes that any proposals to change the operation of the federal courts implicate access to justice and must be considered in light of their impact on it.*
>
> . . . While the courts have made much of our national prosperity possible through their facilitation of stable business relationships, they have also been central to the traditional American values of personal accountability and personal responsibility. Accordingly, ATLA believes that both the federal and state courts must remain as open to ordinary citizens who seek to hold wrongdoers accountable for their wrongful behavior as they are to business entities and government.
>
> . . . ATLA is fully prepared to work with the judiciary and other bar organizations toward appropriate legislative solutions to a number of the problems identified in the Proposed Plan, where such efforts would be consistent with ATLA's strong commitment to maintaining access to justice for Americans and to preserving individual rights, including the right to trial by jury.

ATLA Comments at 1-2 (emphasis in original).

ATLA's comments included support for most of the Committee's recommendations, but voiced strong disagreement with several of them, and urged the committee to give its attention to several additional matters. For instance, ATLA suggested that the *Proposed Plan*'s "Core Values" statement (*Proposed Plan* at 5-6) explicitly identify "maintenance of access to justice" as a core value and emphasize "the role of the federal judiciary as protector and defender of the United States Constitution and especially the values enshrined in our Bill of Rights, and primary enforcer of civil rights throughout much of our recent history." ATLA Comments at 4.

ATLA also expressed disappointment at finding, among the Committee's statement of matters that threaten the "core values," a reference to the alleged "stubborn litigiousness" of American society (*Proposed Plan* at 7). To

HIGHLIGHTS

challenge this notion, ATLA attached to its Comments a "Memorandum of Points and Authorities on 'Litigiousness.'" ATLA Comments, App. I.

ATLA also questioned the caseload growth projections utilized by the Committee, noting references in the *Proposed Plan* to a number of alternative scenarios not elaborated, and the Committee's apparent assumption, in its prediction of a four-fold increase in federal cases by the year 2020, "that legislators will be unresponsive to the caseload problem." ATLA Comments, Executive Summary. In an attempt to refine the analysis of the caseload projections, ATLA produced two graphs based entirely on historical statistics provided by the federal courts' Long Range Planning Office, that demonstrate that tort cases have been only a small percentage of overall civil cases and that they have, with minor variations, been stable for many years. See Figures 1 and 2, below.

"Thus," wrote Stewart, "recommendations designed to curtail tort cases would improperly and unfairly penalize tort claimants, while effecting little real change in judicial workloads." ATLA Comments at 6.

Shift Diversity Cases to the States?

ATLA's principal disagreements were with Recommendations 5, 11, 31, 33, and 87.

- **Recommendation 5** (*Proposed Plan* at 23-24) would eliminate many diversity cases from federal court dockets, Stewart wrote,

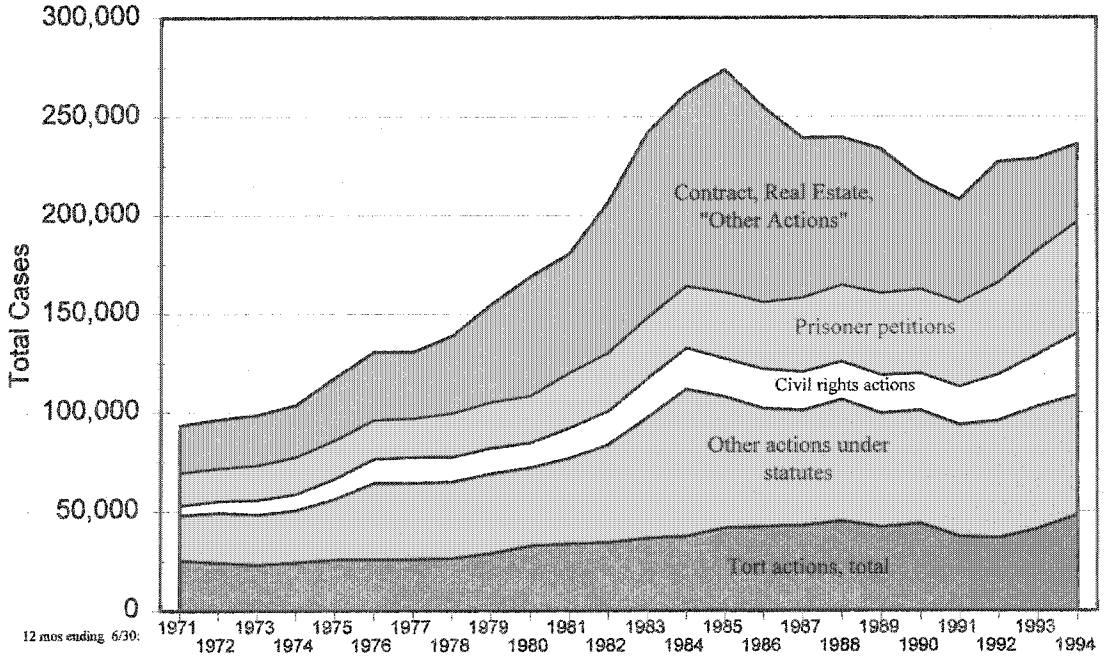
> most likely resulting in an increase in the caseload of the state courts rather than the actual elimination of any substantial number of cases. Given the strains under which many state court systems are currently operating, *it simply cannot be assumed that state legislatures will ever be willing and able to make available to their courts additional resources to absorb the potential increase in cases.* For this reason, consideration of any move to eliminate any part of diversity jurisdiction should be undertaken only in consultation with the U.S. Congress and the Conference of Chief Justices of the several states, which are the only two institutions in a position to actually represent or consider state court interests.

ATLA Comments at 6-7 (emphasis added).

Employee Suits to State Courts

- **Recommendation 11** (*Proposed Plan* at 29-30) would eliminate most ERISA, FELA and maritime cases from the federal courts. Noting that such cases make up only 6.7 percent of civil filings in district courts and that "highly effective mechanisms have been developed over the years to deal with such cases," ATLA argued that "the federal judiciary's investment in them should not be discarded."

Figure 1:
Civil Cases Commenced in US District Courts



Source: Statistics provided by Administrative Office of the United States Courts, Long Range Planning Office
Graph produced by Association of Trial Lawyers of America

Jury System More Than a Symbol

• **Recommendation 31** (*Proposed Plan* at 46-47) called for continued study of and improvement in the administration and operation of the jury system. Although it agreed that the administration and operation of the jury system should be the subject of continued study, ATLA argued nevertheless that "the jury system itself must be preserved, as is directed in the Bill of Rights." ATLA also expressed "profound disagreement" with the implications of the *Proposed Plan*'s statement that "the role and significance of juries in federal court litigation in the future will change as the population of the nation becomes larger and more diverse while federal litigation becomes faster-paced and more complex." (*Proposed Plan* at 47.) "Under the Constitution," Stewart wrote, "the judiciary is allowed hardly any planning as to when juries will [be] used. The parties themselves must remain free to determine when they will avail themselves of their rights to trial by jury."

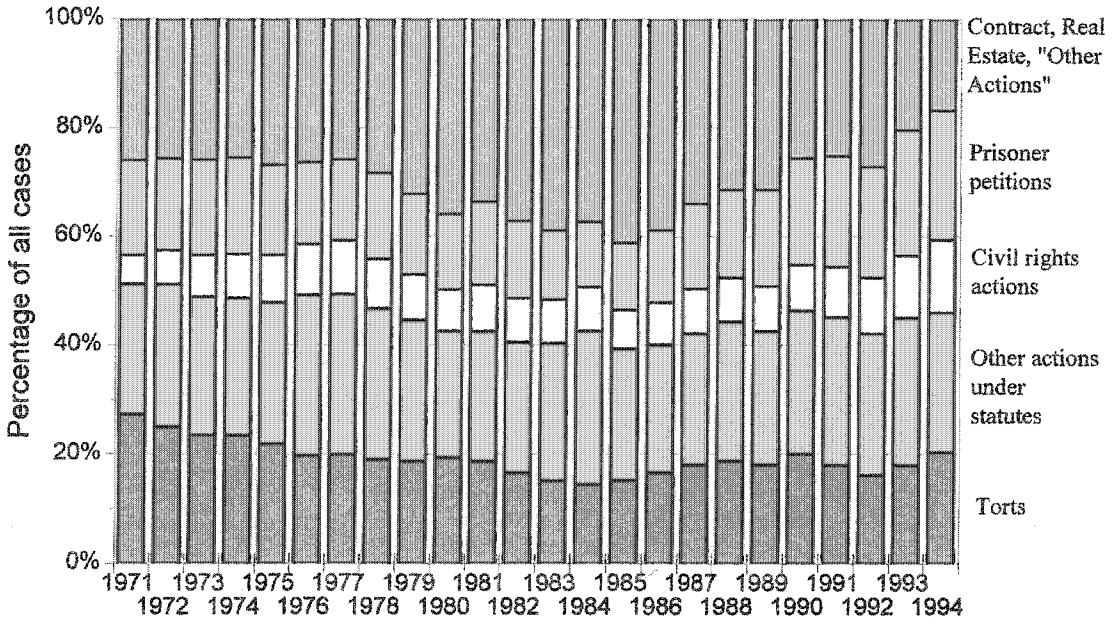
ATLA also disagreed with the *Proposed Plan*'s characterization of the jury as "a potent public symbol" (*Proposed Plan* at 47), asserting that

> trial by jury is not merely a symbol to be maintained through careful management of appearances. It is a central institution of American justice—and indeed of American democracy as a whole—which the Constitution commands the federal courts to preserve.
>
> Yet for all of the importance of the jury as an institution, in its discussion of this issue the *Proposed Plan* makes no mention of the actual number of trials (whether jury or non-jury, civil or criminal) completed in federal courts in recent years. In fact, the statistics of the Administrative Office of the United States Courts clearly show that only a minuscule number of cases actually end in jury trial in the federal courts (less than 9,000 civil and criminal jury trials in fiscal year 1994), and that the total number of trials in federal courts has remained stable between 18,000 and 21,400 for the last fifteen years, with even a suggestion of a downward trend [see Figure 3, below], despite the gradual increase in the number of federal judgeships [see Figure 4, below]. Under these circumstances, the raw number of jury trials cannot possibly be said to represent a serious problem for the federal courts. Rather, as is suggested by [Figures 3 and 4], one problem appears to be the diminishing amount of *judicial time* available to try cases when caseloads increase substantially, causing judges to devote time to cases which do not go to trial. *For this reason, ATLA is opposed to any proposal to limit the total number of federal judges.*

ATLA Comments at 8-9 (emphasis in original).

Figure 2:
Civil Cases Commenced in U.S. District Courts

Five major categories as percentages of all cases



Source: Statistics provided by Administrative Office of the United States Courts, Long Range Planning Office
Graph produced by Association of Trial Lawyers of America

"Loser Pays" Experiment

• **Recommendation 33** (*Proposed Plan* at 49-50) suggests experimentation with the "loser pays" rule in "certain federal cases," as yet undefined. ATLA argued that it was

> particularly concerned that [such experimentation] would inevitably curtail access to justice for some litigants, who would naturally fear the possibility of being ordered to pay their adversary's legal expenses. This is a particularly onerous requirement in cases which pit individuals against large corporations which can issue a virtual carte blanche to their attorneys. ATLA believes that any "loser pays" or similar fee-shifting provision should be ordered only by Congress as a matter of important public policy to promote self-enforcement of important individual rights which might otherwise not be vindicated. ATLA respectfully asserts that the federal courts, as a matter of substantive law, have no authority by themselves to implement a "loser pays" rule in any form, even on an experimental basis, and that a false economy (through exclusion of meritorious cases) would result from any such attempt.

ATLA Comments at 10, citing Roxanne Barton Conlin and Clarence L. King, Jr., "The 'Loser Pays' Rule: Who Pays for Injustice?", *Trial*, Oct. 1992, at 58-62.

User Fees

• **Recommendation 87** (*Proposed Plan* at 91-92) suggests implementation of filing and user fees under certain circumstances. ATLA argued that

> among the several kinds of access to justice to which Americans are entitled is the right of members of the public (including, no more and no less importantly, the news media) to know what business is transacted in the public courts. Accordingly, ATLA believes it is important to allow public access to all publicly filed documents, as well as copying of documents upon payment of fees which fairly compensate the courts for personnel time and cost of production.

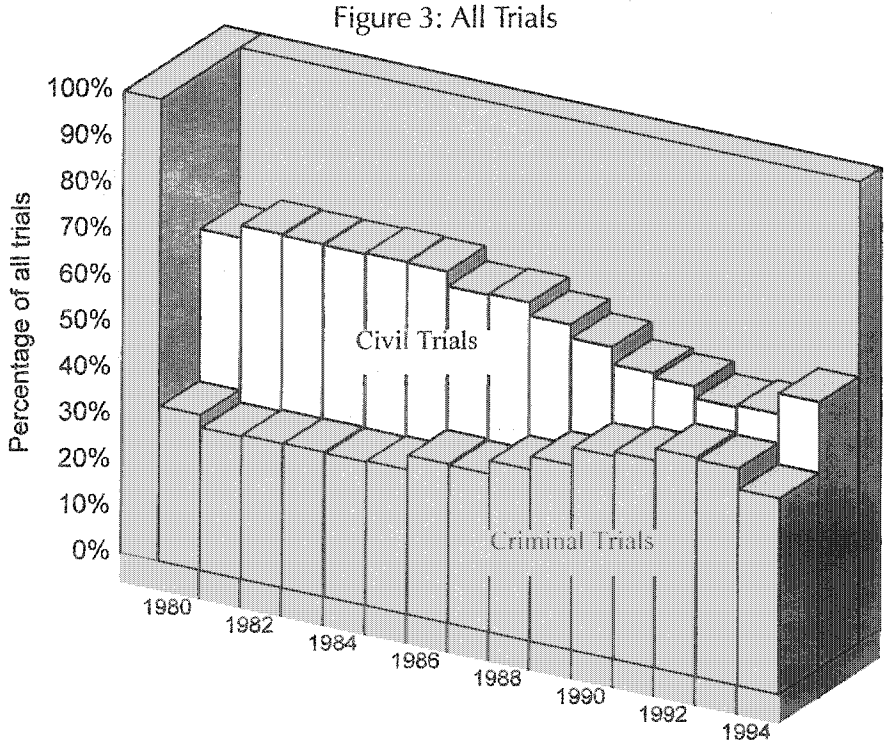
ATLA Comments at 13-14.

Alternative Dispute Resolution (ADR)

• **Recommendation 38** (*Proposed Plan* at 53) suggests expanded use of alternative dispute resolution mechanisms in the federal courts. ATLA commented that "the imposition of *mandatory* ADR mechanisms would [not] be an appropriate or effective solution to any perceived problem of litigants' inability to obtain trial dates," and argued that five fundamental principles must guide future development of ADR programs:

- maintenance of access to justice;

Figure 3: All Trials



Source: Statistics provided by Administrative Office of the United States Courts, Long Range Planning Office
Graph produced by Association of Trial Lawyers of America

- preservation of the right to trial by jury for all cases that cannot be resolved through ADR;
- no additional significant financial burden on the litigants;
- fairness and impartiality; and
- no delay of established trial dates.

ATLA Comments at 11.

Other Issues

On three subordinate issues, ATLA:

- asserted that judicial education (Recommendation 81, *Proposed Plan* at 85-86) must be conducted in a nonpartisan fashion;
- agreed that "it is desirable that citizens called for jury duty should understand the role and function of the federal courts, [but that] citizens' understanding of the role and function of the United States Constitution (especially the individual protections afforded by the Bill of Rights), and of the role of the jury in our American system of justice, should come first (Recommendation 93, *Proposed Plan* at 97-98); and
- agreed that the Judicial Conference should work with "the bar" (Recommendation 98, *Proposed Plan* at 101), but called for more involvement by organized bar organizations and for a "much more broadly participatory" process for further consideration of the *Proposed Plan*, including participation by several nationally recognized academic experts on the subject of litigation and court caseloads who were not included in the published list of individuals consulted by the Committee.

ATLA also voiced strong opposition to the creation of subject matter courts (*Proposed Plan* at 108-110), as

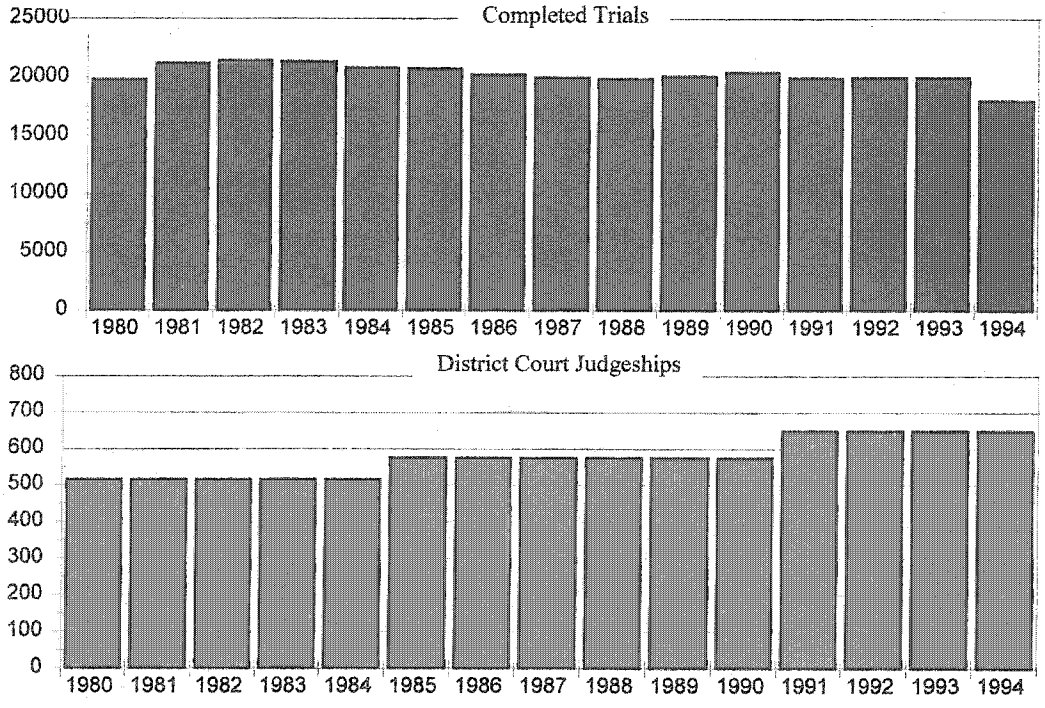
> it is highly likely that they will come to be staffed by judges whose law practice prior to their appointment to the bench was devoted to work for clients in the industry to whose subject matter the court's jurisdiction would be directed. The potential for a high frequency of recusal, or of an undesirable appearance of bias, gives the concept of such courts questionable value. ATLA believes that our American adversarial system of justice should continue to be based on proof developed by the parties and presented by their attorneys, not on the undiscoverable (and perhaps uncertain) expertise of judges of a particular background. The stated desire of the federal courts to attract a diverse population of judges also militates against the idea of subject matter courts.

ATLA Comments at 15-16.

Comments of Other Organizations and Individuals

A number of other organizations and officials filed their own comments, sometimes through the news media.

Figure 4: Completed Trials v. Judgeships



Source: Statistics provided by Administrative Office of the United States Courts, Long Range Planning Office
Graph produced by Association of Trial Lawyers of America

Writing on the Op Ed page of *The New York Times*, **Chief Judge Judith S. Kaye** of the New York Court of Appeals pointed out that, while the *Proposed Plan*

> laments the 282,000 cases filed in Federal district courts last year, . . . more than 200,000 cases were filed in the New York City Family Court alone. And in 1992 (the most recent year for which national statistics are available), more than 33 million civil and criminal cases were filed in state trial courts—100 times the number filed in Federal court.

Chief Judge Kaye went on to project 100 million new case filings in the state courts in the year 2020, compared to one million in federal courts under the *Proposed Plan*'s most dire scenario:

> A common response to the problem of the nation's overburdened judiciary—a response reflected in the Federal panel's draft report—seems to be that as long as the whole system is in trouble, why not at least save the Federal courts? Thus the report recommends that entire categories of civil and criminal cases be transferred from the Federal to the state courts and that Federal jurisdiction over cases involving citizens from different states be virtually eliminated.
>
> Such an approach would serve the institutional interest of the Federal judiciary, but it would not be in the interest of the millions who turn every year to the state courts seeking fair and efficient resolution of their cases. A solution that eases the burden on the Federal courts without taking into account the effect on the state court system is no solution at all.

A solution that eases the burden on the Federal courts without taking into account the effect on the state court system is no solution at all.

Judith S. Kaye, "Federalism Gone Wild," *The New York Times*, Dec. 13, 1994, at 29A.

Discretionary Access to Federal Courts?

One of the more radical reactions to the *Proposed Plan* came from **Chief Judge Jon O. Newman** of the Second Circuit, who advocated making access to federal courts discretionary in many cases, to be granted only on petition to the appropriate circuit court.

Both plaintiff and defense lawyers expressed reservations about the *Proposed Plan*'s recommendation to eliminate much of the current diversity jurisdiction. The Litigation Committee of the **Association of the Bar of the District of Columbia** generally opposed restrictions on diversity cases, while Michael Pope, representing the defense-oriented **Lawyers for Civil Justice**, asserted that defendants' right to remove cases to federal courts should be preserved because "many major corporate defendants can't get a fair trial in state courts." Alan Morrison of the **Public Citizen Litigation Group** in Washington, D.C., suggested just the opposite: eliminate in-state corporate defendants' right to remove diversity cases from state courts. Randall Samborn, "Judges Foresee Federal Courts Caseload Crunch," *National Law Journal*, Jan. 9, 1995, at 1. **John P. Frank** of Phoenix, Arizona, argued that the planning process on which the diversity recommendation was based depended on "highly improbable" caseload projections.

Prof. Judith Resnick of USC Law Center commented that the *Proposed Plan* should recognize "the central role that the federal courts have played in the enforcement of civil rights and liberties," while Nan Aron, speaking for the **Alliance for Justice** and the **American Civil Liberties Union**, argued that proposed restrictions on access to federal courts "would fall most heavily on disenfranchised groups and individuals." Comments of Alliance for Justice at 2. Similar sentiments were echoed by Burton Fretz for the **National Senior Citizens Law Center**.

Speaking for the **National Legal Aid and Defender Association**, H. Scott Wallace advocated resistance to recent legislative trends toward "federalizing" state criminal offenses by eliminating federal jurisdiction of all offenses not involving significant federal interests.

Speaking to broader issues, Steven Tomashefsky, of Jenner and Block in Chicago, representing the **Chicago Council of Lawyers**, argued that the *Proposed Plan* effectively placed the interests of judges above the public interest. **Jerold Solovy**, chairman of Jenner and Block, warned that implementation of a "loser pays" rule would lead to "an elitist judicial system in which the only participants will be the rich and powerful." *Id.*

Addressing one of the ultimate issues before the courts, **Judge Stephen R. Reinhardt** of the Ninth Circuit forthrightly advocated responding to the caseload problem through a major expansion of the federal courts, arguing that "[o]nly our fears, and an outdated and nostalgic desire for a small, clubby and elite federal court system, stand between us and the ability to provide first class justice." *Id.*

COMMENTS AVAILABLE

The Editor of the *Civil Justice Digest* has available copies of the ATLA Comments on the *Proposed Long Range Plan for the Federal Courts*. Copies may be requested on letterhead from Mary P. Collishaw, The Roscoe Pound Foundation, 1050 31st Street, N.W., Washington, D.C. 20007. Fax requests may be directed to 202-965-0355.

TRANSLATION TABLE
FOR RECOMMENDATION NUMBERS

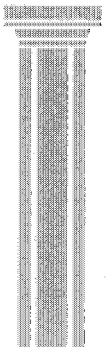
The following table shows the corresponding recommendation numbers in the Draft for Public Comment (dated November 1994), the subsequent draft Submitted to the Judicial Conference in March 1995, and the final version of the *Proposed Plan* published in December 1995. (Numerous recommendations were rewritten in the later drafts. In this comparison, recommendations are considered parallel from one version to the next if they address the same subject matter and are substantially similar in their wording.)

Corresponding Recommendation Numbers

Subject Matter	*Public Comment Version*	*Submitted Version*	*Adopted Version*
Limit federal jurisdiction	—	1	1
Limit criminal jurisdiction	1	2	2
Eliminate some federal criminal statutes	2	3	3
Federal-state cooperation on criminal prosecutions	3	4	4
Prosecutorial guidelines	4	5	5
Limit civil jurisdiction	5	6	6
Limit diversity jurisdiction	6	7	7
State law question certification	7	8	8
Broaden administrative adjudication	8	9	9
Administrative adjudication of federal benefit cases	9	10	10
Federal agency litigation	10	11	11
Eliminate workplace injury cases	11	12	12
Federal judicial impact of legislation	12	13	13
State judicial impact of changes in federal jurisdiction	13	14	14
Discretionary access to federal courts	—	15	—
Controlled growth of Article III judiciary	14	16	15
Appellate function	15	17	16
Size of courts of appeals	16	18	17
Equalize appellate caseloads	17	19	18
Conflicts among circuits	18	20	19
Review of administrative actions	19	21	20
Bankruptcy appeals	20	22	21
Bankruptcy appeals	21	23	22
Appeals of cases decided by magistrate judges	22	24	23
District courts as trial forums	23	25	24
District alignment	24	26	25
Merger of districts	25	27	26
Bankruptcy courts within district courts	26	28	27
Status of bankruptcy judges	27	29	—
Rules of evidence	28	30	28
Criminal sentencing policy	29	31	29
Sentencing standards	30	32	30
Probation and pretrial services	—	33	31

Corresponding Recommendation Numbers

Subject Matter	*Public Comment Version*	*Submitted Version*	*Adopted Version*
Jury system	31	34	32
Pro se litigation	32	35	33
Fee shifting	33	36	34
Appellate case management	34	37	35
Appellate case management	35	38	36
Appellate case management	36	39	37
District court case management	37	40	38
Alternative dispute resolution	38	41	39
Court governance	39	42	40
Role of Chief Justice	40	43	41
Role of Judicial Conference	41	44	42
Judicial Conference Executive Committee	42	45	43
Judicial Conference Committee Structure	43	46	44
Judicial Conference membership	44	47	45
Administrative Office of the U.S. Courts and Federal Judicial Center	45	48	46
Regional and local governance	46	49	47
Court administrators and managers	47	50	48
Long-range planning	48	51	49
Participation in governance	49	52	50
Court facilities administration	50	53	51
Budget formulation	51	54	52
Judicial discipline mechanisms	52	55	53
Financial resources	53	56	54
Legislative impact on resources	54	57	55
Judicial compensation	55	58	56
Appropriations for constitutionally mandated functions	56	59	57
Appropriations	57	60	58
Lifetime judicial tenure	58	61	59
Retirement benefits	59	62	60
Courthouse security	60	63	61
Judicial assignments	61	64	62
Use of senior and recalled judges	62	65	63
Senior status	63	66	64
Magistrate judges: duties	64	67	65
Magistrate judges: contempt power	65	68	66
Advance notice of retirements	66	69	—
Selection of judges	67	70	—
Time limits on nominations	68	71	—
Recess appointments	69	72	—
"Floater" judgeships	70	73	—
Emergency procedures for filling vacancies	71	74	—
Emergency procedures for filling vacancies	72	75	—
Judicial, executive, and legislative handling of judicial vacancies	—	—	67



Corresponding Recommendation Numbers

Subject Matter	*Public Comment Version*	*Submitted Version*	*Adopted Version*
Budget decentralization	73	76	68
Use of technology	74	77	69
Familiarity with technology	75	78	70
Comprehensive space and facilities program	76	79	71
Organizing and allocating support functions	77	80	72
Expanded data collection and information gathering capacity	78	81	73
Quality of support services	79	82	74
Working conditions for support staff	80	83	75
Continuing education for judges	81	84	76
Court staff training	82	85	77
Elimination of bias	83	86	78
Cultural diversity	84	87	79
Access to individuals with disabilities	85	88	80
Justice for non-English speakers	86	89	81
Filing and user fees	87	90	82
Federal defender organizations	88	91	83
Private attorneys as defenders	89	92	84
Indigent and *pro se* litigants	90	93	85
Public understanding of courts	91	94	86
Public understanding of role of judiciary	92	95	87
Juror education about courts	93	96	88
Public support for judiciary	94	97	89
Complaints of mistreatment by judges, attorneys, and court personnel	95	98	90
Communication with executive and legislative branches	96	99	91
Federal-state court cooperation	97	100	92
Relations with the bar	98	101	93

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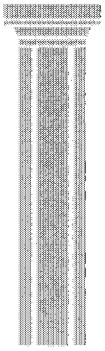

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(08R) $35

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Report on 1993 Roundtable, examines the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court. (10R) $20

Safety of the Blood Supply

Report on Spring, 1991 Roundtable, written by Robert E. Stein, a Washington, DC attorney and Adjunct Professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV, and litigation involving blood products and blood banks. (06R) $20

Injury Prevention in America

Report on 1990 Roundtables, written by Anne Grant, lawyer and former editor of *Everyday Law* and *Trial* magazines. Topics: "Farm Safety in America," "Industrial Safety: Preventing Injuries in the Workplace," and "Industrial Diseases in America."

(05R) $20

(continued on back)

Health Care and the Law

Report on 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics: "Hospitals and AIDS: The Legal Issues," "Medicine, Liability and the Law: Expanding the Dialogue," "Developing Flexible Dispute Resolution Mechanisms for the Health Care Field." (37B) $20

Health Care and the Law II - Pound Fellows Forum

Report on 1988 Pound Fellows Forum, "Patients, Doctors, Lawyers and Juries," written by John Guinther, award-winning author of *The Jury in America.* The forum was held at ATLA's Annual Convention in Kansas City, and was moderated by Professor Arthur Miller of Harvard Law School. (35B) $20

Health Care and the Law III

Report on 1988-1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics: "Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue," "Health Care Providers and the New Questions of Life and Death," "Medical Providers and the New Era of Assessment and Accountability." (02R) $20

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