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## Realigning the Federal Court Caseload

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# REALIGNING THE FEDERAL COURT CASELOAD

## I. INTRODUCTION

In recent years there has been a growing awareness that the federal judiciary is facing a crisis because of the increasing number of cases it must handle. This increase in the number of cases filed in federal court is the result of several factors: federal legislation that has created new substantive rights,<sup>1</sup> ambiguous legislation that requires judicial interpretation,<sup>2</sup> and increased litigiousness of the public.<sup>3</sup> The civil case backlog problem is further exacerbated by the priority given to criminal cases by the Speedy Trial Act.<sup>4</sup>

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1. The control of the federal government is expanding into new areas previously left unregulated or regulated solely by the states. Concomitant with this expansion, Congress has passed new legislation that enlarges the federal courts' federal question jurisdiction, thus increasing the number of cases that may be brought in federal court. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976); Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-900 (1976); Freedom of Information Act, 5 U.S.C. § 552 (1976). For a more detailed discussion of how this legislation has effected expanded federal jurisdiction, see Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17 (1978); Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245 (1977) [hereinafter cited as Lasker]; Wallace, *Our Judicial System Needs Help: A Few Inside Thoughts*, 12 U.S.F.L. REV. 3, 9 (1977).

Chief Justice Warren Burger has proposed that a judicial impact statement accompany every piece of legislation that tends to create new cases for the federal courts. Each statement would include an estimate of the number of additional judges and court personnel required by the legislation. Burger, *The State of the Federal Judiciary 1972*, 58 A.B.A.J. 1049, 1050 (1972). Recently \$302,000 has been appropriated to Mathtech, of Bethesda, Maryland, to develop means to determine how legislation impacts on the judiciary. L.A. Daily J., Oct. 17, 1978, at 1, col. 2.

2. Ambiguous federal legislation requiring court interpretation has also contributed to the problem of case overload in the federal courts. There are several reasons why ambiguous legislation is passed: (1) to satisfy competing special interests; (2) to maintain flexibility on specific issues within regulatory agencies; and (3) to pass responsibility for absolute decisions to the judiciary, who are not elected and have no constituency to whom they must respond. *See* Tyler, *Congressional and Executive Expansion of Federal Jurisdiction*, 71 F.R.D. 229 (1976).

3. Increased litigation has resulted from a number of socioeconomic changes that have occurred over the past several decades. With an increase in technology, the wealth of the nation has increased, communication within the country has greatly improved, and the sense of neighborhood community has broken down. These in turn have led to a growing ability of individuals and businesses to afford access to the courts, to rising expectations of the poorer, more disadvantaged sectors of society, and to an increased propensity to use more formal means of revolving disputes. Lasker, *supra* note 1.

4. The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976), by requiring trial within 120 days of arrest or indictment, has given priority to criminal cases, thereby drastically increasing the backlog of civil cases. Lasker, *supra* note 1, at 249; 124 CONG. REC. H726 (daily ed. Feb. 7, 1978) (remarks of Adrian Spears, Chief Judge 5th Cir.). The number of

The scope of the problem is evidenced by caseload statistics.<sup>5</sup> As a result of increased filings, the per-judgeship caseload for the district courts averaged 432 cases in 1977, compared with 317 in 1970, an increase of 36.3%.<sup>6</sup> As a natural consequence of the increased number of filings in the district courts, the number of appeals to the circuit courts has also increased.<sup>7</sup> The Ninth Circuit alone has a backlog of 4000 appeals, with 800 fully briefed cases waiting to be calendared.<sup>8</sup>

The burden on the courts gets worse each year, and in the absence of any positive steps to reduce the number of cases each judge must manage, the ability of the federal judiciary to perform its function adequately will be seriously threatened.

The growing awareness of rapidly increasing caseloads in the federal court system has resulted in a number of proposals for reform. Most of the means suggested to deal with the overload problem are aimed at decreasing the district court caseload. Because the number of cases appealed to the circuit courts is proportional to the number of cases originally filed in district courts, any proposal that decreases the number of cases heard in the district courts will also result in a decrease in the number of cases appealed.

This comment examines legislative and judicial remedies that deal with the federal caseload problem. First, it examines a set of legislative proposals aimed primarily at increasing the capacity and efficiency of the federal courts. Second, it analyzes a set of judicial decisions that have addressed the problem by imposing requirements that increase efficiency yet decrease the access to federal courts. Finally, it examines an additional set of judicial decisions aimed entirely at restricting access to the federal courts. It also looks at the legislative action intended to counter these restrictions.

## II. LEGISLATIVE PROPOSALS

As a response to concern about the overload of the federal courts,

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pending civil cases has increased 63.3% from 1970 to 1977 as a result of the Act. 124 CONG. REC. E3792 (daily ed. July 14, 1978) (remarks of Daniel Meador, former U.S. Asst. Atty. Gen.).

5. In 1977, 172,031 cases were filed in federal court, an increase of 35.2% over the number of cases filed in 1970. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 113, 115 (1977) [hereinafter cited as ANNUAL REPORT].

6. *Id.* at 112. During 1977, the United States District Courts had 398 authorized judgeships. *Id.*

7. *Id.* at 166.

8. These figures were reported by Chief Judge James R. Browning in a report to the Federal Bar Association on the state of the Ninth Circuit. L.A. Daily J., Sept. 26, 1978, at 1, col. 6.

Congress has introduced legislation that attacks the problem in several broad areas: by excising large numbers of cases through elimination or severe curtailment of diversity jurisdiction, by increasing the number of judges eligible to decide cases, by developing alternative means of dispute resolution, and by developing a means of resolving conflicting inter-circuit opinions.

### A. Diversity

Diversity cases represent a large proportion of the federal court caseload.<sup>9</sup> Therefore, eliminating or restricting diversity of citizenship as a basis of federal jurisdiction presents an attractively simple means of reducing the federal caseload burden.

Federal diversity jurisdiction is authorized in article III, section 2 of the United States Constitution, which provides for federal jurisdiction based on "Controversies . . . between Citizens of different States . . . and between a State, or Citizens thereof, and foreign States, Citizens or Subjects."<sup>10</sup> It was first enacted in the Federal Judiciary Act of 1789 and has been retained as a basis of federal jurisdiction ever since.<sup>11</sup>

The specific reasons for the inclusion of diversity jurisdiction in the Constitution are not known.<sup>12</sup> Scholars, however, generally cite Chief Justice John Marshall's suggestion that the underlying rationale for diversity jurisdiction was to provide a forum for out-of-state litigants in which they would be protected from the possible prejudice of state courts.<sup>13</sup> This has been the traditional explanation for the inclusion of

9. During the judicial year ending June 30, 1977, 130,567 civil cases were commenced. Of these, 31,678 cases, or 24.3%, were brought under diversity jurisdiction. ANNUAL REPORT, *supra* note 5, at 317.

10. U.S. CONST. art. III, § 2, cl. 7.

11. Diversity jurisdiction is currently codified as 28 U.S.C. § 1332 (1976). Section 1332(a) states:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

12. For instance, in *THE FEDERALIST*, Hamilton said only that cases based on diversity of citizenship are one of the kinds of cases over which the federal judiciary should have authority. *THE FEDERALIST* No. 80 (A. Hamilton).

13. In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Marshall said:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that

diversity jurisdiction in the Constitution.<sup>14</sup>

Valid arguments have been expressed on both sides of the question of whether diversity jurisdiction should be eliminated. Discussion has focused on whether bias against out-of-state litigants exists today in state courts<sup>15</sup> and whether it is still possible to afford litigants in a di-

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the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

14. See, e.g., Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 329 (1977) [hereinafter cited as Shapiro]. But see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928), which suggests that there is little actual historical support for this rationale.

15. The question of the existence of bias against out-of-state litigants in state courts arises in two contexts: bias resulting from choice of law provisions and bias resulting from local prejudice as manifested by juries and judges. Proponents of elimination of diversity jurisdiction argue that the danger of prejudice resulting from choice of law provisions no longer exists. See, e.g., Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 U.M.K.C. L. REV. 347, 350 (1978) [hereinafter cited as Hunter]. Since 1938, the Supreme Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), has required federal courts to apply state substantive law in diversity cases. Proponents of elimination of diversity jurisdiction assert that as a result of *Erie*, an out-of-state litigant is not prejudiced by the substantive law applied in state courts, since the law applied is the same law that would be applied if the case were brought in federal court. See Hunter, *supra*, at 350; 124 CONG. REC. H1554 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier).

Opponents of elimination of diversity jurisdiction do not address this argument, for they admit that, even before *Erie* required the application of state substantive law in diversity cases, state law was a "major source of the rules of decision" on which federal decisions were based. See Shapiro, *supra* note 14, at 317. Instead, they focus on the issue of local bias, which may be present in state court juries and judges. Shapiro points out that, although they are now drawn from the same registers as federal juries, state court juries, because they may be drawn from a smaller geographical area, are likely to be comprised of more provincial local residents. *Id.* at 330. See also Begam, *Should We Remove Diversity Cases from the Federal Courts?*, 61 JUDICATURE 302 (1978) [hereinafter cited as Begam]. However, advocates of elimination of diversity jurisdiction assert that local bias does not exist today because increased travel and relocation of residences is resulting in a more homogeneous society. See Hunter, *supra*, at 349; 124 CONG. REC. H1554 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier); 124 CONG. REC. H1556 (daily ed. Feb. 28, 1978) (remarks of Rep. Bennett).

Opponents of elimination of diversity jurisdiction assert that local bias may also affect the rulings of state court judges. Shapiro, *supra* note 14, at 330. They concede that the extent of this bias cannot be measured, since actions of state court judges as well as federal court judges often occur in private; bias may be manifested only in settlements and nonreviewable discretionary decisions. *Id.* Proponents of elimination of diversity jurisdiction counter this with the argument that, if bias exists, it is equally present among state and federal court judges. Hunter, a federal district judge, explains:

If a personal testimonial is permitted, it seems strange to me as one who has been a state court judge for 13 1/2 years and one has sat on all the courts of record of his state—trial, appellate and supreme court—that I then may have been susceptible of such prejudice but have been purged of it for the twelve years I have been a federal judge. Hunter, *supra*, at 349 n.21.

versity case a choice of federal or state forum.

Those who favor retention of diversity jurisdiction argue that because a choice of forum in diversity cases was constitutionally authorized and has been a part of our judicial system since 1789, it should not be abolished summarily.<sup>16</sup> Proponents of elimination of diversity jurisdiction address this issue by refusing to recognize that choice of forum is a citizen's right.<sup>17</sup> Instead, their approach is to characterize the federal judiciary as a "precious commodity," a "scarce resource."<sup>18</sup> They advocate rationing this resource by allocating federal judicial time and energy on a priority basis. According to their proposal, the federal judiciary would hear cases that only it is authorized to hear or that it is especially well-qualified to decide, that is, cases involving constitutional issues and cases requiring decisions on questions of federal law.<sup>19</sup> In diversity cases in which there is no overriding federal interest, litigants would be limited to "one trial court to a customer" and would be forced to litigate their claims only in state courts.<sup>20</sup>

Examples of plans for reallocation and realignment of federal judicial resources are the two proposals introduced by advocates of elimination of diversity jurisdiction in the ninety-fifth Congress. The first bill<sup>21</sup> sought to achieve reallocation and realignment of federal judicial

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16. 124 CONG. REC. H1561 (daily ed. Feb. 28, 1978) (remarks of Rep. Holtzman). More practical reasons have also been offered for maintaining choice of forum: (1) a belief by some that federal courts dispense a more professional quality of justice than state courts, Shapiro, *supra* note 14, at 328-29; 124 CONG. REC. H1558 (daily ed. Feb. 28, 1978) (remarks of Rep. Wiggins); (2) a belief that diversity jurisdiction promotes a cross-pollination of ideas between state and federal courts and that its abolition would result in a specialty bar, Begam, *supra* note 15, at 303; Shapiro, *supra* note 14, at 324-26; and (3) a belief that a case brought in federal court will result in a higher monetary recovery. 124 CONG. REC. H1560 (daily ed. Feb. 28, 1978) (remarks of Rep. Sawyer).

17. Representative Kastenmeier, sponsor of the bill to eliminate diversity jurisdiction, characterized choice of forum as "a luxury that our judicial system can no longer afford." 124 CONG. REC. H1555-56 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier). That choice of forum is a "luxury" was echoed by Representative Railsback, 124 CONG. REC. H1556 (daily ed. Feb. 28, 1978) (remarks of Rep. Railsback).

18. 123 CONG. REC. H9509 (daily ed. Sept. 15, 1977) (remarks of Rep. Kastenmeier).

19. 124 CONG. REC. H1554-55 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier); 124 CONG. REC. H1553 (daily ed. Feb. 28, 1978) (remarks of Rep. Rodino). See statement of former U.S. Asst. Atty. Gen. Daniel Meador, 124 CONG. REC. E3792-93 (daily ed. July 14, 1978) (remarks of Rep. Kastenmeier).

20. This statement was made by former Ninth Circuit Judge Shirley Hufstедler, 123 CONG. REC. H9510 (daily ed. Sept. 15, 1977) (remarks of Rep. Kastenmeier).

21. H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. H1553 (daily ed. Feb. 28, 1978) (as amended). H.R. 9622 was reintroduced in the 96th Cong., 1st Sess., as H.R. 2202, 125 CONG. REC. H692 (daily ed. Feb. 15, 1979). A similar bill was introduced in the Senate as S. 679, 96th Cong., 1st Sess., 125 CONG. REC. S2875 (daily ed. Mar. 15, 1979).

resources by eliminating all diversity jurisdiction in federal courts,<sup>22</sup> while extending federal court jurisdiction to all federal question cases, regardless of the amount of money involved. Federal court judges thus would be relieved of the caseload burden from diversity jurisdiction, but would assume concurrent jurisdiction of federal question cases with state courts. Although this bill passed the House of Representatives, it failed to get out of committee in the Senate.

The second bill<sup>23</sup> proposed elimination of diversity jurisdiction only in cases brought in federal court in the state of which the plaintiff is a citizen. This bill would have significantly reduced the federal court caseload.<sup>24</sup> While acknowledging the traditional fear of prejudice against out-of-state litigants in state courts, it would have preserved protections against possible bias, because a resident plaintiff in a diversity case has no claim of fear of local bias in his own state.

The question of whether federal diversity jurisdiction should be abolished is a troublesome one. Elimination of any part of our federal judicial tradition should be approached with caution. At the same time, the federal judiciary is overburdened and fundamental ways of reducing the judicial caseload must be found. Some of the alternative solutions are even less satisfactory than abolishing diversity jurisdiction: for example, judicial decisions that, in cases involving federal questions and constitutional issues, restrict federal court access and that in other cases bar access to the courts by means of the judicial doctrines of standing and abstention. These solutions are contrary to the underlying premise of our judicial system that the federal courts are available to decide important questions of federal law.<sup>25</sup> The second proposal, which would have eliminated diversity jurisdiction when the case is brought by a resident plaintiff, would have best balanced the need to relieve the federal caseload burden against the need to provide a forum in which litigants can have their cases fairly heard. This proposal would have retained the historical rationale of protecting against bias toward out-of-state litigants while effecting significant reduction in the federal caseload.

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22. Alienage jurisdiction and statutory interpleader would have been retained, but the required amount in controversy would have been increased from \$10,000 to \$25,000. 124 CONG. REC. H1553 (daily ed. Feb. 28, 1978) (as amended). Statutory impleader jurisdiction would have been unchanged. *Id.*

23. S. 2094, 95th Cong., 1st Sess. (1977); H.R. 9123, 95th Cong., 1st Sess. (1977).

24. This is so because most diversity cases are filed by in-state plaintiffs. 124 CONG. REC. H1556 (daily ed. Feb. 28, 1978) (remarks of Rep. Railsback).

25. C. WRIGHT, LAW OF FEDERAL COURTS 3 (3d ed. 1976).

### B. Omnibus Judgeship Bill

On October 20, 1978, President Carter signed the Omnibus Judgeship Bill,<sup>26</sup> which created an additional 117 district and 35 circuit court judgeships.<sup>27</sup> This measure has been recognized as an important means of alleviating the federal court overload by reducing the number of cases that each judge hears.<sup>28</sup> The problem of overcrowded dockets, however, is caused by the increasing number of cases filed, as well as by the per judge caseload. Therefore, since the number of judges cannot be increased indefinitely without creating an unmanageably large judiciary, more fundamental changes in the federal judiciary system are needed in order to effect a lasting solution.

### C. Magistrates

Magistrate positions were originally created in 1968<sup>29</sup> as a reform of the United States Commissioner system. Magistrates relieve district court judges of some of their workload by assuming jurisdiction of preliminary trial proceedings and minor offenses.<sup>30</sup>

Although it does not address the more fundamental problem of providing a lasting solution to overcrowding, one way to increase the number of judges available to decide cases is to expand the jurisdiction and power of the magistrates.

The Federal Magistrates Act of 1968 gave magistrates the same power that commissioners had to hear minor offenses and preside over preliminary trial proceedings. In addition, district judges could, at their discretion, empower magistrates to assume a variety of additional duties.<sup>31</sup> Some duties include writing reports and recommendations of disposition of prisoner petitions, conducting civil pretrial conferences,

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26. Pub. L. No. 95-486, 92 Stat. 1629 (1978). This law provides for the judges to be selected on the basis of merit.

27. The Ninth Circuit has been apportioned ten new circuit judges and California has been apportioned seven additional district judges.

28. Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 5 (1978) [hereinafter cited as Bell].

29. The Federal Magistrates Act, 28 U.S.C. §§ 631-637 (1976), was passed in 1968 and became effective in 1971.

30. Puro, *United States Magistrates: A New Federal Judicial Officer*, 2 JUST. SYS. J. 141, 143 (1976) [hereinafter cited as Puro]. The functions that magistrates perform vary widely among the district courts. Generally, their duties have been restricted to preliminary trial proceedings, such as issuing search or arrest warrants, conducting bail hearings, and holding preliminary examinations. *Id.* at 143-44.

31. *Id.* Magistrates may be empowered to try persons accused of minor offenses, involving a penalty of less than \$1,000, imprisonment for less than a year, or both, if the defendant consents to trial by the magistrate and waives trial by jury. *Id.*



reviewing motions in civil cases, and post-indictment assignments in criminal cases.<sup>32</sup>

In the years following the statute's enactment, problems developed that led to an inconsistency among the district courts as to the degree of authority that magistrates should be given. The problems centered on whether a magistrate constitutionally could be given authority to dispose of civil matters.<sup>33</sup>

As a result of the uncertainty regarding the magistrates' constitutional authority, it became clear that congressional action was necessary to define more clearly the duties a magistrate could perform.<sup>34</sup> The Magistrate Act of 1979<sup>35</sup> expands the power of the magistrates by allowing them to decide more kinds of criminal and civil cases.<sup>36</sup> Expansion of magistrate jurisdiction enables them to be utilized more effectively by the district courts by allowing them to take over more of the district judge workload.<sup>37</sup>

#### D. Bankruptcy Act

The Bankruptcy Reform Act of 1978<sup>38</sup> was enacted by Congress and signed by President Carter on November 6, 1978. The Act will reduce

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32. ANNUAL REPORT, *supra* note 5, at 137-38.

33. Puro, *supra* note 30, at 151. The inconsistency arose because some of the circuits (Sixth and Seventh Circuits) had restricted magistrates' powers to those duties specifically enumerated in the Act that were seen as facilitating an independent decision of the district court judge. Other circuits (primarily the Second, Fifth, and Ninth Circuits) had held that the magistrates' authority was limited only to the extent that their decisions were inconsistent with the constitution. *Id.* at 151, 154.

34. *Id.* at 156.

35. Pub. L. No. 96-82, 93 Stat. 643 (1979).

36. The new act upgrades the quality of the magistrates by requiring all magistrates to have practiced law at least five years and by requiring all full-time magistrates to be certified as qualified by the judicial council of the circuit, the standards for qualification to be promulgated by the judicial conference. Where designated by the district courts and upon consent of the parties, the magistrate has authority to hear civil cases; appeal of the judgment to the district court is by right, with further appellate review in the circuit court or United States Supreme Court limited to discretionary review of matters of law. The Act provides an alternative method of appeal, if the parties consent to it: an appeal of right directly to the circuit court of appeals.

The Magistrate Act would have increased the magistrates' authority in criminal cases, allowing them, upon consent of the defendant, to hear any misdemeanor case, regardless of the fine or penalty imposed. Furthermore, a defendant charged with a petty offense, less than six months imprisonment and less than \$500 fine, no longer has the option of trial by a district court judge. For misdemeanors above the petty offense level, a defendant can have a trial by jury before a magistrate, although the government can petition the district court to remove complex, novel, or important cases to the district court. *Id.*

37. Puro, *supra* note 30, at 143.

38. Bankruptcy Code of 1978, 11 U.S.C. §§ 101-1501 (1979).

the district court caseload by expanding the authority of bankruptcy judges and by restructuring the system of appellate review.<sup>39</sup>

Currently, a large number of bankruptcy cases, involving billions of dollars,<sup>40</sup> are filed each year in bankruptcy court.<sup>41</sup> It has been anticipated that the number of cases filed annually will increase at a rate of six percent per year.<sup>42</sup> Therefore, development of an efficient means of dealing with these cases has become necessary.

Bankruptcy cases had been heard by bankruptcy judges who had restricted authority.<sup>43</sup> Because bankruptcy judges lacked the power to decide all the issues in bankruptcy cases, issues such as jurisdiction were submitted to a district court judge for determination.<sup>44</sup> The Bankruptcy Reform Act of 1978 will relieve district court judges of this duty by expanding the authority of bankruptcy judges to hear all the issues in a bankruptcy case,<sup>45</sup> thus decreasing the caseload burden of the district court judges.

The Bankruptcy Reform Act also restructures appellate review in bankruptcy cases.<sup>46</sup> Formerly, bankruptcy cases were appealed to the district court before they could be appealed to the circuit court.<sup>47</sup> The Bankruptcy Act of 1978 provides that the parties, by their agreement, may appeal directly to the circuit courts of appeals without first appealing to the district court.<sup>48</sup> If this route is followed by litigants, the district court will hear fewer bankruptcy appeals, thereby decreasing its caseload. This change in appellate review will have no effect, however, on the caseload burden of the circuit courts.

### *E. Alternative Methods of Resolving Disputes*

More fundamental changes in the federal judiciary system and more permanent solutions to the caseload problem could be effected by providing methods of resolving disputes outside of the established judicial system. Several methods have been advocated as having the greatest

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39. *Id.*

40. 123 CONG. REC. H11781 (daily ed. Oct. 28, 1977) (remarks of Rep. Edwards).

41. ANNUAL REPORT, *supra* note 5, at 129.

42. 123 CONG. REC. H11772 (daily ed. Oct. 28, 1977) (remarks of Rep. Railsback).

43. See Klee, *The New Bankruptcy Act of 1978*, 64 A.B.A.J. 1865, 1867 (1978) [hereinafter cited as Klee].

44. King, *The New Bankruptcy Code: Many Improvements Over Earlier Law*, Nat'l. L.J., Nov. 6, 1978, at 26, col. 1 [hereinafter cited as King].

45. Klee, *supra* note 43, at 1867.

46. King, *supra* note 44, at 26, col. 3.

47. *Id.*

48. *Id.*

potential for success: (1) arbitration,<sup>49</sup> (2) neighborhood justice centers,<sup>50</sup> and (3) small claims courts.<sup>51</sup> In addition to such specific suggestions for alternative means of resolving disputes, a proposal is pending in Congress that would provide funds for research into further means of resolving those disputes that involve small amounts of money.<sup>52</sup>

Arbitration has been used successfully in some states as a means of reducing congestion in state courts by resolving uncomplicated civil disputes.<sup>53</sup> Because of this success, the use of arbitration in the federal court system has been proposed as an inexpensive and informal means of encouraging prompt resolution of civil disputes.<sup>54</sup>

During the ninety-fifth Congress, the Senate passed a bill that would have authorized the use of arbitration panels in district courts on a three-year experimental basis.<sup>55</sup> The bill would have required the use of arbitration panels in certain kinds of civil cases. Panels would have been established in five to eight districts to be chosen by the Chief Justice, as well as in additional districts by local court rule. Although cases could have been voluntarily referred to arbitration by the consent of the parties, arbitration would have been mandatory in certain kinds

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49. S. 2253, 95th Cong., 1st Sess., 123 CONG. REC. S18068 (daily ed. Oct. 28, 1977).

50. Although these centers do not bear directly on the federal judiciary, they would not only decrease the overall caseload in the state courts but would also provide all citizens with greater access to a dispute resolution. Three neighborhood justice centers, including one in Los Angeles, have been established on an experimental basis. The purpose of the centers is to serve as an alternative to the courts for resolution of domestic, customer/merchant, and landlord/tenant disputes. The centers provide an informal forum for mediation and/or arbitration and therefore serve the dual purpose of relieving the courts of large numbers of cases and of decreasing overall tension within the community by settling disputes before they get out of hand. Bell, *supra* note 28, at 8; EDITORIAL RESEARCH REP., July 22, 1977, at 573. The centers are funded with federal money but are under local control.

51. Again, wider use of small claims courts has no direct bearing on the federal courts except in the way they affect the caseload of the local courts. The purpose of these courts is to provide a simple, inexpensive means of resolving disputes that involve small amounts of money. For a nominal fee (usually about \$6.00), a person may file a claim and arrange for service of summons and the setting of a hearing date. No lawyers are needed to appear in the court, and resolution is speedy and efficient. EDITORIAL RESEARCH REP., July 22, 1977, at 574.

52. Dispute Resolution Act of 1979, S. 423, 96th Cong., 1st Sess., 125 CONG. REC. S1411 (daily ed. Feb. 9, 1979).

53. See Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475 (1978), for a full discussion of compulsory arbitration in many states. This comment also points out the possible constitutional issues involved.

54. Bell, *supra* note 28, at 7; Bell, *Improving the Justice System*, 13 TRIAL, Nov. 1977, at 23, 24.

55. S. 2253, 95th Cong., 1st Sess., 123 CONG. REC. S18068 (daily ed. Oct. 28, 1977) (remarks of Sen. Eastland).

of civil cases.<sup>56</sup> The rationale for requiring mandatory arbitration in these cases is that they normally require resolution only of questions of fact and do not require trial before a district judge.

Under the proposed arbitration legislation, the arbitration procedure followed would have been less formal than that of a trial in district court.<sup>57</sup> After judgment by the arbitration panel is rendered, either party would be entitled to appeal for a trial *de novo* in district court. To reduce the number of cases going to district court, however, there would be a disincentive for appeal: the party requesting the appeal would be required to pay court costs if the award granted in district court is less than the arbitration award.

By local court rule, three federal district courts have adopted the use of arbitration on an experimental basis.<sup>58</sup> Although results of the impact of the program are not yet available, district judges involved are optimistic that its effect will be to reduce the number of cases proceeding to trial in district court. Because of the apparent success of the program, it was thought likely that the arbitration bill will be reintroduced in the ninety-sixth Congress.<sup>59</sup>

Expanded use of arbitration in the federal courts would effect a double benefit. It would decrease the number of cases coming to the district courts and, in the process, afford litigants a quicker, more informal, and less expensive means of resolving their disputes.

During the ninety-sixth Congress, another proposal was introduced, the Dispute Resolution Act of 1979.<sup>60</sup> This Act would establish funding for a national Dispute Resolution Resource Center, which would research alternative out-of-court methods for resolving consumer disputes and other minor conflicts.<sup>61</sup> Such a Resource Center would serve as a national clearinghouse for the exchange of information relating to

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56. Included in this category would be the following: actions for money damages only; actions referred in the discretion of the court; and actions for money damages of not more than \$50,000 that are Miller Act (where the United States has no monetary interest) or Jones Act (part of the Federal Employers' Liability and Compensation Act that applies to merchant seamen) federal question cases; contract or negotiable instrument cases brought under federal question or diversity jurisdiction; or personal injury or property damage cases brought under federal question or diversity jurisdiction. *Id.*

57. For example, discovery by the parties would be limited to 120 days. The case would be presented to a panel of three arbiters chosen by the parties and the Federal Rules of Evidence would not need to be followed. *Id.*

58. Klement, *Pilot Case—Arbitration System Draws Optimism from U.S. Judges Involved*, Nat'l L.J., Nov. 27, 1978, at 7, col. 2.

59. *Id.* This, however, has not occurred as of the date of this publication.

60. *See* note 52 *supra*.

61. 125 CONG. REC. S1411 (daily ed. Feb. 9, 1979) (remarks of Sen. Ford).

nonjudicial methods of dispute resolution gathered from the states, local communities, and the academic community.<sup>62</sup> The Center would identify those dispute resolution mechanisms most effective for general use and would also provide assistance to state and local governments in creating and improving various dispute resolution mechanisms.<sup>63</sup>

The Dispute Resolution Act and arbitration proposals both provide avenues for exploring more fundamental changes in the federal judicial system. This could lead to a more lasting solution to the overcrowding of federal court dockets, unlike merely increasing the number of judges qualified to hear cases.

#### F. *National Court of Appeals*

The National Court of Appeals was originally conceived as an additional federal court that would lighten the case burden of the Supreme Court.<sup>64</sup> The National Court would have decreased the number of cases that go to the Supreme Court by screening all cases filed for certiorari and appeal, deciding those cases involving conflicts among the circuits, and sending up to the Supreme Court only those cases of special importance.<sup>65</sup> Because the original concept was born of a need to ease the case burden of the Supreme Court, it produced a proposal whose main effect would have been to monitor access to the Supreme Court.<sup>66</sup>

Although one of the principal purposes of the Supreme Court is to provide for a consistent national law, the present system affords a national standard only for those few cases that the Supreme Court is able

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62. *Id.* at 1412.

63. *Id.*

64. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 590 (1973).

65. *Id.* at 611.

66. The court would be composed of seven judges appointed for life, who would sit en banc and whose decisions would be binding on all federal courts (and also on state courts in federal question cases). The court would have jurisdiction to hear cases referred to it by the Supreme Court and cases transferred to it from the circuit courts of appeals, the Court of Claims, and the Court of Custom and Patent Appeals. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 236-47 (1975).

It was contemplated that the court would have transfer jurisdiction in the following circumstances: cases involving federal questions on which there had been inconsistent lower court decisions; federal question cases involving recurring fact situations, in which it would be advantageous to have a definitive determination by a national court of appeals; and cases that involve a question of interpretation or application of a rule announced previously by the National Court of Appeals. The court could decline to hear any case transferred to it and such decision would not be reviewable. A National Court of Appeals decision on the merits would be reviewable by the United States Supreme Court. *Id.*

to hear each year. An advantage of the original proposal is that it would have provided for a more consistent national law by resolving intercourt conflicts.<sup>67</sup> If there were an additional means of defining a national standard, the litigation engendered by inconsistent appellate level decisions would be eliminated. There would also have been the added benefit of providing more answers to those important questions that the Supreme Court currently does not have the time to consider.

The proposal for a National Court of Appeals has met with a great deal of opposition.<sup>68</sup> Opponents argue that by putting another level of court between the circuit courts of appeals and the Supreme Court, an unnecessary fourth tier in the federal court system would be created. They further argue that it would give rise to new areas of litigation, that it would undermine the authority of the appellate courts, that it would cause increased delay and cost, and that, rather than decrease the workload of the Supreme Court, it would increase it.<sup>69</sup>

To counteract these objections, a means of providing a more consistent national law has been proposed that does not encounter the same objections as did the National Court of Appeals.<sup>70</sup> It has been suggested that a court of Patent and Trademark Appeals be formed that would have national jurisdiction. A separate National Tax Court of Appeals would also have national jurisdiction. These new courts would remove from the circuit courts of appeals system two of the more complex and technical areas of litigation, areas in which inconsistencies are frequent.<sup>71</sup>

This proposal avoids most of the strongest objections to the National Court of Appeals and has generally met with favorable opinions.<sup>72</sup> Rather than creating a fourth tier in the federal judiciary, it merely gives national scope to already existing courts; the new courts also do not attempt to limit or alter access to the Supreme Court.<sup>73</sup>

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67. *Id.* During the 95th Congress, Rep. Charles Wiggins introduced the proposal to the House as H.R. 3969, 95th Cong., 1st Sess., 123 CONG. REC. H1395 (daily ed. Feb. 23, 1977). The bill died in committee and has apparently not been reintroduced in the same form.

68. *See, e.g.,* Larkin, *Streamlining the Federal Judicial System*, JUDGES J. 33 (Spring 1977); Feinberg, *A National Court of Appeals?*, 42 BROOKLYN L. REV. 611 (1976).

69. Feinberg, *supra* note 68, at 617.

70. Nat'l L.J., Sept. 25, 1978, at 1, col. 1. The proposal was made by former Asst. Atty. Gen. Daniel J. Meador and is substantially included as part of the Federal Courts Improvement Act of 1979, S. 1477, 96th Cong., 1st Sess., 125 CONG. REC. S9133 (daily ed. July 10, 1979).

71. S. 1477, 96th Cong., 1st Sess., 125 CONG. REC. S9133 (daily ed. July 10, 1979).

72. Nat'l L.J., Sept. 25, 1978, at 1, col. 1.

73. Since it only affects indirectly the number of cases going to the Supreme Court, the proposal does not provide the sort of National Appeals Court that Chief Justice Burger and

The two proposals have very different goals: one attempts to ease the Supreme Court overload and the other syphons off the number of cases going to the circuit courts of appeals. Both would provide the benefit of a more consistent national law.

The latest proposal would lighten the load of the circuit courts, not indirectly by decreasing the number of cases coming into the federal judiciary, but directly by providing a different court to hear certain kinds of appeals. It would appear to be a vehicle that can provide relief to the circuit courts while maintaining citizen access to the federal judiciary.

These legislative proposals attempt to ease the burden on the federal courts without denying access to litigants with federal causes of action. That there is a need to do so is clearly shown by the judicial decisions considered below that attempt to solve the overload problem by limiting federal question access to the federal courts.

### III. JUDICIAL DECISIONS LIMITING ACCESS TO FEDERAL COURTS

There is a pattern of decisions that has had the effect of limiting access to the federal courts. For ease of exposition, the decisions that have not evoked congressional response are discussed in this section and the decisions to which Congress has reacted are discussed in the following section, along with the proposed congressional solutions.

Members of the federal judiciary have exercised their decision-making powers and discretionary authority to restrict the number and kinds of cases heard in their courts. Some have used pretrial devices as a means of attempting to force litigants to simplify their cases, thus avoiding lengthy trials and use of scarce judicial resources.<sup>74</sup> Others have used their discretion to remand cases to state courts by stating that cases were removed "improvidently and without jurisdiction."<sup>75</sup> Decisions by Chief Justice Warren Burger's Supreme Court have imposed limited access to the federal courts at an earlier stage. By restrictive concepts of standing and habeas corpus review, and by invocation of the mootness and political question doctrines, many citizens are denied even initial entry through the federal courthouse doors.<sup>76</sup>

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Associate Justices White and Blackmun recently called for in dissents from denial of certiorari. See *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978).

74. See, e.g., *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir. 1976); *Identiseal Corp. v. Positive Identification Systems, Inc.*, 560 F.2d 298 (7th Cir. 1977).

75. 28 U.S.C. § 1441(c) (1976). See text accompanying notes 77-89 *infra*.

76. See text accompanying notes 91-106 *infra*.

A. *Use of Pretrial Devices to Limit Access*

Federal district court judges are given broad discretionary powers in the management of the cases they hear and decide. The pretrial conference<sup>77</sup> is one device that district court judges can use effectively to regulate and simplify trials, thus allowing them to manage their large dockets more efficiently.

*J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*<sup>78</sup> is an extreme example of an attempt by a federal court judge to cope with his case overload by using pretrial procedures to simplify trials. When the judge did not meet with success in encouraging the parties to agree on some issues, he tried to eliminate the trial altogether.<sup>79</sup> That the frustration expressed by the judge's actions may not be uncommon is suggested in *Identiseal Corp. v. Positive Identification Systems, Inc.*<sup>80</sup> In *Identiseal*, a district court judge dismissed a party's pleadings for failure to prosecute, concluding that "the pretrial work necessary to efficiently try this action had not been done."<sup>81</sup> The appellate court reversed the district court rulings in these cases. It recognized that, while the function of pretrial procedures is to simplify issues for trial, thus resulting in a shortening of the trial, stipulation of facts and issues and pretrial settlement must remain an uncoerced by-product of pretrial procedures. As the court in *J.F. Edwards* held, settlement by judicial compulsion is not one of the goals of pretrial procedure, nor can it legitimately be one of its results.<sup>82</sup>

Another discretionary tool available to district court judges to reduce the size of their dockets is the use of remand to state court for cases removed "improvidently and without jurisdiction."<sup>83</sup> In *Thermtron Products, Inc. v. Hermansdorfer*,<sup>84</sup> Judge Hermansdorfer had remanded a case because he was overwhelmed with cases involving black lung disease<sup>85</sup> and felt that, absent a showing of need for the case to be

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77. FED. R. CIV. P. 16.

78. 542 F.2d 1318 (7th Cir. 1976).

79. In *J.F. Edwards*, the district court judge requested the parties to stipulate to a set of provable facts to simplify issues for trial. Several pretrial conferences were held in an effort to comply with the judge's request, but counsel for the defendant was unable or unwilling to reach agreement with plaintiff's counsel. As a sanction against the defendant, the trial judge struck the defendant's pleadings and cross-complaint, entering judgment for the plaintiff. *Id.* at 1320-21.

80. 560 F.2d 298 (7th Cir. 1977).

81. *Id.* at 299.

82. 542 F.2d at 1325.

83. 28 U.S.C. § 1447(c) (1976).

84. 423 U.S. 336 (1976).

85. The Black Lung Benefits Act of 1972 dramatically increased the caseload in the East-



heard in federal court, the interests of the parties involved would best be served by a more expeditious trial in state court. The Supreme Court reversed and held that a case otherwise properly removed could not be remanded solely because the district court considers itself too busy to hear the case.<sup>86</sup>

The problem faced in *Thermtron*, however, still remains unsettled. As long as a district court purports to remand a case under section 1447(c) as "removed improvidently and without jurisdiction,"<sup>87</sup> that order is not reviewable either by appeal or writ.<sup>88</sup> This creates a large discretionary area for the district courts: they may remand, as Judge Hermansdorfer did, because of an overcrowded docket, and still preclude review of their decisions, as long as the language of their remand order conforms to the requirements of section 1447(c).

Judicial discretion in management of pretrial procedures can be used to reduce the number of cases proceeding to trial in district court, by encouraging pretrial settlement and by deciding not to hear cases "improvidently" removed from state court. Because district court judges have an "inherent power . . . to manage their calendars to have an orderly and expeditious disposition of their cases,"<sup>89</sup> many of their decisions are virtually unreviewable. Therefore, it is not known to what extent these discretionary tools are used improperly to lessen the district court overload by reducing the number of cases that actually proceed to trial.

### B. Use of Trial Devices To Limit Access

In addition to the pretrial devices that may be used to limit access to the federal courts, decisions of the Supreme Court have also limited access. Although the Court's actions in some areas have prompted congressional response,<sup>90</sup> those areas in which the Court has acted without response from Congress include taxpayer standing to sue, federal

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ern District Court of Kentucky, where Judge Hermansdorfer is a district court judge: 845 black lung cases were filed in 1975; 1723 were filed in 1976. This resulted in a caseload of 740 cases per judge, 124 CONG. REC. H724 (daily ed. Feb. 7, 1978) (remarks of Rep. Mazzoli), which can be compared with the 1977 overall average caseload of 432 cases per judge. See text accompanying note 6 *supra*.

86. 423 U.S. at 344.

87. 28 U.S.C. § 1447(c) (1976).

88. *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam).

89. *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323 (7th Cir. 1976).

90. For a discussion of the legislative response to the Court's decisions in the areas of standing, class actions, and § 1983 (Civil Rights Act) suits, see text accompanying notes 107-78 *infra*.

habeas corpus review, and invocation of the doctrines of mootness and political question.

### 1. Taxpayer Standing To Sue

The Supreme Court has sought to limit access to the federal courts by defining standing to sue<sup>91</sup> in very narrow terms. In *Frothingham v. Mellon*,<sup>92</sup> the Court denied that a taxpayer might have standing to sue regarding an allegedly unconstitutional expenditure. *Frothingham* stands for the proposition that a federal taxpayer lacks sufficient individualized injury to challenge the constitutionality of a federal statute.<sup>93</sup> In the 1968 case of *Flast v. Cohen*,<sup>94</sup> the Court articulated an extremely narrow exception to the general rule of *Frothingham*. In *Flast*, the Court held that a taxpayer would only have standing to challenge the exercise by Congress of the taxing and spending power and only if "the challenged enactment exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment [was] generally beyond the powers delegated to Congress by Art. I, § 8."<sup>95</sup> In addition, the Court required that the taxpayer point to a provision in the Constitution that specifically limits the taxing and spending power. The Court could only identify one such provision, the first amendment.<sup>96</sup>

In two subsequent decisions, *United States v. Richardson*<sup>97</sup> and *Schlesinger v. Reservists Committee to Stop the War*,<sup>98</sup> the Supreme Court demonstrated that it did not intend to expand taxpayer standing. In both *Richardson* and *Schlesinger*, the Court limited taxpayer standing to challenges based on article I, section 8 of the Constitution.

Thus, the Court has effectively curtailed the possibility that a taxpayer might have standing to sue because of his or her status as a taxpayer.

### 2. Federal Habeas Corpus Review

The jurisdiction of federal courts to review state prisoners' convictions by use of the writ of habeas corpus is founded upon a federal

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91. *Id.*

92. 262 U.S. 447 (1923).

93. *Id.* at 488.

94. 392 U.S. 83 (1968).

95. *Id.* at 102-03.

96. *Id.* at 105.

97. 418 U.S. 166 (1974).

98. 418 U.S. 208 (1974).

statute, namely, 28 U.S.C. § 2254.<sup>99</sup> Since the Warren Court held that the exclusionary rule for unconstitutionally seized evidence was applicable to the states,<sup>100</sup> the scope of habeas corpus relief has been expanded to allow review of state prisoners' convictions when those convictions are based on illegally seized evidence. In *Kaufman v. United States*,<sup>101</sup> the Supreme Court rejected the position of a majority of the circuit courts of appeals, who had denied habeas corpus relief to state prisoners asserting violation of their fourth amendment rights. The Court stated that the purpose of the federal habeas corpus remedy was not to further the deterrent function of the exclusionary rule but was to "insure the integrity of proceedings at and before trial where constitutional rights are at stake."<sup>102</sup>

In *Stone v. Powell*,<sup>103</sup> the Supreme Court rejected this rationale as a misinterpretation of the scope of section 2254. Instead, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."<sup>104</sup> The effect of this decision has been to limit substantially the remedies available to a state prisoner whose fourth amendment rights may have been violated. Because it has eliminated federal habeas corpus review as a remedy for many state prisoners who previously would have sought to redress their wrongs in federal court, it has thus reduced the number of cases coming into federal court.

### 3. Mootness

Traditionally, the federal courts have sought to manage their dockets by limiting the kinds of cases they will review. Although not constitutionally mandated, these limitations have been adhered to for many years. For instance, the courts will not consider issues that have become moot. Thus, a minor suing for the right to be served beer will have no standing when he reaches the age of majority because the issue will have become moot as to him.<sup>105</sup> The rationale behind requiring that the issues in the case not be moot is that a case can only be effec-

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99. 28 U.S.C. § 2254 (1976).

100. *Mapp v. Ohio*, 367 U.S. 643 (1961).

101. 394 U.S. 217 (1969).

102. *Id.* at 225.

103. 428 U.S. 465 (1976).

104. *Id.* at 482 (footnote omitted).

105. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

tively litigated if the parties are truly adverse, that is, if they have an interest in the outcome of the litigation. To do otherwise would have the effect of allowing the Court to give advisory opinions, which would violate the dictates of the Constitution.<sup>106</sup>

#### IV. LEGISLATIVE REACTION TO JUDICIAL DECISIONS RESTRICTING ACCESS TO FEDERAL COURTS

Although the judicial decisions cited in the previous section have effectively limited access to the federal courts, they have not evoked congressional response. However, in the areas of standing, class actions, and civil rights, Congress has found the Court's decisions so restrictive of necessary citizen access to federal courts that it has responded with proposals to restore access in these areas.

##### A. *Standing To Sue*

The standing doctrine is based in part on the constitutional provision that requires that those matters heard by the courts be "cases" and "controversies."<sup>107</sup> In *Warth v. Seldin*, the Supreme Court termed this the "minimum constitutional mandate."<sup>108</sup> As such, it cannot be altered by Congress. The Court has indicated that the case and controversy clause requires that a plaintiff allege "such a personal stake in the outcome of the controversy" to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.<sup>109</sup>

But another aspect of the standing doctrine has developed over the years. It is based on a judicial policy to control the kinds and numbers of cases that the federal courts will hear. It is this policy or prudential aspect of the standing requirement that can be addressed by Congress.<sup>110</sup>

The combined reading of the constitutional minimum and prudential standing requirements has produced the following criteria to determine standing:<sup>111</sup> (1) the party seeking relief must have suffered some actual injury; (2) the injury must have been caused by the action being chal-

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106. U.S. CONST. art. III, § 2, cl. 1. Other cases traditionally avoided by the federal courts are those believed to involve political questions. Such cases involve issues that are more appropriately left to the legislature to resolve.

107. *Id.*

108. 422 U.S. 490 (1975).

109. *Id.* at 498-99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

110. 124 CONG. REC. E3778 (daily ed. July 14, 1978) (remarks of Rep. Kastenmeier).

111. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

lenged; (3) the injury alleged must be one that is likely to be redressed by a favorable judgment; (4) the right asserted must belong to the particular litigant before the court; and (5) the interest asserted must be within the zone of interest intended to be protected by the statute or constitutional guarantee in question.

A number of recent decisions have denied standing to litigants on three broad grounds: (1) that the injury alleged is a "generalized grievance" such that the litigant has no more interest in the outcome than does the public at large;<sup>112</sup> (2) that the allegedly invalid statute is not the primary cause of the injury;<sup>113</sup> and (3) that the injury will not be completely redressed by a favorable decision.<sup>114</sup> To the extent that these decisions are based on policy and not on constitutional grounds, they have met with opposition. Critics have contended that the decisions appear to be based on political and not policy grounds.<sup>115</sup>

A change in restrictive standing requirements has been recognized as one of the goals of the Carter administration.<sup>116</sup> There has been a feeling that the Burger Court's decisions unwarrantedly deny access to citizens who seek to challenge governmental action in the federal courts.<sup>117</sup> For this reason, legislation has been introduced<sup>118</sup> to counter those technical barriers created by the Court.

The congressional bill enunciated three reasons and policies behind the bill: (1) members of the public should have access to the federal courts to redress governmental wrongs even if many members of the public are affected equally; (2) unduly restrictive standing requirements have prevented resolution of meritorious lawsuits; and (3) judicial energy and resources are more efficiently spent deciding cases than considering complicated standing requirements.<sup>119</sup>

Specifically, the Act would be applicable in civil actions against gov-

112. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

113. *See, e.g., Linda R. S. v. Richard D.*, 410 U.S. 614 (1973); *Warth v. Seldin*, 422 U.S. 490 (1975).

114. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

115. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 518-20 (1975) (Douglas, J., dissenting) (Brennan, J., dissenting).

116. Address by President Carter before the Los Angeles Bar Association (May 1978), reprinted in *L.A. LAW*, 15, 42 (June 1978).

117. *See, e.g.,* 125 CONG. REC. S2821 (daily ed. March 15, 1979) (remarks of Sen. Metzenbaum).

118. Citizens' Right to Standing in Federal Courts Act, S. 680, 96th Cong., 1st Sess., 125 CONG. REC. S2822 (daily ed. Mar. 15, 1979). *See also* 125 CONG. REC. S2822-25 (daily ed. Mar. 15, 1979) (remarks of Sen. Kennedy).

119. *Id.* at S2823.

ernments, their agencies, or their officials. While the act does not alter taxpayer standing, broadly stated it does provide that a federal court may not dismiss a plaintiff's action for lack of standing on any of four grounds: (1) that the injury complained of is a generalized grievance; (2) that defendant's conduct is not the primary cause of plaintiff's injury; (3) that a favorable decision on the merits is not substantially likely to remedy plaintiff's injury; or (4) that the plaintiff's injury is not within the "zone of interests" regulated by the statute in question. It is believed that these four areas do not come within the constitutional minimum required for standing and that, therefore, Congress has the right to act.<sup>120</sup>

It is hoped that the legislation will effect two results. First, it is expected that a broader range of issues involving allegedly illegal governmental action will be presented in federal court. Second, the bill would clear up the present confusion about standing, providing more certainty, which would in turn allow the courts to focus their energies on the resolution of disputes rather than standing issues.<sup>121</sup>

It can be seen from the discussion accompanying the introduction of the bill and the analysis of the bill conducted by the Justice Department that its purpose is to react specifically to a developing restrictive standing doctrine. In fact, Senator Kennedy went one step further and suggested that Congress ought to act to require that the invocation of the standing doctrine be limited to the strict constitutional minimum requirements.<sup>122</sup>

There is a feeling in Congress that, although this measure will increase the workload of the federal courts, it is more important that

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120. *Id.*

121. *Id.* When a similar bill was introduced in the 95th Congress, Asst. U.S. Atty. Gen. Patricia M. Wald presented to Congress a Justice Department staff memorandum which analyzed the potential effect of the legislation on several of the leading standing cases. 124 CONG. REC. S6498, S6499-01 (daily ed. April 27, 1978). The seven leading cases discussed were *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Public Citizen, Inc. v. Simon*, 539 F.2d 211 (D.C. Cir. 1976); and *Scodari v. Alexander*, 69 F.R.D. 652 (E.D.N.Y. 1976). The analysis concluded that had the act been in effect at the time these cases were decided, three of them (*Warth*, *Schlesinger*, and *Linda R.S.*) would have been decided differently; two of the cases (*Richardson* and *Public Citizen*) would be unaffected, since they involved taxpayer standing; and the remaining two (*Simon* and *Scodari*) would eliminate only one of the grounds relied on by the court to deny standing, lack of standing to assert the rights of third parties would remain unaffected. 124 CONG. REC. S6500-01 (daily ed. April 27, 1978) (letter from Asst. U.S. Atty. Gen. Patricia M. Wald).

122. 125 CONG. REC. S2823 (daily ed. Mar. 15, 1979) (remarks of Sen. Kennedy).

"[i]ndividuals who have been victimized by unlawful governmental action . . . have access to the courts."<sup>123</sup> Mr. Justice Douglas, in his dissenting opinion in *Warth*, pointed to the seriousness of limiting access to the courts, particularly in a case like *Warth*, which involved discriminatory zoning:

Standing has become a barrier to access to the federal courts, just as "the political question" was in earlier decades. The mounting caseload of federal courts is well known. But cases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need.<sup>124</sup>

### B. Class Actions

In the twelve years since class actions were reformed by Federal Rule of Civil Procedure 23, there has been much controversy over the use of class actions because of difficulties of judicial management of these cases, the high cost to plaintiffs, and the risk of great financial liability to defendants.

Decisions by the Supreme Court construing jurisdictional amount requirements for diversity cases brought in federal court and interpreting the notice requirements of rule 23(b)3 have had the effect of limiting the number and kinds of class actions that may be heard in federal court. As a response to these judicial decisions and the widespread dissatisfaction voiced by the judicial, academic, and practicing legal communities, several measures have been introduced in Congress that would significantly alter rule 23(b)3.

In *Snyder v. Harris*,<sup>125</sup> the Supreme Court considered the question of whether separate and distinct claims presented by claimants in a class action could be aggregated to meet the required \$10,000 amount in controversy.<sup>126</sup> It did so in order to resolve an inconsistency among the circuit courts of appeals as to whether the amendments to rule 23,<sup>127</sup>

123. 124 CONG. REC. E3777-78 (daily ed. July 14, 1978) (remarks of Rep. Kastenmeier).

124. 422 U.S. at 519 (Douglas, J., dissenting).

125. 394 U.S. 332 (1969).

126. A minimum amount in controversy of \$10,000 is required in diversity cases. 28 U.S.C. § 1332 (1976). In *Snyder*, the Court rejected the class plaintiffs' contentions that the "matter in controversy" should encompass the claims of the entire class. The Court instead took the position that the class action device was merely one of permissive joinder, and that, as with other joinder provisions, plaintiffs could not add together the amounts of their claims in order to meet the jurisdictional amount requirements, where those claims were separate and distinct.

127. Under the old rule 23, class actions were classified as true, hybrid, or spurious. Under "true" class actions, when the interests of the parties were common and undivided,

which abolished the distinctions between "true" and "spurious" class actions, now required aggregation of claims in all class actions. The Court did not base its decision on an interpretation of rule 23; instead, it decided that the ability to aggregate claims depended on the Court's previous interpretations of the statutory phrase "matter in controversy."<sup>128</sup> Although the Court recognized the validity of the contention that its decision might "prevent some important questions from being litigated in federal courts,"<sup>129</sup> it claimed that it was more important to further the congressional purpose of using the jurisdictional amount requirement to check "the rising caseload of the federal courts . . . [since] [t]he expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship."<sup>130</sup>

In *Zahn v. International Paper Co.*,<sup>131</sup> the Burger Court used the \$10,000 amount in controversy requirement to limit the use of class actions further.<sup>132</sup> The Court dismissed the action as to most of the plaintiffs, expanding *Snyder* to require that each plaintiff member of the class in a rule 23(b)3 class action must satisfy the jurisdictional amount, and that those who do not must be dismissed from the case.<sup>133</sup>

*Snyder* and *Zahn* reflect an intentional decision by the Supreme Court to use the jurisdictional amount requirement as a vehicle for limiting class actions in federal courts. Either case could have appropriately reached an opposite result, had the Court chosen to base its decision on other well-developed judicial doctrines. In *Snyder*, "matter in controversy" could have been recognized as encompassing the claims of the whole class; in *Zahn*, the Court could have applied the concept of ancillary jurisdiction to allow the federal courts to hear those claims that did not meet the requisite \$10,000 amount, as long as the representative plaintiffs did meet the requirement. Instead, the

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aggregation was permitted. Under "spurious" class actions, a form of permissive joinder, each plaintiff was required to meet the jurisdictional amount requirements. The 1966 amendments to rule 23 eliminated the categories of true, hybrid, and spurious and separated class actions functionally. The Tenth Circuit had held that elimination of the distinction required aggregation of claims in all class actions, whereas the Fifth and Eighth Circuits had held that it did not. 394 U.S. at 335-36.

128. 28 U.S.C. § 1332 (1976).

129. 394 U.S. at 338.

130. *Id.* at 340.

131. 414 U.S. 291 (1973).

132. In *Zahn*, representative plaintiffs brought an action based on diversity jurisdiction on behalf of themselves and 200 other property owners with lake-front property on Lake Champlain. They sought damages for the decrease in utility and value of their land resulting from the defendant's continued pollution from its pulp and paper-making plant. Each of the named representative plaintiffs met the \$10,000 amount in controversy requirement.

133. 414 U.S. at 300.



Court utilized these cases further to restrict access to federal courts in class actions.<sup>134</sup>

The Supreme Court placed an even heavier burden on class action plaintiffs in *Eisen v. Carlisle & Jacquelin*.<sup>135</sup> In *Eisen*, the Court held that rule 23(c)2 requires that individual notice of the action be provided to those members of the class who are identifiable through reasonable effort. When the class is composed of many members, meeting this requirement can be prohibitively expensive. If the cost of notice is so high that the plaintiff cannot afford to bear it, the action cannot proceed as a class action.

The imposition of such a great financial burden on the representative plaintiff<sup>136</sup> is an unfortunate means of limiting the federal court access of plaintiffs who may have claims worthy of adjudication. This limitation, in conjunction with the jurisdictional amount limitations, has erected a substantial barrier to the use of federal class actions as a means of seeking judicial relief. Because large class actions frequently entail complex, multidistrict litigation, denial of the federal forum may result in denial of an adequate remedy.

The need for reform of federal class action procedures has been recognized by the federal judiciary, practitioners involved in class action litigation, and the academic legal community.<sup>137</sup> Examples of possible reform are two proposals that were introduced in Congress. The first would have substantially modified rule 23;<sup>138</sup> the second would have abolished rule 23, replacing it with a new class action structure.<sup>139</sup>

The Citizens' Access to the Courts Act of 1978 would have signifi-

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134. This position was reaffirmed recently by the Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), where it held that the defendant could not be required to compile the list of members of the class to whom notice must be given. As a general rule, since the representative plaintiff seeks to maintain the suit as a class action, he must perform and pay for the tasks necessary to give notice to the class. *Id.* at 356. However, the Court did recognize an exception to this general rule: When a defendant in a class action can perform one of the tasks necessary to send notice more efficiently than the representative plaintiff, the district court has the discretion to order him to do so. *Id.* The district court also has limited discretion in allocating the cost of complying with its order. *Id.* at 358.

135. 417 U.S. 156 (1974).

136. In *Eisen*, cost of notice was estimated at over \$200,000. 124 CONG. REC. S33 (daily ed. Jan. 19, 1978) (remarks of Sen. Metzenbaum).

137. *Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, 5 CLASS ACT. REP. 1 (1978). In a recent survey, many federal district judges expressed their beliefs that rule 23 wastes judicial resources through cumbersome, expensive, and time-consuming procedures, and that rule 23 should be amended to improve this problem. *Id.* at 17.

138. Citizens' Access to the Courts Act of 1978, S. 2390, 95th Cong., 2d Sess., 124 CONG. REC. S33 (daily ed. Jan. 19, 1978).

139. Reform of Class Action Litigation Procedures, S. 3475, 95th Cong., 2d Sess., 124 CONG. REC. S14501 (daily ed. Aug. 25, 1978).

cantly amended rule 23 as it now exists.<sup>140</sup> It would have counteracted the Supreme Court's decisions in *Snyder* and *Zahn* by allowing class action plaintiffs to aggregate their claims; each individual plaintiff would be required, however, to have at least a twenty-five dollar claim. The heavy financial burden of notice imposed upon the plaintiff in *Eisen* would also have been ameliorated; in rule 23(b)3 actions, only a reasonable notice would be required. The trial judge would have had flexibility in determining what is reasonable in each case, depending on the cost of notice, the resources of the parties, and the likelihood of represented members wanting to opt out. The court also would have had discretionary power to apportion the cost of notice in proportion to each party's likelihood of prevailing in the action. The result of this bill would have been to eliminate the restrictions on class actions that were effected by the Supreme Court in *Snyder*, *Zahn*, and *Eisen*.

A second proposal would have effected more fundamental reform by repealing rule 23 altogether, and replacing it with two new procedures: the "public" class action and the "compensatory" class action.<sup>141</sup> The primary purpose of the "public" class action would be to deter frauds perpetrated on large numbers of people in comparatively small dollar amounts. In such situations, it is not economically feasible for an individual to bring the action alone.<sup>142</sup> The purpose of the "compensatory" class action is to provide a means of compensating individuals who have suffered more substantial economic injury.<sup>143</sup> These goals would be effected by new definitions of class membership and class action procedures.<sup>144</sup>

These legislative proposals would alleviate some of the problems in-

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140. See note 138 *supra*.

141. See note 139 *supra*.

142. 124 CONG. REC. S14502 (daily ed. Aug. 25, 1978) (remarks of Sen. DeConcini).

143. *Id.*

144. The public class action would not be a class action in the traditional sense. Rather, it would be a procedure for litigating a single collective claim in the name of the United States. It would require a class of at least 200 people who had suffered damages of less than \$300 each, but whose combined damages were greater than \$60,000. The injuries must arise from the same transaction or occurrence and present at least one substantial common question of law or fact. No prejudgment notice would be required, because the claim would be vested in the United States.

For the compensatory class action, a class of at least 40 people would be required, with each claimant having an injury exceeding \$300. As in the public class action, each injury must arise from the same transaction or occurrence and present a common question of law or fact. Notice that is reasonably necessary to ensure adequacy of representation and fairness would be required. Restrictive use of discovery and a prompt preliminary hearing to determine class certification would result in a more manageable class action device than that available under rule 23. Its requirements are more stringent than the public class action, based on the premise that people injured in amounts greater than \$300 have sufficient incen-

herent in class actions. At the same time, they would restore the federal courts as a forum for class action suits.

### C. *Civil Rights Improvement Act*

A large number of decisions restricting access to federal court have involved cases brought under section 1983 of the United States Code.<sup>145</sup> In the wake of the Civil War, the Civil Rights Act of 1871 was enacted to provide "a remedy where state law was inadequate" and "a federal remedy where the state remedy, though adequate in theory, was not available in practice."<sup>146</sup> As a result of early restrictive judicial interpretations, the Civil Rights Act did not fulfill the original congressional intent and remained largely unused as a remedy until the 1950's and the beginning of the civil rights movement. The Warren Court effected a realignment of the balance of federal and state court litigation of federal constitutional rights, recognizing that federal courts are the proper place to redress the violation of federal constitutional rights. The more recent Burger Court, with its emphasis on federalism, has used a number of judicial doctrines as rationales for restricting access to the federal courts in section 1983 cases. Congress, responding to what it considered to be "certain earlier Supreme Court rulings that have seriously curtailed access to federal courts for civil rights litigants,"<sup>147</sup> is considering a bill, the Civil Rights Improvement Act of 1979,<sup>148</sup> the purpose of which is to "insure the continued vitality of section 1983."<sup>149</sup>

The bill would amend section 1983 by: (1) providing that states, municipalities, and other local government entities are "persons" for the purpose of section 1983;<sup>150</sup> (2) defining the circumstances under which states and local governments will be liable for actions of their employees and agents in section 1983 suits;<sup>151</sup> (3) limiting the doctrine of *Younger v. Harris*<sup>152</sup> to criminal proceedings;<sup>153</sup> (4) prohibiting the use of the abstention doctrine in section 1983 suits;<sup>154</sup> and (5) protecting

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tive to retain counsel and maintain their action as a class. *Id.* at S14501. *See also* Meador, *Proposed Revision of Class Damage Procedures*, 65 A.B.A.J. 48 (1979).

145. 42 U.S.C. § 1983 (1976). This is the codification of the Civil Rights Act of 1871.

146. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

147. 125 CONG. REC. S15992 (daily ed. Nov. 6, 1979) (remarks of Sen. Mathias).

148. *Id.* at S15994.

149. *Id.* at S15992 (remarks of Sen. Mathias).

150. *Id.* at S15994.

151. *Id.*

152. 401 U.S. 37 (1971).

153. 125 CONG. REC. S15994-95.

154. *Id.* at S15994.

suits brought under section 1983 from the possibility that a federal court might require exhaustion of state judicial proceedings before hearing the case<sup>155</sup> or apply res judicata principles to a state decision of the section 1983 case.<sup>156</sup>

### 1. Definition of Persons

By interpreting the legislative history of the Civil Rights Act of 1871, the Supreme Court in *Monell v. Department of Social Services*<sup>157</sup> held that municipalities are "persons" for section 1983 cases. This position overruled earlier decisions by the Court in *Monroe v. Pape*<sup>158</sup> and *Kenosha v. Bruno*,<sup>159</sup> which excluded municipalities from the section 1983 definition of "persons." The Court refused, however, to extend the definition of "person" to include states in *Quern v. Jordan*.<sup>160</sup>

### 2. Governmental Immunity

Although the Court in *Monell* abrogated the absolute immunity of local governments from section 1983 suits, definition of the limits of governmental liability must occur on a case by case basis. By delineating these limits in congressional action, governmental liability would be more clearly defined and governments would have notice of potential liability.<sup>161</sup>

### 3. The *Younger* Doctrine

One of the principal ways in which decisions of the Burger Court have denied citizens' access to federal courts is the expansive use of the *Younger* doctrine. Absent a showing of bad faith enforcement or other special circumstances, the *Younger* doctrine requires that principles of equity, comity, and federalism preclude a federal court from enjoining an ongoing state criminal proceeding.<sup>162</sup> Since the initial articulation of the *Younger* doctrine, the Court has extended it to include: (1) state criminal proceedings begun after a complaint in federal court has been filed, but before any federal proceedings of substance on the merits have taken place;<sup>163</sup> (2) completed state proceedings, the period for ap-

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155. *Id.* at S15994-95.

156. *Id.* at S15995.

157. 436 U.S. 663, 701 (1978).

158. 365 U.S. 167 (1979).

159. 412 U.S. 507 (1973).

160. 440 U.S. 332 (1979).

161. 125 CONG. REC. at S15994.

162. *Younger v. Harris*, 401 U.S. 37, 53-54 (1971).

163. *Hicks v. Miranda*, 422 U.S. 332 (1975).

peal of which has not yet elapsed at the time of the filing of the federal suit, even though there may have been no intent to appeal,<sup>164</sup> (3) state civil cases,<sup>165</sup> and (4) contempt proceedings.<sup>166</sup> It is feared that the Court will continue to extend the doctrine.<sup>167</sup>

Typical of the criticism of the broadening scope of the *Younger* doctrine is Justice Brennan's dissent in *Juidice v. Vail*:

It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum *because* of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit *without regard* to the pendency of the state suit. Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.<sup>168</sup>

#### 4. Abstention

The judicially created abstention doctrine was formulated by the Court in *Railroad Commission v. Pullman Co.*<sup>169</sup> As first articulated, the doctrine was founded on the principle that federal courts should delay their decision when a federal constitutional claim is based on an unsettled question of state law. The rationale behind the doctrine was that a federal court, by first allowing the states to settle the underlying question of state law, would be able to avoid unnecessarily deciding a constitutional question. In 1959, in *Harrison v. NAACP*,<sup>170</sup> the Court expanded the doctrine to apply in section 1983 cases. The Court again applied the doctrine in a section 1983 case in *Boehnig v. Indiana State Employees' Association*.<sup>171</sup>

There has been widespread criticism of the use of abstention in section 1983 cases. As early as the first use of the doctrine in such cases,

164. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

165. *Id.*

166. *Juidice v. Vail*, 430 U.S. 327 (1977).

167. Greenhouse, *Texas Case May Advance U.S. Abstention Doctrine*, Nat'l L.J., Nov. 13, 1978, at 5, col. 1. Indeed, the Court has done so in *Moore v. Sims*, 442 U.S. 415 (1979). In *Moore*, the Court held that the *Younger* doctrine applied to a state civil suit involving the temporary removal of a child from the custody of its parents under child abuse statutes. The Court based its holding upon its findings that the state was a party to the proceedings and that the proceeding itself was based on a statute "in aid of and closely related to criminal statutes." *Id.* at 2377 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

168. 430 U.S. 327, 343-44 (1977).

169. 312 U.S. 496 (1941).

170. 360 U.S. 167 (1959).

171. 423 U.S. 6 (1975).

Justice Douglas articulated the view that “[w]e need not—we should not—give deference to a state policy that seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by Congress on the federal judiciary in the Civil Rights Acts when we do so.”<sup>172</sup> In response to this criticism, the Civil Rights Improvement Act would have prohibited the use of the abstention doctrine in section 1983 suits.<sup>173</sup>

### 5. Exhaustion of State Judicial Remedies

In *Monroe v. Pape*,<sup>174</sup> the Supreme Court held that the doctrine of exhaustion of state judicial remedies was not applicable to section 1983 suits. Although thus far there have been no decisions altering this holding, it is feared that, in light of other judicial decisions readjusting the balance between state and federal courts, the Burger Court may attempt to erode or reverse the exhaustion rule of *Monroe*.<sup>175</sup>

As a preventive measure, the Senate bill would have codified the *Monroe* holding by providing that no court could dismiss any civil action brought under section 1983 on the ground that the plaintiff failed to exhaust his or her state judicial remedies.<sup>176</sup>

### 6. Res Judicata

Because the nature and purpose of section 1983 is to provide a federal remedy for violations of federal constitutional and statutory rights, it would seem antithetical to apply res judicata to state decisions of section 1983 claims. The Supreme Court has not decided the applicability of res judicata principles to section 1983 suits. It is feared, however, that the Court may be heading in that direction, and in light of its present restrictive policy, such a decision would effectively shut off access to a federal forum altogether in section 1983 suits.<sup>177</sup>

The Senate proposal anticipated this by providing that federal courts would not be barred from hearing section 1983 suits previously litigated in state courts. However, it would have limited the kind of relief that a federal court could have granted in such circumstances to the

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172. *Harrison v. NAACP*, 360 U.S. 167, 184 (1959) (Douglas, J., dissenting).

173. 125 CONG. REC. at S15994.

174. 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 653 (1978).

175. This fear was expressed by Senator Mathias when a similar bill was introduced in the 95th Congress. 123 CONG. REC. S203 (daily ed. Jan. 10, 1977) (remarks of Sen. Mathias).

176. 125 CONG. REC. at S15994-95.

177. *See* note 175 *supra*, at S204.

following: invalidation or setting aside of a criminal conviction, modification or setting aside of an order with respect to damages, and modification or setting aside of an order related to conduct determined not to be covered under section 1983.<sup>178</sup>

The current majority on the Supreme Court has sought to emphasize federalism by shifting some federal question cases to state courts. The rationale has been that state courts are just as qualified as federal courts to decide federal question cases. However, the purpose of the Civil Rights Act was to provide a federal forum for cases in which it was assumed that litigants would not get a fair hearing in the state courts. Therefore, to deny access to the federal courts in these cases is to defeat the express purpose of the Act.

The cumulative effect of the Supreme Court's decisions in these areas has been an erosion of the rights of citizens to have their federal question cases decided in the federal courts. Congress has appropriately responded by seeking to restore access to these federal courts. Congress has realized that, although there is a need to decrease the number of cases heard in federal courts, federal rights should not be sacrificed to achieve this result.

## V. CONCLUSION

While Congress has recognized the need to reduce the federal court caseload, it has also realized the necessity of maintaining litigant access to federal courts in cases involving important federal questions. Congress has adopted a two-pronged attack to reallocate federal judicial resources. First, legislation has been introduced that would ease the caseload burden in the federal courts by: (1) increasing the numbers and types of judges and magistrates, (2) removing some cases from the judicial system altogether, and (3) shifting diversity cases to state courts. In addition, a proposal for a National Court of Appeals would reduce the caseload of the circuit courts of appeals by giving certain kinds of federal courts national appellate jurisdiction. Second, Congress has responded to judicially imposed technical restrictions of access to federal courts with proposals tailored specifically to counteract their effect.

It is apparent that the federal judiciary is quickly reaching the upper limits of its capacity to hear and decide all the cases that it is currently empowered to hear. It is equally apparent, therefore, that it is necessary to provide some means of reducing the federal court caseload. It is

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178. *Id.*

imperative, however, that in doing so federal rights are not abridged. Several of the recent Supreme Court decisions have, in the name of federalism, shifted cases from federal to state court. It can be argued that, in some classes of cases, denial of the federal forum is tantamount to denial of a federal right. Therefore, it is necessary to balance the need to reduce the federal court overload against the need to preserve access to the federal courts when federal rights are in jeopardy.

Of the legislative proposals meant to reduce the caseload burden, only those dealing with diversity eliminate a currently existing right of access to a federal court. In view of the apparent alternative of denying access in some federal question cases, elimination from the federal courts of at least some of the diversity cases appears to be the lesser of two evils. Furthermore, if the heavy federal caseload is the factor motivating the Supreme Court to decide cases in a way that keeps cases out of federal court, perhaps the elimination of a large number of diversity cases will have the effect of reducing these kinds of decisions by the court.

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