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## **CASELOAD BURDENS AND JURISDICTIONAL LIMITATIONS: SOME OBSERVATIONS FROM THE HISTORY OF THE FEDERAL COURTS**

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CASELOAD BURDENS AND JURISDICTIONAL LIMITATIONS:  
SOME OBSERVATIONS FROM THE HISTORY OF  
THE FEDERAL COURTS

EDWARD A. PURCELL, JR.

Judge Newman has asked that we talk not about him today but about the federal courts. Naturally, I will honor his request, but I must also say that I can think of no better place to start such a discussion than with the exceptionally valuable contributions he has made over the past two decades in examining the institutional problems that confront the federal courts and in proposing thoughtful and imaginative ways to deal with them. He has been especially concerned with the problems created by a heavy and growing federal caseload,<sup>1</sup> and his many suggestions—including ideas about rethinking issues of systemic fairness and proposals for making much of the jurisdiction of the lower courts discretionary—compel our attention and warrant serious consideration.<sup>2</sup>

Most important is the fact that in his many discussions of jurisdictional reform Judge Newman has consistently reaffirmed the principle that the “pure gold” of the American judicial system is the guarantee of “vital protections of individual rights.”<sup>3</sup> Consequently, he has proposed limitations on the jurisdiction of the federal courts only to ensure that the federal judiciary retains its high quality and fulfills its essential constitutional role.<sup>4</sup> The “mission of the federal courts,” he

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1. The nature, causes, and significance of the growth of the federal caseload raise difficult and sharply disputed matters. It is clear, moreover, that docket statistics tell only a part of the story. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (Harvard University Press, 2d ed. 1996) (1985); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). Sometimes the growth slows substantially or even disappears. *See, e.g.*, William H. Rehnquist, *2000 Year-End Report on the Federal Judiciary*, 25 AM. J. TRIAL ADVOC. 1, 8-9 (2001).

2. *See, e.g.*, Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L. J. 1643 (1985); Jon O. Newman, *Determining the Proper Allocation of Cases between Federal and State Courts*, 79 JUDICATURE 6 (1995).

3. 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, 23 (1982).

4. The dual nature of Judge Newman’s goal—maintaining the high quality of the federal judiciary while at the same time preserving its role as the guarantor of federal rights and liberties—is of paramount importance. The claim that the caseload should be reduced in order to preserve the quality of the national judiciary has sometimes

explains, “is not only to protect important federal rights but to do so through an institution of such quality and efficiency as to command high public regard.”<sup>5</sup> Although he has great confidence in the state judiciaries,<sup>6</sup> he nonetheless emphasizes the need to have federal law and federal rights under the general supervision of the national courts and to extend their jurisdiction where necessary to achieve that goal. “Federal-question jurisdiction,” he urges, “should be available to entertain a federal defense, but also on a discretionary basis.”<sup>7</sup> Thus, Judge Newman’s fundamental principle of federal jurisdiction is clear, “Federal courts should have at least the opportunity to adjudicate all issues of federal law.”<sup>8</sup>

### I.

I have been asked to discuss the history of the federal courts, to consider what we can learn from studying their growth and evolution over time, and to speculate on what their past might suggest about their likely future, particularly about the issues of caseloads and jurisdictional limitations on which Judge Newman has focused. Let me start by highlighting four relevant and familiar aspects of that history.

First, the federal courts have always been doubly embedded in the broad and dynamic context of American politics. On the one hand, the Founders linked the federal judiciary closely to the new political institutions they created. The Constitution’s provisions for appointing federal judges, calling for presidential nomination and approval by the Senate, tied the federal courts inextricably to national politics.<sup>9</sup> Further, the constitutional convention’s “Madisonian Compromise”—which gave Congress the discretionary power to establish “inferior”

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been used as a lever to try to force restrictions on federal jurisdiction for ulterior political reasons, to try to prevent the federal courts from hearing certain disfavored classes of cases. Consequently, all suggestions for restricting federal jurisdiction must be considered carefully with the full practical political and social impact of the restrictions clearly in mind. See, e.g., Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 681-706 (Summer, 1999).

5. Jon O. Newman, *Determining the Size of the Federal Judiciary Requires More Than a Mission Statement*, 27 CONN. L. REV. 865, 867 (1995).

6. See Newman, *supra* note 3, at 26.

7. Jon O. Newman, *Discretionary Access to the Federal Courts*, THE FEDERAL APPELLATE JUDICIARY 63, 66 (1989).

8. Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 777 (1989).

9. See U.S. CONST., art. II, § 2, cl. 2.

federal courts and determine, within the limits of Article III, the extent of their jurisdiction<sup>10</sup>—expressly made the lower courts and their jurisdiction the creatures of Congress. On the other hand, the Founders also gave the federal judiciary an unusual degree of institutional independence<sup>11</sup> and a potentially vast and commanding jurisdiction. With those characteristics the judiciary held the potential of exercising a powerful influence over the course of the nation’s development. Despite their profound disagreements, Hamilton, the principal Federalist defender of a national judiciary, and Brutus, the Anti-Federalist pamphleteer who was its most trenchant opponent, both agreed on that.<sup>12</sup>

As a general matter, history proved them right. From small, contested, and somewhat inauspicious beginnings, the federal judiciary grew steadily in size, resources, and prestige as well as in the scope of its jurisdiction and the authority of its mandate. Over the course of the nineteenth century it developed into a major force in establishing and articulating national policy and values. From its early influence as a nationalizing force, to its mid-nineteenth-century role upholding slavery and enforcing the fugitive slave acts, through its identification with “big business” in the decades around the turn of the twentieth century, to its growing “liberalism” after the New Deal “constitutional revolution,” the federal judiciary played an expanding role in the nation’s affairs, appearing as an increasingly powerful and—to many Americans at varying times and places—a partisan political institution. The disintegration of “found law” theories and the rise of legal realism in the twentieth century highlighted the substantive policy judgments that informed judicial decisions and led Americans increasingly to assume that much of the work of the judiciary was value-driven, subjective, and, in many ways, “political.” More recent developments—the activist, innovative, substantively contrasting, and highly controversial de-

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10. While the constitutional language that resulted (U.S. CONST., art.I, § 8, cl. 9; art. III, § 1) seems clear, the meaning and significance of the Madisonian Compromise itself has been changing and disputed. See, e.g., Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 44 (1995) (“The Compromise’s insignificance as a tool for reasoning about state-federal court relations probably lies in ambiguities surrounding its meaning at the time of framing and ratification.”).

11. See U.S. CONST., art. III, § 1 (provides for life tenure and guaranteed compensation).

12. Hamilton’s classic defense of the federal judiciary appears in THE FEDERALIST NOS. 78-83. The essays of Brutus are reprinted in 2 THE COMPLETE ANTI-FEDERALIST 358-452 (Herbert J. Storing ed., 1981). His major critique of the federal judiciary appears in essays XI to XV. *Id.* at 417- 42.

cisions of the Warren and Rehnquist Courts—have only strengthened those assumptions.

Second, although the Madisonian Compromise gave Congress formal authority over the jurisdiction of the federal courts, it also served indirectly to enhance the ability of the Supreme Court to exert *de facto* control over that jurisdiction. By making the jurisdiction of the lower courts dependent on congressional action, the Madisonian Compromise highlighted and institutionalized federal jurisdiction as an overtly “political” matter. That, as it turned out, helped make formal changes in jurisdiction particularly difficult to accomplish. Congress was usually unwilling to consider significant jurisdictional reform because the subject was relatively technical and attracted little public interest or attention. Conversely, on the rare occasions when reform proposals did arouse public support, the practical social implications of the proposals would spur intense opposition. The usual result was either defeat or a compromise that brought only minor changes. Indeed, even relatively technical and seemingly quite limited reform proposals often implicated important practical issues that exposed conflicting social interests and consequently fragmented potential congressional majorities.<sup>13</sup> Success in altering the structure or jurisdiction of the national courts proved to require thorough preparation, dogged persistence and determination, acutely pressing practical problems, fortuitously favorable political circumstances, and a shrewd melding of conflicting views and interests.

With the legislative branch usually willing, and often quite content, to occupy the sidelines while the judiciary fended for itself, the Supreme Court became a major *de facto* force in shaping the jurisdiction of the lower courts. Over the years, the Court developed a range of fluctuating “substantive” and “procedural” doctrines to expand and contract the jurisdiction of the national courts by using the varied tools of constitutional interpretation, statutory construction, and judge-made law. On the most general level, the Court, like Congress, shaped the jurisdiction of the national courts to reach cases the justices thought most important for federal adjudication and to exclude those it thought less important. The complete diversity requirement, the doctrine of corporate citizenship for diversity purposes, and a narrow conception of cases “arising under” federal law are only a few of the

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13. See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 5-6, 198-99 (1973).

Court's broadest and best-known efforts to control the scope of federal jurisdiction. As the Court's values changed over the years, its expansion and contraction doctrines have changed with them.<sup>14</sup>

Third, since the 1880s, the federal courts have found themselves confronting an expanding and, in the view of many, increasingly unmanageable caseload.<sup>15</sup> Beginning with the Judiciary Act of 1887-88,<sup>16</sup> Congress periodically attempted to alleviate the burdensome caseload through a variety of measures, including narrowing diversity jurisdiction, raising the jurisdictional amount, establishing intermediate appellate courts, authorizing new judgeships, streamlining procedural arrangements, and creating special administrative structures to help the courts process cases more efficiently.<sup>17</sup> Less overtly, and usually less sweepingly, the Supreme Court often followed a similar course, narrowing jurisdictional statutes and articulating a variety of judge-made constraints on federal jurisdiction.<sup>18</sup> For example, in 1888 it inaugurated the "well-pleaded complaint" rule, severely restricting federal question jurisdiction,<sup>19</sup> and after the New Deal "constitutional revolution," it developed a variety of doctrines enabling or requiring the federal courts to "abstain" from deciding certain cases within their statutory jurisdiction.<sup>20</sup>

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14. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, 265-91 (1992); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1991).

15. Although the federal caseload has fluctuated substantially due to a variety of internal and external factors, overall during the course of the past century and a quarter it has grown relatively steadily and substantially. See generally David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981). For contrasting views as to the sources and significance of, and the remedies for, the caseload growth, compare Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983), with POSNER, *supra* note 1. A wide range of relevant statistics are available in the *Annual Report of the Director of the Administrative Office of the United States Courts* (Washington, D.C.).

16. 24 Stat. 552 (1887), amended by 25 Stat. 433 (1888).

17. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928). For a later view see PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973).

18. See, e.g., PURCELL, JR., *supra* note 14, at 265-91.

19. See *Metcalf v. Watertown*, 128 U.S. 586 (1888); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 (1894); see also Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

20. E.g., *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Douglas v. City of Jeanette*, 319 U.S. 157 (1943).

Not surprisingly, as social conditions and legal issues changed over the decades, Congress and the Court sometimes tacked in the opposite direction, embracing measures that expanded the jurisdiction and caseload of the national courts. During the twentieth century, Congress increasingly created new regulatory programs and authorized new private causes of action, thereby expanding substantially the number of cases that fell within general federal question jurisdiction, and on occasion even making jurisdiction over new causes of action exclusive to the federal courts. Similarly, the Supreme Court repeatedly broadened federal equity jurisdiction, created its own “implied” causes of action, and periodically loosened the diverse judge-made limits that cabined federal jurisdiction. In the decades surrounding the turn of the twentieth century, for example, the Court reoriented the jurisdiction of the lower courts substantially and expanded their reach — and its own as well — in a variety of ways.<sup>21</sup>

With the nation’s rapidly growing population, and its vigorously expanding economy, the overall result was a continually swelling caseload. In fact, since the 1960s, the docket problem has grown ever more pressing. Almost thirty years ago, Judge Henry J. Friendly, one of the most distinguished judges in the Second Circuit’s long line of distinguished judges, bemoaned “the tidal wave of litigation that has engulfed the federal courts.” The national courts, he warned, faced “a breakdown” because they had “more work than they can properly do.”<sup>22</sup>

The final relevant aspect of the history of the federal courts is the long, uneven, and generally successful effort to adapt the organization and structure of the national judiciary to meet the growing caseload problem. Over the years, politicians, judges, law professors, social scientists, and students of administration explored a variety of methods to control the growing caseload and to expand the capacities of the courts to deal with it. As a general matter, their approaches fell into six categories: first, expanding the number of judgeships; second, altering institutional structure by adding new districts and circuits and by subdividing old ones; third, adding support services, auxiliary personnel, and administrative capabilities; fourth, compressing the docket through a variety of formal and informal devices that include limiting

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21. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 39-63 (2000).

22. FRIENDLY, *supra* note 13, at 3-4.

discovery, encouraging settlements, shifting parties to arbitration or mediation, and granting summary judgment earlier and more readily; fifth, restricting or terminating certain disfavored substantive-law claims; and sixth, narrowing the jurisdiction of the federal courts.<sup>23</sup>

Working within the context of the Madisonian Compromise, those who proposed to solve or alleviate the docket problem by limiting federal jurisdiction commonly attempted to transcend “mere politics” by adopting a stance of non-partisan neutrality and a rhetoric of “science,” “principles,” and “professionalism.” Hamilton himself had shrewdly set the tone, defending the jurisdictional grants in the Constitution’s judiciary article by grounding them in “political axioms” and the principles of republican government.<sup>24</sup> The rise of science and professionalism in the late nineteenth century remolded and strengthened that tendency, and by the early twentieth century, federal judicial reform was increasingly portrayed as an area best left to experts where overt political considerations were deeply suspect. Thus, while the jurisdiction of the federal courts remained an issue entrusted to Congress, the scope of that jurisdiction seemed to increase in practical importance and those who debated jurisdictional change were required to support their positions with institutional reasons that were politically “neutral” and theoretically “principled.”

Each of the six approaches to the caseload problem spurred controversy, and most of the specific proposals they generated raised difficulties which, in some instances, seemed worse than the problems they were designed to solve. To a greater or lesser extent, Congress utilized all six approaches. It has, for example, increased the number of federal judgeships more than tenfold in the past century, while expanding the total number of federal magistrate judges, bankruptcy judges, law clerks, Article I judges, administrative specialists, and other types of support personnel at an even more sharply accelerated rate.<sup>25</sup> Similarly, Congress created a new level of intermediate appellate courts in

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23. The most recent and comprehensive proposals have come from the federal judiciary itself. See, e.g., *Report of the Federal Courts Study Committee* (1990); Judicial Conference of the United States, *Long-Range Plan for the Federal Courts* (1995), reprinted 166 F.R.D. 49 (1996). For an incisive critique of the judiciary’s efforts, see Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

24. THE FEDERALIST NO. 80, 516 (Alexander Hamilton) (Modern Library ed., 1941).

25. See, e.g., POSNER, *supra* note 1, at 8-13.



1891, divided various districts and circuits over the years, and created the Judicial Conference of the United States and then the Administrative Office of the United States Courts in 1939.<sup>26</sup> The cumulative effect of these and other changes on the federal courts has been twofold: first, the federal courts at the beginning of the twenty-first century are quite different in size, organization, and structure from what they were in the 1880s; and, second, the federal courts have been able to handle caseloads many times the size of the caseloads they carried a hundred, or for that matter, a mere twenty-five years ago.

This is not the place to evaluate these diverse approaches. It is probably fair to say that there is a growing sense that the first three—designed to add capacity and increase efficiency— may be approaching the limits of their utility,<sup>27</sup> and that the fourth approach—compressing the docket—may already have been pushed too far.<sup>28</sup> The fifth—changes in substantive law—is a dubious option, readily subject to abuse, that should be utilized only when fully justified by convincing and publicly debated reasons of substantive federal policy.<sup>29</sup>

That leaves the sixth approach, limiting federal jurisdiction. This approach has long been a focus of debate, and may well be discussed in the next decade with increasing concentration. Thus, we arrive at the time-honored question: What cases belong in the federal courts, and which ones have the highest priority in claiming this forum.

## II.

Initially, I should emphasize that the two questions just stated are, in fact, radically different. Indeed, the first—“what cases belong in the federal courts?”—was answered by the Constitutional Convention when it agreed to the “Madisonian Compromise” and the nine catego-

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26. See generally FISH, *supra* note 17.

27. E.g., Jon O. Newman, *1,000 Judges—the Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993).

28. E.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); POSNER, *supra* note 1, at ch. 6; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

29. It is particularly troublesome that the federal courts have increasingly begun to use their administrative apparatus as a mechanism for lobbying Congress concerning various proposed changes in substantive law as a method of limiting growth of the caseload. The efforts involve direct judicial intrusions into contested areas of political debate and raise grave questions about the proper role of the judiciary. Some of the positions the judiciary has adopted seem highly partisan. See Resnik, *The Programmatic Judiciary*, *supra* note 23; Resnik, *Trial as Error, Jurisdiction as Injury*, *supra* note 23.

ries of “Cases” and “Controversies” in Article III. The propriety of those nine categories was exactly what Hamilton tried so carefully to justify in the Eightieth *Federalist*.

Although Article III thus tells us, as a constitutional matter, what cases “belong” in the federal courts, it tells us little, or at least little that is agreed upon, about answering the second question, which cases within the Article III categories have the “highest priority.” There are, of course, arguments to the contrary. For example, a plausible theory has been advanced that Article III distinguishes between two distinct jurisdictional categories.<sup>30</sup> It uses the word “Cases” to refer to three types of suits (those arising under federal law, those affecting ambassadors and public ministers, and those falling within the admiralty jurisdiction), and it extends the judicial power of the United States to “all” such “Cases.” In contrast, Article III uses the word “Controversies” to refer to the six other types of suits (including suits involving the United States and suits between states and between citizens of different states), but it does not extend the judicial power to “all” such “Controversies.” Thus, the argument runs, because Article III requires that federal jurisdiction reach “all” of the three types of “Cases” the Constitution prioritizes them over the six categories of “Controversies.”

There are problems with the “priority” argument. One is that, from the nation’s beginning, both Congress and the Supreme Court seem to have rejected it.<sup>31</sup> It does not, in any event, exert any appreciable influence on the contemporary debate. Another problem with the argument is more specific to the current caseload problem. Even if one accepted the argument, it would not address what has increasingly become the pivotal question concerning jurisdictional limitation:

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30. Most of the traditional debate about the significance of Article III and the character of its nine jurisdictional categories has been addressed specifically to the question of the extent to which Congress has the power to limit or abolish various substantive heads of federal jurisdiction rather than to the more contemporary question of “priorities” discussed in the text. For a general defense of the position noted in the text, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Robert A. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

31. For scholarly criticisms of the approach and alternate arguments see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Friedman, *supra* note 14; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990). For a response, see Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1991).

Which “Cases” arising under “this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” should be heard in the federal courts, and which should be excluded. Thus, there are at least two problems with trying to use the Constitution to resolve priority problems. One is that it is difficult to make a sufficiently persuasive argument differentiating “in principle” between the various types of suits within the Article III categories.<sup>32</sup> The other is that Article III does not provide a basis for distinguishing among the innumerable categories of “Cases” that involve federal law.

Similarly, as Article III has failed to support any compelling “priority” analysis, the Constitution’s “structural” principles of federalism and separation of powers have proved equally unavailing, unless, of course, those principles are infused with specific and jurisdictionally determinate definitions, assumptions, and values. Such infusions have been attempted, but invariably, and not surprisingly, they have led only to disagreements about the nature of the infused definitions, assumptions, and values.<sup>33</sup> Thus, as the Madisonian Compromise foreordained, the question of priority remains ultimately a question of practicality, politics, and policy.

Recognizing the utility of some type of “neutral” prescriptive approach, reformers have sought to develop a variety of reasonable non-constitutional “principles” to serve as relatively “objective” normative and organizational guides. The American Law Institute, for example, sought to justify restrictions on the federal caseload by developing the “principle” that nonresidents of a state who became “participants in

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32. In his well known analysis of federal jurisdiction, Judge Henry J. Friendly offered a potential “minimum model” for federal jurisdiction which prioritized only suits involving the United States, admiralty suits, and suits under federal bankruptcy, patent, and copyright statutes. FRIENDLY, *supra* note 13, at 7-12, 55-73. He did not even try to base his prioritization on the constitutional text. His approach throughout was practical, institutional, and policy-based.

33. Some would certainly disagree. There have been notable attempts to use “the principles of federalism,” for example, to ground specific schemes of federal jurisdiction. The classic example is the American Law Institute’s methodical STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). For a similar but far more tentative and pragmatic approach see POSNER, *supra* note 1. Judge Posner, however, concludes that the “upshot of the analysis in this chapter is that the principles of federalism may not, after all, have revolutionary implications for reallocating federal judicial business to the state courts,” *id.* at 303. Such approaches may be both reasonable and suggestive, but they skate past several fundamental threshold problems: identifying sufficiently specific “principles of federalism,” authenticating those versions as, in fact, constitutionally authoritative, and showing why they necessarily lead only to the jurisdictional schemes proposed. See, e.g., PURCELL, *supra* note 31, at 270-84.

the general life” of that state should no longer be regarded as “non-citizens” of that state for purposes of diversity jurisdiction.<sup>34</sup> Similarly, Judge Richard A. Posner has suggested trimming the federal caseload by applying the principle that federal jurisdiction is generally inappropriate in cases that do not involve “interjurisdictional externalities.”<sup>35</sup>

Although such “principled” approaches often undergird plausible jurisdictional schemes, they lack inherent prescriptive authority, fail to generate any political consensus, and usually track familiar suggestions already under discussion. Moreover, in spite of their “principled” clothing, they nevertheless spur strong opposition from interests that anticipate being adversely affected by the proposals.

Opposition to such schemes is understandable. Changes in the scope of federal jurisdiction can and do make important, and sometimes decisive, practical differences in American life. Moreover, to whatever extent we strive to make jurisdictional proposals neutral, scientific, or principled, we nevertheless recognize that views as to their legitimacy, desirability, and applicability are molded in significant part by political and social values. “As long as the connection subsists between [man’s] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other,” James Madison counseled; “and the former will be objects to which the latter will attach themselves.”<sup>36</sup>

A poignant example comes from our own Southern District of New York. From the late 1920s to the early 1950s the district’s judges, United States Attorneys, and bar members joined in an effort to improve the local jury system by implementing the ostensibly reasonable idea that juries would be better if—in the words of one of the district’s judges—they were restricted to “good people, people with brains, people with experience, people who have a stake in the country.”<sup>37</sup> Implementing that “principled” approach, they developed mechanisms that excluded prospective jurors on such criteria as the quality of their clothing, the nature of their speech patterns and accents, misspellings on the forms they filled out, and hostile attitudes shown when they responded to questions about how they met New York’s \$250 property

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34. STUDY OF THE DIVISION, *supra* note 33, at 110.

35. POSNER, *supra* note 1, at 303. *See generally id.* at 280-884.

36. THE FEDERALIST No. 10, at 55 (Modern Library ed., 1941).

37. M. Catherine Miller, *Finding ‘the More Satisfactory Type of Jurymen’: Class and the Construction of Federal Juries, 1926-1954*, 88 J. AM. HIST. 979, 991 (2001).

requirement for jury service.<sup>38</sup> The result was the widespread exclusion of blacks and manual workers, especially those who were unemployed, and the domination of both grand and petit juries by whites who were overwhelmingly drawn from three narrow social groups — those in business, the professions, and clerical and sales positions.<sup>39</sup> While the flaws and biases of this “principled” reform may seem obvious today, the experience nevertheless suggests a basic truth that reaches jurisdictional reform as surely as it does jury reform. Establishing and implementing “priorities” is neither a wholly objective nor a value-free enterprise.

If we turn specifically to the subject of federal jurisdictional reform, we see the same truth illustrated in the career of Felix Frankfurter, one of the first major figures to address the docket problems of the federal courts from an ostensibly objective and scientific viewpoint. During the 1920’s then-Professor Frankfurter emphasized the deleterious impact that a steeply rising caseload was having on the federal courts, and he urged that their jurisdiction be restricted in order to preserve their elite status and superior quality. When he pressed for abolition of diversity jurisdiction, restrictions on federal equity, and a narrower appellate jurisdiction for the Supreme Court, however, his choice of specific limitations was based on something beyond a desire to maintain the high quality of the national judiciary. As a committed progressive activist, Frankfurter sought jurisdictional reform to bring about certain political and social results he valued most highly—restricting the power of anti-progressive and corporate interests which, in his view, benefitted enormously and quite unfairly from the jurisdictional arrangements and practices that he sought to curtail.<sup>40</sup>

If priority issues are inextricably intertwined with the practical social consequences of federal jurisdiction, and if they are invariably colored by our political values and expectations, they are made even more intractable by the fact that those consequences, values, and expectations change over time as culture, ideas, politics, society, substantive law, and the federal courts themselves evolve and change. The Civil War era provides a striking illustration. In the decades before 1861, the federal courts served as a powerful national force protecting slavery and enforcing the fugitive slave acts on behalf of Southern slaveholders, but war and Reconstruction abruptly reversed their role,

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38. *Id.* at 992.

39. *Id.* at 993.

40. PURCELL, *supra* note 4, at 679, 681-706.

turning them for a decade into an effective tool for enforcing the abolition of slavery and eliminating its “badges and incidents.”<sup>41</sup> Indeed, the Court’s mid-nineteenth century decisions enforcing the fugitive slave laws<sup>42</sup> helped establish a muscular federal judicial authority to override Northern personal liberty laws that served after the Civil War and, once again some eighty decades later, after *Brown v. Board of Education*,<sup>43</sup> to justify determined federal judicial efforts to end oppressive racial practices in the Southern states. Similar, if varied, types of tectonic realignments in the politics of the federal courts occurred again after Reconstruction, around the turn of the twentieth century, and after the New Deal as well as during the 1960’s and again in the past two decades. With each realignment, both the law enforced in the federal courts and the social consequences of their jurisdiction shifted significantly. As these shifts occurred, most related issues, including attitudes about jurisdictional priorities, shifted as well.

Thus, the problem of setting priorities can be resolved neither by appealing to authoritative legal or philosophical sources nor by adopting any wholly objective or scientific methodology. It is a political enterprise. Moreover, it seems to be an enterprise that during the past century has grown increasingly difficult to conduct with fairness and a genuine and disinterested consideration—within human limits—of the public good. More and more, people and interest groups are becoming acutely aware of the practical significance of federal jurisdiction, and those with power are determined to protect themselves in the legislative process. Interest groups of all types have proliferated, and they have made ever more refined, extensive, and methodical efforts to identify ways in which their interests can be protected and further advantaged to the farthest limits of the margin. With their efforts, the vast, corrupting, and domineering power of money in American polit-

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41. The quote is from the Civil Rights Cases, 109 U.S. 3, 20 (1883). See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985). Congress expanded the jurisdiction of the national courts to enable them to enforce its Reconstruction program more effectively. William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969); STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 143 (1968).

42. *Prigg v. Pennsylvania*, 41 U.S. 539, 543 (1842); *Ableman v. Booth*, 62 U.S. 506, 526 (1858).

43. 347 U.S. 483 (1954).

ics has increased at a seemingly geometric rate. As a result, jurisdictional reform looms as one of our most daunting challenges.<sup>44</sup>

### III.

If the history of the federal courts and of federal jurisdictional reform highlights conflicts, complexities, and conundra, it seems fair to ask whether it also suggests anything useful about the likely future of either. Quite cautiously, I venture to suggest that it does.

First, most specific and most apropos of this event, the history of the federal courts offers some support for Judge Newman's intriguing proposal that certain areas of federal jurisdiction be made discretionary.<sup>45</sup> In an early and long since forgotten Reconstruction measure, the "Prejudice and Local Influence Act"<sup>46</sup> of 1867, Congress expanded the right to remove diversity suits in cases where removing parties could make a showing that "local prejudice" threatened their ability to obtain justice in a state court. For a variety of reasons the statute was not widely used, and it was eventually repealed in the Revised Judicial Code of 1948 for the most implausible of reasons.<sup>47</sup> The statute is instructive, however, because it did authorize a kind of "discretionary"

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44. See generally, ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* (1999). As an example of the sweeping and omnipresent power of lobbyists, I would be remiss at this time not to reference the recent bankruptcy of the Enron Corporation. In 1993 and again in 1997 it managed to obtain from the Securities Exchange Commission exemptions from requirements of the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940. As the *New York Times* reported: "Experts say that the S.E.C. rulings unshackled the company from significant accounting restraints and business dealings between the Enron companies and their executives. The 1997 exemption, in particular, cleared the path for the company to both expand overseas and make greater use of the special partnerships that have caused the company so much turmoil." Stephen Labaton, *Enron's Collapse: Regulations*, N.Y. TIMES, Jan. 23, 2002, at C-7 (story begins at A-1). The institutional context that makes such situations possible seems to offer an inhospitable forum for wise jurisdictional reform.

45. See, e.g., Newman, *supra* note 8; Newman, *supra* note 2.

46. 14 Stat. 558 (1867), amended by 24 Stat. 552 (1887), amended and corrected by 25 Stat. 433 (1888).

47. The reason given for the repeal was that the act was "born of the bitter sectional feelings engendered by the Civil War and Reconstruction" and hence was no longer needed "in the jurisprudence of a nation since united by three wars against foreign powers." The reason was implausible because the same Revised Code retained general diversity jurisdiction which was based on the far broader, and hence far more inappropriate and insulting, premise that prejudice and local influence still remained so widespread that *all* Americans from different states needed protection from one another. See H.R. REP. NO. 308, at A-133 (1947); PURCELL, *supra* note 14, at 238.

jurisdiction. The showing required to establish prejudice was relatively slight, and the question of the adequacy of the showing was left “to the discretion of the court.”<sup>48</sup> Thus, for some eighty years the federal courts did apply under the statute a discretionary standard in determining whether to exercise this particular jurisdiction, and they apparently did so with little difficulty. In addition, Judge Newman is not alone in urging a discretionary jurisdiction. In 1936 Justice Louis Brandeis—surely a master of federal jurisdictional issues—suggested that general diversity jurisdiction should be limited to cases where there was “real prejudice which prevents justice in the state courts.”<sup>49</sup> Nine years later a group of twenty-four federal circuit and district court judges in the Ninth Circuit told Congress that such an “actual prejudice” standard was workable and urged that diversity jurisdiction be limited to cases where such a showing was made.<sup>50</sup> Thus, Judge Newman has both precedent and supporters on his side when he advocates a “discretionary” jurisdiction for the national courts.<sup>51</sup>

Second, history suggests that if Congress does not effectively address the caseload problem in one way or another, the Supreme Court will. Indeed, over the past two decades the Court has already handed down a large number of decisions that have served to limit the federal caseload. Although many of its efforts have been muted and small-scale, some have been bold and sweeping. Between its steady pruning and periodic axe work, the current Court has had a significant cumulative effect in restraining caseload growth by eliminating from the courts a substantial numbers of actual and potential claimants.<sup>52</sup> Shift-

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48. *In re Pennsylvania Co.*, 137 U.S. 451, 457 (1890); *Fisk v. Henarie*, 142 U.S. 459, 468 (1892). For a discussion of the statute and its history in the late nineteenth and early twentieth centuries see PURCELL, *supra* note 14, at 128-42.

49. MELVIN I. UROFSKY & DAVID W. LEVY eds., “HALF BROTHER, HALF SON” THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 576 (1991).

50. Hearing before the Committee on the Judiciary of the United States Senate on S. 466, 79 Cong., 1 Sess. (1945) (statement of William Denman, judge of the United States Circuit Court for the Ninth Circuit, on behalf of twenty-four circuit and district court judges in the Ninth Circuit).

51. Judge Newman’s proposal for discretionary jurisdiction does not turn on any “showing” of prejudice. Rather, he suggests that the exercise of discretion be based on the presence of an identifiable federal interest or any other special reason that seems to warrant federal adjudication. See, e.g., Newman, *supra* note 8, at 772-73.

52. The decisions are numerous, and the doctrinal tools that the Court has used range across the judicial spectrum. The move began relatively narrowly in the early years of the Burger Court with *Younger v. Harris*, 401 U.S. 37 (1971) and continued for more than a decade in a relatively halting and selective manner. E.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (preventing implied statutory



ing *de facto* control over jurisdictional change from Congress to the Court does not alter the fact that jurisdictional changes advantage some social interests and disadvantage others, nor does it obviate the truth that choices among jurisdictional alternatives, however labeled as matters of formal doctrine, are shaped by the social and political values of those making the choice. By refusing to act, Congress is enhancing the power of the Court to take restrictive actions and increasing its incentives to do so, and there seems every reason to believe that the current Court will respond to such continued opportunities by further narrowing federal jurisdiction and by restricting or eliminating the types of substantive claims it disfavors.<sup>53</sup>

Third, history suggests several reasons to be reasonably hopeful about the future of the federal courts. One is that the federal judicial

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causes of action); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (expanding officer immunity in civil rights suits). By the late 1980s the move began to spread into a wide variety of doctrinal fields, to impose more substantial limits, to restrict Congress more tightly and directly, and to reflect a consistent set of substantive policy choices, *see, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (denying habeas corpus relief under Eighth Amendment and Equal Protection Clause); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (creating special federal common law defense for government contractors); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (preventing implied constitutional causes of action); *Gilmer v. Johnson/Interstate Lane Corp.*, 500 U.S. 20 (1991) (broadening enforcement of arbitration agreements); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause in consumer form contract); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (heightening standing required to bring environmental suit and limiting power of Congress to authorize suit); *United States v. Lopez*, 514 U.S. 549 (1995) (restricting congressional power under Commerce Clause); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (limiting power of Congress under the Commerce Clause and broadening state immunity under the Eleventh Amendment); *Bd. of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) (limiting local governmental liability under civil rights laws); *United States v. Morrison*, 529 U.S. 598 (2000) (restricting congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (limiting congressional power under Section 5 of the Fourteenth Amendment); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (restricting congressional power under Section 5 of the Fourteenth Amendment).

53. As a general matter, the current Court has disfavored habeas corpus petitions, suits brought by prisoners, tort and civil rights claims, and certain types of regulatory claims (perhaps especially efforts to enforce federal environmental laws). Among defendant classes, it has favored established institutions, whether private or governmental, over individual claimants, and it has reserved its most favored treatment for states, even when the representatives of the states have opposed such favored treatment. *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001); Comm. on Civil Rights, Ass'n of the Bar of the City of N.Y., *Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection of Federal Civil Rights Laws in Light of Recent Restrictive Supreme Court Decisions* (2001).

system was born not of divine intervention but out of congressional politics. The August Judiciary Act of 1789—which established the basic structure of today’s federal judicial system—is often praised for its wisdom and statesmanship, but the fact is that it was the product of the same kinds of conflicts and compromises that shape jurisdictional reform legislation today.<sup>54</sup> Over the years, in fact, Congress has adopted a number of salutary and far-sighted reforms, including the Evarts Act of 1891<sup>55</sup> establishing intermediate federal appellate courts and the Rules Enabling Act of 1934<sup>56</sup> authorizing the Federal Rules of Civil Procedure. Another reason for hope is that the problem of “overburdened dockets” has been a perennial since the 1880s.<sup>57</sup> Although today the caseloads from earlier times seem small, they represented significant growth and certainly seemed burdensome to the judges at the time. As one federal judge complained in 1924, “[t]he work, the worry, the responsibility are more than double what they were in 1915.”<sup>58</sup> Yet effective measures have frequently been framed, and the caseloads themselves have sometimes remained static or even declined.<sup>59</sup> A third reason for hopefulness rests with the development of knowledge, expertise, and planning in the field of judicial administration and with the massive growth in the administrative capacities of the federal courts themselves. Since the 1920s these forces have increasingly professionalized the field of judicial administration and helped lay the groundwork for a variety of reforms and improvements.<sup>60</sup> Thus, one could conclude that history suggests that once again we may be able to find ways to resolve the caseload problem.

Indeed, to speculate wildly, it might be that the coming decades will offer a relatively favorable time for jurisdictional reform of some

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54. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789* at 13 (Maeva Marcus ed., 1992).

55. 26 Stat. 826 (1891).

56. 48 Stat. 1064 (1934).

57. For basic docket statistics after 1870, see *OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES, ANNUAL REPORT* (Washington, D.C.) and *AMERICAN LAW INSTITUTE, STUDY OF THE BUSINESS OF THE FEDERAL COURTS* 38-46 (Philadelphia, 1934). By the beginning of the twentieth century the statistics become much more complete and reliable as well as more comprehensive. See, e.g., Clark, *supra* note 15.

58. Martin J. Wade to Thomas J. Walsh, Dec. 30, 1924, Walsh Papers, Library of Congress, Box 281, Legislation file.

59. E.g., Rehnquist, *supra* note 1, at 8-9.

60. See, e.g., Report of the Federal Courts Study Committee (1990). See generally Fish, *supra* note 17.

significant, though presently unpredictable, type.<sup>61</sup> We live in a time of political transition when party structure, organization, and loyalty are changing and important shifts are underway in social, ethnic, religious, and demographic voting patterns. Moreover, the recognizable issues that dominated American politics during the twentieth century—industrialism and governmental economic regulation during its first half, and movements for civil rights and civil liberties during its second—seem to have faded in importance and have clearly changed in nature. Most broadly, both American culture and the national economy have been undergoing radical transformations, and it seems likely that they will continue to change, perhaps at an even more rapidly accelerating rate. In this shifting and relatively fluid context, the practical significance and ideological resonance of federal jurisdiction has also been changing, and the various statutory and judge-made rules that have shaped that jurisdiction may be coming to serve new purposes and producing unexpected results. It is possible that these changes might generate enough uncertainty about, and inconsistency in, the political and social consequences of federal jurisdiction that established political interests would be confounded and familiar coalitions fragmented. The dynamics of historical change, in other words, might conceivably create a kind of Rawlsian “veil of ignorance,” obscuring and reshaping the practical consequences of federal jurisdiction sufficiently to allow significant changes to be made.

In the event that this third point seems naive, sanguine, or perhaps even fantastic, I will add a fourth. What history teaches with the greatest clarity and certainty is that, whatever else does or does not happen, the scope of federal jurisdiction will remain a vital political issue. That is inevitable because of both the Madisonian Compromise and the fact that proposed changes in federal jurisdiction necessarily raise a significant and wholly legitimate political question: which individuals, groups, interests, policies, and values will be advantaged by the changes, and which will be disadvantaged. True, we can seek to constrain political pressures and special interest pleading by striving for a broad and disinterested view, focusing on institutional and structural considerations, and trying to identify fairly and honestly the types of cases where the special qualities of the federal courts—independence,

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61. If such a promising period were to eventuate, there is no way to know the nature of the changes that would be adopted nor what their political and social significance would be. That would, of course, depend on the political configurations of the time.

prestige, high quality, and national orientation—seem most desperately needed. We can also seek to constrain narrowly partisan forces by candidly and thoroughly examining the way in which technical jurisdictional matters do, in fact, affect substantive interests, policies, and values. While such discipline, good faith, and reliable information may chasten and channel our thinking, however, they cannot eliminate the unavoidably political nature and significance of the subject.

#### IV.

If the question of jurisdictional limitation requires us to make political judgments, then the fundamental question is not what cases should be taken from the federal courts but what cases are most essential to send to them. While any answer will draw on personal values and pragmatic estimates, the Madisonian Compromise ordained that those considerations would determine the shape of federal jurisdiction. To the extent that there are problems with, or objections to, that political method, moreover, they are only partially the fault of the Madisonian Compromise itself. For many of our difficulties reside not with the institutions the framers created, but with the way more recent generations have allowed concentrated private centers of wealth and power to exert their sway over legislative processes and public affairs.

Accepting those premises, considering the nation's historical experience, and estimating the range of jurisdictional changes that seem politically feasible, I suggest that the best answer for the present and foreseeable future is that the federal courts should concentrate on those important cases where there is a drastic inequality of social resources between the parties, where ordinary individuals confront centers of institutionalized power and wealth. Such cases would include, preeminently, cases where individuals confront the power of government and government officials, especially those of the states, in cases under the Bill of Rights, the Fourteenth Amendment, and the national civil rights laws. It would also include cases—even cases based on diversity of citizenship—where private individuals confront the power of national corporations in actions where the stakes of the suit or the conditions of its litigation are such that the corporate parties have particular opportunities or special incentives to utilize the vast and unequal social resources they command.

The basic proposition that the federal courts should be used to adjudicate suits between private individuals and governmental or large-scale corporate parties is rooted in the basic ideals of American govern-

ment, in the Constitution itself, and in the principles incorporated by the First Congress in the Judiciary Act of 1789. From the Founding, one of the paramount reasons the national courts were authorized and created was to provide national judicial protection for certain categories of socially disadvantaged parties in disputes against socially disadvantaged parties.<sup>62</sup> The idea was that the distinctive institutional characteristics of the national courts would enable federal judges to remain independent of social pressures, counterbalance the influence of social disparities that might otherwise distort fair legal processes, and ensure that judicial decisions were based on the legal merits of the claims rather than on the social resources and positions of the parties. While both the concerns of Congress and the nature of commonly advantaged and disadvantaged parties have changed over the course of more than two centuries, that fact does not alter or undermine the fundamental principle that the federal courts exist to provide special protections for the latter against the former.

With respect to the proposition that the federal courts should be used, in particular, to adjudicate suits between individuals on one side and state or local governments or their various officials on the other, the fundamental historical truth seems to be—despite numerous claims and finely-spun theories to the contrary—that over the course of two-plus centuries the worst abuses of individual freedoms and liberties have been committed by the states and the most successful efforts to protect those freedoms and liberties have come at the national level. Many exceptions and qualifications are in order, of course, and that fundamental truth may not hold forever or in all circumstances. I sug-

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62. Most generally the Founders had in mind the disadvantages that “outsiders” (aliens and citizens of other states) might face when litigating against local citizens in the latter’s own state courts. Although there is considerable dispute as to the original purpose behind diversity jurisdiction (and, to a related but lesser extent, admiralty jurisdiction) and further disagreement as to the specific groups or interests sought to be protected, there is general agreement that the federal courts were created in part to provide independent judicial forums capable of protecting some categories of parties who might be disadvantaged by local prejudice, the influence of special local interests, or hostile public policies in the states that could hinder or prevent them from enforcing their legal rights. *See, e.g.*, ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 54; WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (Wythe Holt & L. H. LaRue eds. 1990); Wythe Holt, ‘To Establish Justice’: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L. J. 1421; TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

gest only that in the United States for the foreseeable future, judged by past experience and with everything considered, this category of suits should retain its highest jurisdictional priority. So far, in other words, James Madison has been proven right when he warned that political abuse, oppression, and tyranny would be found most commonly and most dangerously at the state and local levels:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.<sup>63</sup>

Until clear and relatively long-term evidence establishes the contrary, the contours of federal jurisdiction should be shaped in accord with Madison's insight.

## V.

In conclusion, in this setting, or in any other for that matter, I could hardly do better than conclude my remarks by invoking the words of two of this circuit's most distinguished members, Judge Friendly and Judge Newman. "[M]y belief," Judge Friendly concluded after a long and sensitive analysis of possible limitations on federal jurisdiction, is "that no business is more appropriate for the federal courts than suits to protect . . . federal constitutional rights against invasion by the states."<sup>64</sup> A quarter of a century later Judge Newman, in the course of his own thoughtful consideration of the same issues, affirmed the identical principle. "[Y]ou do not consign to the state court system those categories of cases most in need of sensitive han-

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63. THE FEDERALIST NO. 10, at 60-61 (James Madison) (Modern Library ed., 1941). Similarly, Madison later wrote:

An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations.

*Id.*, No. 37, at 227.

64. FRIENDLY, *supra* note 13, at 90-91.

dling by the federal court system—those cases governed by the Fourteenth Amendment, the realization of which we've only lately begun to enjoy.”<sup>65</sup>

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65. Newman, *supra* note 7, at 64.