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Summary and Conclusions A Kaleidoscopic View of the Problems Confronting Federal Courts

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SUMMARY AND CONCLUSIONS

A KALEIDOSCOPIC VIEW OF THE PROBLEMS CONFRONTING FEDERAL COURTS

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I. INTRODUCTION

Several themes have echoed throughout this Symposium. These themes focus upon the problems that confront contemporary federal courts in a complex modern society—problems that often find their roots in the past and cast shadows into the future. In my summary and conclusions, I will focus upon several issues that have been pivotal in our discussions, as well as several other troubling dilemmas confronting the federal court system.

My remarks will cover the following elements:

(1) Problems confronting the federal trial courts, including:

(a) the jury as fact finder in complex, prolonged cases;

(b) the shift in the center of gravity of contemporary litigation from the trial to the pretrial discovery phase;

(c) the need to develop, and the problems that accompany the development of, mass joinder devices, such as interpleader and class actions, as means to reduce the workload of federal trial courts;

(d) the use and misuse of the courts' ability to control their own workload by stricter interpretation of article III case or controversy requirements (standing, ripeness, and mootness doctrines), and the expanding use of immunities doctrines in civil rights cases;

(e) the efficacy of methods of alternative dispute resolution, such as arbitration, insurance cost-shifting measures, or

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administrative proceedings; and

(f) the feasibility of deflecting portions of the federal court workload to the state courts through such means as the narrowing of diversity jurisdiction, increasing the jurisdictional amount, encouraging the litigation of civil rights disputes in state forums, and curbing prolonged review of state criminal proceedings in federal habeas corpus hearings.

(2) Problems confronting the courts of appeals, including:

(a) the increasingly summary nature of many appellate proceedings in which workload pressure too often forces appellate tribunals to forego full arguments and written opinions;

(b) the need to resolve the growing number of intercircuit and intracircuit conflicts that give rise to the problems of uncertainty in the law and blatant forum shopping;

(c) the increasing difficulty of generalist judges, no matter how brilliant, in dealing with complex, esoteric specialties, such as tax, antitrust, and securities law. An examination will be made of proposals for the development of specialized subject matter courts of appeals as a means of resolving intercircuit conflicts and enabling judges to develop deeper knowledge of arcane but important technical bodies of law. The opponents of such tribunals contend that the use of courts with narrow jurisdiction would create isolated enclaves of law that might be incompatible with the mainstream of legal thought;

(d) the question of whether the courts are interpreting the interlocutory appeals statutes too permissively; and

(e) the proposals to abolish the mandatory appellate jurisdiction of the courts of appeals.

(3) Issues confronting the Supreme Court, including:

(a) the proposal that a National Court of Appeals be created to increase the national appellate capacity of the federal judicial system;

(b) the desirability of eliminating the remaining mandatory appellate jurisdiction of the Supreme Court and the positive and negative consequences of allowing the Court total control over its own docket; and

(c) the controversies concerning the independence of the Surpeme Court in reviewing the constitutionality of legislative action. This discussion will include the debate concerning whether Congress has the power to delete major categories of cases from the Supreme Court's jurisdiction. Should such alterations in jurisdiction be viewed as legitimate exercises of Con-

gress' article III, section 2 power[1] to delineate the Supreme Court's appellate jurisdiction or as illicit attacks upon the judiciary's impartiality and independence?

Inextricably entwined with and exacerbating all of these problems and issues is the increasingly litigious nature of our society, which Professor Howard so cogently described. He indicated to us that through a combination of events, including growth in population, in complexity of economy, and in the regulatory scheme of government, more and more cases of greater difficulty are being brought. In addition to the reasons he gave for the increase in litigation, we should note the vigorous use of the fourteenth amendment, which applies national standards of justice to the states. This amendment made possible new federal causes of action. When it was combined with the creation of exceptions to the eleventh amendment ban against using federal courts for suits against states, extensive new vistas were opened for suits against state and local officials. In *Ex parte Young*[2] the Court held that suits seeking prospective relief against state officials for violating federal constitutional standards are permissible because the official who acts unconstitutionally is stripped of his connection to the state. Thus, the suit is against the official rather than the entity.[3] Through this device, federal courts became the major jousting ground for testing the legitimacy of state and local government actions.

Also, statutory reasons underlie the development of increased litigation involving constitutional rights. These include the 1976 Attorney's Fee Award Act, which grants attorney's fees to the prevailing party in civil rights cases, thus encouraging filing suit.[4]

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1. U.S. CONST. art. III, § 2.

2. 209 U.S. 123 (1908).

3. *But see* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (refusing to expand the stripping doctrine to permit suit in federal court against state officials and state agencies when the basis of the injunction was an alleged violation of state law rather than the need to vindicate federal constitutional standards).

4. 42 U.S.C. § 1988 (1982). In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court concluded that in order to be a prevailing party and be qualified to receive attorneys' fees, a litigant in a multiple claims case need not win on all of the issues. The award, however, should not include compensation for work on unsuccessful claims unless they are firmly linked to the claims on which the party seeking fees was victorious. These relatively liberal attorney's fee award standards should serve as a powerful incentive to litigation.

Many of the factors that have resulted in increased litigation are positive developments when looked at from a vantage point other than judicial economy. They increase equal justice and accessibility to the courts and encourage people to bring cases that are needed to monitor government conduct. They do bring in their wake, however, court congestion and retardation of the pace of government operations as officials pause to defend themselves in court. We have to deal with this avalanche in a way that does not compromise the essential even-handedness of our judicial system.

These problems form the agenda for my review of the Symposium. Now, we must more closely examine the topography of each item.

II. PROBLEMS CONFRONTING THE FEDERAL TRIAL COURTS

The shock waves of the increase in litigation will be most acutely felt at the trial level. We should not forget because of our fascination with the appellate system, that the heavy and complex caseload that confronts the higher courts also confronts the trial level.

A fast-paced economy, sprawling government, and modern science have combined to produce protracted, multiparty cases with convoluted issues. Such cases strain the jury system to the limit. Scholars and practical lawyers have often raised the question of whether the seventh amendment right to a jury trial can survive that kind of prolonged, highly technical case.[5] Recent cases have questioned whether the due process clause entitlement to have a competent fact finder compels a complex case exception to the seventh amendment right of jury trial.[6]

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5. *See* Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 527 n.87 (1980). Kirkham quotes Roscoe Pound who said: "[T]he notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States." Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 735 (1906). For additional references to this issue, see authority cited in C. WRIGHT, LAW OF FEDERAL COURTS 615 n.45 (1983), including Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Loo, *A Rationale for an Exception to the Seventh Amendment Right to a Jury Trial*, 30 CLEV. ST. L. REV. 647 (1981); and Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978).

6. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (in

Methods for adapting trial by jury to the challenges of complex cases are being examined. Special verdict forms and careful judicial instructions can increase the competency of the average jury. In addition, we have begun to develop ideas of alternatives to the classic tradition of juries of ordinary people taken from the general population. One such alternative would utilize juries comprised of experts or people with unusual abilities to analyze certain types of facts. These ideas, however, give rise to many questions, including: (1) Would such an elite body constitute a jury of the litigants' peers?[7] (2) Would use of such carefully selected juries raise questions about jury-rigging that could produce a loss of impartiality? (3) Would the ordinary citizen's sense of participation in and confidence in the jury system be diluted?

Another trial level problem is the shift in the center of gravity of litigation away from the trial itself toward the pretrial stage dominated by discovery maneuvers. Such ploys often are carried out in a rambunctious, wide-open, unregulated fashion in which the attorneys attempt to dominate rather than the judge. Courts are beginning to bring these practices under control through tighter certification requirements, which make attorneys attest to the reasonableness of discovery activities, motions, and pleadings. In addition, as Judge Motley noted, tighter pretrial conference control by judges, including the setting of discovery schedules, stymies the use of discovery as a stalling tactic.[8] Still,

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cases of unusual complexity, due process right to a fair fact-finding method might take precedence over right to jury trial). *But see In re* United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (rejecting complex case exception); Cotton v. Wites, 651 F.2d 274, 276 (5th Cir. 1981) (expressing reluctance to adopt complex case exception). In a provocative footnote in Ross v. Bernhard, 396 U.S. 531 (1970), the Supreme Court noted that the right to trial by jury in civil cases depends upon the following: "[F]irst, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." *Id.* at 538 n.10 (citing James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963)); *see* C. WRIGHT, *supra* note 5, at 615.

7. Kirkham argues that the "systematic exclusion of segments of the community is a denial of due process since it deprives the parties of a representative cross-section of the community." Kirkham, *supra* note 5, at 528 n.88 (citations omitted).

8. For the standards governing certification requirements, see FED. R. CIV. P. 7, 11, 26(g). For provisions mandating tighter judicial control of discovery scheduling, see FED. R. CIV. P. 16(b). *See also* J. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 6-12 (1985).

the basic question remains: is the center of gravity of litigation shifting so much from the trial stage to a less-regulated pretrial stage that the accuracy of the fact finding process is compromised?

Judicial control over promiscuous pretrial activity must be exerted. It must be realized, however, that carried to the extreme such control exacts a heavy price. Strict certification standards and rigid pretrial schedules may stifle innovation in developing novel but sound theories for redressing wrongs. In attempting to reduce the workload, moreover, we actually might be increasing it by creating new areas of satellite litigation in the form of hearings on the accuracy and reasonableness of an attorney's certification. Such disputes over attorney ethics are important, but fascination with them will not necessarily tell us more about the merits of the case and may form the basis of a new form of dilatory tactic.

The increasingly specialized, technological nature of our society has changed the identity of the leading players on the litigation stage. The role of the expert witness was once peripheral; it is now pivotal. This is especially true in mass litigation in which the individual litigant is nearly a faceless anonymity, but the expert plays an increasingly dominant, visible role.

We attribute various oracular powers to these experts. They seem to speak with a direct line to God. Consequently, trials often become battles of experts with directly conflicting testimony. Can we find juries that are able to sift amongst such complex cross-currents, even when guided by the most informative instructions from the judges?[9] Perhaps we should develop tighter rules concerning the relevancy of expert testimony and the degree of weight it should carry in jury deliberations.[10]

For an example of judicial attempts to thwart abusive and duplicative discovery, see Hayes v. National Gypsum Co., 38 F.R. Serv. 2d 645 (E.D. Pa. 1984) (requiring defense counsel to pay reasonable expenses incurred by plaintiffs because of duplicative discovery motions by defendant).

9. *See* C. MCCORMICK, ON EVIDENCE 44 (3d ed. 1984).

10. FED. R. EVID. 702 permits the testimony of a person with "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence." The problem arises when the expert's testimony becomes such a comprehensive packaging of the facts that it usurps the role of the jury. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 392 (1978). Perhaps closer pretrial conference assessment of an expert's testimony would be in order.

Another approach to the battle of experts problem is permitting a judge to appoint a

Those are some of the problems that are confronting the trial stage. What research management and workload control devices are available for coping with this parade of horribles?

Earlier in this Symposium, Professor Wechsler mentioned the need for long range comprehensive research rather than the episodic reactions that we tend to get out of Congress, state legislatures, and various special study committees. A research, policy-suggesting agency similar to Judge Cardozo's proposal for a Ministry of Justice,[11] could make comprehensive recommendations concerning which problems of society should be dealt with in the courts, which issues should be dealt with in arbitration[12] or administrative bodies, which problems should be dealt with in state courts, and which should be dealt with in federal courts. For example, do we need federal court adjudication of truth in lending controversies?[13] Do we need adjudication in a court sys-

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more neutral court expert under authority of rule 702. One difficulty with this approach, however, is that the expert's status as court appointed may cloak him with such an aura of infallibility that the expert may impinge upon the role of the jury. *See* R. McCULLOUGH & J. UNDERWOOD, CIVIL TRIAL MANUAL 2 410-14 (1980).

11. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1922).

12. Former Chief Justice Burger has suggested that complex commercial cases are especially appropriate for arbitration. He noted that "[a] skilled arbitrator . . . can digest evidence at his own time and pace without the expensive panoply of the judicial process." *See* Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Jan. 24, 1982), *reprinted in Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982). He further observed that commercial arbitration is more conducive to stipulations concerning the discovery process. He recommends that arbitrations voluntarily entered into be binding on the parties. *Id. But see* Lay, *A Blueprint for Judicial Management*, 17 CREIGHTON L. REV. 1047 (1984). Lay questions the contention that arbitration is less expensive and faster than classic trial court adjudication. He also notes that

> arbitration fails to provide equitable relief, such as issuance of injunctions, nor does it afford other remedial powers inherent in the judicial process such as the use of contempt to enforce its decrees. The rights of third parties often involved in private disputes, are not considered in arbitration. Moreover, the selection of arbitrators in given disputes is often based upon prior favorable results from the same arbitrators.

Id. at 1052-53.

13. For jurisdiction and procedure in consumer credit disclosure cases, see 15 U.S.C. § 1640 (1982). Section 1640(e) allows truth in lending actions to be litigated in federal district courts or any other courts of competent jurisdiction, including state courts. Is concurrent jurisdiction necessary to effectuate the purpose of the act? An examination of the substantive provisions of the act, 15 U.S.C. §§ 1601-1639 (1982), reveals that disputes with regard to such transactions are likely to concern the kind of contract and accounting questions at which state courts are quite expert. A new system could be enacted under which federal law could provide a uniform standard, and state courts could perform the adjudication in most cases, thus freeing federal courts to concentrate on cases

tem at all? Suggestions have been made by Judge Motley that we develop a system of insurance compensation in the toxic tort area in which such a multitude of injuries may arise out of a single event or a series of related events that they may be impossible to redress in any one or even a coherent series of cases.[14]

Once a panel to comprehensively study these questions is convened, then perhaps we can address the procedural and jurisdictional details more intelligently. I would suggest that the following analytical factors should be kept in mind when alternatives to adjudicative dispute resolution such as arbitration, administrative proceedings, or government-sponsored insurance compensation are considered: (1) Would such systems in fact be faster and less costly than court proceedings? (2) Would the cases being considered for resolution by such a system be appropriate for determination by a private or bureaucratic decisionmaker who does not command the tradition and stature of a judge? (3) Are they cases in which judicial enforcement power should be available immediately through the contempt authority rather than later through a suit to enforce the arbitration or administrative results? (4) Are such cases likely to involve constitutional or public policy issues that defy solution by a private or low-level government decisionmaker?

During the course of this Symposium several concrete solutions have been suggested for reducing and managing more efficiently the workload confronting the federal court system. The perennial controversy over the proper scope of diversity jurisdiction was debated. One view is that diversity jurisdiction should be abolished entirely or curtailed drastically.[15] Serious consider-

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in which a greater need for knowledge of basic federal policy or need for an impartial forum exists.

14. *See* Motley, *supra* p. 545. Models that may be adaptable to the toxic tort area are already in operation. In New Zealand accident victims are barred from bringing court actions for their injuries, but instead apply to a government accident compensation corporation for medical, rehabilitative, funeral, and income replacement expenses. *See* Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 982-83 (1985) (description of New Zealand plan). Perhaps such a system is adaptable to toxic torts in this country. Even if you assume, however, that such a system would not destroy the deterrence of accidents effect that may be attributed to tort suits, it does raise questions concerning the indirect cost of such a system in denying citizen participation in the compensation system through jury service.

15. *See, e.g.*, Lectures delivered by Judge Henry J. Friendly, Columbia Carpentier Lectures, Columbia University School of Law, *reprinted in* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 149-50 (1973) [hereinafter H. FRIENDLY] (retain diversity juris-

ation should be given to reducing diversity jurisdiction by limiting it to situations in which there is a real need for a neutral forum, such as cases in which a citizen of the forum state, someone with the so-called local boy advantage, is opposed by a citizen of another state who, in theory, may be subject to prejudice in state courts for being an outsider.[16]

On the other hand, it may be appropriate to increase diversity jurisdiction in the area of mass litigation when a single state court cannot obtain personal jurisdiction over a significant proportion of the litigants.[17] We have a model for that in the statutory interpleader procedure, which uses the minimal diversity rather than the complete diversity standard.[18]

We have vigorously debated the need for mass joinder devices. The desire to achieve judicial economy must be balanced

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diction only when suit between citizen and foreign state or citizen and foreign state citizen or when suit is under statutory interpleader procedure); Bartels, *Recent Expansion in Federal Jurisdiction: A Call for Restraint*, 55 ST. JOHN'S L. REV. 219 (1981); Butler, *Diversity in the Court System: Let's Abolish It*, 3 ADELPH. L.J. 51 (1984); Griswold, *Helping the Supreme Court by Reducing the Flow of Cases into the Courts of Appeals*, 67 JUDICATURE 58 (1983); *see also* Meador, *supra* p. 459; Wechsler, *supra* p. 557; Wright, *supra* p. 478.

16. Limiting diversity jurisdiction in this way would be consistent with the original statutory dimensions of diversity jurisdiction. The Judiciary Act of 1789 stated:

> The circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another state.

Ch. 20, § 11, 1 Stat. 78. The United States Code, at 28 U.S.C. § 1332 (1982), does not require that the suit be between a citizen of the forum state and an "outsider" as a per se indicia of the need for a neutral federal forum. Complete diversity of citizenship between the two sides is sufficient even if neither has the "home court" advantage.

Judge Henry Friendly suggested that diversity jurisdiction be confined to disputes between "a citizen and foreign states or citizens or subjects thereof" and statutory interpleader actions. *See* H. FRIENDLY, *supra* note 15, at 149-50. For a discussion of various proposals for alteration of diversity jurisdiction, see 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3601 (1984) [hereinafter WRIGHT, MILLER & COOPER].

17. The American Law Institute proposed that "[t]he district courts shall have original jurisdiction of any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 2371(a), at 67-68 (1969).

18. *See* 28 U.S.C. § 1335 (1982); *see also* State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967).

against the cost incurred in the loss of individual litigant autonomy. The judicial landscape is littered with fragments of litigation—seemingly discordant pieces that are broken into separate cases—which, because of common issues of law or fact, could efficiently be combined in one proceeding. The procedural and jurisdictional machinery for gathering these cases together often is too limited in scope. One of the examples mentioned several times in this Symposium is the multidistrict venue provision that was adopted in 1968.[19] This device permits the federal courts through the multidistrict panel to transfer numerous cases with common questions of fact into one district for consolidated pretrial discovery, thus preventing different parties from utilizing the same document or the same witness in ways that are not compatible. Dean Cooper suggested that this multidistrict transfer system be expanded to permit more ready consolidation of the same cases for plenary trial purposes and not just for pretrial discovery.[20] This suggestion has considerable merit. Dean Cooper pointed out, however, that before the system can be expanded, the venue and choice of law problems that often arise in mass litigation cases must be resolved.[21]

In diversity cases in which state substantive law governs, federal courts normally must apply the law that would be used in the courts of the forum state,[22] including that state's choice of law rule.[23] The applicable law after venue is transferred is normally that which the transferor court would have applied prior to transfer.[24] Transferee courts in multidistrict consolidations for full trial purposes are confronted with the question of whether any uniform substantive law can be applied to all the consolidated cases or whether each claim is governed by inde-

19. 28 U.S.C. § 1407 (1982). See the discussion of the operation of this system in J. UNDERWOOD, *supra* note 8, at 263-70.

20. *See* Cooper, *supra* p. 516; *see also* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581 (1978). *But see* Trangsrud, *Joinder Alternatives in Mass Tort Cases*, 70 CORNELL L. REV. 779, 804 (1985) (arguing that although numerous cases have affirmed the right of the transferee judge to retain cases sent to him under a § 1407 order for plenary trial, such a practice is contrary to the wording and legislative history of § 1407, which permits transfer to achieve coordinated pretrial activity only).

21. *See* Cooper, *supra* pp. 515-18.

22. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

23. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

24. Van Dusen v. Barrack, 376 U.S. 612 (1964).

pendent state law. If the court can apply a uniform rule of law, the court must then resolve whether it is the law of the state having the most significant contacts with acts of a common defendant or a uniform federal standard.[25] If a uniform substan-

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25. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), and Van Dusen v. Barrack, 376 U.S. 612 (1964), have implications concerning the choice of law problems in 28 U.S.C. § 1407 procedure. Even if that provision is interpreted to permit consolidation of numerous multidistrict cases for trial, the law used in each consolidated case would vary according to the law applied in the state courts in each transferor district. The transferee judge, therefore, would be confronted with a confusing welter of law from several states to apply. In Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law*, 54 FORDHAM L. REV. 167 (1985), however, the author suggests that federal common law could be developed to provide a uniform rule that could be applied to all of the consolidated cases if no transferor forum state has an interest paramount to the other forum states and if a textually rooted congressional policy demands that a uniform federal rule be applied. Section 1407 itself, with its call for the just and efficient resolution of multidistrict cases, may be considered evidence of congressional demand for application of a uniform federal rule. We must not lose sight, however, of the fact that § 1407 explicitly provides for consolidation of pretrial proceedings only. Thus, it is slender authority for developing uniform rules for substantive law to be applied in plenary trial proceedings. *See also* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 927-30 (1986) (author proposes that "the primary limit on [judicial] power to make federal common law [should be] that there must be a source of authority for any given federal common law rule," *id.* at 928, such as a constitutional or statutory enactment other than the diversity jurisdiction grant or Rules of Decision Act, *id.*).

Analysis of the choice of law problems involved in consolidated and class actions based on diversity jurisdiction should include consideration of the implications of Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In *Shutts* the Supreme Court held that in a nationwide class action Kansas state courts improperly applied Kansas law to all of the underlying class members' claims. The Court reasoned that due process and full faith and credit principles forbade Kansas to apply its law unless it had substantial state interests, which would be indicated by significant contacts or an aggregate of contacts with the underlying transactions, that made the application of its law reasonable. In the absence of such contacts the application of Kansas law would be arbitrary and capricious. *Id.* at 821-22.

The implications of this holding on the choice of law question for federal court consolidated or class actions based on diversity jurisdiction are unclear. Although the participants in this Symposium debated the impact of *Shutts* on the *Klaxon* rule, *see supra* pp. 554-58, many questions remain: (1) Does *Shutts* limit the ability of the district court to apply a common substantive law rule? (2) Would due process standards preclude a federal court from applying the law of a single state to all claims in a consolidated or class action when some of those claims lack substantial contacts with the state whose law the court seeks to apply? (3) Would the inability to apply a uniform standard to all of the claims in a class action make it difficult, if not impossible, to meet the common questions requirement that lies at the heart of FED. R. CIV. P. 23? (4) Could Congress, under the Commerce Clause power, legislate a choice of law rule that would govern all claims in such a consolidated or class action if interstate transactions were involved? *See* Field, *supra*, at 913-15 (analyzing the choice of law difficulties confronted by the Seventh Circuit in Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S.

tive law is not possible, the resulting babel of state laws applicable to the various claims might wipe out the efficiency and economy normally expected to result from consolidation. The question also arises whether traditional diversity case venue standards[26] should govern cases consolidated for full trial purposes. Narrow interpretation of these standards might make consolidation potentially impossible because of the difficulty of finding any one district in which all plaintiffs reside, all defendants reside, or all the claims arise.

Carried to the most grandiose extreme, the transfer of numerous widespread cases, possessing common questions of fact, into one district for coordinated discovery or plenary trial purposes might involve the joinder of claims initiated in state as well as federal court. Such a procedure, however, raises significant constitutional questions concerning the propriety of such a maneuver under our dual sovereignty system.[27] Concepts of pendent and ancillary jurisdiction permit a substantial claim that independently meets federal jurisdictional requirements to carry into court with it other claims that do not meet such standards by themselves if the supported and supporting claims arise from a common nucleus of operative fact.[28] Despite the advantages from the standpoint of judicial economy and convenience that such consolidation brings, it runs the risk of federal usurpation of state power to adjudicate nonfederal, nondiverse claims. This risk is especially great when pendent or ancillary jurisdiction is used to bring in new parties as well as new claims. The Supreme Court clearly has shown in *Aldinger v. Howard*[29] and *Owen Equipment and Erection Co. v. Kroger*[30] that it is reluctant to approve such support jurisdiction in the face of even a hint of congressional opposition. Thus, any such mass joinder device

978 (1975), and the court's decision to apply the federal law of contribution and indemnity because the federal government was a party and had a predominant and almost exclusive interest in regulating the nation's airways); Comment, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913 (1986) (discussing, among other things, the impact of *Shutts* on class action litigation).

26. *See* 28 U.S.C. § 1391 (1982).

27. *See* Wright, *supra* p. 555 (discussing cases construing whether the Anti-Injunction Act is a bar against a federal court enjoining state court proceedings in the context of mass litigation).

28. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

29. 427 U.S. 1 (1976).

30. 437 U.S. 365 (1978).

would have to be approved by statute rather than a mere rule of court. When these state-federal relations difficulties are added to the loss of individual litigant autonomy that mass joinder devices bring, it is less clear that the judicial economy arguments in favor of such techniques should carry the day. Nevertheless, the increased volume of litigation remains, and the inertial force toward the mass joinder grows inexorable.

In addition to those mass joinder devices, we also have suggestions for expanded use or continued use of the class action procedure. This is a procedure that many plaintiff's attorneys see the necessity of continuing to use because it affords a mechanism for putting under one litigation umbrella a large variety of claimants who have common questions of law or fact that can be litigated more efficiently in unison than in separate litigation. It is almost a foregone conclusion that some degree of increase in class actions may be necessary. At the same time, however, we have to realize the great variety of problems that flow in the wake of the class action. Choice of law problems similar to those in the multidistrict transfer of venue cases may arise. In addition, the certification process in class actions seems to have developed a life of its own. Class certification proceedings have developed into monsters that sometimes take longer than the main case.[31] Courts spend vast amounts of time in determining whether a case is manageable, whether there are common questions of law or fact, whether the class representatives are typical of the class, and how to handle various conflicts of interest within the class.[32] Additionally, we still have an ambivalent feeling toward class actions.[33] On the one hand, we look at them as a mass litigation device for the little man of society who cannot afford to litigate matters individually. On the other hand, critics view class actions as engines of the devil whereby cases seeking huge recoveries are brought against worthy corporations that are unable to pay massive damages. Such critics look at class actions

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31. For a discussion of the requirements for bringing a class action, see R. McCULLOUGH & J. UNDERWOOD, *supra* note 10, at 246-75. For a discussion of certification problems in frequently litigated cases, see Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619 (1986), and Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 487 (1985).

32. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *construed in* 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

33. *See, e.g.*, 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS 2 & n.4 (2d ed. 1985).

as devices for stirring up litigation that otherwise would not be brought. This ambivalent attitude must be resolved if greater use of the class action device is to occur.

We need to reexamine class action procedure to determine the correctness of the balance drawn between the need for an efficient collective litigation device and the due process needs of the individual litigant. The difficulty in balancing the two needs is especially acute in rule 23(b)(3) class actions[34] in which class members are bound together only by a loose alliance based only on common questions of law or fact. Perhaps class representation in such actions is inherently inadequate. Are there means of insuring absent member monitoring of class representative stewardship without losing the benefits of efficiency flowing from combined litigation? Moreover, the notice requirements of rule 23(c)(2),[35] that personal notice be sent to reasonably identifiable class members informing them of the nature of the action, of their right to participate, and of their right to opt out or to remain in the case and be bound by the judgment, should be reexamined. Are these requirements so stringent that they discourage consumer class actions,[36] or are they inadequate as a means of truly informing absent members that significant events affecting their interests are taking place in a sometimes distant courtroom?

An alternative to class actions as a mass joinder device may be the interpleader procedure. Interpleader has not been the most popular mass litigation device because the proliferation of various rules and types of interpleader discourages litigants and attorneys from using this procedure. There is statutory interpleader and rule interpleader; each has entirely different sets of jurisdictional standards, which leads to a great deal of confusion.[37] Until the confusion is alleviated, we probably will not see

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34. FED. R. CIV. P. 23(b)(3).

35. FED. R. CIV. P. 23(c)(2).

36. *See* Eisen v. Carlisle & Jaquelin, 417 U.S. 156 (1974); *see also* Weiner, *The Class Action, the Federal Court and the Upper Class: Is Notice, and Its Consequent Cost, Really Necessary?*, 22 CAL. W.L. REV. 31 (1985). Weiner argues that notice of pendency of the action should be dispensed with even in actions of the rule 23(b)(3) variety. In his view, fairness to absent class members is more dependent on the adequacy of class representation than a notice that often has little impact.

37. *See* 28 U.S.C. § 1335 (1982) (statutory interpleader standards); FED. R. CIV. P. 22 ("rule interpleader" provisions). For a comparison of the two types of interpleader, see State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523, 528 n.3 (1967).

an increase in use of the interpleader device. It does afford some advantages, however, particularly in statutory interpleader, that make it attractive as a mass litigation device: it offers nationwide service of process and an exception to the Anti-Injunction Act,[38] thus permitting the consolidation of cases from state courts as well as federal courts.[39] Those are advantages that should not be dismissed lightly.

Increased use of mass joinder devices deserves the most serious attention. Any thorough cost-benefit analysis, however, must give considerable weight to the impersonal quality that might then pervade our judicial system. Individual litigants, even in cases with opt-out provisions, might feel themselves swept into mass movements over which they have little control. A lawyer's control over his case would be diluted as lead and liaison counsel take over. Litigation might tend to concentrate in major judicial centers less convenient than nearby courthouses.

Multidistrict case transfer, class actions, and interpleader are joinder devices that could be expanded by statute or rule to help alleviate our mass litigation problems. In addition to those techniques, courts by case law could expand key doctrines that have served as barriers to promiscuous litigation. In section 1983 actions, the courts could develop stricter immunities doctrines in damages actions brought against officials. The development of absolute immunity doctrines for judges and those acting in semi-judicial capacities, the tighter use of qualified immunity for executive officials so that they are less likely to be subjected to prolonged litigation, and the encouragement of summary judgments have all pervaded recent Supreme Court decisions in the civil rights area.[40] This expanded availability of immunity de-

38. 28 U.S.C. § 2361 (1982).

39. It should be noted, though, that in State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967), the Court held that the power of a district court to enjoin another proceeding to protect interpleader jurisdiction is limited to instances when such other action threatens the stake that is the object of the interpleader proceeding. *Id.* at 533-37.

40. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985) (strengthening the qualified immunity of most executive officials); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Stump v. Sparkman, 435 U.S. 349 (1978) (affirming the absolute immunity of judges acting within their jurisdiction); Imbler v. Pachtman, 324 U.S. 409 (1976) (discussing broad immunity for prosecutors acting in a quasi-judicial capacity). *But see* Owen v. City of Independence, 445 U.S. 622 (1980) (holding that local government bodies are not entitled to the qualified immunity against suit under 42 U.S.C. § 1983 (1982) that most government officials would have); Monell v. New York City Dep't of Social Servs., 436 U.S. 658

fenses to officials confronted by civil rights claims may reduce the volume of section 1983 actions. I would interject a note of caution, however, and ask whether the evolution of the immunities doctrines has gone rampant to the point where many proper claims are not receiving redress in the only way they can be fully redressed and that is through a court damages action.

We also see the courts getting more strict, belatedly so, but finally getting more strict, in their application of basic constitutional jurisdictional standards such as the article III case or controversy doctrine. After a strong flirtation in the late sixties with a broad concept of taxpayer standing,[41] the Supreme Court in recent times has been rejecting claims of taxpayer standing with a niggling hypertechnical fervor.[42] The Court now insists that the plaintiff seeking taxpayer standing be attacking a congressional enactment rather than executive action and that the statute have a primarily fiscal rather than regulatory impact. The basis of the attack must be a governmental violation of a constitutional provision specifically designed to limit taxing and spending. Thus, the potentially broad concept of taxpayer standing has been narrowed to just a window of opportunity for the litigant. Loose interpretations of the case or controversy doc-

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(1978) (holding that some local subdivisions of states are subject to suit under § 1983 for injuries caused by entity policy). The line of cases affirming or broadening official immunity would tend to discourage suits, but the line increasing the vulnerability of entities to suit would tend to encourage litigation. Perhaps one line cancels out the other as far as impact on the federal court workload is concerned.

41. *See* Flast v. Cohen, 392 U.S. 83 (1968).

42. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); United States v. Richardson, 418 U.S. 166 (1974); *cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1973) (held that allegation of congressional nonobservance of Incompatibility Clause implicated only the generalized interest of all citizens and was not a concrete injury as required by case or controversy doctrine). *But see* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (sufficient actual injury found when environmental organization claimed failure of Interstate Commerce Commission to suspend railroad rate increase would cause economic, recreational, and aesthetic harm to members of organization because rate increase would discourage use of recyclable materials and encourage use of raw materials from environment).

For discussions of the Supreme Court's approach in recent taxpayer standing cases, see Note, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U.L. REV. 717 (1983), and Nichol, *Standing on the Constitution, The Supreme Court and* Valley Forge, 61 N.C.L. REV. 798 (1983). For probing critiques of the general direction of standing, see Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984), and Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37.

trine persist in some emotion-laden areas of law, such as civil rights. In order to avoid dismissal because of mootness, cases normally must be live and viable at each stage court action is requested. In areas in which public pressure for court resolution of visceral issues is great, such as cases litigating the right to an abortion, courts may relax these standards to permit technically moot cases to proceed if they involve fundamental issues that might arise again and might not otherwise receive appellate review.[43] The general drift of recent case law, however, has been toward erecting higher jurisdictional hurdles for suits challenging governmental actions.[44] Litigants are more and more being relegated to political remedies at the ballot box. The question that again presents itself, as it did in the immunities context, is whether in carrying out this generally laudable purpose of reducing the volume of litigation, courts are, through tight interpretations of the case or controversy doctrine, discouraging very useful forms of litigation that hold governmental feet to the fire in a pointed way that cannot be matched simply by voting in an election in which the issues with which you are concerned are buried in a multitude of political controversies.

Are there additional workload control devices that could be considered? For example, a frequent refrain sung by those who want to stem the flow of cases into the federal courts is that the jurisdictional amount requirement should be raised.[45] My impression is that it does not seem to make a great deal of difference what the jurisdictional amount is.[46] Litigators would find some means of pleading to satisfy the higher amount. It might be useful, however, to consider raising the jurisdictional amount for selected categories of cases that might be particularly appro-

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43. *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

44. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (holding that an element of establishing standing in suits against local government entities to stop alleged infringement of constitutional rights is to convincingly plead a substantial causal connection between the plaintiff's injuries and the governmental action). *But cf.* Lay, *Comments on the Volume of Litigation in the Federal Courts*, 8 DEL. J. CORP. LAW 435, 439-40 (1983) (noting that indulgent interpretations of the case or controversy doctrine have increased the federal court workload).

45. 14A WRIGHT, MILLER & COOPER, *supra* note 16, § 3701, at 11.

46. Chief Justice Warren concluded that the 1958 increase in the jurisdictional amount to in excess of $10,000 did little to reduce the flow of cases into federal courts. Address by Chief Justice Earl Warren, Am. Law Inst. Annual Meeting (May 18, 1960), *reprinted in* 25 F.R.D. 213, 213 (1960).

priate for state court adjudication because of a strong state interest in trying such disputes or because of the tendency of litigants to resort promiscuously to federal court as a ploy to persuade the opposition to settle.[47]

The growing volume and complexity of litigation in the federal courts may be attacked not merely by limiting access to the courts or by developing mass joinder devices such as the class action, but also by the more efficient use of judicial personnel. Progress has been made in recent years through the development of a stronger system of federal magistrates whereby courts can turn over more pretrial discovery to judges who may not have the status of judges exercising the complete range of article III judicial power, but who are highly trained, very professional, and very competent.[48] One of the problems this trend generates, however, is that increased reliance upon judges with less than full decisionmaking powers splinters the litigation process. Consequently, the danger exists that nobody truly gets a comprehensive view of the litigation. Additionally, some litigants have raised the question of whether decisions by magistrates, who are not article III judges with lifetime tenure and Presidential appointment and Senate confirmation, provide the kind of justice that the framers of the Constitution had in mind.[49] Can a judge

47. Cases under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982), must involve at least $50,000 in dispute, measured by all the claims in the suit. 15 U.S.C. § 2310. This provides a federal cause of action, but discourages promiscuous resort to federal courts.

48. *See* 28 U.S.C. § 638 (1982). For a discussion of the role of federal magistrates, see J. UNDERWOOD, *supra* note 8, at 271-82.

49. The Ninth Circuit has debated the constitutionality of provisions of the Federal Magistrates Act that permit the magistrate to conduct civil trials upon consent of the parties and that permit direct review of such proceedings by the court of appeals, bypassing the district court, if the parties so stipulate. In Pacemaker Diagnostic Clinic v. Instomedix, Inc., 712 F.2d 1305 (9th Cir. 1983), a panel of the circuit struck the civil trial provision as unconstitutional. The panel pointed out that in contrast to article III judges, magistrates serve eight year terms, must retire at age seventy, have no protected salary, and may be removed for various reasons. An en banc assembly of the Ninth Circuit reversed and upheld consensual referrals to magistrates for civil trial. Pacemaker Diagnostic Clinic v. Instromedix, Inc., 725 F.2d 537, 547 (9th Cir. 1984). The en banc court held that sufficient article III judge control over the proceedings was retained because a district judge was able to cancel a reference to a magistrate upon a showing of good cause. The court observed, however, that careful scrutiny by the district court should be maintained to insure that the party's consent to magisterial trial is truly voluntary. *See* J. UNDERWOOD, *supra* note 8, at 277-78.

Any analysis of the legitimacy of the commitment of extensive judicial power to

who is appointed by other judges, who has less security of salary than an article III judge, and who serves an eight year term, dispense impartial justice? Federal magistrates seem to be conducting the tasks entrusted to them in a fair, forthright manner. In so doing, they relieve the district judges of many of the worrisome details of processing cases, especially in the pretrial phase. This gives the district judge more time to devote to his role as the independent article III adjudicator.

These are some of the workload control devices that can have an impact particularly upon the trial court level. Now, let us look at the appellate courts by first examining the courts of appeals and then the Supreme Court.

III. Problems Confronting the Courts of Appeals

The courts of appeals have not been immune to the growing volume and complexity of litigation confronting the trial courts. Many proposals for more coherently managing increasingly unwieldy appellate dockets have been made.

These proposals include suggestions for dealing with the growing number of conflicting decisions that have arisen among the circuits. Other suggestions seek to solve the alleged inability of judges who lack specialized training to deal with very technical types of litigation, such as some of the more esoteric varieties of tax cases. Dean Griswold has urged the creation of topical courts of appeals.[50] Each would have jurisdiction focusing on a

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judges not possessing article III independence and security must focus on Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In that case the Supreme Court declared unconstitutional portions of the Bankruptcy Reform Act of 1978 that gave broad powers to bankruptcy judges to adjudicate civil proceedings arising out of or related to the bankruptcy. The Court recognized that separation of powers considerations dictate that the legislative and executive branches be permitted to create courts with judges possessing less than full article III security, but only in areas in which the political branches had been given extraordinary substantive power. The Court found that these include areas dealing with federal territories, military courts-martial, and the adjudication of public rights, which the Court left undefined stating only that at a minimum a matter of public right must arise between the government and other parties, as distinguished from controversies that are solely between private parties. *Id.* at 64-70. The Court held, however, that bankruptcy was not an area in which the political branches could claim such extraordinary substantive power. *Id.* at 71-72.

For a general discussion of the aforementioned issues, see C. Wright, *supra* note 5, at 50-51.

50. *See* Griswold, *supra* note 15, at 66.

cluster of technical statutory construction problems. Several such courts are already operating successfully. The Court of Appeals for the Federal Circuit, which focuses upon the problems of patent law, claims against the government, and problems of international trade,[51] and the Court of Military Appeals, which reviews courts-martial,[52] are but two examples. These courts have very successfully developed coherent bodies of law in what might have been areas of conflict amongst various circuits.

Advocates of appellate reform have suggested extending the system of specialized appeals courts to areas such as tax, antitrust, or complex commercial problems.[53] Some have urged the creation of a special panel to deal with appeals of federal law issues involved in criminal convictions in either the state or federal court systems.[54] Others have suggested caution in adopting such solutions. Judge Wilkinson pointed out that judges on specialized courts tend to get a more narrow view divorced from the general stream of development of the law. Another objection voiced by Judge Wilkinson is that a specialized court might be subjected to pressure from political groups that try to capture control of the process of appointing its judges.[55] A complex system in which specialized courts of appeals coexist with general

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51. 28 U.S.C. § 1295 (1982). *See generally* Meador, *American Courts in the Bicentennial Decade and Beyond*, 55 MISS. L.J. 1, 15 (1985); Comment, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301, 305-24 (1984).

52. 10 U.S.C. § 867 (1982). *See generally* Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972) (author discusses the court's treatment of constitutional issues and suggests ways to enhance court's status as civilian overseer of military justice system); Willis, *The United States Court of Military Appeals: Its Origins, Operation and Future*, 55 MIL. L. REV. 39 (1972) (author discusses the creation and growth of the court).

53. *See* Griswold, *supra* note 15, at 66; *see also* Handler, *What to Do with the Supreme Court's Burgeoning Calendars?*, 5 CARDOZO L. REV. 249, 274-75 (1984) (advocating a specialized court for tax appeals, but remaining noncommital for specialized courts in other areas of law).

54. *E.g.*, Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 604 (1973).

55. *See* Wilkinson, *supra* p. 442. Some scholars would point to the old Commerce Court, a specialized tribunal created to review decisions of the Interstate Commerce Commission, as evidence of the vulnerability of courts with jurisdictions focusing largely on cases involving powerful interest groups to pressure from such groups. The court was abolished after a barrage of charges that it was prejudiced in favor of the railroads and against the public. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 153-74 (1928); Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964).

subject matter, regional appellate courts, presents a variety of jurisdictional problems such as whether a case belongs in a specialized or regional court of appeals and, if the case does belong in a specialized court, in which technical court does a case affecting several specialties belong.

My own reaction to this conflict is that a modest increase in the categories of cases handled by specialized courts of appeals would be useful. If we were to develop a large menagerie of limited subject matter courts of appeals dealing with various areas of the law, we would have to develop a whole new jurisprudence of traffic management between these various courts of appeals. A cautious increase in the number of topical courts of appeals and the cases handled by them, however, would be useful, and the tax area would seem to be the area most logical for careful consideration.

The volume of work has forced courts of appeals increasingly to rely upon abbreviated procedures such as deciding cases without the benefit of oral argument and without giving guidance to prospective litigants through complete, written opinions.[56] Scholars and judges have been debating means to halt this drift toward increased use of summary disposition techniques. Earlier in this Symposium, Dean Carrington discussed devices for reinstituting plenary appeals with full opinions, full arguments, and careful consideration by judges who have a chance to read the entire transcript.[57] One suggestion would create a new tier between the district courts and the courts of appeals that would be composed of district judges from the vicinity from which the appeal arose. This court would be able to give plenary consideration to matters on appeal. This proposal generated a good bit of interest and controversy among Symposium participants. The main objections voiced against the proposal are that it would introduce yet another layer into the federal litigation process, further delaying the ultimate resolution of cases, and it would make even more speculative any attempt to

56. *See generally* Address by Myron H. Bright, Am. Bar Ass'n Tax Inst. (Apr. 5, 1974), *reprinted in The Changing Nature of the Federal Appeals Process in the 1970's*, 65 F.R.D. 496, 499-501 (1975) (discussing efforts to streamline internal operating procedures of courts of appeals); Lay, *supra* note 12, at 1064.

57. *See* Carrington, *supra* pp. 431-33. For a compilation of state systems that have used trial judges in appellate capacities, see Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 595 (1969).

predict which cases would be accepted for review.[58] A new set of jurisdictional rules for determining which cases would go to the new panels and which would go to the regular courts of appeals would have to be developed. The multistate perspective that emanates from the courts of appeals as they now exist would be lost. The proposal, however, should not be dismissed out of hand. It has some virtue in categories of cases in which the issues on appeal are dominated to a considerable degree by state law. In this context, it may make sense to have district judges from the local area, who presumably are more familiar with the state law, act as a first tier of appeals.

Dean Carrington invited us to debate whether the system of mandatory review of district court civil cases by the courts of appeals should be abolished.[59] This would mean that a litigant would no longer have an appeal of right, but would have to file something akin to a petition for writ of certiorari with the courts of appeals. Many will criticize such a development as one likely to increase the element of chance in determining which decisions are reviewed. The present system under which courts of appeals sit in three-member panels creates a climate of arbitrariness in which it is hazardous for even the most skilled clairvoyant to predict what judges will sit on a given panel, or, when intracircuit conflict exists, what law the panel will consider binding. If you add to this problem the loss of mandatory review in civil cases, the ability of counsel to advise clients on the likely course of litigation and the ability of courts of appeals to enforce precedent would be further eroded. Despite these concerns, workload pressure may force the abolition of mandatory appeals.

Another factor that should be considered in examining the workload of the courts of appeals is whether courts are interpreting interlocutory appeal statutes too loosely. Generally, trial court determinations must be final and plenary before appeal can take place.[60] Nonfinal decisions can be appealed, however, in cases dealing with a grant or denial of injunctions.[61] Interloculatory appeals may be filed in multiple claims cases when adjudication of one claim is completed prior to the rest of the case,

58. *See* Bator, *supra* p. 451.
59. *See* Carrington, *supra* pp. 429-31.
60. 28 U.S.C. § 1291 (1982).
61. 28 U.S.C. § 1292 (1982 & Supp. III 1985).

and the judge issues a certificate authorizing immediate appeal.[62] The judge may also certify interlocutory appeal of controlling issues of law when a genuine controversy exists if an early determination might speed resolution of the rest of the case.[63] Are those rules being interpreted too loosely, too strictly, or in conformity with the drafters' intent?[64]

IV. Problems Confronting the Supreme Court

The Supreme Court sits at the apex of the federal judicial system. It must not only provide direction in managing the mounting workload of the federal courts as a whole, but the Court also must confront a flood of cases awash against its own doors. Considerable attention has been given to proposals to reduce this workload. One of the suggestions is the abolition of the remaining categories of mandatory appeals, thus leaving the Court's docket entirely discretionary. In his confirmation hearings for Chief Justice, Justice Rehnquist indicated that the members of the Supreme Court supported with near unanimity the abolition of mandatory appeals.[65]

Serious study should be given to the wisdom of the mandatory and direct appeals systems. Currently, the Supreme Court's mandatory jurisdiction covers cases in which the state court of last resort strikes down a federal statute as unconstitutional or upholds a state statute against allegations that it is invalid under federal law,[66] and cases in which the federal courts of appeals strike down state laws as unconstitutional.[67] Direct appeal to the Supreme Court from district court decisions lies

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62. Fed. R. Civ. P. 54(b); *see* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980) (liberally interpreting the rule 54(b) standards for permitting the court in a multiple claims case to certify as final for appeal purposes one or more but fewer than all of the claims if there is no just reason to delay).

63. 28 U.S.C. § 1292(b) (Supp. III 1985). *Compare* Hadjipatiras v. Pacifica, 290 F.2d 697, 702-03 (5th Cir. 1961) *with* Alabama Labor Council v. Alabama, 453 F.2d 922, 924 (5th Cir. 1972) *and* Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970) (discussing strict and liberal approaches to interpreting § 1292(b)).

64. *See* C. Wright, *supra* note 5, at 715.

65. *See Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 272-73 (1986) [hereinafter *Rehnquist Hearings*] (testimony of Justice William Rehnquist).

66. 28 U.S.C. § 1257 (1982).

67. 28 U.S.C. § 1254(2) (1982).

when a three-judge panel renders a decision granting or denying an injunction,[68] or when a district court holds an act of Congress unconstitutional in any action in which the federal government is a party.[69] Mandatory appeals from the courts of appeals force the Supreme Court to consider cases that may not be of sufficient intrinsic importance to justify high court review. Also, the obligatory jurisdiction may result in the Supreme Court's deciding a controversial point of public policy before the Court has had adequate time to consider the consequences of the various options. Direct appeals from the district court to the Supreme Court may speed the resolution of important issues, but they leave the Supreme Court without the benefit of consideration by the courts of appeals. The abolition of direct and mandatory appeals may be a partial solution to the Court's workload problems. We should keep in mind, however, that this approach could create new problems. The Court may spend more and more of its time determining what cases it should take. At some point, this might ultimately end up creating more of a workload problem rather than reducing it.[70]

Abolition of the remnants of mandatory appeals will not by itself reduce the Supreme Court's workload to manageable proportions. Many have proposed more fundamental structural alterations. Prominent among these suggestions are proposals to increase the nationwide appellate capacity by establishing an intermediate appellate tribunal between the regional circuit courts of appeals and the Supreme Court. A committee established by the Federal Judicial Center, chaired by Professor Paul Freund of Harvard, offered the ice-breaking proposal in this debate. This blue ribbon panel suggested that a National Court of Appeals be created to perform two basic functions: to serve as a screening device to select the cases most worthy of Supreme Court consideration and to decide cases involving intercircuit conflict, especially in the interpretation of federal statutory law.[71] The first

68. 28 U.S.C. § 1253 (1982). For example, when a three-judge panel is convened to hear a challenge to an apportionment scheme for congressional or statewide legislative districts, 28 U.S.C. § 2284(a) (1982 & Supp. III 1985), direct appeal to the Supreme Court is permitted from orders granting or denying injunctive relief.

69. 28 U.S.C. § 1252 (1982).

70. *See* Freund, *Rx for an Overburdened Supreme Court*, 66 JUDICATURE 394, 398 (1983).

71. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57

role suggested for the intermediate tribunal has proven to be the most controversial. The Freund Committee recommended that all cases in the Supreme Court's jurisdiction be filed initially with the National Court of Appeals. That body then would have had the power to deny review entirely, to transmit the case to the Supreme Court for consideration, or to retain the case for its own decision in order to resolve intercircuit conflicts that are significant, but not worthy of Supreme Court review. All denials of review would have been final. The Supreme Court would have considered only the cases transmitted to it by the National Court of Appeals and would grant certiorari to those cases it wished to hear. The National Court of Appeals would have been staffed by judges already sitting on federal appellate courts who would have been drawn from the regional circuit bodies by an automatic rotation system.

Critics claimed the grant of the screening function to the National Court of Appeals was surgery far too radical for the malady it was designed to cure. Justice Brennan argued that this function touched the very core of the Supreme Court's ability to monitor the direction of federal law and insure that civil rights were protected.[72] He vigorously insisted that this was a function that should not be delegated because article III provides for *one* Supreme Court. The delegation of the power to screen cases to a court that could deny Supreme Court review without recourse could be interpreted as creating a dual high court system.

A few years later another distinguished panel composed of members appointed by the Senate, the House of Representatives, the Chief Justice, and the President also recommended the creation of a National Court of Appeals. This commission, chaired by Senator Roman Hruska, called for an intermediate court of more modest jurisdiction: it would not have performed the screening function.[73] Cases proceeding beyond the regional court of appeals and state supreme court levels would have been filed initially with the Supreme Court. The Court would have

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F.R.D. 573, 590 (1972).

72. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 480 (1973); *see also* Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983).

73. *See* COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 238-39 (1975).

had the option of retaining the case for decision on the merits, of denying all review, of denying certiorari and referring the case to the National Court of Appeals for decision on the merits, or of giving the National Court of Appeals the choice of retaining the case for decision or denying review.[74] Judges were to be selected in the traditional way: appointment by the President with the advice and consent of the Senate. The system of selecting judges as envisioned by the Freund Report, from the regional courts of appeals by an automatic rotation method, was constitutionally suspect because these judges would have been occupying a new office for which they had not been selected by the President with the advice and consent of the Senate.

Recently Chief Justice Burger proposed that an intercircuit panel be created as a new tier between the regional courts of appeals and the Supreme Court.[75] It would be created for a temporary experimentation period of five years. The panel's function would be to resolve cases referred to it by the Supreme Court. These cases primarily would involve conflicts among the circuits in the interpretation of federal law, particularly statutory law. It would be staffed by judges drawn from the regional courts of appeals who would be selected by the Chief Justice or by the Supreme Court. Such a selection method would remove a political obstacle to the creation of the new court that would exist if an arguably partisan political figure, the President, had power to appoint all of the members of the new court at one time. A political party would be reluctant to concede such power to the leader of the opposition camp.

Appointment by the Chief Justice or Supreme Court would appear to be less partisan. Such a selection method, however, might clash with the Appointments Clause requirement that judges be appointed by the President with the advice and consent of the Senate. The Chief Justice does already select judges

74. *Id.* at 239. In addition to having jurisdiction over cases referred to it by the Supreme Court, the National Court of Appeals proposed by the Hruska Commission would have had jurisdiction over cases transferred to it by circuit courts of appeals in which a circuit court decided that a prompt definitive determination was needed by a court of nationally binding stature, or that a need for resolution of an intercircuit conflict existed. *Id.* at 241-42.

75. Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Feb. 13, 1985), *reprinted in The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J. 86 (1985).

for courts, such as the Panel on Multidistrict Litigation,[76] from among sitting judges. These positions, however, are logical extensions of the judges' main jobs. Service on the intercircuit panel would be a major new office, even though a temporary one. Appointment by the Chief Justice or the Supreme Court would concentrate too much power in one person or one small group. Chief Justice Rehnquist opposes selection by the Supreme Court or Chief Justice.[77] He also opposes allowing each circuit court to elect a representative to sit on the intercircuit panel. He argued that the court would end up "like the United Nations [with judges] primarily loyal to where they came from rather than to where they are coming to."[78] He contended that the judges should be appointed by the President with the advice and consent of the Senate.[79] This route is politically hazardous, but it is the safest constitutionally. The basic thrust of Chief Justice Burger's proposals is sound. An intercircuit panel that does not perform the screening function but focuses on resolving conflicts in statutory construction should be established on a temporary experimental basis.

Fundamental structural changes are not the only means to address the Supreme Court's workload problems. Together with the proposals for the development of a national court of appeals and proposals for the abolition of the Supreme Court's mandatory appellate docket, increased attention is being devoted to whether some of the internal rules of the Supreme Court should be altered. Should the Rule of Four be changed so that certiorari would be granted only if five Justices vote affirmatively?[80] This might reduce the ultimate number of cases that the Court has to address for final decision, but it could actually increase the contention and debate with regard to what cases should receive a grant of certiorari. One wonders whether that is

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76. 28 U.S.C. § 1407(d) (1982).

77. *See Rehnquist Hearings*, *supra* note 65, at 174, 273, 368-69. Dix, in his account of the demise of the Commerce Court, notes that selection of the court's judges by the Chief Justice from among members of the federal judiciary contributed to the public perception of the court as an administrative body, rather than an entity deserving the respect accorded the federal judiciary. *See* Dix, *supra* note 55, at 255.

78. *Rehnquist Hearings*, *supra* note 65, at 273.

79. *Id.*

80. *See* Handler, *supra* note 53, at 269. Handler notes that Justice Stevens, in a 1982 speech, advocated that the Rule of Four be changed to a Rule of Five. *Id.*

in fact a solution or the creation of a new problem.

In addition to the above suggestions designed to deal directly with the workload of the federal courts, alterations have occurred in the relationship between the federal and state court systems, which, although not intended primarily to be workload control devices, could have a significant impact on the volume of federal litigation. Cases that at one time composed staples of federal jurisdiction have lately been diverted to state courts. We now have fairly clear holdings that section 1983 actions can be brought in state courts as well as in federal tribunals,[81] and the Supreme Court has encouraged litigants, through its development of new claim preclusion principles, to bring federal civil rights claims in a state forum when state claims involving the same injury or series of events are brought in state courts.[82] Also, the Court recently has reduced the scope of habeas corpus review by federal courts of state court criminal case decisions. In *Stone v. Powell*[83] the Court decided that when a state forum has provided an opportunity for a full and fair hearing of defense arguments that fourth amendment search and seizure standards have been violated, those contentions normally are not subject to habeas corpus review.

In closing, let me note that the keystone of the handling of the workload and the keystone of the preservation of the role of the federal courts in the judicial review system is a responsible independent judiciary with adequate salary, tenure during good

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81. Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980).

82. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984).

83. 428 U.S. 465 (1976). *But see* Kimmelman v. Morrison, 106 S. Ct. 2574 (1986) (claims of sixth amendment right to effective counsel are subject to habeas corpus review). The Supreme Court reached this result despite the fact that the defendant's allegations of ineffective counsel largely were based on failure to make a motion to suppress evidence supposedly seized in violation of fourth amendment standards. The Court was influenced by the fact that often the first practical opportunity to raise ineffectiveness of counsel arguments is in habeas proceedings. Unlike the exclusionary rule involved in *Stone*, which the Court dismissed as largely a judge-made construct, the right to counsel is based directly on the Constitution and more often may deserve a federal habeas airing.

The general trend, however, seems to be to discourage federal habeas review. For example, in Wainwright v. Sykes, 433 U.S. 72 (1977), the Court showed itself more willing to let violations of state procedural rules, such as a failure without good cause to make contemporaneous objection to a confession, serve as separate and independent state law bases for decisions against criminal defendants, thus blocking federal habeas review because no federal legal issues were implicated in the state court decision.

behavior, and a posture of independence and impartiality. Is there an Achilles' heel that makes the Supreme Court vulnerable to jurisdictional raids that threaten the Court's role as impartial arbiter of the constitutional system? In article III, section 2 the Constitution permits Congress to make exceptions to the appellate jurisdiction of the Supreme Court.[84] Some would construe this to mean that major deletions from the appellate jurisdiction of the Supreme Court, deletions perhaps even of entire categories of cases, would be proper. If Congress begins to take broad sweeping categories of cases, such as school prayer, busing, and abortion, out of the hands of the Supreme Court, it begins to tamper with judicial independence.[85] We need not only to insure the competence of the federal court system to manage its increasing workload, but also to insure that the courts can discharge their work in a way that maintains the aura of independence and impartiality that we have come to rely on as a key trait of the federal court system.

The Reconstruction Era case, *Ex parte McCardle*,[86] permitted a newly passed statute to frustrate Supreme Court review of a federal circuit court decision rendered pursuant to a habeas corpus petition challenging incarceration of a civilian by a military tribunal. The Supreme Court acknowledged the power of Congress to create exceptions to the appellate jurisdiction it otherwise would have over cases arising under the Constitution, laws, and treaties of the United States.[87] Those wishing to stymie Supreme Court consideration of sensitive controversial civil rights decisions may seize upon this part of the decision. Heed should be given, however, to the closing words of the decision. The Court indicated that Congress was merely taking back the expanded, streamlined, habeas corpus appeal jurisdiction it had granted to the Supreme Court in a recent statute and was not abolishing preexisting channels for reviewing such issues.[88] This conclusion was affirmed shortly thereafter in *Ex parte Yer-*

84. *See* U.S. CONST. art. III, § 2.

85. For examples of recent unsuccessful efforts to enact congressional controls over jurisdiction of federal courts, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 38 (3d ed. 1986), and 13 WRIGHT, MILLER & COOPER, *supra* note 16, § 3525, at 224-25.

86. 74 U.S. (7 Wall.) 506 (1868).

87. *Id.* at 512-15.

88. *Id.* at 515.

ger.[89] Perhaps those cases can be interpreted to mean that Congress can alter the modes of appeal, but cannot totally block review of key constitutional cases by the Supreme Court.

Professor Goebel, a leading scholar of the formative era of the federal constitution, has suggested that article III, section 2 never was intended to give Congress the power to delete significant categories of constitutional issues from the appellate jurisdiction of the Supreme Court, but only to grant Congress power to superintend federal appeals in a manner similar to that exercised by state legislatures in the late eighteenth century in regulating state court appellate proceedings.[90] Such state court powers were, in his view, largely limited to regulating housekeeping details and setting the technical mode of appeal, and did not encompass a power to block consideration of fundamental substantive issues.[91]

The congressional maneuver in *Ex parte McCardle* was designed to and succeeded in controlling the outcome of a particular case already in the jurisdictional bosom of the Supreme Court. In *United States v. Klein*,[92] a case decided only two years after *McCardle*, the Supreme Court had second thoughts about the breadth of its concession of power to Congress. The Court held that Congress could not, under the guise of passing legislation controlling jurisdiction, enact rules dictating precisely the weighing and balancing process a court goes through in reaching a decision if this results in Congress predetermining the outcome of a case or a category of cases. The *Klein* decision is more in keeping with the narrow view of Congress' article III, section 2 powers later espoused by Goebel. Tenure during good behavior, security of salary, and other safeguards of judicial independence would be meaningless, hollow gestures if the jurisdiction of the Supreme Court could be manipulated by the temporarily powerful to banish unpopular decisions.

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89. 75 U.S. (8 Wall.) 85 (1869).

90. 1 J. GOEBEL, *Antecedents and Beginnings to 1801*, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 240 (1971); *see also* Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962).

91. 1 J. GOEBEL, *supra* note 90, at 240.

92. 80 U.S. (13 Wall.) 128 (1871). For a general discussion of *Klein*, see Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189.

Shortly after his retirement from the bench, Justice Owen Roberts strongly urged that the portion of article III, section 2 that seemed to permit Congress to remove categories of cases from the appellate jurisdiction of the Supreme Court be excised by constitutional amendment to plug what he considered a large hole in the dike of Supreme Court independence.[93] Such an amendment would be a logical extension of the impartial judicial review role the Supreme Court is expected to exercise over the constitutionality of acts of the other branches of state, local, and national governments, including Congress. The other side of the argument, however, is that the potential for deletion by Congress of topics from the appellate jurisdiction of the Supreme Court is, even if seldom exercised, a significant safeguard against judicial usurpation of popular branch power. It is thus consistent with the doctrine that each branch should check and balance the powers of the others. Perhaps a middle ground might be appropriate, one that permits Congress to exempt categories of cases from the Supreme Court's appellate jurisdiction, but limits the exercise of the power to occasions in which the need for such exemption is considered extraordinary, a broad consensus is formed behind such deletion, and safeguards are included against the precipitous passage of deletions designed to influence particular case outcomes. This could be accomplished by an amendment that allows Congress to exempt cases from the appellate jurisdiction of the Supreme Court only by a supermajority of three-fourths of the entire membership of each chamber passed by two votes in two separate sessions with a general election occurring between the two ballots, and the effective date of the deletion to be delayed so as to not govern any case then awaiting adjudication by the Court.

Such issues of judicial independence are entitled to as much thought and debate as our current preoccupation with workload management tools. The growing volume and complexity of the cases pouring into the federal trial courts, appellate courts, and the Supreme Court pose significant problems. However, the recurring dilemma facing a democracy with a court system exercising a judicial review function in a tripartite system of government is determining the proper balance between judicial

93. *See* Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1 (1949).

responsiveness to the popular will and independence from it. The characteristics of the cases confronting the federal courts in the next one hundred years will change as society and the economy change, but the propriety of this balance will remain a source of constant debate and challenge.

APPENDIX

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* This compilation of resources is intended to provide assistance for those who wish to delve further into the subject matter of this Symposium. The divisions in this bibliography are by subject matter and are are intended to reflect those issues that were discussed during the one and one-half day Symposium. Even in those areas, however, the sources listed are by no means exhaustive.—Eds.

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