

# Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts

LAUREN ROBEL\*

## INTRODUCTION

In a federal courtroom in Indianapolis, representatives of the Republic of Cyprus and the Cypriot Greek-Orthodox Church nervously await word on the fate of a priceless part of their nation's heritage. An Indianapolis art dealer, financed by a local bank, had purchased four Byzantine mosaics for over \$1.2 million. The artifacts were part of a much larger mosaic that had been affixed to the apse of the Church of the Panagia Kanakaria in the village of Lythrankomi, Cyprus in the early sixth century. The large mosaic, made of small bits of colored glass, depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles. Before it was stolen, the mosaic was displayed in the Kanakaria Church for centuries, where it became, under the practices of Eastern Orthodox Christianity, sanctified as a holy relic.<sup>1</sup>

History had given Cyprus little reason to be optimistic about the willingness of other countries to thwart the interests of their own citizens to protect those of a far-away island nation. Yet in this federal courtroom, almost matter-of-factly, the nation of Cyprus would have its national treasures returned, and the Indianapolis art dealer would go home over one million dollars poorer. So, too, would an Indianapolis federal judge endure death threats to bring the promise of *Brown v. Board of Education* to Indianapolis schoolchildren,<sup>2</sup> and yet another federal judge would tell the city of Indianapolis that its politically popular pornography ordinance violated the Constitution.<sup>3</sup>

Happily, Indianapolis is not unique in the courage and integrity of its federal judiciary. I begin this discussion of the Long Range Plan for the Federal Courts<sup>4</sup> with these stories

---

\* Associate Dean and Professor of Law, Indiana University School of Law. I would like to thank my colleagues Aviva Orenstein and Gene Shreve for helpful comments on a draft of this Article and to absolve them of any responsibility for the views expressed herein.

1. *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); see Kevin M. McClermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122-23 (1996) (confirming that foreign plaintiffs win 20% more often than domestic plaintiffs in federal district courts, and domestic defendants fare worse in those courts than foreign defendants).

2. *United States v. Board of Sch. Comm'rs*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

3. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

4. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter SEPTEMBER PLAN]. The recommendations and implementation strategies in the September Plan have been approved by the Judicial Conference, which is the policymaking arm of the judicial branch. This Article will also refer to two other documents: JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter MARCH PLAN] and JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1994) [hereinafter NOVEMBER PLAN]. The March Plan incorporated revisions made in response to public hearings and commentary on the November Plan. Much of the March Plan was adopted by the Judicial Conference in April and May, 1995. See 60 Fed. Reg. 30,317 (1995). The September Plan does not contain commentary, and the commentary from the earlier plans does not represent official Judicial Conference policy. However, I refer to it to explain the recommendations that the Judicial Conference adopted.

to focus on what is at stake in this planning effort. The great virtue of the federal courts has been their unusual resistance to the pull of nationalism and politics. A plan for the future of the federal courts would ideally be concerned with assuring that this virtue is preserved at all costs.

The Long Range Plan, written and adopted by the federal judiciary, charts a course for the federal courts that is in many respects commendable. Yet ultimately, the vision articulated in the Plan underemphasizes both the explanatory power of Article III's protections for the judiciary,<sup>5</sup> and the implications of Article III for its planning efforts. By choosing to focus on issues of federal jurisdiction rather than topics within its control, the federal judiciary risks further embroiling itself in the most political of choices, with consequences that are likely to decrease the respect for the federal courts. By making a small federal judiciary a cornerstone of its vision, the Plan ensures that decisionmakers not given Article III protection—the magistrate and bankruptcy judges and agency adjudicators—will shoulder even more of the work of the federal courts, without confronting the questions presented by increased reliance on these judges.

It is the protections from politics contained in Article III that make the federal courts special, not historical notions about jurisdictional boundaries nor, with the greatest respect to the men and women who people the federal bench, the "exacting process" through which federal judges are selected.<sup>6</sup> Article III protects the federal judiciary from political pressure, both to assure its neutrality in fact and to assure the citizenry that its neutrality can be trusted. Issues of federal jurisdiction are inextricably political and, as such, committed to Congress. When the federal judiciary takes official public positions on the legitimacy of particular grants of jurisdiction, or outlines, outside the confines of a case, bright-line tests for the allocation of jurisdiction, it risks compromising the very protections that ensure its stature and excellence.

Part I describes the Long Range Plan's genesis and some of the difficulties faced by planners within the judicial branch. It examines as well the frustrations facing federal judges as they attempt to preserve what is best about the federal courts in the face of concerns that those courts will be overwhelmed by caseload.

Part II describes the Long Range Plan's commitment to a particular vision of "judicial federalism" premised on historical allocations of jurisdiction between the state and federal courts. Under this view, which I will call "impermeable federalism," the boundaries between state and federal jurisdiction are fixed by tradition and history, not the pragmatics of evolving national needs. The Plan's view of judicial federalism is supported both by well-developed arguments about caseload crisis and by less developed arguments about federalism. While the caseload arguments would appear to lead to the conclusion that the Article III judiciary is understaffed, the federalism arguments lead in the opposite direction, against expanding the number and hence the role of the federal judiciary.

Part III argues that every element of the Plan's version of judicial federalism is contestable. While there exists a core of federal cases about which we can easily reach consensus, it is more difficult to reach any sort of agreement about which cases should stay out of the federal courts, and the tests proposed by the Long Range Plan do not help greatly in that regard. My point here is not to repeat the large body of literature debating

---

5. U.S. CONST. art. III, § 1 (providing federal judges with life tenure and protection from loss of compensation).

6. MARCH PLAN, *supra* note 4, at 7.

appropriate allocations of federal jurisdiction, but rather to demonstrate that the Plan takes a view on that allocation that is neither historically mandated nor constitutionally required. That being so, the Plan's jurisdictional recommendations are simply policy recommendations premised on a controversial view of the role of the federal courts. As the Plan's commentary candidly notes, "Any such proposals, like the ones discussed here or others, would favor certain interests over others, and may therefore be seen by some to constitute an initiative beyond the province of a non-majoritarian apolitical institution."<sup>7</sup>

Part IV considers the consequences of the Judicial Conference's commitment to a small federal judiciary. While others have exhaustively reviewed the arguments for and against the relative "smallness" of the federal judiciary,<sup>8</sup> my concern is with the staffing consequences of a refusal to seek additional judges to handle the work. For whether or not Congress agrees with the Judicial Conference's views on jurisdictional allocation, a slow-growth policy in the federal judiciary focuses attention inexorably on the non-Article III personnel whose role will continue to increase in order to handle the existing caseload.

Finally, Part V considers whether federal judges have anything distinctive to offer in what has come to be called the "federalization debate." I conclude that they do not, and that the increasing volume of judicial voices in this debate puts important values at risk. In particular, judicial involvement risks the appearance of hostility to a variety of cases Congress has already assigned to the federal courts, it risks the appearance of insensitivity to the state courts, and it risks the political neutrality central to the vision of judging implicit in Article III.

## I. THE DIFFICULTIES IN JUDICIAL PLANNING

The effort to identify why the federal courts are successful has become particularly urgent in the face of growing concerns that, under mounting caseloads, their success will cease.<sup>9</sup> That concern was forcefully presented in the Report of the Federal Court Study Commission, which recommended that the Judicial Conference establish a "permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals."<sup>10</sup> This concern is repeated in the Long Range Plan's discussion of

---

7. *Id.* at 23.

8. GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993); A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627 (1995); Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52 (1993); Jane A. Restani & Ira Bloom, *The Quick Solution to Complex Problems: The Article III Judge*, 18 FORDHAM INT'L L.J. 1668 (1995); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for Equality, Justice, and the Learned Hand Tradition*, 81 CORNELL L. REV. (forthcoming 1996) (manuscript on file with author); Jonathan D. Varat, *Determining the Mission and Size of the Federal Judiciary via a Three-Branch Process: The Judges' Debate and a Reform Menu*, 27 CONN. L. REV. 885 (1995); J. Clifford Wallace, *Developing the Mission of the Federal Courts—A Method to Determine the Size of the Federal Judiciary*, 27 CONN. L. REV. 851 (1995).

9. See, e.g., THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5-6 (1990) (describing a crisis in federal court caseload) [hereinafter FCSC REPORT]. The Federal Courts Study Committee was created by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), and charged with "examin[ing] the] problems and issues currently facing the courts of the United States" and "develop[ing] a long-range plan for the future of the Federal judiciary." *Id.* § 102(b)(1)-(2).

10. FCSC REPORT, *supra* note 9, at 147. The FCSC Report recognized that "the Constitution determines the judiciary's most important goals and the separation of powers places many strategic planning decisions for the judiciary within the authority of Congress." *Id.* It recommended that the judiciary focus on the effect of anticipated demographic trends on the courts, issues of funding through users' fees, judicial adaptation to scientific and technological change,

caseload pressures,<sup>11</sup> and its presentations of various dark scenarios for the future of the courts if caseload growth continues.<sup>12</sup>

Yet judicial branch planning is beset by numerous difficulties. The first, and most obvious, is that the judiciary lacks control over the amount of judicial work. The Constitution leaves to Congress most of the important choices about the workload of the federal courts, constrained only by the generous jurisdictional limits of Article III, Section 2 and whatever the constitutional limits on Congress' own power might currently be.<sup>13</sup> Thus Congress is free to use the lower federal courts as it sees fit to address the nation's needs—needs that can change with alacrity.<sup>14</sup> For instance, environmental laws would surely have been considered a purely local concern in our recent past, as would the regulations of business activities found in a variety of federal statutes.<sup>15</sup>

Executive branch policy choices can also have dramatic effects on the ebb and flow of federal caseload. During the 1980's, for instance, the district courts saw a 238% increase in Social Security cases following an executive branch effort to reduce the number of Social Security disability recipients.<sup>16</sup> Prosecutorial priorities, particularly with respect to drug laws, also affect caseload beyond the judiciary's control.

Moreover, much of the fluidity of the federal courts' business is due to demographic and social trends.<sup>17</sup> In the past decades, for instance, the federal courts faced a substantial increase in civil caseload, much of it due to such things as the emergence of asbestos claims—resulting from long-ago exposure—that brought thousands of new claimants into the federal courts.<sup>18</sup> And while the extent of drug prosecutions' effect on federal courts

reliable indicators for the need for judicial branch growth, and provision for criminal representation. *Id.*

11. *Id.* at 9-15.

12. MARCH PLAN, *supra* note 4, at 18-20. One scenario imagines a quadrupling of cases, a leveling off of judges at 1000, and a federal budgetary crisis that requires onerous user fees that would drive most civil litigants away from the federal courts. An early version of the Plan dubbed this scenario as "Nightmare Justice." NOVEMBER PLAN, *supra* note 4, at 18.

13. These constitutional boundaries are perhaps less generous than they were even last year. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding unconstitutional federal legislation forbidding guns in schools because Congress had transgressed limits of its Commerce Clause power). The Founders themselves could not agree on a role for lower federal courts. See 4 THE FOUNDERS' CONSTITUTION 131-212 (Phillip B. Kurland & Ralph Lerner eds., 1987).

14. See Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 75.

Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress, essentially making the lower federal courts a resource to be used as Congress deems necessary.

*Id.* (footnote omitted).

15. As an example of how quickly the business of the courts can change, Chemerinsky and Kramer point to the Eighteenth Amendment: "No one thought in the years before the Eighteenth Amendment was ratified that a huge investment of federal judicial resources would be necessary to enforce Prohibition, just as no one foresaw how short the Amendment's life would be and how quickly this business would disappear." Chemerinsky & Kramer, *supra* note 14, at 76. They concluded that "[o]ur priorities as a nation change so fast that investing substantial time in articulating a well-defined model of federal jurisdiction would be a waste." *Id.*

16. Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 926; see also 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 302-08 (1990).

17. See FCSC REPORT, *supra* note 9, at 8-9 (discussing reasons for inability to predict federal caseload, including the difficulty of predicting "any but the grossest social, economic, political, and demographic trends more than a few years in advance—if that far"); Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep"*, 45 CASE W. RES. L. REV. 705, 709-10 (1995) (reporting on results of two "state of the art" studies predicting trends that would affect caseload, noting that caseload is "greatly a function of population").

18. See Andrew Blum, *Asbestos Confusion Continues*, NAT'L L.J., Mar. 9, 1992, at 1, 32 (noting the 20,000 to 25,000 cases currently pending on federal court dockets and 55,000 to 70,000 on state court dockets).

is controverted,<sup>19</sup> it would have taken a prophet to predict the impact of drug use on the federal caseload.<sup>20</sup> Likewise, complaints about the increase in prison litigation must begin with the fact that as a society, we have incarcerated a huge number of people. Indeed, simple increases in population will lead to increased caseloads, a fact assuredly beyond the control of federal court planners.<sup>21</sup> The little room that the federal courts have to control their jurisdiction directly results from the courts' interpretations of jurisdictional grants and various court-created abstention doctrines developed in the cases and controversies that have come before them.<sup>22</sup> Small wonder, then, that federal judges have been concerned that the large, unpredictable caseload to which they must attend will threaten the quality of their working lives and the justice they dispense.<sup>23</sup>

It is thus within severe constraints on the efficacy of its work that the Committee on Long Range Planning began the task of articulating a vision for the future.<sup>24</sup> Noting that "[t]he federal judiciary is largely reactive to external forces beyond its control," the Plan's authors begin by stating that judicial-branch planning is nonetheless useful because it allows the courts to "clarify [their] mission and the values [they] seek[] to preserve and promote, to articulate those values in goals or objectives, and take effective action to achieve them."<sup>25</sup>

The Plan identifies five "core values": equal justice, judicial independence, excellence, accountability, and courts of limited jurisdiction. With respect to equal justice, the Plan recommendations include a strong commitment to the elimination of gender bias in federal courts,<sup>26</sup> fully accessible court facilities,<sup>27</sup> the provision of translators for those non-English speaking litigants and witnesses who cannot afford them,<sup>28</sup> and a general increase in sensitivity to the diverse cultural backgrounds of participants in the justice

19. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1039-41 (1995) (noting that federal criminal caseloads are declining, that 1980 represented the "low point" in a consistently decreasing criminal filing trend, and that the per judge criminal workload has decreased from 534 cases in 1932 to 73 in 1994). *But see* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1995, at 39 (arguing that criminal caseload is only a fifth of the federal docket, but consumes a disproportionate share of federal resources).

20. The drug caseload points as well to another source of judicial business beyond judicial control: executive branch charging decisions. See NOVEMBER PLAN, *supra* note 4, at 23 (recommending that the Justice Department promulgate prosecutorial guidelines after consultation with the Congress and Judiciary that encompass the Plan's views on appropriate use of federal jurisdiction). Also consider the disastrous effect of executive branch officials' decisions regarding Social Security claimants in the 1980's. Richard Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461.

21. See Baker, *supra* note 17, at 709-15 (discussing studies of caseload growth). Edward McConnell, past president of the National Center for State Courts, identifies other impediments to court planning, including the decentralized nature of a court system and the fact that the basic organizational structure of courts is fixed by statute or constitution. Edward B. McConnell, *Planning for State and Federal Courts*, 78 VA. L. REV. 1849, 1853 (1992).

22. Even this much control is controversial. See Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) (arguing for Congress' primacy in jurisdiction assignment); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (arguing against propriety of abstention doctrines on separation of powers ground). *But see* Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 B.Y.U. L. REV. 767.

23. John Oakley, *William W. Schwarzer: A Judge For All Seasons*, 28 U.C. DAVIS L. REV. 1097, 1101 (1995) (noting that judges are voicing concerns about workload in greater numbers and questioning whether "current conditions are compatible with satisfactory discharge of judicial responsibilities"); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 44-47 (describing judges' frustrations with caseload pressures).

24. One of the Plan's most welcome provisions is a renewed commitment to examining the federal courts' data collection methods. SEPTEMBER PLAN, *supra* note 4, at 21. This will surely make the next round of planning easier.

25. MARCH PLAN, *supra* note 4, at 2.

26. *Id.* at 104-05.

27. *Id.* at 105-06.

28. *Id.* at 108.

system.<sup>29</sup> The Plan also strongly favors both more secure funding for indigent criminal representation<sup>30</sup> and the establishment of federal defender programs in every district,<sup>31</sup> and it suggests methods to provide counsel to indigent civil litigants.<sup>32</sup>

Of judicial independence, the Plan notes that Article III provides protection from political pressures on the judiciary through its provisions for life tenure and protection against salary decreases, while arguing that the protection of Article III extends further to judicial branch control of its own governance.<sup>33</sup> Thus, issues of judicial independence are subsumed, for the most part, in recommendations about the internal governance structure of the courts.<sup>34</sup> Excellence, the Plan states, results from the quality of judicial nominees, superior resources, and limited jurisdiction that allows judges to develop an expertise in federal subject matter and procedure. Accountability, while vital to the legitimacy of the federal courts, is primarily a function of the appointments process, "which responds generally over time to changes in electoral majorities."<sup>35</sup>

## II. JUDICIAL FEDERALISM: THE IMPERMEABLE LINE

The final core value is "national courts of limited jurisdiction, operating within a system of federalism." Unelaborated, this is an unobjectionable principle, one that reflects history at a comfortable level of abstraction. But this value "is at the heart of judicial federalism," a concept central to the entire Plan and one elaborated in some detail.<sup>36</sup> The first recommendation in the Plan, and the key to much of what follows, states:

Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.<sup>37</sup>

The Plan's authors assert that judicial federalism requires Congress to avoid transgressing historical and traditional boundaries between state and federal jurisdiction,<sup>38</sup> because the distinction between state and federal courts, and thus the distinctiveness of the federal judicial forum, results from the historically limited nature of federal jurisdiction. While recognizing that "the Framers wisely left the actual scope

29. *Id.* at 105.

30. *Id.* at 110.

31. *Id.* at 111.

32. *Id.* at 112-13.

33. *Id.* at 8. The idea that judicial independence requires administrative independence from the executive or legislative branches is a recent development. See Gordon Berman & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835, 836-37, 844-56 (1995) (tracing the history of the administration of the judicial branch).

34. Within the judiciary, these recommendations were the most controversial in the early drafts of the Plan. Plan recommendations to include magistrate, bankruptcy, and territorial judges in the various governance structures of the federal judiciary were deleted before the Plan was approved. Compare MARCH PLAN, *supra* note 4, at 77-78 (Recommendations 52(o)(1), (3), (4)) with SEPTEMBER PLAN, *supra* note 4, at 13-14. See also Robb M. Jones, *The Future of the Federal Courts*, 34 *JUDGES' J.* 17, 44 (1995) (noting that governance was "one of the most hotly debated planning topics within the federal judiciary").

35. MARCH PLAN, *supra* note 4, at 9.

36. *Id.* at 8.

37. SEPTEMBER PLAN, *supra* note 4, at 1.

38. MARCH PLAN, *supra* note 4, at 21. The Plan reminds us that federal question jurisdiction was a relative latecomer (although it fails to note that federal question jurisdiction originated from the paradigm shift in federal-state relations occurring as a result of the Civil War and the constitutional amendments which followed). *Id.*

of lower federal jurisdiction to Congress' discretion," and that Article III extends "to a wide range of 'cases and controversies,'" the Plan contends that "it is possible to distinguish between federalism in the legislative context" (*i.e.*, what Congress may theoretically do under the text of the Constitution) and "judicial federalism," which is a product of constitutional structure, tradition and history, and sound policy.<sup>39</sup>

Constitutional structure therefore requires congressional restraint. Specifically, the "fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states" demands this restraint.<sup>40</sup> According to the Plan's authors, it is offensive to this constitutional principle for Congress to extend the jurisdiction of the federal courts to reach actions traditionally cognizable in state courts because to do so would inevitably reduce the power of the states. Further, the Plan argues that Congress' recognition of the constitutional basis for judicial federalism can be discovered in its reluctance to grant general federal question jurisdiction until 1875, and in its "allocating a narrower jurisdiction to the lower federal courts than the Constitution permits and allowing state courts to retain concurrent jurisdiction in numerous civil contexts."<sup>41</sup>

Moreover, both "theory and practice" support limited federal jurisdiction because there is "no sound justification for having two parallel justice systems" handling the same range of cases.<sup>42</sup> Unfortunately, the Plan argues, "[t]he federal courts . . . have proceeded well on their way down . . . [that] path. As Congress continues to 'federalize' crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk."<sup>43</sup> Indeed, if Congress does not restrain in its zeal to federalize, the federal courts' ability to hear cases will be compromised by unrelenting caseloads, and the state courts will be sapped of their vitality to hear the cases that belong there "in the light of history and a sound division of authority."<sup>44</sup>

In practice, these broad principles result in rules for allocating jurisdiction. Principal among them is the idea that cases should not be in federal court unless the states cannot handle them and there exist additional arguments in favor of federal jurisdiction; there should be, in other words, a presumption against the extension of federal jurisdiction. Federal criminal jurisdiction should exist only in those instances when "state court prosecution is not appropriate or where federal interests are paramount," such as when the federal government's agents or interests are attacked directly, when there are substantial multistate or international aspects to the activity, or when the activity raises suspicions about the neutrality of the local decisionmakers.<sup>45</sup> In a nod to political realities, the Plan also would allow federal jurisdiction if the criminal activity is sophisticated or complex, but only until the states possess sufficient resources and expertise to take over.<sup>46</sup> Thus, the Plan rather firmly would restrain Congress from using a "minor connection with and effect on interstate commerce" as the basis for federal

---

39. *Id.*

40. *Id.*

41. *Id.* The Plan also cites 28 U.S.C. § 1332 which confers a narrower diversity jurisdiction than the Constitution would permit. *Id.*

42. *Id.*

43. *Id.* at 22.

44. *Id.*

45. *Id.* at 23-25. The activity may raise suspicions either because it is sensitive (presumably civil rights cases) or because it raises issues of local corruption.

46. *Id.* at 24-25.

criminal jurisdiction,<sup>47</sup> and from attacking new crimes in the federal courts without making a policy decision to take over the area completely. Both restraints are obviously directed at recent federal initiatives against guns and drugs.<sup>48</sup>

On the civil side of the docket, the Plan again counsels restraint in the creation of new federal causes of action, reserving federal jurisdiction in principle for civil matters that arise under the Constitution, that cannot be dealt with satisfactorily by the states because of a need for uniformity or the presence of paramount federal interests,<sup>49</sup> that involve foreign relations or the federal government, that involve disputes among the states, or that affect substantial interstate or international disputes.<sup>50</sup> Because diversity jurisdiction fits none of these categories, it should be altered to reduce its impact on the docket.<sup>51</sup> In a similar vein, the Plan recommends eliminating a number of statutes that primarily raise issues of state law or involve workplace injuries, because the state courts are, in its view, competent to adjudicate such issues. Thus, cases under such venerable old statutes as FELA<sup>52</sup> and the Jones Act,<sup>53</sup> as well as relative newcomers such as ERISA,<sup>54</sup> should be brought in state court, and litigation relating to any health care program Congress might pass should be sent there as well.<sup>55</sup> The presumption against new federal civil jurisdiction should be high, and should only be overcome by a showing that the states have failed to resolve an issue satisfactorily.<sup>56</sup>

47. *Id.* at 24. For examples of earlier cases that had held such a slim nexus constitutional, see *Scarborough v. United States*, 431 U.S. 563 (1977) (upholding federal statute criminalizing possession of firearms by felons); *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal statute criminalizing loan sharking). While much civil rights crime would seem to fall within this category, it would presumably be saved by the exception for "highly sensitive issues in the local community" which would be perceived as "more objectively prosecuted within the federal system." SEPTEMBER PLAN, *supra* note 4, at 2.

48. The Judicial Conference, through Chief Justice Rehnquist, has previously expressed its opposition to the federalization of crime on the following grounds:

[E]xpansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism, and would ignore the boundaries between appropriate state and federal action.

. . . [I]t will [also] swamp the federal courts with routine cases that states are better equipped to handle, and will weaken the ability of the federal courts effectively to deal with difficult criminal cases that present uniquely federal issues.

. . . [F]ederal courts, overburdened by criminal cases, will be unable to carry out their vital responsibilities to provide timely forums for civil cases.

Federalization of State Prosecutions: Position of the Judicial Conference of the United States, *in* Letter from Chief Justice Rehnquist, Presiding Officer of the Judicial Conference, to Rep. Jack Brooks, Chairman of the House Comm. on the Judiciary, reprinted in 140 CONG. REC. S6090 (daily ed. May 19, 1994) [hereinafter *Federalization of State Prosecutions*]; see also William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6-7 ("Most federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts."); Mary Deibel, *Justices Warn Against "Police Courts"*, COM. APPEAL (Memphis), Mar. 4, 1994, at 4A (stating that, while presenting the Supreme Court's budget to the Senate Appropriations Committee, Justices Kennedy and Souter warned of serious consequences for the federal court system when pressed for their views on the federalization of crime).

49. The "paramount federal interests" standard was a response to criticism of the November Plan which appeared to exclude any reference to congressionally created rights, such as statutory civil rights.

50. SEPTEMBER PLAN, *supra* note 4, at 3.

51. *Id.* at 3-4 (calling, *inter alia*, for elimination of in-state plaintiff diversity jurisdiction, an increase in jurisdictional amount, and an amendment to the removal statute to require parties to plead specific jurisdictional facts). The Judicial Conference has a long-standing policy favoring abolition of diversity jurisdiction. See Memorandum from the Administrative Office of the United States Courts to the United States Judges et al. 15 (Sept. 26, 1995) (noting this position and reasons for moderating it in the September Plan) (on file with Author).

52. Federal Employers Liability Act, 45 U.S.C. § 51 (1994).

53. 46 U.S.C. § 688 (1988).

54. Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (1994).

55. SEPTEMBER PLAN, *supra* note 4, at 5.

56. *Id.* at 3; MARCH PLAN, *supra* note 4, at 28 ("Absent a showing that state courts cannot satisfactorily deal with an issue, Congress should be hesitant to enact new legislation enforceable in the federal courts, and should not do so in any event without a concomitant reduction of federal jurisdiction in other areas.").



Judicial federalism, as articulated in the Long Range Plan, is designed, its authors stress, to prevent a “disastrous” scenario, in which the state and federal courts are “engaged in essentially identical business” and in which federal courts would lose their distinctiveness, and presumably the qualities that make them especially successful.<sup>57</sup>

### III. IMPERMEABLE FEDERALISM CONTESTED

All of the arguments in favor of the Plan’s version of judicial federalism are contestable. My point in making this observation is not to take a position on the wisdom of the jurisdictional allocations advocated by the Plan. It is, rather, to demonstrate that the Plan’s advocacy for various jurisdictional rules cannot be viewed as a neutral, apolitical statement about the proper role of the federal courts. Such neutrality is impossible in an area governed not by history or constitutional law but by substantive policy choices about some of the most important and controversial issues in our nation.

First, the idea that the constitutional structure of limited federal powers should result in limitations on jurisdiction not otherwise found in the Constitution itself is a notion at war with Congress’ powers under Article I and the broad limits on the kinds of cases and controversies that are justiciable under Article III. Simply put, if Congress may permissibly legislate on a subject, it may bring that subject into the federal courts. It is notoriously difficult as a matter of constitutional interpretation to find principled limits to federalism-based challenges to Congress’ authority under its enumerated powers.<sup>58</sup> It is much more difficult to infer such limits from amorphous notions of constitutional structure. Trying to draw a convincing line between proper subjects for the exercise of state and federal power—at a level of specificity that is helpful—ignores the lessons of various constitutional crises from our history, from the Civil War to the New Deal period (a period which makes the federalization efforts of today’s Congress look restrained). Nor is federal jurisdiction a zero-sum game in terms of power-sharing with the states. Most grants of jurisdiction are, after all, concurrent. Therefore, “[p]olicy considerations bearing on decisions about extending jurisdiction need to be evaluated on their own merits, without being confused with unfounded constitutional notions.”<sup>59</sup>

If the Constitution is an unreliable guide for allocating jurisdiction, history is even less reliable. Disagreement about the proper role of the federal courts in the nation’s life is one of the enduring legacies of the Founders, whose inability to reach consensus on this very issue resulted in Congress’ broad power over federal jurisdiction.<sup>60</sup> Our history is one of ever-expanding federal jurisdiction in response to congressional policy initiatives, the most obvious involving various civil rights crises, notably after the Civil War (when federal question jurisdiction was created) and during the 1960’s, which led to an increased need for access to federal courts. History, as viewed from 1963, would never have counseled that the federal courts be a forum in which to challenge the discriminatory

57. MARCH PLAN, *supra* note 4, at 22.

58. The history of both the Commerce Clause and the Tenth Amendment in the U.S. Supreme Court demonstrate the difficulties. Compare *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding against constitutional challenge application of Fair Labor Standards Act (“FLSA”) to some state employees) with *National League of Cities v. Usery*, 426 U.S. 833 (1976) (finding FLSA application to state governments unconstitutional) with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (reversing again its position on FLSA’s application to state government employees).

59. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 13 n.35 (1994).

60. See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 6-11 (1928); 4 THE FOUNDER’S CONSTITUTION, *supra* note 13, at 131-212.

practices of a business called "Ollie's Barbeque" in Birmingham, Alabama.<sup>61</sup> As other scholars have noted, "History . . . underscores that any model identifying the 'proper' role of the federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension. Defining the role of the federal courts simply is not a scientific inquiry."<sup>62</sup>

Moreover, the argument that it would be disastrous to blur the distinctions between state and federal courts is surely overstated. State and federal courts have always had substantial overlapping jurisdiction on the most basic categories of federal cases. The federal courts have contributed much to the development of state law through diversity jurisdiction,<sup>63</sup> and the state courts have had concurrent jurisdiction in federal question cases; indeed, they had sole jurisdiction over most federal cases until the federal question statute was passed.<sup>64</sup> In the area of criminal jurisdiction, where the Plan is most protective of state-court prerogatives, recent studies suggest that the criminal caseload of federal courts was much more substantial in the 1930's than it is now.<sup>65</sup> Indeed, "if 'federalization' means creating federal jurisdiction over crimes that might also be prosecuted by the States, then it has been going on since the First Congress."<sup>66</sup> Ours has not been an impermeable federalism.

Commentators have argued that this jurisdictional redundancy is a blessing, allowing for the development of empathy between the sovereigns, and an enrichment of the law.<sup>67</sup> Litigants have certainly benefited from the ability to make choices about the expertise and neutrality of the forum in which to bring their claims. And the perspective of the litigant is not wholly self-serving. We can largely ignore many unanswerable issues about parity between state and federal courts by giving litigants choices about where to pursue federal claims, while maximizing the possibility that deserving federal claims will be vindicated.<sup>68</sup> Likewise, we can ignore the again largely unanswerable empirical debate

61. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding constitutional Title II of the 1964 Civil Rights Act forbidding discrimination in public accommodations). "Indeed, the federal civil rights prosecutions championed today, even by opponents of federalization, were often state 'street crimes' such as assault or murder," Little, *supra* note 19, at 1058.

62. Chemerinsky & Kramer, *supra* note 14, at 76.

63. At least one federal judge strongly opposes this view. See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

64. 28 U.S.C. § 1331 (1994); see also *supra* note 38 and accompanying text.

65. Little, *supra* note 19, at 1040-41 (finding that federal criminal case filings have remained steady for 60 years, that the number of criminal case filings today is far below what it was 60 years ago (86,000 in 1932; 45,500 in 1994); the per judge workload of federal criminal cases was roughly 534 cases per judge in 1932, 115 in 1972, and only 73 in 1994, roughly a sevenfold workload decrease over the past 60 years).

66. *Id.* Little notes:

The statutes of the First Congress from 1789 to 1790, which created a number of dual jurisdiction federal crimes, were enacted by bodies whose membership was drawn substantially from the Constitution's signers. While the Framers almost certainly foresaw a lesser federal role for the federal courts in criminal law than exists today, this is just as certainly true with regard to every area in which the Framers expressed a vision. . . .

For example, in its first month (July 1789), the First Congress enacted federal criminal statutes encompassing bribery and false statements. After recessing from September until February 1790, the Congress then enacted federal criminal statutes encompassing, *inter alia*, murder, maiming, theft, fraud, and even receiving stolen property. Of course, these statutes had, as all federal criminal statutes must have for proper federal jurisdiction, a connection to stated federal interests. But that merely masks the fact that these were 'state' crimes gone federal, because a number of the First Congress's criminal statutes applied without regard to geography or exclusive federal control.

*Id.* (footnotes omitted).

67. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1772-73 (1992).

68. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 302 (1988).

over the necessity of diversity jurisdiction by allowing litigant choice.<sup>69</sup> As others have noted, concurrent and overlapping jurisdiction often works to enhance the best qualities of federalism by setting the courts of each sovereign in competition to protect individual liberties.<sup>70</sup>

Do the proposed jurisdictional rules help us to determine whether some item that has reached the national agenda is now appropriate for federal judicial intervention? Consider the Plan's recommendation that federal court jurisdiction should extend only to civil matters that "deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve . . . [a] paramount federal interest[.]"<sup>71</sup> How would this affect the Violence Against Women Act<sup>72</sup>—a piece of legislation opposed by many federal judges—which provides a civil action against the perpetrator of gender-based violence? Do the horrifying statistics on domestic violence deaths demonstrate state failure in addressing this problem? Is the fact that the states have never conceptualized domestic violence or rape as a civil rights offense a demonstration that the states cannot deal with gender-based violence effectively? Other civil rights violations that we now view as perfectly acceptable subjects for federal court concern were once viewed as intolerable intrusions into state sovereignty.<sup>73</sup>

And what of the idea of a "paramount federal interest"? Does this mean more than that federal judicial resources should be expended when an issue is viewed as a matter of national importance by a substantial majority of Americans? In order to be effective in limiting congressional action, it must mean more than that, for Congress rarely acts without a sense of political imperative. But if "paramount federal interest" means more than that, if it is limited to some subset of substantive problems—those that affect the United States government directly, or have major interstate effects—then one would have to wonder whether the Judicial Conference indeed intends Congress to revisit major areas of federal law, such as much environmental law.<sup>74</sup> And if this is what is really intended by the Judicial Conference's recommendation, then the political ramifications become quite clear, and the rhetorical question raised by the Plan—the appropriateness of a "nonmajoritarian apolitical branch" making suggestions such as these to the political branches—becomes more pressing.<sup>75</sup>

---

69. Litigant choice, while complicated, has many advantages in terms of forum allocation strategies. See Redish, *supra* note 67, at 1778.

70. Chemerinsky, *supra* note 68, at 308-09.

71. SEPTEMBER PLAN, *supra* note 4, at 3.

72. Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (1994).

73. Consider, for instance, the cause of action for discrimination in the making of ordinary contracts. 42 U.S.C. § 1981 (1994).

74. For instance, what are the major interstate effects of an illegal toxic waste site in a small Indiana town not located on a major waterway? In her Response, Judge Barker suggests that my reluctance to subscribe to the Plan's views on judicial federalism results from a fondness for the substantive agenda as represented by the Violence Against Women Act and various environmental provisions. In my defense, may I suggest that if that were all there was to my objections, I would certainly not be championing congressional power during the 104th Congress.

75. Professor Little makes a similar point:

The debate regarding the federalization of civil rights offenses was heated in 1870—and in 1950. Yet critics of federalization today do not question the federalization of this particular class of local offenses. However, the principle set forth in the *Long Range Plan* ("highly sensitive issues in the local community") is little more than an *ipse dixit*. This is apparent simply by way of current example. Today, gun and drug cases would seem to fall within the plain language of "criminal cases raising highly sensitive local issues." Most Americans today report that their fears are higher regarding these local criminal offenses than any other. But the message of the *Long Range Plan* and other current anti-federalizationists seems to be that they do not want these particular "local" crimes in federal courts. Thus, unless the stated principle simply means that civil rights cases are an exception, then the *Plan's* linguistic formulation fails to distinguish (with any clarity or by any principle) the civil rights

## IV. THE CONSEQUENCES OF SMALLNESS

Of course, the Plan's drafters might well respond that in times of caseload crisis, arguments about values like litigant choice should give way to concerns about conserving the possibility of litigant access, albeit in fewer categories of cases. But the Plan also comes out in favor of a slow-growth policy for the federal judiciary.<sup>76</sup> While the Plan did not adopt the widely discussed idea of a moratorium on federal judges,<sup>77</sup> it is clear from the commentary that the sentiment of the drafters is against meeting increasing caseload by adding judges; indeed, the Plan commentary states that this option would "alter irrevocably the nature of the judicial institution."<sup>78</sup>

It is not my intention to repeat here the many arguments on both sides of this issue.<sup>79</sup> Given the unpredictability of caseload in the best of times and the inflexibility of Article III, it is clear that substantial amounts of work will continue to be done by non-Article III judges. Several Plan recommendations would exacerbate that trend. For instance, the Plan recommends reassigning to administrative agencies or Article I courts "the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive factfinding."<sup>80</sup> It also recommends that Congress clarify the authority of bankruptcy judges, so that they might "exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible."<sup>81</sup> In addition, it recommends the use of magistrate judges "to the extent constitutionally permissible and consistent with sound judicial policy," including the provision of a limited contempt power to magistrate judges.<sup>82</sup>

There are now 406 authorized full-time magistrate judge positions and 85 part-time magistrate judge positions nationwide, as many magistrate judges in total as there were district court judges in 1975.<sup>83</sup> The volume of the magistrate judges' work cannot be underestimated:

For the twelve-month period ending on September 30, 1994, magistrate judges adjudicated 55,304 non-case-dispositive motions (such as discovery and procedural motions) and, by report and recommendation, addressed 10,335 case-dispositive motions in civil cases. During the same period, magistrate judges conducted 54,703 pretrial conferences in civil cases. . . . In 1994, magistrate judges terminated 7835 civil cases with consent of the parties, including 912 civil jury trials and 831 non-jury trials.<sup>84</sup>

The workload of magistrate judges is not, of course, limited to civil cases:

---

prosecutions it endorses from its overall anti-federalization position.

Little, *supra* note 19, at 1059-60 (footnotes omitted).

76. SEPTEMBER PLAN, *supra* note 4, at 6 ("The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.")

77. See BERMANT ET AL., *supra* note 8, at 1.

78. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 LOYOLA-L.A. L. REV. 1 (1993) (noting the Judicial Conference's refusal to seek 10 new judgeships for the Ninth Circuit, although the Judicial Conference caseload formulae used to determine when additional judges are needed suggested the additions were warranted).

79. See sources cited *supra* note 8.

80. SEPTEMBER PLAN, *supra* note 4, at 4.

81. *Id.* at 9.

82. *Id.* at 19.

83. Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1526 (1995) (citing the current figures for magistrates); Levin & Kunz, *supra* note 8, at 1631 (noting that there were 497 Article III judgeships in 1975).

84. Pro & Hnatowski, *supra* note 83, at 1527-28 (footnotes omitted).

For the twelve-month period ending on September 30, 1994, magistrate judges adjudicated 75,381 petty offense cases and 12,138 misdemeanor cases, issued 26,250 search warrants and 18,395 arrest warrants, and presided over 50,645 initial appearances and 21,711 detention hearings. During the same period, magistrate judges also adjudicated 23,463 non-case-dispositive motions and, by report and recommendation, addressed 4777 case-dispositive motions, including motions to suppress evidence and to dismiss indictments in felony cases.<sup>85</sup>

Bankruptcy judges, now numbering around 300,<sup>86</sup> likewise carry a heavy workload, receiving about 900,000 petitions annually.<sup>87</sup> The factfinding and adjudicatory mission of administrative law judges ("ALJs"), even without the increase in cases called for by the Plan, today far exceeds the caseload of the federal courts—up to 700,000 cases each year.<sup>88</sup>

What is particularly striking is how quickly the large group of non-Article III adjudicators within the federal judiciary, the magistrate and bankruptcy judges, has become responsible for such a large amount of work that was, until relatively recently, performed by life-tenured judges.<sup>89</sup> If I am correct that the distinctiveness of the federal courts comes from the extraordinary protection from politics given Article III judges, then a judicial branch strategy that has the effect of increasing the decisionmaking responsibility of non-Article III judges ought, at the least, to give us pause.

Leaving aside the ALJs, whose quest for some sort of decisional independence is born of bitter experience,<sup>90</sup> questions remain about the forces affecting the non-Article III judicial officers within the federal judiciary. While they are chosen by Article III judges, we know very little about the considerations going into their appointment,<sup>91</sup> and virtually nothing about what considerations lead to reappointment or refusal to reappoint.<sup>92</sup>

The Judicial Conference's own ambivalence about these judges is evident in its rejection, through its Long Range Planning Committee, of recommendations designed to integrate these non-Article III judges into the governance structure of the federal

---

85. *Id.* at 1527 (footnotes omitted).

86. As of 1992, there were 291 full-time bankruptcy and 374 full-time magistrate judges, plus 35 authorized but not-yet-funded bankruptcy positions. L. RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 99-100 (1992); see also Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965 (codified as amended in scattered sections of 28 U.S.C.) (authorizing 35 new positions).

87. Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1026 (1994).

88. Critiques of the idea that factfinding is not work worthy of an Article III judge have been circulating for the better part of this century: "An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" Charles Evans Hughes, Important Work of Uncle Sam's Lawyers, Address Before the Federal Bar Association (Feb. 11, 1931), reprinted in 17 A.B.A. J. 237, 238 (1931).

Others have noted the very real problems of political control and lack of neutrality among the corps of ALJs. See generally Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863, 873 (1995) (recounting past problems with the Social Security Administration's adjudication procedures); Levin & Kunz, *supra* note 8, at 1650 (recounting Social Security Administration's setting of denial rates in advance of ALJs hearing cases).

89. See Levin & Kunz, *supra* note 8, at 1643 (claiming that the "unambiguous purpose" of magistrate judges and bankruptcy judges is to serve as judge substitutes).

90. See generally Hoffman & Cihlar, *supra* note 88.

91. There are statutory requirements for both bankruptcy judges and magistrate judges. 28 U.S.C. § 152 (1994) (requirements for bankruptcy judges); 28 U.S.C. § 631 (1994) (requirements for magistrate judges).

92. As far as I can tell, the Administrative Office of the United States Courts keeps no statistics on how many magistrate judges and bankruptcy judges are reappointed at the conclusion of their terms.

judiciary.<sup>93</sup> The Plan's section on judicial independence does not address questions of non-Article III judges' independence, if it indeed exists or should exist. While their work is, in theory, overseen by Article III judges,<sup>94</sup> the volume of that work suggests that serious oversight in the run-of-the-mill case would bring the judiciary to a grinding halt.

My concern in this area has less to do with any serious questioning of the qualifications of the individuals who provide so much decisional capacity to the federal courts than it does with the relationship between the constitutional protections given Article III judges and the distinctiveness of the federal courts. Whatever else may be said of judicial adjuncts, they do not enjoy the protection of life tenure. Their performance is subject to regular review under some standard, and their jobs are at risk unless they meet it. Unless we are to believe that Article III is meaningless, the decisional environment for judicial adjuncts is considerably different than it is for district judges. One of the Plan's core values is independence. Another is accountability. It seems to me that the Plan is oddly silent about the relationship of these core values to the work of the judicial adjuncts.

#### V. PRAGMATIC SILENCE: WHY THE JUDICIAL CONFERENCE SHOULD GET OUT OF THE FEDERALIZATION DEBATE

The federal judiciary has legitimate concerns about its workload and the effect that workload has on judges' ability to give each case careful and thoughtful attention.<sup>95</sup> It is clearly appropriate for the judiciary to remind Congress that the use of the federal courts to combat social problems is not costless; added cases bring either added judges, at a cost estimated to be over one million dollars per judgeship annually,<sup>96</sup> added strain on the judges who are already there, or additional non-Article III judges, at a cost to decisional independence. Moreover, federal judges have been some of the finest commentators on jurisdictional issues.<sup>97</sup> Nevertheless, I believe that the Long Range Plan's approach of constructing models bearing the judicial branch stamp of approval to respond to jurisdictional concerns is itself too costly.

The discussion in Part III demonstrates that efforts to outline federal jurisdictional tenets are subject to claims of politics; in fact, the Plan recognizes this problem. Citizens of communities besieged by gun crime or drugs as well as victims of spousal abuse—two of the groups whose claims to federal judicial attention have been met with widely reported judicial opposition<sup>98</sup>—are likely to wonder about the federal judiciary's commitment to and concern for the cases that arise from Congress' disagreement with the judiciary's judgments. Indeed, while we have been talking in terms of jurisdiction, we should remember that with the exception of the diversity recommendations, the Long Range Plan does not deal with subjects traditionally considered jurisdictional. Rather, the

---

93. Compare NOVEMBER PLAN, *supra* note 4, at 64 (proposing that bankruptcy and magistrate judges should have the opportunity to serve on the Judicial Conference) with SEPTEMBER PLAN, *supra* note 4, at 16 (proposing that these judges be permitted to sit on the Board of the Federal Judicial Center but rejecting their inclusion as voting members of the Conference and its committees).

94. See 28 U.S.C. § 152; *id.* § 631.

95. See generally Robel, *supra* note 23 (concerning the effects of caseload on both attention to cases and judges' lives).

96. Orrin G. Hatch, *Congress and the Courts: Establishing a Constructive Dialogue*, 46 MERCER L. REV. 661, 664 (1995).

97. Judge Friendly's work comes immediately to mind. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

98. See *supra* notes 47-48, 72 and accompanying text.

Judicial Conference is taking the position, in effect, that Congress should not create new substantive causes of action, new rights to sue upon, new theories of recovery, or new crimes.

This substantive view that federal rights are already too expansive and should be curtailed has subjected the Judicial Conference to criticism<sup>99</sup>—some of it from within the federal judiciary<sup>100</sup> and some of it from members of Congress<sup>101</sup>—that there is elitism<sup>102</sup> or a political agenda at work in both the jurisdiction- and size-limiting aspects of the Long Range Plan.

Likewise, state court judges, who preside over a system that currently handles 95-98% of all cases in the United States, have expressed concern about the obvious effects of reallocating jurisdiction to the states on an already tremendously overburdened and under-resourced system. Nor is the Plan's solution—a federal financial commitment to state judicial systems—unproblematic.<sup>103</sup> For a Plan concerned with federalism, the implications of providing major funding for the state courts out of the federal fisc ought to be obvious.<sup>104</sup>

Given the controversy that has been, and will continue to be, incited by Judicial Conference involvement in Congress' substantive agenda for the federal courts, what justifications exist for third branch involvement? The first is recognized by the Code of Judicial Conduct: judges are persons "specially learned in the law," and are thus in "a unique position to . . . contribute to the administration of justice."<sup>105</sup> This is a convincing rationale for judicial involvement in many aspects of judicial administration: judges are obviously uniquely situated to comment on case management efficiencies, procedural rules, and the like.<sup>106</sup> Judges bring a perspective to the conduct of litigation unparalleled by, and thus different from, the views of lawyers. Likewise, the judiciary is uniquely situated to comment on matters involving its own governance. Indeed, a recent study of judicial appearances before Congress determined that the most frequent were in connection with court administration issues.<sup>107</sup> Judges surely bring a special expertise to

99. Little, *supra* note 19, at 1038-70; Reynolds & Richman, *supra* note 8; Dennis E. Curtis, Comment, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019, 1024-26 (1995).

100. Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 541 (1995); Reinhardt, *supra* note 78, at 3-4.

101. See Hatch, *supra* note 96, at 663:

I firmly believe . . . that the need for the federal government to respond directly to the serious epidemic of growing violent crime that plagues the streets of our cities and towns far outweighs the interest on the part of some members of the judiciary in trying only those cases for which they believe they are uniquely qualified.

*Id.*

102. Reinhardt, *supra* note 78, at 3; Reynolds & Richman, *supra* note 8; Curtis, *supra* note 99, at 1024-25.

103. SEPTEMBER PLAN, *supra* note 4, at 6 (urging Congress to "provide federal financial and other assistance to state justice systems to permit them to handle the increased workload that would result from the reduction of existing federal court jurisdiction or the creation of new concurrent jurisdiction").

104. *But see* John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 52, 62-63 (arguing for substantial federal assistance to state courts to allow them to combat crime more successfully, as an antidote to increasing federal criminal jurisdiction).

105. CODE OF JUDICIAL CONDUCT Canon 4 cmt. (1990).

106. Judges were understandably upset at Congress' lack of consultation in formulating the provisions of the Civil Justice Reform Act ("CJRA"), for instance, which was primarily concerned with case management in federal trial courts. See Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

107. See Harvey Rishikof & Barbara A. Perry, "Separateness but Interdependence, Autonomy but Reciprocity": *A First Look at Federal Judges' Appearances Before Legislative Committees*, 46 MERCER L. REV. 667, 692-93 (1995).

this range of procedural and interpretive issues, and I see no special concerns in judicial dialogue with Congress over these issues.<sup>108</sup>

But do federal judges bring any special expertise to the determination to expend federal court resources to combat, for example, environmental degradation rather than spousal abuse?<sup>109</sup> Does their position provide them with special insight into whether federal courts should be available for gun crime prosecutions? While federal judges are senior and respected members of the profession, it is difficult to discern why, on these matters of policy, their views are more important or informed than any other citizen's.<sup>110</sup>

A more compelling argument for judicial involvement has to do with the impact of caseload on judicial independence. Were Congress to continue to add cases to the federal courts without funding those courts appropriately or adding the necessary judges, the courts might find their ability to perform constitutionally required functions, such as providing jury trials, unacceptably compromised.<sup>111</sup> But this is an argument about funding, not content. It should be enough to address this concern for the judiciary to insist, as the Plan does, that Congress account fiscally for the impact on the federal court system of every expansion of federal rights or crimes.

But what harm could it possibly do to have the Judicial Conference voice publicly and officially its opposition to Congress' substantive agenda? Judges certainly have views, and strong ones, about the wisdom of many congressional policy initiatives. As the "front line" in Congress' assault on, for instance, domestic violence or street crime, as the people who have to decide the cases, should not the judges be free to lobby Congress like anyone else?

It is precisely the power entrusted to the federal judiciary that ought to counsel hesitation in its becoming just another lobbyist before Congress. If I am wrong about the Judicial Conference's constitutional arguments,<sup>112</sup> then it is the judges represented by the Judicial Conference who will have both the power and the responsibility to strike down those ill-conceived laws. Thus, the judges surely have it within their grasp to protect themselves, and us, from unconstitutional incursions by Congress, and it is unusual for an official body of the third branch to take a position on the constitutionality of such legislation ahead of time.

108. Deanell R. Tacha states:

[T]he value of a judge's professional experience to assist in the development of the law on a nuts-and-bolts level is [significant] with respect to the interpretation and application of statutes drafted by Congress, much-needed reforms in criminal law and sentencing, and virtually all aspects of civil and criminal procedure. Most judges have developed valuable views on the practical aspects of these and other matters because their work on the bench requires them to test and adapt the law so it works in day-to-day practice. Judges know when a statute is ambiguous, unwieldy, impractical, or shortsighted as a result of problems encountered in drafting, the legislators' lack of experience with the justice system, or the reality of political compromise. Judges wrestle with interpreting the law on a daily basis, and their expertise should be regarded as an available and worthy resource that legislators regularly consider.

Deanell R. Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 294 (1991).

109. It is, in fact, somewhat ironic that the federal judiciary should commit substantial resources to telling Congress how to behave so soon after bristling at what it termed Congress' intrusion into its own business in the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994).

110. Of course, judges are going to have to adjudicate these matters, and may have personal opinions on whether that will be a professionally rewarding way to spend time. See *supra* notes 22-23 and accompanying text. But as Judges Arnold and Reinhardt argue, courts exist to serve public ends, not private professional ends of judges. See Arnold, *supra* note 100, at 543-44; Reinhardt, *supra* note 78, at 3.

111. Bermant & Wheeler, *supra* note 33, at 848, hints at this, as does Justice Rehnquist: "[F]ederal courts, overburdened by criminal cases, will be unable to carry out their vital responsibilities to provide timely forums for civil cases." Federalization of State Prosecutions, *supra* note 48.

112. See *supra* text accompanying notes 37-57.



More importantly, the Judicial Conference's lobbyist role runs the risk of having every citizen who is involved in federal litigation in those areas disapproved by the Judicial Conference wonder how the third branch's official position will affect her case. Many judges have recognized that their impartiality might reasonably be questioned when they take public positions on substantive issues outside the context of cases. Judge Jack Weinstein, for instance, took himself out of criminal cases when he publicly attacked the mandatory minimum sentencing aspect of the war on drugs.<sup>113</sup> While I fully expect that judges will not "confuse their positions as members of an institutional governance body . . . with their instrumental roles . . . interpreting and applying statutes and precedents,"<sup>114</sup> it is asking a lot of the public generally to make this distinction. I think American citizens do not ordinarily approach the federal courts pessimistic about their chances for a fair hearing, the way Cyprus did in the case with which I introduced this essay.

While the Code of Judicial Conduct does not forbid judges—and thus, presumably, their institutional spokesperson, the Judicial Conference—from speaking on issues of law reform, it does require that they do so in a manner that at all times promotes confidence in their impartiality.<sup>115</sup> I suggest that concern about this impartiality should counsel pragmatic silence on issues of policy as contentious as federal jurisdiction.

### CONCLUSION

Like the mosaics with which I began this essay, the federal courts are one of our national treasures. The stresses on this treasure are real, and the authors of the Long Range Plan raise many provocative and interesting ideas. Yet I cannot finish reading the Long Range Plan for the federal courts without wishing the judiciary had attended more to those pressing issues within its control,<sup>116</sup> and left the world of politics to the political branches.

---

113. See James Zagels & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 809 (1995). But Weinstein would disagree with me. See Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 23 (1994) (setting out a list of ten guidelines for when judges' public comments need not lead to self-removal from cases involving similar issues).

114. Sarah Evans Barker, *Federal Court Long Range Planning: Fine Lines and Tightropes*, 71 IND. L.J. 859, 868 (1996).

115. CODE OF JUDICIAL CONDUCT Canon 2A (1990). *But cf.* Tacha, *supra* note 108, at 292-95.

116. So many subjects touched on in the Plan beg for expansion. The fragmentation of federal civil procedure has been a source of deep concern for several years, prompted by both CJRA and FED. R. CIV. P. 26(a). The Plan hopes for both more procedural cohesion and appropriate experimentation. Some discussion of how to achieve these conflicting goals, as well as what subjects might be appropriate for local experimentation without threatening national goals, would have been welcome.

