

THE THIRTEENTH ANNUAL CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE

FEDERALIZATION OF STATE LAW QUESTIONS: UPHEAVAL AHEAD

presented by
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Mario Cuomo was not the first to choose the governorship of New York over the opportunity to be Chief Justice of the United States. In 1795, John Jay, the first Chief Justice, resigned from that life tenured post so that he could become the governor of New York.¹ Later, he declined reappointment as Chief Justice because he allegedly believed the Supreme Court and, by extension, the whole federal judiciary would never have "great influence in the national life."²

If John Jay could look at the state of the federal judiciary in 1995, his head would spin. Today, the federal courts' power reaches every aspect of our lives including state elections,³ carjacking,⁴ child support,⁵ and even the most intimate part of

* United States Court of Appeals, Third Circuit.

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1. Emily F. Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 345 (1993).

2. RICHARD B. MORRIS, JOHN JAY, THE NATION AND THE COURT 69 (1967).

3. *Baker v. Carr*, 369 U.S. 186, 198-204 (1962) (holding that a federal district court had subject matter jurisdiction over a complaint which alleged debasement of votes in violation of the Fourteenth Amendment's Equal Protection Clause).

4. The Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified in scattered sections of 15, 18, 19 and 42 U.S.C.).

5. The Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106

family life: the relationship between husband and wife.⁶ None of these examples even begins to take into consideration the numerous federal courts that are currently monitoring, if not running, prisons,⁷ hospitals⁸ and even entire school districts.⁹

Ironically, if we could resuscitate John Jay today and ask him to resume the Chief Justiceship, he would probably turn it down again, but for an entirely different reason: he would complain that the growing caseload has increasingly transformed federal judges into administrators and managers no different than any other bureaucrat.¹⁰

THE CASELOAD PROBLEM AND ITS SOURCES

The workload of every federal judge has grown exponentially over the last thirty years to become the most pressing concern for the federal judiciary. In 1962, there were 4800 appeals to the United States Courts of Appeals and 100,000 district court filings.¹¹ In 1993, there were 50,224 appeals¹² and 229,850

Stat. 3403 (codified in scattered sections of 18 and 42 U.S.C.).

6. The Violence Against Women Act of 1994, Pub. L. No. 103-322, secs. 40001-40703 (to be codified in 108 Stat. 1902-55 and scattered sections of 28 and 42 U.S.C.) Title II of that bill, entitled "Safe Homes for Women Act of 1994," deals with domestic violence.

7. Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 381-82 (1995) (discussing federal courts' history of monitoring prison reform and "adopting an activist role in the supervision of the states' penal systems").

8. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 971-72 (2d Cir.) (affirming a district court's appointment of a Special Master to monitor a children's mental health facility), *cert. denied*, 464 U.S. 915 (1983).

9. *See, e.g., Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (indicating that the Supreme Court should look at "every facet of school operations" in determining whether to terminate a court-ordered desegregation plan); Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345, 376-77 (1994) (noting that the federal judiciary has been overseeing desegregation of public schools for 40 years).

10. *See* Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187 (1993) (arguing that the number of federal judgeships must be held to 1,000).

11. L. RALPH MECHAM, 1992 ANNUAL REPORT OF THE DIRECTOR: AC-

district court filings,¹³ an increase of approximately 1,000% in appeals and an increase of approximately 230% percent in district court filings. Yet, the number of federal judges increased only from 353 to 701, not nearly enough to keep pace with the increased workload.¹⁴

Contrary to the opinion of many, even federal judges cannot expand time. The more cases a federal judge is forced to decide, the less time and attention he or she can give to each individual case. Under such pressure, judges must rely more and more on law clerks and central staff attorneys. The quality of adjudication in such a situation deteriorates.¹⁵

Two important factors have contributed most to the caseload that the federal courts now shoulder. The first is that the pace of our lives has become faster and much more complicated since John Jay declined reappointment. When he graced the Court, people rode in horse-drawn carriages. They used pens and paper and other tools primitive by contemporary standards. Business transactions were carried on by human beings in proximity to each other, usually in the same state. Disputes were relatively few and simple to resolve. No one ever heard of or even dreamed of multi-district litigation. John Jay even had the leisure of serving as ambassador to England at the same time he sat on the Court.

Today, we have supersonic jets, trains, cars, faxes and the Internet. In the blink of an eye, we buy and sell goods, stocks, bonds and other incomprehensible derivative investments across state lines and national borders with people we never see. And, of course, we need ever increasing and more complicated regulations to control our sophisticated transactions. These ever-proliferating regulations and rules generate ever-

TIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 10 (1992).

12. L. RALPH MECHAM, 1993 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 3 (1993).

13. *Id.* at 7.

14. MECHAM, *supra* note 11, at 10.

15. *But see* Daniel J. Meadon, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 735 (1983) (arguing that the reliance placed on central staff by federal judges has improved the quality of appellate adjudication).

proliferating disputes. New products leave us novel and convoluted product liability cases. We have class actions that grow into multi-district class litigation.¹⁶

This increasing complication and litigiousness of our society reflects our culture and shows no indication of abating. This process is driven by two factors. The first is an unstoppable engine: the advancement of technology and the social thinking connected with it. The second factor, the one we can control, is the federalization of traditionally state law questions. Congress has dramatically expanded the jurisdiction of the federal courts through creating or making certain rights or crimes a matter of federal law.

As we all know, under the Constitution federal courts have always had jurisdiction of federal questions, diversity suits, admiralty and certain other cases.¹⁷ Judges used to complain that diversity cases were the culprits that clogged our calendars, but statistics show that diversity cases have not been increasing nearly as much as federal question cases.¹⁸

The number of federal question cases has increased exponentially because, for whatever reasons of its own, Congress relishes creating a federal case out of any issue that it believes has national and political significance. Congress accomplishes this by passing a federal statute typically asserting its power under the Commerce Clause. The conduct to be elevated to a federal crime "affects commerce," says Congress, however slight the linkage between the conduct and interstate commerce.¹⁹

16. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250 (S.D. Tex. 1985) (consolidating suits of 50 asbestos claimants into one trial), *cert. denied*, 484 U.S. 828 (1987); *In re Asbestos Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977) (involving 103 asbestos actions pending in 19 districts); see generally Andrew T. Berry & Gita F. Rothschild, *Mass Torts/Mass Litigation/Mass Settlements*, in *CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL COURTS* 215 (1994) (discussing class actions and multidistrict litigation).

17. U.S. CONST. art. III, § 2.

18. WILLIAM W. SCHWARZER & RUSSELL W. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 55 (1994).

19. See generally Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994).

Because we are "all-connected" in today's high-tech world, almost any conduct can fall into the ever expanding category of "affecting commerce." Moreover, Congress enjoys something tantamount to the final say as to whether certain conduct affects commerce under the Supreme Court's deferential review standard.²⁰

Accordingly, many traditionally state court matters, including some relatively minor infractions, become federal questions overnight. A garden variety fraud becomes a federal crime if the perpetrator happens to mail one letter to consummate it.²¹ Possessing a gun in the vicinity of a school becomes a federal crime simply because you are within 1000 feet of a school.²² The Employee Retirement Income and Security Act of 1974²³ basically federalizes what used to be state law wrongful discharge claims. Violence in the home appears to be on the way to becoming a federal crime.²⁴ Last year's crime legislation alone federalized numerous crimes.

And, every time Congress acts to federalize state law questions, the federal courts receive a flood of filings. For example, the expansion of the federal criminal jurisdiction increased the criminal filings per sitting district judge nearly 70% between 1980 to 1992: from fifty-eight to eighty-four cases.²⁵ This has taken its toll on the federal courts. In 1992 federal district judges spent 36.5% of their time on criminal matters.²⁶ The disturbing result is that after the district judges adjudicate criminal matters, they do not have sufficient time available for basic federal question cases that deal with constitutional

(analyzing the proliferation of federal crimes and urging Congress to curtail the federalization of criminal law).

20. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (stating that the Court is "constrained in [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause").

21. 18 U.S.C. § 1341 (Supp. V 1993); *see also* § 1343 (extending mail fraud statute to cover communication in interstate commerce).

22. 18 U.S.C. §§ 921(a)(25), 922(q)(1)(A) (Supp. V 1993).

23. 29 U.S.C. §§ 1001 to 1461 (1988 & Supp. V 1993).

24. *See supra* note 6.

25. SCHWARZER & WHEELER, *supra* note 18, at 3.

26. Jim R. Carrigan & Jessica B. Lee, *Criminalizing the Federal Courts*, TRIAL, June 1994, at 52 (citing telephone interview with the Administrative Office of the United States Courts).

rights, federal-state relationships, state to state relationships, and other important federal concerns.²⁷

IN LIGHT OF THE LITIGATION ONSLAUGHT, CAN CORE VALUES BE PRESERVED?

We must ask ourselves what role the federal courts should play within a nationwide system of justice, which is increasingly under stress. There is no "politically correct" or "constitutionally correct" answer, because the founding fathers envisioned a living, breathing and malleable Constitution.²⁸ Even so, all of us believe in certain fundamental core values within the federal judiciary. Let us enumerate some of them, and see if they are at risk:

Judicial Independence: Federal judges must be able to decide cases in an atmosphere free from fear that an unpopular decision will be a threat to their livelihood or existence.²⁹ For that reason, Article III provided life tenure and protection from salary decrease.³⁰ Although the autonomy to make important and possibly unpopular decisions is at the heart of this protection, judicial independence also depends on the basic ability of a judge to function adequately and properly as an adjudicator and judicial scholar. This ability can be affected by more than a threat to job security. An overwhelming and, yes, impossible docket in the working and practical world threatens the quali-

27. U.S. CONST. art. III, § 2. Pursuant to Article III, Congress has passed enabling legislation conferring jurisdiction upon federal courts in diversity cases (28 U.S.C. § 1332 (1989)), federal questions (§ 1331), admiralty (§ 1333), commerce (§ 1337), patents (§ 1338), postal matters (§ 1339), and bonds (§ 1352). THOMAS E. BAKER, REPORT TO THE FEDERAL JUDICIAL CENTER: A PRIMER ON THE JURISDICTION OF THE U.S. COURT OF APPEALS § 2.01 (1989).

28. See generally OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 2 (1951) (commenting that federal courts are frequently "called upon to announce propositions nowhere expressly stated in the Constitution").

29. MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 4 (1991) (discussing the need to insulate federal courts from the direct influences of the political process).

30. "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." U.S. CONST. art. III, § 1.

ty and independence of a judge's work even more than other activities aimed at undermining the independence of the federal courts.³¹ A judge cannot be said to be independent when the press of work is so great that there is insufficient time to perform necessary analysis and reflection.

Limited Jurisdiction: Federal courts were conceived as national courts of limited jurisdiction operating within a system of federalism.³² Unlike state courts which are designed to hear all legal disputes within a fixed geographic area, the federal courts were never intended to handle more than a small percentage of the nation's legal disputes.³³ Our Constitution's structure explains the importance of this core value.³⁴ Federal courts were intended to complement state

31. A special committee appointed to evaluate federal courts has found "deterioration in indices of federal judicial performance," based in part on the surge in the number of cases filed annually. FEDERAL COURTS STUDY COMMITTEE, REPORT 6 (1990) [hereinafter FEDERAL COURTS STUDY]. The Administrative Office of the U.S. Courts attributes the sharp rise in the workload of federal appellate courts to "substantial jump[s] in criminal appeals from the district courts" in matters of sentencing and drug-related offenses. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 4 (1990). In spite of a steady rise in the number of criminal appeals over the past decade, the number of authorized judgeships shows only a modest rise. ADMINISTRATIVE OFFICE OF THE COURTS, 1990 ANNUAL REPORT 3 (1990).

32. That federal courts are courts of *limited* jurisdiction is a fact widely recognized throughout our nation's history. See RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 13-15 (1987) (noting the Framers' conception that federal judicial authority would extend only to specifically defined cases); ALFRED CONKING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 64 (New York, Gould & Co. 1831) (stating that "the circuit courts possess no powers except such as both the constitution and the acts of Congress concur in conferring upon them").

33. See *supra* notes 19-20 and accompanying text.

34. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Concern is rising about the effect of continuing expansion in the federal judiciary on state rights in our dual system of government. See FEDERAL COURTS STUDY, *supra* note 31, at 8 (warning that the indefinite expansion of federal courts "is likely to come at the expense of the states, and thus impair the fundamental constitutional concept of *limited* federal government").

court systems, not to supplant them. Federal courts were designed to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not undertake.³⁵ Without federal courts there would be no *Brown v. Board of Education*³⁶ and similar landmark cases and principles such as "one man one vote."³⁷ Opening federal courts to the usual litigation of state courts turns this concept of limited jurisdiction on its head. It also undermines the basic concept that federal courts are structurally different from state courts and designed to perform a separate function. Strangely enough, transferring state court matters to federal courts also runs counter to the current call by Congress,³⁸ governors³⁹ and even the President⁴⁰ for a return of power to the states.

Equal Justice: Every federal judge takes an oath to "administer justice without respect to person" and to "do equal right to the poor and to the rich."⁴¹ I have heard that oath administered about a dozen times, but it still to this day moves, excites and invigorates me. This oath hopes to ensure that bias or partiality and economics play no role in the administration of justice. This core value speaks to a concern with fairness. Courts must decide cases in a manner that fully understands the relevant individual circumstances of the litigants, that

35. The Founders intended the Constitution to bestow relatively narrow functions upon the federal judiciary. THE FEDERALIST NO. 78 (Alexander Hamilton).

36. 347 U.S. 483 (1954).

37. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

38. Recent Congressional support for limiting federal regulation of state and municipal government is indicative of the move to "shrink the federal government and return power . . . to the states." *Senate Votes to Limit Unfunded Mandates*, WASHINGTON POST, Jan. 28, 1995, at A1.

39. New Jersey governor Christine Todd Whitman is a prominent advocate of the state power movement. Stephen Handelman, *New Jersey's Rising Star of Conservatism*, TORONTO STAR, Mar. 12, 1995, at E7 (stating that Whitman is "at the leading edge of the national movement to devolve power to the states from the federal government").

40. See Bill Clinton, *What is Good Government?*, NEWSWEEK, Apr. 10, 1995, at 20 (calling for the downsizing of federal government and the decentralization of power).

41. 28 U.S.C. § 453 (Supp. V 1993).

appreciates the nuances involved. To do this, federal courts must give litigants ample opportunity to be heard, and judges must have sufficient time to make deliberative decisions. Lately, the ability to adhere to this core value has led judges to express concern that, faced with a crushing caseload, it is difficult to administer the individual, tailored and discerning attention that each case deserves.⁴²

Excellence: Throughout our history, the federal courts have handled our society's most contentious issues.⁴³ These cases present high factual, legal and administrative complexity. The federal courts have been equal to the task because they are repositories of legal competence, including a superlative court system with superior resources that attracts talented lawyers as candidates for judgeships and support staff. Excellence has many more components, encompassing also the quality of the nomination process, training given to judges, resources provided for support staff and, in particular, a limited enough jurisdiction so that judges can become sufficiently expert with subject matter and procedure, and have time available for contemplation and reasoned decision. Excellence cannot be maintained in the face of a case onslaught which allows insufficient time and opportunity for excellent disposition. Last year I filed twenty-seven opinions for publication in the federal reporter. Could I achieve that volume without heavily relying, and over relying, on law clerks, librarians and support staff? Can I competently read, digest and research thirty-nine cases seven times each year? In addition, when federal courts become high production factories, they will no longer attract as judges the legal minds necessary to achieve quality.⁴⁴

I believe the above core values are at risk because of the huge burdens faced by federal courts through federalization of state court crimes.

42. See *supra* note 31 and accompanying text.

43. See, e.g., *supra* note 9 and accompanying text.

44. See *supra* note 31.

A PROPOSAL: DE-FEDERALIZATION

These two factors—the increasing sophistication and complication of our way of life and the federalization of state law questions—force us to search for a solution to the problem facing the federal judiciary. Some commentators have proposed a cap on the number of federal judges.⁴⁵ In light of the inexorable progress of the two factors discussed above, a cap on the number of judges seems unrealistic. If we limit the number of federal judges while more cases are coming into the courts,⁴⁶ we must make every federal judge into a super-judge complete with super powers, or the quality of justice will suffer. On the other hand, dramatically expanding the judiciary as Judge Stephen Reinhardt of the Ninth Circuit proposes⁴⁷ is no panacea, although expansion to some degree appears inevitable. Expansion of the judiciary may not be able to keep pace with the combined growth caused by our two factors. Moreover, expanding the judiciary will not necessarily improve the quality of justice. As Judge Jon O. Newman of the Second Circuit⁴⁸ and Judge Gerald B. Tjoflat of the Eleventh Circuit⁴⁹ forcefully argue, expanding the judiciary may permit the political process to reward more and more politically savvy candidates who may not be the most qualified. Expansion may also threaten collegiality, lessen the efficiency of the courts, and produce more and more uncertainty in the law because of a multitude of conflicting precedents. We can already see all these predictions coming true in the Ninth Circuit which comprises California, Arizona, Montana, Idaho, Oregon, Washington, Alaska, Hawaii and the Northern Mariana Islands.⁵⁰ Thirty-eight

45. Newman, *supra* note 10, at 187.

46. Particularly when the lawyer population in our country has now increased to three lawyers per 1,000 people. See Ty Ahmad-Taylor, *Lawyers Live Where Clients Are, Data Show*, N.Y. TIMES, July 15, 1994, at B7.

47. Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52-54.

48. Newman, *supra* note 10, at 187-88.

49. Gerald B. Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, A.B.A. J., July 1993, at 70.

50. See, e.g., *United States v. Valdez-Corral*, 33 F.3d 60 (9th Cir. 1994) (noting the conflicting precedent on the standard of review for

court of appeals judges serve on that court.⁵¹

Finally, dramatically expanding the federal judiciary simply is not in the spirit of the limited role assigned to it by our constitutional scheme. That scheme calls for a relatively small, specialized federal court system.⁵² In adding more and more judges to handle the creeping increase in newly-minted "federal" matters, we will fundamentally change the character of the federal judiciary, turning it into a bureaucracy.⁵³

If neither imposing a moratorium on the number of federal judges nor dramatically expanding that number offers a solution to the caseload problem, where must we look for an answer? Of the two factors which have contributed most to the increase in caseload,⁵⁴ the growing sophistication and complication of our way of life appears to be beyond our control. Therefore, we must by necessity address the second factor, the federalization of state law questions.

If our goal is to maintain a manageable caseload consisting of specialized cases envisioned by Article III, then we must rethink the federalization process and look for alternatives. Congress can slow federalization of state law questions or defederalize some others that are now federal questions. What Congress can do, Congress can undo. Instead of rushing to federalize the politically hot crime or issue of the week, Congress should seek solutions by taking full advantage of the existing state law enforcement and state court systems now in place. Congress could even exercise its appropriation power⁵⁵ to provide states with financial assistance in dealing with critical problems, rather than use that money to federalize issues and pass the cases into the federal courts. Only after it has ascertained that the states cannot adequately deal with the problem, even with federal assistance, should Congress federalize a matter.

cases involving the entrapment defense).

51. See 2 ALMANAC OF THE FEDERAL JUDICIARY (Stephen Nelson et al. eds., 1994) (9th Circuit).

52. Newman, *supra* note 10, at 187-88.

53. *Id.* at 187.

54. See *supra* text accompanying notes 15-27.

55. U.S. CONST. art. I, § 9, cl. 7.

Reasons for De-federalization

My proposal is borne of several considerations, other than the size of the federal docket. First, the increasing federalization of traditionally state law questions changes the political balance of the Constitution's concept of federalism by gradually eroding the sovereignty of the states, leaving only cases with minor significance for the state courts. The state will have no choice but to retreat in its roles as a law giver and law enforcer before the rising tide of federal jurisdiction. This retreat has already begun. As a consequence, any attorney who pursues a fraud case with some significance in state court rather than federal court may face malpractice lawsuits. This is because knowledgeable clients are becoming aware that federal courts are now applying federal fraud laws, which many believe favor plaintiffs.⁵⁶ In effect, gone is the day when the state had the power to define fraud or to regulate conduct within its own borders as far as fraud is concerned. The federal Racketeer Influenced and Corrupt Organizations (RICO) legislation⁵⁷ where a plaintiff can obtain treble damages and attorney's fees, is another example of why state courts are being left behind.

This prospect, I believe, is contrary to the design of federalism as expressed in the Constitution. When the founding fathers assembled in Philadelphia during that hot summer, they undoubtedly envisioned a republic built upon the existing state systems and endowed the federal government only with limited, enumerated powers.⁵⁸ To ensure that the citizens of our new country totally understood their intentions, the founding fathers quickly proposed and enacted the Tenth Amendment which proclaims that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁵⁹ Although this amendment does not appear to have been given

56. For example, 17 C.F.R. § 240.14a-9 (1993), the federal anti-fraud provision addressing proxy solicitation, imposes an easier causation requirement on plaintiffs. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 379-85 (1970) (explaining causation).

57. 18 U.S.C. §§ 1961 to 1968 (1988 & Supp. V 1993).

58. See U.S. CONST. arts. I-III.

59. U.S. CONST. amend. X.

much teeth by the Supreme Court,⁶⁰ it does emphasize the constitutional concept of a federal government with limited, enumerated powers. The Tenth Amendment retains at least a modicum of content, which the growing federalization of state law questions threatens to erode to nothing. It may even be predicted that the fifty sovereign states will be reduced to fifty Lilliputians in our federal system. This has brought Judge Jim Carrigan of the U.S. District Court for the District of Colorado to ask, "Shall the constitutional concept of a central government of limited powers pass into history?"⁶¹

One may argue that the federalization of state law questions is based on the power to regulate commerce, a power expressly delegated to the federal government.⁶² Federalization is thus consistent with the Tenth Amendment. This argument jibes with the current Supreme Court's interpretation of both the Commerce Clause and the Tenth Amendment.⁶³ The Supreme Court is extremely deferential to Congress with respect to the question of what affects commerce. But this attitude, coupled with the insignificant effect the Supreme Court has given to the Tenth Amendment, means that anything goes so long as Congress whispers "commerce" as it federalizes state law questions.

Constitutional scholars have begun to voice substantial objections against such use of the Commerce Clause.⁶⁴ First and

60. *Compare* United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.") with New York v. United States, 112 S. Ct. 2408 (1992) (Congress may not compel states to regulate conduct according to congressional instructions).

61. Carrigan & Lee, *supra* note 26, at 50.

62. U.S. CONST. art. I, § 8, cl. 3.

63. See, e.g., United States v. Lopez, 115 S. Ct. 1624 (1995).

64. See Stephen Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 896 (1990); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1988); Stephen K. Schutte, *Doctrinal Foundation of Sectional* 1983

foremost is the glaring realization that this process could ultimately reduce the states to non-entities. This defeats the design of the Constitution as envisaged by the founding fathers and undermines basic concepts of federalism and comity. Second, interpreting the commerce power as the omnipotent power trivializes a written constitution that grants limited, enumerated powers to the federal government. By continuing to interpret the commerce power so inclusively and powerfully, that clause alone may encompass all the work of government. The remaining language in the Constitution that grants powers to the federal government will have no purpose. Such a broad, inflexible interpretation of the commerce power effectively treats it as a general grant of police power beyond the wildest expectations of the founding fathers. As Judge Carrigan states,

when the Framers adopted the Commerce Clause, with no dissent and almost no discussion, they weren't thinking of local street crimes. They were concerned that some of the 13 states might impose trade barriers to discriminate against products from other states. Thus, Congress was empowered to ensure free trade among the states so that merchants in the young nation wouldn't have to contend with 13 different systems of protective tariffs.⁶⁵

The broad interpretation of the commerce power may even bring under its umbrella something other than the local street crimes which Judge Carrigan discusses, *i.e.*, violence in the home, and even the bedroom.⁶⁶ Matrimonial law could easily be encompassed under federal law, since most marriages use products, or at the least, affect interstate commerce. The O.J. Simpson trial could with little difficulty be in U.S. District Court, by making it a crime to use the knife, which was in interstate commerce, to commit murder. Do we really want a federal court to spend months involved in such a local criminal matter? What if Mr. Simpson had driven the Bronco across state lines? Such a broad interpretation of the Commerce Clause deserves strong criticisms.

and the Resurgent Dormant Commerce Clause, 77 IOWA L. REV. 1249, 1252 (1992).

65. Carrigan & Lee, *supra* note 26, at 51.

66. See *supra* note 26 and accompanying text.

Finally, the importance of showing deference to Congress does not mean that Congress has *carte blanche* to do anything. The Supreme Court maintains this deference with an understanding that Congress act responsibly. The Supreme Court and the American people expect Congress to cherish this deference given it by using its commerce power judiciously and even sparingly. Possessing substantial power does not mandate that one always exercise it to the maximum. Power savors best when exercised with restraint. Power also savors best when exercised with creativity, not resorting to the same Pavlovian response to every problem.

Most current uses of the Commerce Clause to federalize state law questions are based on a belief that any legal issue with a national implication must receive a national response. Some think that this reasoning demands that the issue become a federal question justiciable in the federal courts. Certainly, problems with national implications must receive a national response; however, the national response need not be to federalize the question under the Commerce Clause. Alternatives exist.

Congress resorts to federalization to produce two results: (1) a uniform law for the entire country; and (2) greater deterrent effect. Innovative use of its spending power,⁶⁷ however, may achieve the same goals without the unfortunate byproduct of inundating the federal courts with essentially state law questions. For instance, the federal government may provide funding to the states for identified purposes on the condition that the states formulate effective regulation and rigorously enforce those regulations according to the standards set by the federal government.⁶⁸ This method will unquestionably encourage uniformity.

Moreover, the federal government could also participate in and financially subsidize efforts to standardize the laws among the states. A good example of such efforts are the restatement projects conducted by the American Law Institute and National Conference of Commissioners on Uniform State Laws. In so doing, the federal government will promote uniformity.

67. U.S. CONST. art. I, § 8, cl. 1.

68. *Id.*

The second goal, deterrence, can also be enhanced without resorting to federalization. One method is to require the states to provide adequate penalties for certain infractions and crimes. A prime example is the regulation of traffic and driver licensing. No one can deny that these activities carried out on the highways affect commerce and that rules governing these activities are perfect candidates for federalization under the Commerce Clause.⁶⁹ Congress, however, has not federalized traffic regulations and driver licensing. Instead, it provides funding to the states on the condition that the states impose certain uniform regulations.⁷⁰ Today, the federal-state cooperation in this area produces uniform speed limits⁷¹ and other traffic regulations that provide more than adequate deterrence. Congress has used the same method to achieve a national drinking age limit.⁷²

Federal-state cooperation effectively achieves the end result of federalization without the pain of having to federalize all traffic regulations and overwhelming the federal courts with traffic violation cases. This demonstrates that the financial appropriation power under the Constitution⁷³ may be as effective as the commerce power⁷⁴ in regulating conduct in our society.

Even if Congress does feel the need to federalize a state law question, Congress should encourage or require that the matter be pursued in state court. The founding fathers envisioned that states would be primarily responsible for criminal law enforcement and it is well settled that state courts must entertain federal criminal cases as well as federal civil cases.⁷⁵ In

69. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that a federal statute conditioning receipt of highway funds on the adoption of a minimum drinking age is a valid use of Congress's spending power).

70. *Id.* at 205.

71. 23 U.S.C. § 141(a) (1988).

72. *Dole*, 483 U.S. at 203.

73. U.S. CONST. art. I, § 8, cl. 1.

74. *Id.* art. I, § 8, cl. 3.

75. SCHWARZER & WHEELER, *supra* note 18, at 11 n.28 (citing Thomas M. Mengler, *Federal Criminal Jurisdiction* 5-9 (unpublished manuscript on file with author)). See also *Testa v. Katt*, 330 U.S. 386, 389 (1947) (holding that state courts are obligated to enforce valid federal penal laws).

the earlier years of the Republic, state courts had concurrent jurisdiction over federal crimes.⁷⁶ Little reason exists why we should not do the same now, particularly when docket congestion has been a serious problem for the federal courts. By requiring state governments to pursue certain federal crimes in state courts, Congress would still receive all the satisfaction and credit of making a federal matter out of a serious problem, while sparing the federal courts from the jurisdiction of adjudicating many essentially state law matters that are more properly within the province of the state courts.

Questions that May be De-federalized

In keeping with the spirit of these observations, I propose that Congress consider de-federalizing most, if not all, federal questions which derive federal character solely from the use of an instrument of interstate commerce, such as telephone lines⁷⁷ and transportation lines.⁷⁸ These questions are primarily state law questions. When a federal court adjudicates such a question, it does no more than what a state court does, except that it first must take extra time to ascertain whether a long distance phone call was made, or whether a telegraph was sent, or exactly what technicality put the case in the lap of the federal court.

Drug trafficking,⁷⁹ gun dealing,⁸⁰ mail fraud,⁸¹ bank fraud,⁸² Federal Employers Liability Act,⁸³ and even securities fraud cases⁸⁴ all fall within this category and may properly be dealt with by the state courts. On the other hand, anti-discrimination statutes such as the Civil Rights Act of 1964⁸⁵

76. *Testa*, 330 U.S. at 390.

77. *See, e.g.*, 47 U.S.C. § 223 (1988 & Supp. 1993) (prohibiting obscene phone calls placed interstate).

78. *See, e.g.*, 18 U.S.C. § 342 (1988) (providing for punishment of interstate common carrier if under the influence of alcohol or drugs).

79. 21 U.S.C. §§ 841 to 863 (1988 & Supp. V 1993).

80. 18 U.S.C. § 922 (1988 & Supp. V 1993).

81. *Id.* § 1341 (Supp. V 1993).

82. *Id.* § 1344.

83. Act of Apr. 22, 1908, ch. 149, §§ 1-8, 35 Stat. 65-66 (current version at 45 U.S.C. §§ 51-60 (1988)).

84. 15 U.S.C. § 77q (1988).

85. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered

and the Age Discrimination in Employment Act of 1967⁸⁶ can be viewed differently even though Congress expressly cited the Commerce Clause when federalizing certain issues under these acts.⁸⁷ These statutes can more properly be considered as inspired by, and intended to implement, the Equal Protection Clause under the 14th Amendment.⁸⁸ Congress cited the Commerce Clause because of the state action requirement laid down by the Supreme Court in *The Civil Rights Cases*.⁸⁹

In the more traditional state law questions with which we have been dealing, several advantages in adjudicating them in the state courts are clear. First, leaving state law matters to state law will save the time spent on ascertaining federal jurisdiction because there would be no need to determine whether an instrument of interstate commerce was used. This factor alone will save a great deal of time. The authority of state law does not depend upon whether certain conduct affects interstate commerce, since states have general police power and may regulate any aspect of life. Second, state courts are more accustomed to adjudicating matters of state law than federal courts. State courts have intimate knowledge of the state law issues. They need less time dealing with such issues and produce higher quality work in this area.

Finally, state courts have accumulated a great deal of experience in adjudicating a large number of cases. As Judge Newman describes, state court systems "are already geared to handle high volume."⁹⁰ They appear to be doing better than the federal courts when volume is concerned. Indeed, over 98% of all civil cases and over 99% of criminal cases are currently

sections of 28 U.S.C. and 42 U.S.C. (1988 & Supp. V 1993)).

86. Pub. L. No. 90-202, 81 Stat. 602-08 (current version at 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993)).

87. See, e.g., Civil Rights Act of 1964 § 201(b), 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a(b) (1988)) (prohibiting discrimination by places of public accommodation whose "operations affect commerce"); Age Discrimination in Employment Act of 1967 § 2(a)(4), 81 Stat. 602 (codified at 29 U.S.C. § 621 (a)(4) (1988)) (finding that "arbitrary discrimination in employment because of age . . . burdens commerce").

88. U.S. CONST. amend. XIV, § 1.

89. 109 U.S. 3, 11-12 (1883).

90. Newman, *supra* note 10, at 194.

filed with the state courts.⁹¹

Statistics cited by Judge Newman also answer the objection often voiced against de-federalization, which is that the state courts are as congested as the federal courts and will not be able to deal with the cases reallocated from the federal courts. Judge Newman has calculated that reallocation of about 70,000 cases from the federal courts to the state courts will reduce the federal docket by 30%, but will only increase the state courts' caseload by 1%.⁹² A 1% increase in volume should not pose a problem for the state court systems that have substantial experience and capability in dealing with high volume. Moreover, Congress may redirect the funding saved from de-federalization to support any increased costs to the state court systems.

CONCLUSION

Once Congress de-federalizes those "federal" questions which derive their federal character solely from the use of means of interstate commerce, the federal courts will be left with truly federal questions. These are questions that arise under the Constitution, truly federal statutes (such as those anti-discrimination statutes inspired by the Constitution), and treaties. They would address the large concerns of our Republic, such as the relationship between the federal government and the state, between one state and another, between the federal government and the territories, between the federal government and a foreign country, and between governmental power (federal or state) and the individual. The federal courts will not enmesh itself with the states' law-giving and enforcing functions with respect to those rules that govern essentially private conducts in our society, and will be spared a large part of its present caseload. Ultimately, the sovereignty of the states will be preserved and efficiency in the administration of justice at both the state and federal level will be improved.

91. SCHWARZER & WHEELER, *supra* note 18, at 34.

92. Newman, *supra* note 10, at 194.