ESSAYS

Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System

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Ever since this nation's founding, debate has raged over the proper allocation of authority between state and federal courts. Much of that debate has been political. Expanding or contracting the jurisdiction of federal courts has been urged by those favoring or opposing a larger role for the federal government. In recent years, there has emerged a special reason, independent of issues concerning state and national power, for devising ways to limit the caseload of federal courts. That reason is the need to maintain the essential character of the federal judiciary as a body of preeminent judges, carefully selected according to exacting standards, devoting their time to adjudicating important issues of federal law. The essence of my argument is fourfold: (1) the volume of federal court cases is growing at an unacceptable rate; (2) this growth threatens the quality and nature of the federal judiciary; (3) reallocation of some cases from federal to state courts provides the only feasible means of limiting the volume of federal court cases; and (4) new approaches to structuring federal jurisdiction are needed to achieve that reallocation.

I. GROWTH IN FEDERAL COURT CASELOAD

The spectacular growth in the volume of federal court cases is well known. Since 1960 filings in the district courts have more than tripled.¹ In the courts of appeals the volume has increased more

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¹ In 1960, 89,112 cases were filed in the district courts (civil, 59,284; criminal, 29,828). 1960 Annual Report of the Director of the Administrative Office of the United States Courts

than ninefold.² Additional judges have been added—a response (discussed below) that I believe contributes to the problem. Even with the expanded number of judges, however, cases filed *per judge* have increased 36 percent in the district courts and 359 percent in the courts of appeals since 1960.³

There is no reason to believe that the increase in federal court caseload will abate in the decades ahead.⁴ The population continues to grow. Congress and the regulatory agencies continue to generate statutes and regulations that invite litigation. Perhaps most significantly, the number of lawyers continues to increase at the same time that publicly-funded criminal defense and civil litigation services remain extensively available for non-paying litigants. These factors assure that growth in the number of lawsuits will persist.

II. THE CONSEQUENCE OF GROWTH IN THE FEDERAL COURT CASELOAD

Growth in the number of federal cases is a fact; the consequences of such growth are debatable. No doubt, there are those who believe that the growth in the federal caseload is a virtue, a valued expansion of opportunity for individuals to vindicate their federal rights in the face of increased assertions of government authority. Perhaps others simply accept the growth, without assessing it favorably or unfavorably, as an inevitable consequence of increases in population, laws, and lawyers. My own view is that we have now reached, and may have passed, the point where the in-

224 (table C1), 288 (table D1) ("Annual Report"); in 1988, filings increased to 284,219 (civil, 239,634; criminal, 44,585). 1988 Annual Report 5 (table 3), 7 (table 5).

² In 1960, 3,899 appeals were filed in the courts of appeals. 1960 Annual Report at 210 (table B1); in 1988, the number of appeals filed increased to 37,524. 1988 Annual Report at 2 (table 1).

³ In 1960, when 89,112 cases were filed in the district courts, there were 233 active district judges, 1960 Annual Report at 205, or 382 filings per judge. In 1988, when 284,219 cases were filed, there were 547 active judges, 1988 Annual Report at 21, or 520 filings per judge.

In 1960, when 3,899 appeals were filed in the courts of appeals, there were 66 active court of appeals judges, 1960 Annual Report at 205, or 59 appeals per judge. In 1988, when 37,524 appeals were filed, there were 158 active judges, 1988 Annual Report at 21, or 237 appeals per judge.

⁴ Some prior projections of federal court volume have woefully *underestimated* future growth. The Administrative Office of the United States Courts reported in 1981 that straight line projections of district court filings would indicate 270,000 filings by the year 2000. See J. Clifford Wallace, "Working Paper—Future of the Judiciary," 94 FRD 225, 228 n 3 (1981). Just four years later district court filings reached 300,000. Administrative Office of the United States Courts, *Federal Court Management Statistics* 168 (GPO, 1985).

crease in federal court cases poses a serious and substantial risk to the nature and quality of the federal judicial system. This risk threatens three distinct though related aspects of the federal court system—the quality of federal judges, the quality of their work, and the functioning of the federal court system.

A. Quality of Federal Judges

The nation expects and deserves high quality from all its judges, whether state or federal. But it has a special expectation that its federal judges will be men and women of special distinction. These judges enjoy life tenure and are insulated from the vicissitudes of elections and periodic reappointments, so that they may discharge the Article III responsibilities entrusted to them by the Constitution.

I do not believe that the requisite quality of the federal judges can be maintained once the number of federal judges becomes so large that selection of new judges becomes a commonplace occurrence. There are now approximately 750 authorized federal judgeships in the district courts and the courts of appeals.⁵ Approximately 7 percent of this complement is appointed each year. In years when the size of the judiciary increases, as occurs after omnibus judgeship bills are passed, the number of new appointments is even higher. Even without an increase in judgeships, about fifty new federal judges will be selected this year. For the Department of Justice, the Standing Committee on the Federal Judiciary of the American Bar Association, and the Senate Judiciary Committee, this results in one appointment every week, or more realistically, two a week in the weeks outside of the Christmas holidays and the summer doldrums. The degree of scrutiny to which prospective federal judges are subjected must necessarily diminish as the number of federal judgeships moves past 1,000 and heads toward 2,000.

More significant than the limited scrutiny given to those selected for appointment is the nature of the selection process itself. The small number of judgeships authorized for a federal trial or appellate court normally exerts a beneficial effect upon the selection process. An appointment to a federal court of limited size is a major event of high visibility. The intense attention given to nominees for the limited numbers of federal judgeships ensures that Presidents and United States Senators will not be tempted to depart from high standards of selection. But as a court expands, it

⁵ 1988 Annual Report at 21.

becomes easier to make at least occasional appointments of inadequate distinction. This phenomenon is evident in many large state court systems, with a resulting unevenness in the quality of judges appointed. It is likely that far more rigorous standards were applied in selecting a nominee for the Second Circuit when it numbered only six judges, in the days of Learned Hand, than will be applied in the decades ahead when the Court increases to sixteen, or twenty six, or even thirty six.

It is undoubtedly true that some distinguished appointments are being made to courts of considerable size, in both the federal and state systems. However, a court's expansion tends to increase the number of occasions when selection of nominees, already influenced so heavily in the federal system by political relationships with United States Senators, will not be based on the highest standards. I hasten to include my own initial selection to the federal bench within this criticism. I was appointed to the District Court in Connecticut primarily because of the support of the then senior United States Senator from Connecticut, Abraham Ribicoff. I was 39, an age I believe is too young for a truly distinguished appointment. I had a few years of experience as a United States Attorney, a few years of private practice, and a few years of non-legal government service. All of these experiences provided useful background for a federal judge but hardly the length or breadth of experience one ought to expect for appointment to the federal bench. I would like to think that Senator Ribicoff recognized my potential; candor compels me to acknowledge that he (and the public) were taking a risk in appointing someone with my modest credentials. In the future, as the size of federal courts increase, such risks will be taken too frequently.

The concern for the high quality of federal court appointments is as old as the Republic. In the debate on the Judiciary Act of 1789, Senator William Maclay of Pennsylvania remarked, "[t]he way to secure respectable decisions was to choose eminent characters for judges."⁶ Sixty years ago, Felix Frankfurter, surveying a federal judiciary that then numbered only about 170 judges, observed: "Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions."⁷

⁶ Quoted in Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv L Rev 49, 76 (1923).

⁷ Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L Q 499, 515 (1928); see also *Lumbermen's Mutual Casualty Co. v Elbert*, 348 US 48, 59 (1954) (Frankfurter concurring) ("In the farthest reaches of the prob-

The point is no less valid because it has been made before.

B. Quality of Federal Judges' Performance

In addition to the threat that the increased size of the federal judiciary poses to the quality of those selected to be judges, the growth and ensuing complexity also create significant risks of impairing the quality of the work they do. Those risks arise both from the increased number of cases requiring decision and the non-decisional components of the work of a federal judge today.

Federal judges try mightily to devote the time and attention necessary to resolve every case, despite the increasing number demanding attention. But the increasing volume inevitably creates some risk of inadequate attention to some cases. In the district courts, the rise in volume results primarily in an increase in the backlog of cases awaiting trial. But rising volume also exerts pressure upon trial judges to decide more quickly the myriad of matters that arise outside the confines of the case being tried. Rulings required on such weighty matters as claim-testing motions to dismiss, motions for summary judgment, and motions for preliminary injunction may simply receive inadequate consideration.

In the courts of appeals, the rise in volume results primarily in an increase in the number of appeals heard by each three-judge panel. Many courts, notably the Second Circuit, are determined to keep pace with the increase in appellate filings and have scheduled more oral argument per week in order to avoid a backlog of appeals. But fuller schedules also create the risk that judges will give inadequate consideration to significant issues. Moreover, this risk increases as the growth in volume thrusts more and more cases upon appellate judges. Though some of the 700 appeals per panel now filed yearly with the Second Circuit may be less substantial than some of the 189 appeals per panel filed yearly forty years ago,⁸ many of the modern cases, involving extensive records of multi-month trials and administrative proceedings, are far more complicated and thus more demanding. In consequence, with the

lem [of rising federal court caseload] a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system.”).

⁸ In 1947, 378 appeals were filed in the Second Circuit, a court then consisting of six judges. 1947 Annual Report 94 (table B1). This resulted in 189 filed appeals per year for each panel of three judges. In 1987, the Court had grown to thirteen judges, but the number of appeals increased to 3,008. 1987 Annual Report of the Circuit Executive of the Court of Appeals for the Second Circuit (table 1). This resulted in 700 filed appeals per year for each panel of three judges.

number of filed appeals *per panel* more than tripled, the quality of decision making is understandably at risk.

In addition to the volume of cases, the non-decisional aspects of federal judges' work also pose risks to the quality of their performance. Unlike their counterparts of earlier decades, today's federal judges participate in an elaborate administrative structure within their individual courts, their judicial councils, and the committees of the United States Judicial Conference. Federal judges concern themselves with judicial misconduct complaints, jury selection plans, and speedy trial plans. An astonishing volume of matters requiring judicial approval comes before all the federal appellate judges and those federal trial judges who are members of judicial councils. In addition, about one quarter of all federal judges serve on Judicial Conference committees.⁹ These institutional aspects of the work of federal judges inevitably detract from the time available for thoughtful decision making.

Let me try to avoid misunderstanding on this point. The pressure of rising caseloads and of increased institutional tasks is not yet causing federal judges to decide cases arbitrarily or even without considerable thought. However, today's increasing volume has altered the standards many judges apply in determining how much time is appropriate for thinking about the decision in a case and for crafting a careful opinion. We are not yet doing our jobs inadequately. There is a distinct risk, however, that the continued growth in the volume of cases will bring us to the point where we no longer function at the level of special competence normally expected of federal judges.

C. The Functioning of Federal Courts

The increasing volume of cases has already had significant adverse effects upon the functioning of federal courts, effects that will become more manifest and more serious as the caseloads continue to grow. In the district courts, more and more matters are not being decided by judges, but are instead being referred to magistrates. In the courts of appeals more and more cases are being decided without oral arguments and without published opinions. The Second Circuit is the only remaining court of appeals that affords oral argument to every litigant, including those appearing *pro se* (unless incarcerated). In both trial and appellate courts, the

⁹ At the beginning of 1988, 187 active circuit and district judges were serving on judicial conference committees. Memo of L. Ralph Mecham to Federal Judges (Jan 10, 1989).

increasing number of law clerks poses substantial risks to the degree of individual attention each judge devotes to the crafting of opinions.

The increased number of judges, especially in the appellate courts, threatens not only the operation of courts but also the coherent development of law. Courts of appeals used to have five or six judges. The Ninth Circuit now has twenty eight. As caseload increase is followed (often a decade too late) by increases in judgeships, we will face the unattractive choice of circuits so large that judges who barely know each other will serve together on panels once in two or three years, or circuits so numerous that the uniformity of federal law will be in serious jeopardy. Even today the outpouring of opinions from the courts of appeals challenges the reading capacity of bench and bar alike. It is difficult to remain current with opinions of one's own circuit or field of practice, and the task will grow even more daunting as the number of judges increases.

D. Overall Assessment

There are a few indications that the increase in the number of federal judges to the present total of 750 has not been accompanied by the maintenance of customarily high standards in their selection, the quality of their work, and in the functioning of the federal court system. Nevertheless, the institution of the federal judiciary as a whole is performing well. Thus, if my only concern was maintaining a federal judiciary at the current level of competence, I would not think that any jurisdictional reforms were warranted. Although I might prefer an earlier era when there were only two or three hundred federal judges, I would not be alarmed for the future if I had any confidence that today's 750 was the likely limit. Having no such confidence, however, I am deeply concerned for the future of our institution and for our ability to perform the role assigned to us. Unless significant changes are made, I foresee the day when the current total of 750 federal judges will increase to 2,000, then 3,000, and, before the end of the next century, even 4,000. When this growth occurs, we will not have a federal judiciary as we now know it. In selection and performance it will be indistinguishable from the judiciary of most states—manned by many capable and conscientious judges, but including within its ranks an unacceptable number of men and women not sufficiently qualified to be the primary adjudicators of federal law.

III. CURBING THE GROWTH OF FEDERAL COURT CASELOAD

The only effective means I see for curbing the growth of federal court caseload is a modest reallocation of jurisdiction from federal to state courts. Proposals for expediting the handling of federal court cases deserve careful consideration, but at best they will effect only minor savings of time and judicial resources. Diverting litigation out of the court system altogether through the various devices of alternative dispute resolution (ADR) also deserves consideration. Some benefits have been achieved. But ADR, even as espoused by its most ardent supporters, cannot keep the federal judiciary from growing into the thousands. Elsewhere, I have advanced the possibility of slowing the growth of all litigation—state and federal—by rethinking fundamental conceptions about which losses occurring in society ought to be compensated, at what level, and with what degree of precision.¹⁰ But I entertain no serious hope that such rethinking will yield results in time to retard the inevitable continuation of growth in the federal judiciary.

I am left, therefore, with only one solution: the increased use of state courts as forums for cases arising under both state and federal law.¹¹

Urging this greater use of state courts, especially for cases arising under federal law, encounters two powerful counterarguments that should be discussed before presenting my specific proposals. These counterarguments concern the crushing caseloads already burdening the state judiciaries and the risk of inadequate vindication of federal rights in state courts.

A. State Court Caseloads

The state courts are already overwhelmed with the volume of their own caseloads. How then can it be seriously urged that their burdens should be increased simply to lessen the burdens on the federal judiciary? The response will not find much favor with state

¹⁰ See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L J 1643 (1985).

¹¹ This solution has a distinguished pedigree. See, for example, Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* 292-93 (MacMillan, 1928); Charles Warren, 37 Harv L Rev at 131 (cited in note 6):

With the present congestion of the dockets of the Federal Courts, the questions may well be asked by lawyers and legislators whether it would not now be wise to return to the provisions of the original Judiciary Act, which worked so well for so long a period, and to cut down to its early dimensions the original jurisdiction of the inferior Federal Courts.

court judges, but I suggest that it deserves to be assessed dispassionately.

There is the blunt reality that a modest reallocation would result in only a minute increase in state court caseloads, while making a significant reduction in federal court caseloads. In 1988 there were about 240,000 civil cases filed in federal courts¹² and about 7,000,000 civil cases filed in state courts.¹³ A reallocation of 70,000 cases from federal courts to state courts would increase state court caseloads by only 1 percent, but would reduce the federal court caseload by 30 percent. No doubt the state courts would not welcome an increase of even 1 percent in their caseloads as a result of diversion from federal courts, but it is hard to believe that their overall operations would be affected to any significant degree. On the other hand, a reduction of 30 percent in the caseload of the federal court would have profound significance in stabilizing the size of the federal judiciary.

B. State Court Vindication of Federal Rights

The concern that state courts might not be sufficiently hospitable to the vindication of federal rights is a serious one. Indeed, it strikes at an inherent vulnerability in my argument: What is the use of preserving the essential nature of the federal judiciary as the basic expositor of federal law if the price of doing so is the relegation of many federal claims to inhospitable state court forums? There are two responses, both of which are more likely to find favor with state court judges than my response concerning state court caseloads.

First, state courts are now authorized, indeed required, to adjudicate a vast array of claims arising under federal law,¹⁴ and they do so with considerable skill and faithfulness to the commands of federal statutory and constitutional law. Admittedly, the pressures arising from the need to seek reelection and even to secure reappointment present a risk to courageous decision making by state judges that federal judges enjoying life tenure do not face. But state judges have not only competence, they have courage; it would be a mistake to think that they would routinely be less protective

¹² 1988 Annual Report at 5 (table 3).

¹³ State Court Caseload Statistics: 1986 Annual Report 39 (table 2.1) (National Center for State Courts, 1988). The total in this table is nearly 8,000,000 cases, but it should be somewhat reduced because a few of the smaller states included probate and family court cases.

¹⁴ *Testa v Katt*, 330 US 386 (1947).

of federal rights than would federal judges. Indeed, many state judges are currently giving more protection to civil rights and liberties under state law than are many federal judges in their interpretations of federal law.¹⁵

Second, reallocating some cases from federal to state courts need not mean totally foreclosing entire classes of federal claims from either federal trial or appellate forums. Reallocation can be accomplished while preserving opportunities for federal courts to continue their role as primary expositors of federal law. In fact, the case for restructuring the division of authority between federal and state courts turns largely on the particular means chosen for accomplishing that task. I now turn to consideration of some of those means.

IV. SOME PROPOSALS FOR RESTRUCTURING FEDERAL AND STATE COURT JURISDICTION

Most proposals for reallocation of jurisdiction between federal and state courts proceed from three premises. First, they assume that entire categories of cases will be placed into one court system or the other. Thus, those who urge the abolition or curtailment of federal court diversity jurisdiction typically favor barring from federal courts all diversity cases, or all cases brought by an in-state plaintiff, or all cases involving a sum substantially above even the recently increased threshold of \$50,000.¹⁶ Proponents of increased use of state courts for federal question cases also urge that some of these cases be barred from federal courts by entire categories. For example, all claims arising under the FEHA, Jones Act, Social Security Act, or the Truth in Lending and Fair Debt Collection Practices Acts (which typically involve small amounts of money), or all prison conditions cases would be redirected to the state courts. Second, most proposals, inhibited by traditional practice, assume that the federal district courts are the exclusive entry point into the federal court system. Third, these proposals usually assume that cases, once allocated, will remain entirely within either a state or federal court system, save only for Supreme Court review.

I advocate a fundamentally different approach on all three of these matters. First, cases should not be assigned to or barred from federal courts by entire categories; instead, federal judges should

¹⁵ See Jon O. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 Conn L Rev 21 (1982).

¹⁶ Judicial Improvements and Access to Justice Act, Pub L No 100-702 § 201, 102 Stat 4642, 4646 (1988) (amending 28 USC § 1332 (1982)).

exercise their discretion as to whether particular cases within some designated categories may proceed in federal court. Second, the discretion to permit cases in designated categories to proceed in federal courts should be exercised by federal appellate judges. Third, I suggest that cases need not always be confined to trial and appeal entirely within either a state or a federal court system, but instead should in some circumstances proceed from a state trial court to a federal appellate court and in other circumstances from a federal trial court to a state appellate court.

A. Discretionary Access to Federal Courts

Permitting federal judges to exercise discretion as to whether particular cases in selected categories may proceed in federal court would reallocate substantial numbers of federal court cases to state courts while preserving the opportunity for federal judges to decide those cases that especially merit federal court consideration.¹⁷ Some categories in which most cases need not be brought in federal court can be readily identified. FELA and Jones Act cases, now regularly heard in large numbers in state courts, are obvious examples. Diversity cases brought by in-state plaintiffs form another likely category for this approach.

The discretionary classes of cases need not be limited to civil actions. Before the turn of the century, substantial doubt existed over whether federal criminal laws could be enforced in state courts,¹⁸ but that doubt has long since been extinguished.¹⁹ It would be entirely appropriate to relegate to state courts most mail and wire fraud violations, typically local crimes eligible for a federal forum only because of the happenstance that a letter was mailed or a telephone call was made. Also appropriate for state court forums are most narcotics and gambling violations, especially those involving less than some stated threshold amount of drugs or

¹⁷ Discretionary decisions as to the exercise of federal court jurisdiction have been proposed before. Forty years ago, Professor Wechsler suggested that district courts should have "discretion to refuse adjudication [of diversity cases] whenever they find state law too uncertain to justify its application in a case that is not subject to state appellate review." Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 J Law & Contemp Probs 216, 240 (1948).

See also David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543 (1985) (analyzes and endorses the necessity of judicial discretion within the concept of jurisdiction, even in the absence of statutes authorizing such discretion).

¹⁸ See *Huntington v Attrill*, 146 US 657, 672 (1892).

¹⁹ See *Testa v Katt*, 330 US 386 (1947). The history of state court jurisdiction to enforce federal criminal laws is surveyed in Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv L Rev 545 (1925).

money.²⁰

Within designated categories of cases a system of discretionary access to federal courts would moderate the volume of federal caseloads while at the same time providing federal court adjudication under compelling circumstances. It would permit an adequate degree of federal court exposition of federal law and of federal court availability for those state law diversity cases appropriate for a federal forum. The latter category would be determined by such factors as the multi-state nature of the dispute or a reasonably perceived risk of local prejudice. Discretionary jurisdiction in selected classes of cases would also provide the federal court system with flexibility to adjust its caseload in response to fluctuations in the volume of filings in categories of obligatory jurisdiction.

The implementation of the discretionary access system must not become an occasion for extensive litigation on the issue of access itself. The decision to permit access should be made without factfinding and should be nonreviewable. It is unlikely that there is a constitutional entitlement to proceed in a federal trial court on any claim. For 100 years the federal trial courts had no general federal question jurisdiction, a fact often noted but inadequately pondered. If a particular claim is relegated to state court under circumstances where some might reasonably conclude that discretion to deny access to federal court was improperly exercised, no injustice has occurred, and there is no compelling need to overturn such an exercise of discretion. The claimant is remitted to a state court judge who, like a federal court judge, must observe the Constitution of the United States and all laws made in pursuance thereof as the supreme law of the land. Moreover, instead of federal review of the denial of access, the preferable remedy (suggested below) is federal review of the case, or at least the federal issue in the case, after state court adjudication.

Discretionary access to the federal courts should not turn on whether the lawmakers can establish that the state court forum is

²⁰ The use of state court forums for prosecution of federal offenses was suggested sixty years ago. See Frankfurter and Landis, *The Business of the Supreme Court* at 293 (cited in note 11):

Liquor violations, illicit dealings in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, these and like offenses have brought to the federal courts a volume of business which, to no small degree, endangers their capacity to dispose of distinctly federal litigation and to maintain the quality which has heretofore characterized the United States courts. The burden of vindicating the interests behind this body of recent litigation should, on the whole, be assumed by the states.

inadequate. Such an approach would be burdensome to federal courts. More important, it would be disrespectful of state courts to have a federal court make precise factual findings as to the alleged deficiency of a state court to adjudicate a particular claim. Instead, it should be sufficient to permit a claimant or a removing defendant in one of the designated categories of cases to present an affidavit stating considerations that bear on the appropriateness of litigating the particular claim in federal court. The judge's determination then would be only a conclusory grant or denial of access, without elaboration of reasons or opportunity for review and regardless of whether access was granted or denied. Access might well be granted where circumstances peculiar to the case indicate a risk of inadequate state court consideration of the federal claim. Or access might be granted because similar claims have been adjudicated in the courts of the relevant state with some indication of incomplete or even incorrect understanding of federal law. But such case-specific circumstances or more general patterns would not be subject to factfinding; the federal judge's belief that access appeared to be warranted would suffice.

B. Exercise of Discretion by Federal Appellate Judges

A system of discretionary access to federal courts could be administered by federal district or appellate judges, but decisions at the appellate level are preferable. With a circuit-wide perspective, appellate judges would be in a better position to assess the need for federal court exposition of federal law. They can better assess the contention that a particular federal claim warrants decision by a federal court, perhaps because of its importance, its complexity, its novelty, or simply because of the need to revisit an evolving field of federal law. They can better compare any alleged pattern of state court inadequacy as to federal law implementation with the general body of federal law as announced by their own court of appeals. They can also evolve some consistency in the administration of a discretionary access system more readily than would occur with the individualized decisions of numerous district judges. Vesting authority in federal appellate judges would also avoid the appearance, and sometimes the reality, that a district judge denied a motion for access simply to avoid the burden of a particular lawsuit.

The access decision could be made either by a panel of three appellate judges or by one appellate judge. Motion practice in the courts of appeals is usually not a time consuming burden, with most matters resolved expeditiously on the motion papers.

We are so inured to the pyramid structure of adjudication in which cases always begin in a trial court and work their way up to an appellate court, that it may seem almost heretical to suggest that the initial decision to start a case through the federal court system should be made by an appellate court. Appellate judges would likely disfavor the proposal, not only for its departure from the traditional pattern, but also because of the burdens it would impose upon them. Nevertheless, neither novelty nor burden is a sufficient reason for rejection. In the search for ways to curb the volume of federal court litigation, adherence to the ways of the past is the surest prescription for inaction. As for burdens, as an appellate judge, I would far prefer that we assume some modest burdens as the gatekeepers of the federal courts in selected categories of cases than await the day when we are overwhelmed by an unmanageable increase in federal appeals.

C. Reciprocal Routing of Appeals

A system of discretionary access to federal courts should be accompanied by new appellate arrangements that permit federal law cases, relegated to state trial courts, to be eligible for federal court appeal, and state law cases, adjudicated in federal trial courts, to be eligible for state court appeal. With federal law claims, it would be especially important to preserve a second opportunity for federal court consideration. The need to assure federal court scrutiny of the claim might not always be apparent from the face of the pleadings, when access was initially denied. There will also be instances where the state trial court's inadequate application of federal law or outright erroneous understanding of it make a compelling case for federal appellate review. Supreme Court review through certiorari after state court appeal, although in theory available, is too limited in practice to ensure sufficient protection against inadequate state court exposition of federal law.

With state law claims, it would be useful to develop the reciprocal opportunity to provide for state court appeal of those diversity cases tried in federal trial courts either under current or modified diversity jurisdiction, or because of a discretionary grant of access. It is now possible in some states to secure definitive state court adjudication of state law issues through the device of certification of questions from a federal court to the state's highest court. While this is a helpful innovation, it should be expanded by permitting the entire appeal of a diversity case to be routed into the state appellate court system, where it would normally be adjudicated, as it should be, by an intermediate state appellate court,

with only optional review by the state's highest court.²¹

This reciprocal arrangement should satisfy those who demand that federal courts retain diversity cases. Their concerns are primarily with maintaining access to the more generous discovery procedures of federal trial courts and to a jury pool drawn from a wider area than obtains in some state courts, which cover limited geographic areas in which local prejudice might be significant. Allowing the trial in the federal court, but routing the appeal to the state court system would afford the virtues of the federal trial forum while assuring the indisputable benefit of having the state appellate court provide definitive expositions of its own state law. Even if all diversity cases were retained in federal district courts, without a discretionary access arrangement, it would be appropriate to send all or at least some of the appeals in these cases to the state appellate courts.

Administering a system of reciprocal routing of appeals should be a task for federal appellate judges. For federal law claims, they should have the discretion to permit federal court appeals from cases relegated to state courts. As with the decision to grant access to the federal trial court, the appellate access decision would be accomplished without factfinding and would be nonreviewable. For state law claims, if it is not acceptable to route all diversity appeals to state courts, then federal appellate judges would at least have discretion to deny an opportunity for federal court appeal in selected diversity cases and leave them for review within the pertinent state appellate system.

A discretionary system of reciprocal routing of appeals need not be limited to entire cases, but should permit review of single issues as well. If a case with a federal law claim is relegated to state court, there will often be many issues of state law involved in the litigation. This occurs both because of pendent state law claims in the federal court and because the federal law claims themselves often turn on subsidiary issues of state law. Discretionary access to federal appellate courts might well be limited to the federal issues in the state court litigation.

Such "issue jurisdiction" is not unknown to federal appellate practice. A system of bifurcated appellate jurisdiction evolved for cases arising under the Emergency Petroleum Allocation Act. These cases were initially tried in the federal district courts. Issues arising under the Act were appealed to the Temporary Emergency

²¹ I am indebted to Judge Joseph F. Weis, Jr. of the Third Circuit for this suggestion.

Court of Appeals (TECA). All other issues in the case were appealed to the court of appeals usually exercising jurisdiction over judgements of the district court.²² The system brought TECA's expertise to bear on the issues for which it had special competence and left all others to be reviewed in the ordinary course.

In a system of discretionary access to federal appellate courts for certain categories of federal claims tried in state courts, it would probably make sense to let federal appellate judges exercise their discretion to permit federal court review of either the federal issues or the entire case. Similarly with diversity cases tried in federal court, federal appellate judges should have discretion to route to a state appellate court either the state law issues or the entire case.

V. CONCLUSION

These proposals for making some modest reallocation of jurisdiction from federal to state courts are motivated, I acknowledge, primarily to limit the growth in federal court caseloads in order to preserve the essential nature of the federal courts. Those who will greet these proposals with skepticism and even dismay must ask themselves hard questions: If federal court jurisdiction is not curtailed, will the federal court system of the Twenty-First Century have the special competence to decide the entire volume of what is now considered the proper business of the federal courts? What will be the quality of a federal court system of 3,000 judges? What coherence of federal law will exist when we have either twelve circuits, each with fifty judges, or perhaps thirty circuits, each with twenty judges? What will be the capacity of such a system to give proper attention to its caseload? And finally, on balance, is it better to preserve the present size and nature of the federal court system, so that it may give proper consideration on a selective basis to important issues of federal law, than to let its growth imperil its capacity to perform as the nation expects?

Apart from concerns about federal caseload, however, some reallocation of jurisdiction between federal and state courts is appropriate. More creative uses of the authority of both court systems can benefit from the orderly development of both state and federal law. State courts should be the primary expositors of state law. The current scope of diversity jurisdiction prevents state judges

²² See *Coastal States Marketing, Inc. v New England Petroleum Corp.*, 604 F2d 179 (2d Cir 1979).

from fulfilling that role. Federal courts should have at least the opportunity to adjudicate all issues of federal law. The current preclusion of federal defenses as a ground for federal court jurisdiction prevents federal judges from fulfilling that role.²³ Both the states and the nation would be better served by a restructured system of federal jurisdiction that makes the best possible use of the strengths of state and federal courts. If we do not plan now to achieve that objective, events will overtake us, and our opportunity will be lost.

²³ See *Louisville & Nashville R.R. v Mottley*, 211 US 149 (1988).