ARTICLES

The Judiciary's Bicentennial

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It is no easy task to set the stage for a scholarly commemoration of the two hundredth anniversary of the First Judiciary Act. Few of us are familiar with the entire scope of today's federal judiciary. Territorially, it extends across the continent and even half-way around the world.¹ It reaches into diverse areas—patents, civil rights, bankruptcy, Indian Claims, federal administrative review in all of its variety, the sentencing of federal criminals—some of which must baffle even the most catholic of legal imaginations. Its proceedings vary from the nonadversarial (naturalizing citizens or issuing search warrants) to the traditional (resolving private diversity cases) to the dramatic (formulating institutional decrees). And its impact—on private conduct, on governmental institutions, and on public attitudes—is at once great and unmeasurable.

It is harder still to envision the judicial world established on September 24, 1789, when President Washington signed the first Judiciary Act²—not so much because the original national judiciary was more limited in size or scope, but rather because it was so different in conception from today's federal bench. The very decision to authorize establishment of "inferior" federal courts³ was controversial at the Constitutional Convention⁴ and during the rat-

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¹ See, for example, 48 USC § 1694 (1982) (establishing the District Court for the Northern Mariana Islands).

² Charles Warren, 1 *The Supreme Court in United States History* 33 (Little, Brown, 1922).

³ See US Const, Art III, § 1, vesting the judicial power in one Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."

⁴ See Paul M. Bator, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 10-11 (Foundation, 3d ed 1988) ("*Hart & Wechsler*").

ification debates.⁵ When the first Congress debated the judiciary bill, Fisher Ames, a representative from Massachusetts, noted to a friend that "[t]he question whether we shall have inferior federal tribunals (except Admiralty Courts, which were not denied to be necessary) was very formidably contested."⁶

The Senate had a somewhat more generous vision of the federal judiciary, and in the end that vision prevailed. Still, the district and circuit courts ordained by the first Judiciary Act were of quite limited powers, lacking what today would be viewed as their core jurisdiction in federal question cases.⁷ Furthermore, the structure of the original court system was flawed in conception and hence problematic from the outset. The circuit courts lacked judges of their own, and instead were staffed by district judges and Justices of the Supreme Court riding circuit.⁸ The circuit riding chores were burdensome and at times downright impossible to discharge; small improvements in transportation were outstripped by large increases in the size of the circuits to be covered.⁹ Though a district judge, when sitting on a circuit court, could not vote on an appeal from his own decision,¹⁰ no similar provision prevented a Supreme Court Justice from voting on an appeal from a circuit court decision in which he had participated.

The Supreme Court established by the First Judiciary Act is far more familiar, but to the modern eye there are oddities besides the Justices' circuit riding duties. For those of us raised in an era of vote counting and five-four divisions, a Court with an even number of Justices (six) is itself unusual.¹¹ And at a time when the Court is generally viewed as the pinnacle of the profession, it is sobering to recall that John Jay, the first Chief Justice, resigned in 1795 to become Governor of New York,¹² as Justice Rutledge had resigned in 1791, without ever sitting, to become Chief Justice of the South Carolina Supreme Court.¹³

The federal courts have come a long way in 200 years. And in

⁵ See *id.* at 21-22.

⁶ Carl McGowan, *The Organization of Judicial Power in the United States* 24 (Northwestern U., 1969). See also Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 *Harv L Rev* 49, 66-68, 119-127 (1923).

⁷ Warren, 37 *Harv L Rev* at 131 (cited in note 6).

⁸ Warren, 1 *Supreme Court* at 58 (cited in note 2).

⁹ *Id.* at 86-89; Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* 34-37 (MacMillan, 1928).

¹⁰ Judiciary Act of 1789, ch 20, § 4, 1 Stat 74-75.

¹¹ Judiciary Act of 1789, ch 20, § 1, 1 Stat 73.

¹² See Warren, 1 *Supreme Court* at 124 (cited in note 2).

¹³ See *id.* at 56-57.

marking an occasion like this one, some reflections on their evolution may help us in thinking about what lies ahead.

1. THE BUSINESS OF THE FEDERAL COURTS

The business of the federal judiciary has changed dramatically in two centuries. The least controversial part of the original jurisdiction granted to the inferior courts was in admiralty,¹⁴ which today comprises only 2 percent of federal cases¹⁵ and is *terra incognita* for most lawyers, even those whose practice revolves around the federal courts. The other important original jurisdictions were in diversity and federal criminal cases; the former, narrowed even before it was enacted,¹⁶ has long been a source of controversy.¹⁷

A sea change in the structure of federal jurisdiction was set in motion during the ten years following the Civil War. This period witnessed the adoption of the Fourteenth Amendment, the extension of federal habeas corpus jurisdiction to state prisoners,¹⁸ the enactment of federal civil rights statutes enforceable in the federal courts (most notably the Civil Rights Act of 1871, the progenitor of 42 USC § 1983),¹⁹ and finally, in 1875, the vesting of a general federal question jurisdiction in the federal courts.²⁰ The shift was substantive—involving the creation of new federal rights—as well as jurisdictional.

To be sure, it took quite some time for the full effects to be felt; more than half of the Seventh Circuit's opinions between 1892 and 1911, for example, were written in diversity cases.²¹ But the influx of cases enforcing federal law, once begun, was not to be turned back, and indeed it accelerated in the twentieth century.²² The nearly complete incorporation of the Bill of Rights in the

¹⁴ See Judiciary Act of 1789, ch 20, § 9, 1 Stat 77; Federalist 80 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 475, 478 (Mentor, 1961).

¹⁵ See Richard A. Posner, *The Federal Courts: Crisis and Reform* 182 (Harvard, 1985).

¹⁶ The original proposal in Congress extended to all suits between citizens of different states; section 11 of the First Judiciary Act was limited to suits in which one of the parties was a citizen of the state in which the suit was brought. Compare Charles Warren, 37 Harv L Rev at 79 (cited in note 6), with Judiciary Act of 1789, ch 20, § 11, 1 Stat 78.

¹⁷ For an introduction to the debate, see Hart & Wechsler at 1695-1700 and sources cited note 1 (cited in note 4).

¹⁸ Act of February 5, 1867, ch 27, 14 Stat 385.

¹⁹ See generally Theodore Eisenberg, *Civil Rights Legislation: Cases and Materials* 3-4 (Michie, 2d ed 1987).

²⁰ Act of March 3, 1875, ch 137, §§ 1-2, 18 Stat 470-71 (Part 3).

²¹ See Rayman L. Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 Am B Found Res J 285, 301.

²² Id.

Fourteenth Amendment, the expansive interpretation of the § 1983 cause of action,²³ the elimination of any jurisdictional amount under § 1331 (the statute conferring general federal question jurisdiction),²⁴ the judicial creation of implied rights of action,²⁵ the rise of the federal administrative state, and more generally the burgeoning of federal statutory law—these developments have contributed to the transformation of the federal courts into tribunals concerned primarily with federal statutory and constitutional law.

More has changed than the dockets of federal judges. A new conception of the relationship between citizen and national judiciary has evolved. In admiralty and diversity cases, the federal courts play a structural role; only a national judiciary is competent to administer a body of doctrine with international ramifications, or to serve as a neutral arbiter in disputes where in-state favoritism might be feared.²⁶ But today the federal courts are an active instrument of federal substantive policy; they have become, in Frankfurter and Landis's much-quoted phrase, "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."²⁷

These substantive rights, could, in theory, have been enforced without federal question jurisdiction—by Supreme Court interpretations that the state courts would have been obliged to follow. But as Judge McGowan has noted, it is difficult to believe that a decision like *Brown v Board of Education*²⁸ would have been meaningfully enforced absent a machinery of lower federal courts.²⁹ Much the same could be said of the reapportionment decisions, the myr-

²³ See generally Hart & Wechsler at 1229-77 (cited in note 4); Eisenberg, *Civil Rights Legislation* at 55-117 (cited in note 19).

²⁴ Act of Dec 1, 1980, Pub L No 96-486, 94 Stat 2369, codified at 28 USC § 1331 (1982).

²⁵ See Hart & Wechsler at 917-50 (cited in note 4).

²⁶ This posits the conventional historical explanation for diversity jurisdiction—to protect out-of-state litigants from local bias. See *Bank of the United States v DeVeaux*, 9 US (5 Cranch) 61, 87 (1809); Warren, 37 Harv L Rev at 83 (cited in note 6). Compare Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv L Rev 483, 495-97 (1928), arguing that the constitutional and statutory grants of jurisdiction were motivated not by generalized fear of local prejudice, but rather by a more focused desire to protect creditors from debtor relief laws enacted by state legislatures.

²⁷ Frankfurter and Landis, *Business of the Supreme Court* at 65 (cited in note 9). Indeed, the meaning of Tocqueville's observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," Alexis de Tocqueville, 1 *Democracy in America* 280 (Knopf, 1945), has almost been transformed by wearisome repetition—from an observation of something remarkable to a statement of the obvious.

²⁸ 347 US 483 (1954).

²⁹ See McGowan, *Judicial Power* at 14-16 (cited in note 6).

iad constitutional regulations of criminal procedure, and other controversial matters.

If *Swift v Tyson*³⁰ was an effort to make the federal courts a force for the rationalization and nationalization of judge-made law,³¹ we all know that it had failed long before Justice Brandeis wrote its obituary in *Erie Railroad Co. v Tompkins*.³² But today's federal judiciary has become a quite different kind of nationalizing force, developing federal statutory and constitutional law and perhaps emboldening the Supreme Court and the political branches to exert federal authority because they know that the lower federal courts stand ready to provide support.

The federal judiciary has also been a nationalizing force in two more mundane ways. The first is through the various rules of procedure promulgated by the Supreme Court, which have been widely influential in the states.³³ The second is through the concentration on federal law in the curricula of most law schools. Courses in civil and criminal procedure, constitutional law, evidence, administrative law, and income taxation (to mention only a few) are generally courses in federal law. Even in subjects like torts or contracts, federal decisions are featured far out of proportion to their number.³⁴ Insofar as modern lawyers have a common intellectual heritage, the federal courts are its primary source. This development, too, would have been hard to foresee in 1789.

2. JUDGES AND BUREAUCRATS

The title given this symposium—The Federal Court System—might have seemed a bit grand in 1789. The original judiciary, after all, had only a few judges, fledgling courts (some of which lacked regular judges altogether), and precious little else. Almost a century passed before Justice Gray hired the first law clerk, and

³⁰ 41 US (16 Pet) 1 (1842).

³¹ See, for example, Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 255 (Harvard, 1977); William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 Suffolk U L Rev 771, 830 (1986).

³² 304 US 64 (1938).

³³ See, for example, Walter Cox and David Newbern, *New Civil Procedure: The Court That Came in from the Code*, 33 Ark L Rev 1, 2 n 6 (1979); Vincent L. McKusick, *State Courts' Interest in Federal Rulemaking: A Proposal for Recognition*, 36 Me L Rev 253, 253-55 (1984); Michael E. Solimine and James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const L Q 213, 227 n 72 and sources cited therein (1983).

³⁴ See Posner, *The Federal Courts* at 144 (cited in note 15).

the practice was not regularized until the 1930s.³⁵ The title is more apt today in describing a branch of government that has a billion dollar budget, close to 20,000 employees, training sessions, conventions, and all the other modern trappings of organizational life.³⁶

In some sense, a lawyer today encounters the federal judiciary rather than federal judges. Two centuries ago it was far easier to envision a judge as an individual man (as then they all were) who brought to bear on each dispute a judgment neither mechanical nor arbitrary, but reasoned and wise. Today cases are processed not simply by Article III judges, but by law clerks and staff attorneys, magistrates, and masters. Judges lament that they have become paper-pushers, while some observers lament that judges have become case managers and mediators (often forceful ones) rather than adjudicators.³⁷ The courts of appeals are not immune from these changes. In some circuits, oral argument is the exception, not the rule, and a staff attorney who deems an appeal routine may prepare a draft opinion even before any of the judges has opened the briefs.³⁸

An opinion by Marshall or Holmes or Cardozo has the unmistakable voice of that Justice.³⁹ Hence, Brandeis's remark that "[t]he reason the public thinks so much of the Justices of the Supreme Court is that they . . . do their own work."⁴⁰ Though the comment still has some force today, it does not resonate as clearly as it did when uttered more than half a century ago. Judge Posner has described the increase in opinion writing by law clerks, and how it has homogenized prose and stylized argumentation.⁴¹ Such delegation may be inevitable for all but the most efficient of fed-

³⁵ J. Daniel Mahoney, *Foreword—Law Clerks: For Better or for Worse?*, 54 Brooklyn L Rev 321, 323, 325 (1988).

³⁶ The budget authority of the judiciary was \$1.2 billion in fiscal year 1987. See Administrative Office of the U.S. Courts, *1987 Annual Report of the Director* 46-47 (Table 17). Of a total of 19,352 judiciary employees in 1987, only about 5 percent were judges. See *id.* at 48-49 (Table 19).

³⁷ See Judith Resnik, *Managerial Judges*, 96 Harv L Rev 374 (1982).

³⁸ Joe S. Cecil and Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* 20, 93-94 (Federal Judicial Center, 1987).

³⁹ Even a lesser figure might have a distinctive style. Consider, for example, this sentence from *Berger v United States*, 255 US 22, 43 (1921) (McReynolds dissenting): "[W]hile 'An overspeaking Judge is no well tuned cymbal' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power." One would not confuse this prose with great literature, but neither would one wonder whether it was drafted by the Justice or his law clerk.

⁴⁰ See Charles E. Wyzanski, Jr., *Whereas—A Judge's Premises* 61 (Little, Brown, 1965).

⁴¹ See Posner, *The Federal Courts* at 102-19 (cited in note 15).

eral judges, but in this case necessity is the mother of convention, and an unappealing convention at that.

And so, as the federal judiciary has come of age, its character and organization as well as its docket have changed dramatically.⁴²

3. THE SUPREME COURT, OLD AND NEW

The changes in the Supreme Court's role are just as dramatic as those in the role of the lower courts. In 1988, just one year shy of its bicentennial, the Supreme Court completed a transformation that had begun nearly a hundred years earlier—to a court with complete discretion in the selection of its caseload.⁴³

Although the driving force behind this change—concern about the Court's workload—is painfully familiar today, it has not always been present; Chief Justice Rehnquist reminds us that in 1824, the Court sat in Washington for only six weeks a year.⁴⁴ But by the time the country was celebrating the centennial of the Constitution, Chief Justice Waite was calling for a reduction in the Court's appellate jurisdiction.⁴⁵ Waite's concern was well-founded, as a burgeoning case load was smothering the Supreme Court (and the federal courts generally).⁴⁶ The Evarts Act of 1891⁴⁷ did more than provide much needed relief for the Court. It provided a judicial structure that facilitated the transformation of the Supreme Court, both by creating Circuit Courts of Appeals, in which an appeal of right could be heard, and by introducing, on a limited basis, the principle of discretionary review via writ of certiorari in the Supreme Court.⁴⁸ The scope of that principle expanded over time until, last year, the remaining limits on it were cast aside.⁴⁹

This shift may be administratively necessary, and in that sense desirable, but it raises important questions about the role of

⁴² See generally *id.* at 59-129; Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U Pa L Rev 777 (1981); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 Notre Dame Lawyer 648 (1980).

⁴³ Well, not quite complete. For the tiny areas of mandatory appellate jurisdiction that remain, see Bennett Boskey and Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 109 S Ct lxxxii, xcvi (1988).

⁴⁴ William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla St U L Rev 1, 2 (1986). He notes that the Justices were required to ride Circuit as well. *Id.*

⁴⁵ See Hampton Carson, ed, 2 *History of the Celebration of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States* 313-14 (1889).

⁴⁶ See Frankfurter and Landis, *Business of the Supreme Court* at 60, 69 (cited in note 9).

⁴⁷ Act of March 3, 1891, ch 517, 26 Stat 826.

⁴⁸ *Id.* § 6, 26 Stat 828.

⁴⁹ Pub L No 100-352, 102 Stat 662 (1988).

the national judiciary and of its highest court. One is a question of federalism. A range of statutory and judge-made rules that virtually eliminate plenary federal adjudication of federal issues in cases to which they apply—for example, the Johnson Act of 1934,⁵⁰ the Tax Injunction Act of 1937,⁵¹ the equitable restraint doctrine of *Younger v Harris*⁵²—came into existence at a time when many federal rightholders, if they did not prevail in state court, had the right to appellate review by the Supreme Court.⁵³ Just as in 1789 it was argued that original federal court jurisdiction was unnecessary because of the availability of Supreme Court review of state court judgments,⁵⁴ the unavailability today of Supreme Court review (as of right) may call for reconsideration of these limits on federal district court jurisdiction.

A second question is how this shift affects the Court's adjudication of particular cases. There has always been a tension—some would call it a creative one—involved in deciding concrete controversies in accordance with generalizable principles. But a court that selects its business solely for the purpose of settling issues of national importance may be especially likely to write its opinions for that same purpose—rather than simply to address those legal questions whose decision is necessary to resolve the dispute between the parties.⁵⁵

It is time for the Supreme Court to acknowledge that its perspective on adjudication differs sharply from that of the lower federal courts, whose jurisdiction is obligatory. The *Miranda* decision,⁵⁶ for example, was quite clearly an effort by the Supreme Court to “solve” the problem of police interrogation; indeed, the facts of the cases under review are not even mentioned until the eighteenth page of the opinion.⁵⁷ Whatever the merits of *Miranda*, it is difficult to imagine a federal district court writing an opinion of that kind. The Supreme Court's approach to adjudication should be viewed not as a model for the lower courts, but instead as an adaptation to the quite different jurisdiction that now ex-

⁵⁰ 28 USC § 1342 (1982).

⁵¹ 28 USC § 1341 (1982).

⁵² 401 US 37 (1971).

⁵³ The right to an appeal extended to challenges on federal grounds to the validity of a state or local statute. See *Hart & Wechsler* at 502-03, 721-22 (cited in note 4).

⁵⁴ See, for example, Warren, 37 Harv L Rev at 65 (cited in note 6).

⁵⁵ See generally Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv L Rev 410, 431 (1978).

⁵⁶ *Miranda v Arizona*, 384 US 436 (1966).

⁵⁷ *Id.* at 456.

tends across its entire docket.

4. FEDERAL COURTS AND STATE COURTS: THE ALLOCATION OF JURISDICTION

The federal judiciary can be viewed as merely one part of a system of American courts, federal and state, within which particular cases are distributed to the tribunals of one or another jurisdiction. Within that larger system, it is sometimes said that the federal courts dispense a "juster justice."⁵⁸ That proposition is controversial,⁵⁹ and in the Supreme Court's view any claim of a right to federal court adjudication can have only a statutory, not a constitutional, basis.⁶⁰ But to whatever extent one agrees with the proposition, it raises a vexing question: who deserves a juster justice?

A simple answer is that, at a minimum, parties with federal questions belong in federal court. The prevalence of that view today is another indication of how far our conception of the federal judiciary has changed since 1789. But that view collides with a contemporary reality—federal judges, though their numbers have increased significantly in the past three decades,⁶¹ are straining

⁵⁸ The phrase was used by Henry Hart to refer to a federal court sitting in diversity, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum L Rev 489, 513 (1954), but it has been used since in a more general fashion. See, for example, Henry J. Friendly, *Federal Jurisdiction: A General View* 12 (Columbia, 1973).

⁵⁹ For a recent survey of the complexities buried in the question whether there is "parity" between state and federal courts, see Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 UCLA L Rev 233 (1988).

⁶⁰ See generally Hart & Wechsler at 382 (cited in note 4). I do not ignore, but I have not quite been persuaded by, arguments that the Constitution mandates the establishment of some federal court jurisdiction (original or appellate) over constitutional cases, see Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv L Rev 17, 44 (1981), or more broadly, over the "subject matter" categories of Article III, Section 2—federal question and admiralty cases and cases affecting ambassadors, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 218-19 (1985). In any event, these arguments accept (albeit at times grudgingly) the Supreme Court's certiorari jurisdiction as a sufficient vesting of the judicial power. See *id.* at 267-68 (certiorari does not violate "the letter of Article III," though the Court's "practical inability" to review most cases "seems at war with the spirit of Article III"); Sager, 95 Harv L Rev at 52-57. Accordingly, they do not call into question the constitutionality of restrictions on original federal question jurisdiction. The still broader argument that Article III requires the vesting of original or appellate jurisdiction over every case within the scope of Article III (excepting perhaps matters deemed trivial) also accepts discretionary review as adequate vesting of the judicial power. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U Pa L Rev 741, 749-53 (1984).

⁶¹ The number of circuit court of appeals judgeships has increased from 68 in 1960 to

under caseloads that have increased far more quickly.⁶² And as others have persuasively argued, there are serious institutional and administrative costs to increasing either the number of district and appellate judges or the number of support personnel.⁶³ Article III justice is a limited commodity, and its distinctive quality is in some jeopardy of dilution.

Moreover, the simple answer is not so simple. As Henry Hart so famously explained, "[f]ederal law is generally interstitial in its nature," and "frequently in litigation federal law bears only partially upon the case."⁶⁴ Though pleas for expanded removal based on federal defenses have been made—particularly when the defendant seeks removal⁶⁵—the generally satisfactory experience without such removal jurisdiction must dominate the logic of equal treatment for defendants and plaintiffs.⁶⁶ State court decisions in key areas in which civil defendants raise defenses—such as lack of personal jurisdiction, or First Amendment defenses in defamation actions—have not, to my knowledge, raised general doubts about the sympathy or ability of state courts in dealing with these claims. The same statement is harder to make about state criminal cases, but federal constitutional questions are so pervasive in those cases that a removal jurisdiction could lead to a wholesale federal assumption of the administration of state criminal justice. Federal injunctive relief and habeas corpus are far more surgical ways of extending federal jurisdiction to federal issues in state criminal cases.⁶⁷ And in any event, now is hardly the time for an experiment that could significantly increase the workload of the federal courts.

As our national courts enter their third century, the commit-

168 today. See 28 USC § 44(a) (Supp IV 1986); Posner, *The Federal Courts* at 99 (cited in note 15).

⁶² See the thorough discussion in Posner, *The Federal Courts* at 59-129 (cited in note 15).

⁶³ See, for example, *id.* at 94-129; McCree, 129 U Pa L Rev at 782-85 (cited in note 42). There may also be constitutional limits on the use of supporting personnel like magistrates. See, for example, *United States v Garcia*, 848 F2d 1324, 1329-32 (2d Cir 1988), cert granted sub nom *Gomez v United States*, 109 S Ct 782 (1989).

⁶⁴ See *Hart & Wechsler* at 533 (cited in note 4). See generally Hart, 54 Colum L Rev 489 (cited in note 58).

⁶⁵ See, for example, American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 188-203 (ALI, 1969).

⁶⁶ Judge Posner has doubted the case for symmetry, stressing that defendants have a greater incentive to raise frivolous federal defenses in order to delay. See Posner, *The Federal Courts* at 190 (cited at note 15). For a skeptical response, see Martin Redish, *Federal Courts: Cases, Comments and Questions* 481 (West, 2d ed 1989).

⁶⁷ See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm & Mary L Rev 605, 611-21 (1981).

ments they have undertaken have again placed the system under great strain, much as was true in the last part of the nineteenth century. Many of today's cries about workload might seem to give some credence to the fears of Senator Maclay who, in voting against the First Judiciary Act, characterized it as creating a "system . . . with a design to draw by degrees all law business into the Federal Courts."⁶⁸ In fact, although litigation has increased in recent decades far more quickly in the federal than in the state courts, fewer than 2 percent of all civil cases are filed in federal court,⁶⁹ and fewer than 3 percent of our nation's judges are Article III judges.⁷⁰

What this small portion of adjudicators should do is a painful but critical question. The question is intensely political (not in any pejorative sense), as it has been ever since the original debates between the Federalists and anti-Federalists about the reach of federal court jurisdiction. The scope of federal judicial power is most heatedly debated when federal courts require school busing, the reapportionment of legislatures, or structural changes in state prisons or mental hospitals. Whatever the merits of particular decisions in these areas, there is, I think, a strong case for using the scarce commodity of Article III justice to protect constitutional and other federal rights likely to be asserted by disfavored persons. I recognize that from one view this argument begs the question. Tenure and salary protection is not required as a matter of due process,⁷¹ and it might make judges not apolitical but, rather, autonomously political.⁷² Our attitudes about judicial review incorporate an inescapable contradiction between the desire for judicial independence and the fear of unaccountable power.⁷³ One for whom the latter consideration weighs more heavily might prefer having state judges, who tend to be more accountable, deciding constitutional cases. The point is not merely theoretical; recall the Norris-LaGuardia Act,⁷⁴ the Johnson Act of 1934,⁷⁵ and the Tax

⁶⁸ See Warren, 37 Harv L Rev at 109 (cited in note 6).

⁶⁹ Marc Galanter, *The Day After the Litigation Explosion*, 46 Md L Rev 3, 6, 15 (1986).

⁷⁰ Paul M. Bator, *The Federal Judicial System*, in Leonard W. Levy, Kenneth L. Karst and Dennis Mahoney, eds, 3 *Encyclopedia of the American Constitution* 1068, 1073 (MacMillan, 1986).

⁷¹ But see Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L J 455, 504 (1986).

⁷² See Posner, *The Federal Courts* at 16 (cited in note 15).

⁷³ See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S Cal L Rev 1571 (1988).

⁷⁴ 29 USC §§ 101-15 (1982).

⁷⁵ 28 USC § 1342 (1982).

Injunction Act,⁷⁶ all of which were motivated in part by a desire to limit the power of Article III courts to render broad constitutional rulings.⁷⁷ My own view, nonetheless, is that the concern about judicial independence is the more pressing one—a view shared by such diverse observers as Professor Neuborne and Judge Posner.⁷⁸

But questions important to the federal courts' role lie far outside the rarified air of constitutional adjudication. Has the time finally come, if not for abolition, at least for serious curtailment of diversity jurisdiction? Although last year Congress increased the jurisdictional amount from \$10,000 to \$50,000,⁷⁹ that tightening will almost surely be neutralized by the imagination of those who draft *ad damnum* clauses. But if the political obstacles can be surmounted, additional limitations, such as barring invocation of diversity jurisdiction by citizens of the state of suit or by corporations with a substantial connection there, would also be welcome.⁸⁰ Beyond diversity cases, aren't there sets of federal question cases—for example FELA cases and recovery of unpaid federal loans or excess federal benefits—that could be routed exclusively to state courts? Does it make sense to provide an individualized right to judicial review of (virtually) every adverse determination by the Social Security Administration? Should some screening device be instituted in prisoner cases?⁸¹ In answering these questions, history may offer some useful perspective: we have departed very far from the First Judiciary Act's structure, which encompassed no general federal question jurisdiction at all; nothing would stop some modest moves back in that direction.

In the end, though, there are practical limits to what can be

⁷⁶ 28 USC § 1341 (1982).

⁷⁷ See Johnson Act, S Rep No 125, 73d Cong, 1st Sess 4-5, 8-9 (1934); Tax Injunction Act, S Rep No 1035, 75th Cong, 1st Sess 2 (1937) (Tax Injunction Act modeled on Johnson Act); Felix Frankfurter and Nathan Greene, *The Labor Injunction* 212-20 (MacMillan, 1930) (Norris-LaGuardia Act).

⁷⁸ See Posner, *The Federal Courts* at 21, 180 (cited in note 15); Burt Neuborne, *The Myth of Parity*, 90 Harv L Rev 1105, 1127-28 (1977).

⁷⁹ Judicial Improvements and Access to Justice Act, Pub L No 100-702 § 201, 102 Stat 4642, 4646 (1988).

⁸⁰ See ALI, *Study* at 12-14, 123-33 (cited in note 65). See also David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv L Rev 317, 339-55 (1977) (arguing that the benefits and burdens of diversity jurisdiction vary across regions, and proposing that each judicial district be empowered to decide whether to curtail or abolish the jurisdiction within that district).

⁸¹ Federal law does require exhaustion of administrative remedies in limited circumstances, see 42 USC § 1997e (1982), but this provision has had little impact. See *Hart & Wechsler* at 1352-53 (cited in note 4).

accomplished by jurisdictional trimming. Institutions develop a life of their own, one that resists efforts to turn back the clock. Increased staffs, increased dockets, and the role of judge as manager (of the conduct of individual lawsuits, of staff, and of the increased dockets and flow of paper) are probably here to stay. Most discussions of these phenomena are lamentations coupled with expressions of hope that some set of reforms can recapture the good old days.⁸² I suspect that we also must accept the present, and strive to formulate a new set of understandings that accommodate the changing realities of judicial administration.

History teaches another lesson worth noting here: changes in the federal judicial system are unlikely to occur quickly and decisively. Compared to the early days Congress is now more active,⁸³ but ordinarily it has not been very attentive to legislation concerning the judiciary. It took nearly eighty years for Congress to relieve the Justices of their circuit riding duties.⁸⁴ Thereafter, widespread recognition of the inadequacy of the original judicial structure did not give rise to legislative reform until 1891⁸⁵—by which point the time between docketing and argument in the Supreme Court had reached three years.⁸⁶ More recently, heated controversies about the role of the federal courts in habeas corpus and in civil rights actions have produced relatively little response from Congress.⁸⁷ Last year's elimination of the Supreme Court's mandatory jurisdiction and increase in the jurisdictional amount in diversity cases may be more hopeful signs,⁸⁸ but overall, here as elsewhere "[i]t is easier to accept situational pressures toward drift or inertia than to labor to formulate issues and muster support of interested parties

⁸² See, for example, Antonin Scalia, *An Address by Justice Antonin Scalia, United States Supreme Court*, 34 Fed Bar News & J 252 (1987).

⁸³ Charles Warren notes that for forty-five years the structure of the First Judiciary Act remained unchanged. See Warren, 37 Harv L Rev at 131 (cited in note 6).

⁸⁴ See Act of April 10, 1869, ch 22, 16 Stat 44. I put to one side the relief provided for just over twelve months by the "Midnight Judges Act." See Act of Feb 13, 1801, ch 4, 2 Stat 89, repealed by Act of Mar 8, 1802, ch 8, § 1, 2 Stat 132.

⁸⁵ See *Hart & Wechsler* at 36-37 (cited in note 4).

⁸⁶ See Rehnquist, 14 Fla St U L Rev at 6 (cited in note 44).

⁸⁷ There are a few recent enactments dealing with such matters. See, for example, the 1966 legislation, now codified at 28 USC § 2254(d) (1982), presumptively requiring deference in federal habeas corpus actions to state court factfinding; the 1976 legislation providing for attorneys fees for prevailing plaintiffs in federal civil rights actions, see 42 USC § 1988 (1982); and legislation relating to exhaustion of administrative remedies in prisoner suits, see 42 USC § 1997e (1982) (discussed in note 82).

⁸⁸ Pub L No 100-352, 102 Stat 662 (1988); Judicial Improvements and Access to Justice Act § 201, 102 Stat 4669 (1988).

to get a bill drawn and pressed to passage.”⁸⁹

5. FEDERALISM AND CHOICE OF LAW

A final question is of a quite different order: does the complexity of choice of law questions in this country impair the effectiveness of law as a regulatory system? Judge Friendly's paean to *Erie v Tompkins* and the new federal common law as concepts “so beautifully simple, and so simply beautiful”⁹⁰ would bring some combination of amusement and fury to many law students or practicing lawyers trying to determine whether state or federal law applies. At least as vexing are the choice of law questions that arise when more than one state has some relationship to a controversy. Modern conflicts doctrine, for all (or perhaps because) of its purposive refinement, has proved notoriously indeterminate.⁹¹ Indeed, the very problems that *Erie* was designed to avoid—forum shopping, unfairness, and uncertainty about the rules governing primary conduct—may all be present in horizontal choice of law settings.

Justice Jackson put the problem well in 1945:

[T]oday in respect of our legal administrations we have not achieved a much “more perfect union” than that of the colonies under the Articles of Confederation. We have so far as I can ascertain the most localized and conflicting system of any country which presents the external appearance of nationhood. But we are so accustomed to the delays, expense, and frustrations of our system that it seldom occurs to us to inquire whether these are wise, or constitutionally necessary.⁹²

The growth in the post-War period of nationwide institutions and of interstate travel and communication makes his comments even more apt today.

Justice Jackson's concerns obviously implicate not only the federal judicial system, but also the state courts and, most broadly, the federal structure of government. Still, the problem of choice of law may be particularly visible in some cases in the federal courts.

⁸⁹ James Willard Hurst, *Legal Elements in United States History*, in Donald Fleming and Bernard Bailyn, eds, 5 *Law in American History* 3, 30 (Harvard, 1971).

⁹⁰ See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 *NYU L Rev* 383, 422 (1964).

⁹¹ See Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *Mercer L Rev* 521, 522-23, 585-86 (1983).

⁹² Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 *Colum L Rev* 1, 18 (1945).

Mass tort proceedings under the federal multidistrict rules provide a notable example of the potential complexities. The so-called "transferee" federal district court, hearing a group of consolidated cases, is obliged to apply in each case the choice of law doctrine that would have been applied by the "transferor" federal court—the court in which that case was originally filed.⁹³ Under *Klaxon Co. v Stentor Electric Manufacturing Co.*,⁹⁴ the transferor federal court would have applied the conflicts doctrine of the state in which it sits. In so complex a regime, mistakes—which are nothing more than disagreements between a federal district court and a federal court of appeals about the meaning of some state's choice of law rules—are easy to make⁹⁵ and can be costly to undo.

It is tempting to blame the *Klaxon* decision for these complexities, but they arise more fundamentally from the very existence of diverse state substantive law and choice of law rules. While *Klaxon* may lead to application of different substantive rules of law if suit is filed in one federal district court rather than another, an anti-*Klaxon* regime (under which federal courts would apply federal judge-made choice of law rules to state law claims) might lead to application of different substantive rules if suit is filed in federal rather than state court. Whether one kind of disuniformity is more troubling than another is a complicated empirical question.⁹⁶ In mass tort cases, given the difficulties of applying the conflicts rules of multiple states, the balance of convenience may favor a federal choice of law rule;⁹⁷ in other cases, the balance is far less clear.

In the end, however, neither a *Klaxon* nor an anti-*Klaxon* regime can eliminate all uncertainties about which law governs multistate transactions. These uncertainties inhere in the very federal structure of a republic with multiple loci of lawmaking responsibil-

⁹³ See *Van Dusen v Barrack*, 376 US 612, 639 (1964); Barbara Ann Atwood, *The Choice-of-law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 Conn L Rev 9, 11-12 (1986).

⁹⁴ 313 US 487 (1941).

⁹⁵ See, for example, *In re Air Crash Disaster Near Chicago*, 644 F2d 594 (7th Cir 1981) (reviewing the district court's analysis of the choice of law rules for six different jurisdictions, and ruling that in five of the six cases the district court had misapplied them). For a suggestion that the Seventh Circuit's analysis itself was mistaken, and may have been influenced by a desire to avoid having different claims governed by different substantive rules regarding the availability of punitive damages, see Atwood, 19 Conn L Rev at 28 n 96 (cited in note 94).

⁹⁶ See John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv L Rev 693, 714-15 n 125 (1974).

⁹⁷ See, for example, American Law Institute, *Complex Litigation Project: Council Draft No.1* 250-67 (November 23, 1988); Atwood, 19 Conn L Rev at 43-45, 47-51 (cited in note 94).

ity—for both choice of law rules and substantive rules of decision. And these uncertainties have grown as modern technology has made multistate controversies more common, while long arm statutes provide access to multiple fora whose conflicts doctrines may generate different outcomes.

What is needed, I believe, is a single set of uniform federal choice of law rules, binding in the state as well as the federal courts.⁹⁸ The existence of multiple, conflicting choice of law rules is not—to harken back to Justice Jackson—either “wise, or constitutionally necessary.” The point is not simply that uniform federal choice of law rules, and only such rules, will prevent choice of forum from influencing choice of law. It is also that federal law provides an appropriate source of neutral rules to select the governing law in disputes implicating more than one state.

What might the role of the federal judiciary be in the development of such choice of law rules? Doubts have been raised about the appropriateness of fashioning such rules as federal common law,⁹⁹ and in any event both the force of precedent and the current Court’s narrow view of federal common law make such a development unlikely. Moreover, because choice of law doctrine lacks predictability even within a single jurisdiction,¹⁰⁰ Congressional enactment of some basic rules and principles would provide a welcome starting point.¹⁰¹ The primary role of the federal courts might lie less in launching the enterprise and more in trying to keep it on course. The exposition of a uniform body of federal choice of law rules would occur, of course, in state as well as federal courts. But here as elsewhere, federal courts, though handling only a small fraction of such questions, could be expected to exercise a leadership role.¹⁰² In doing so, they would be playing the structural role

⁹⁸ See William F. Baxter, *Choice of Law and the Federal System*, 16 Stan L Rev 1 (1963); Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L Rev 1191 (1967). See also Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 Law & Contemp Prob 105, 114-26 (Spring 1977).

⁹⁹ Compare Ely, 87 Harv L Rev at 714-15 n 125 (cited in note 97) (arguing that the Rules of Decision Act, 28 USC § 1652 (1982), requires federal courts to follow the *Klaxon* approach to conflicts questions involving state law claims), with Hart, 54 Colum L Rev at 515 (cited in note 58), and Atwood, 19 Conn L Rev at 46 & nn 178-79 (cited in note 94) (both noting that the Act requires adherence to state rules only “in cases to which they apply.”) For arguments that there is federal authority to generate “real” federal choice of law rules binding in the state courts, see Baxter, 16 Stan L Rev at 22-42 (cited in note 99); Horowitz, 14 UCLA L Rev at 1203-05 (cited in note 99); Trautman, 41 Law & Contemp Probs at 114-17 (cited in note 99).

¹⁰⁰ See ALI, *Project* at 254 (Reporter’s Notes to Comment A) (cited in note 98).

¹⁰¹ On the scope of congressional power, see ALI, *Project* at 259-65 (cited in note 98).

¹⁰² See generally Hart, 54 Colum L Rev at 513-15 (cited in note 58). Adoption of such a

originally given to the national judiciary in 1789—to serve as a neutral arbiter within the federal system.¹⁰³

There remains a final problem of uncertainty in a federal system that choice of law rules alone cannot solve. The simple facts that different states have different substantive rules, and that many courses of conduct touch more than one state, generate uncertainty about what law governs. States are unlikely to extend the approach of the Uniform Commercial Code to other areas of law. Substantive uniformity is likely to be forthcoming, if at all, only through the formulation of federal rules of decision, again presumably by Congress.

More than tradition cautions against even limited experimentation with federal lawmaking in areas for which the states have heretofore held primary, if not exclusive, responsibility. To the obvious fear of federal intrusion must be added other concerns. Codification is difficult work even when undertaken by experts who are free, if not of political opinions, at least of the cruder kinds of political pressures that accompany American electoral democracy. Delegation to “experts” raises its own political problems, as highlighted by controversy (here I mean political rather than constitutional) over the existence and recommendations of the United States Sentencing Commission. Finally, nationally imposed uniformity might stifle the creativity and experimentation that a federal system is said to promote.¹⁰⁴

But from another vantage point, creation of uniform federal substantive rules is itself a form of experimentation, whose distinctive advantages—simplicity and provision of clearer guidance to primary actors—might outweigh the drawbacks just noted. The problems faced by national or multinational institutions conducting affairs in fifty states were just not on the agenda in 1789. Perhaps in an era in which the European Community is striving, experimentally, for greater harmonization of the laws of member

proposal might provide one reason for retaining some portion of the diversity jurisdiction—to permit discharge of the leadership role just noted. In any event, federal courts hear state law issues under other grants of jurisdiction—for example, as defenses to federal causes of action or under pendent or ancillary jurisdiction.

¹⁰³ See Baxter, 16 Stan L Rev at 22-23, 33 (cited in note 99); See also Hart, 54 Colum L Rev at 514 n 85 (cited in note 58).

¹⁰⁴ *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting). A final question is whether such cases could be filed in federal court; if so, the burdens on the federal judiciary would be correspondingly increased; if not, serious difficulties in ensuring that these uniform laws remain uniform might arise. One possibility would be to make the cases triable in state court, but with some authority to certify issues to federal appellate courts to help promote consistent interpretation.

states, we too should be willing to undertake similar experiments, at least in selected areas. (One example would be a federal tort law governing the liability of drug manufacturers, whose commerce tends to be nationwide and who are already subject to a regime of federal regulation, with which private tort remedies might appropriately be integrated.)

I suggest consideration of even limited nationalization of substantive law hesitantly, for it raises a set of prodigious difficulties, on which I have touched only briefly. But it is worth recalling that over our history, attitudes about the nature and sources of legal rules have changed a good deal. The conception of the general common law reflected in the First Judiciary Act's famous § 34—as a body of law transcending any particular jurisdiction¹⁰⁵—was exploded by *Erie* and by the writings of the realists.¹⁰⁶ But the familiarity of our modern view that decisional law and statutory law alike are purposive instruments of each state should not prevent us from asking whether fifty state laws always constitute, collectively, an effective instrument of national policy. Diversity and uniformity both have attractions. The decision how far to favor one at the expense of the other cannot be drawn for all time; an approach that made sense in 1789 or 1938 may serve our purposes less well in the year 2000. At some point, we might decide that Justice Story's aspiration for uniformity in *Swift v Tyson* speaks to present needs.

* * * * *

Even on an occasion celebrating the First Judiciary Act, it is hard to agree with Justice Brown that that piece of legislation was probably "the most satisfactory Act ever passed by Congress."¹⁰⁷ It is far easier to accept the view Frankfurter and Landis expressed in 1928, that "changes in the future are likely to be more rapid than they have been in the past."¹⁰⁸ An equally safe prophecy is that the federal judiciary will remain a subject of controversy, drawing condemnation and praise just as it did at its inception.¹⁰⁹

Those of us who labor in the vineyard of federal jurisdiction

¹⁰⁵ See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv L Rev 1513, 1517-21 (1984).

¹⁰⁶ See Akhil Reed Amar, *Law Story*, 102 Harv L Rev 688, 695 (1989); Hart, 54 Colum L Rev at 512 (cited in note 58).

¹⁰⁷ Henry B. Brown, *The New Federal Judicial Code*, 36 ABA Rep 339, 345, (1911), quoted in Warren, 37 Harv L Rev at 52 (cited in note 6).

¹⁰⁸ Frankfurter and Landis, *Business of the Supreme Court* at 1 (cited in note 9).

¹⁰⁹ See Warren, 37 Harv L Rev at 52-53 (cited in note 6).

find it a rich one, whose best product is complex but at times subtle and invigorating. We can only hope that, like the finest products of other vineyards, it will improve with age.