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Mules and Wagons - A Plea for Jurisdiction Reform

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MULES AND WAGONS — A PLEA FOR JURISDICTIONAL REFORM

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I. INTRODUCTION

Once upon a time, a farmer bought a pair of good mules and a stout wagon to carry loads for himself and his neighbors. At first, this worked well so he began to put more and more things on the wagon until the sideboards overflowed. Then, he hitched another wagon to the first. When the mules could not pull the double load, he got new traces and hitched another pair of mules in front of the first. Over time, as he kept piling new things in the wagons, he had to add another wagon and another pair, and another, and another. Despite the additions, he frequently had to wait for his own goods to be hauled, and his neighbors fussed about the way he was handling things for them. When the farmer paused to take stock of his situation, mules were strung out so far he could not see the lead pairs and wagons stretched out of sight in the other direction. Still he continued to increase the loads and to add more mules and wagons.

What a ridiculous story, you say. Yet, Congress has used its plenary power time after time to put more and more jurisdictional loads on and add more and more judges and support staff to the federal court system. For over 100 years, this has been done without any effort to develop a clear policy for governing a federal judicial system which ought to be designed to serve federal needs. Adding judges and courts to accommodate willy-nilly increases in jurisdiction, while giving no thought to the purpose federal courts should serve in our republic, has created a system equally as silly as that of the fictitious farmer – a system that does not and cannot work properly – and one that defies common sense and harms federalism. The situation gets worse, not better. The graphs on the pages that follow show an almost vertical increase in the number of federal judges within the past thirty years. The rate of increase far exceeds population and even exceeds the explosion in the number of lawyers.[1]

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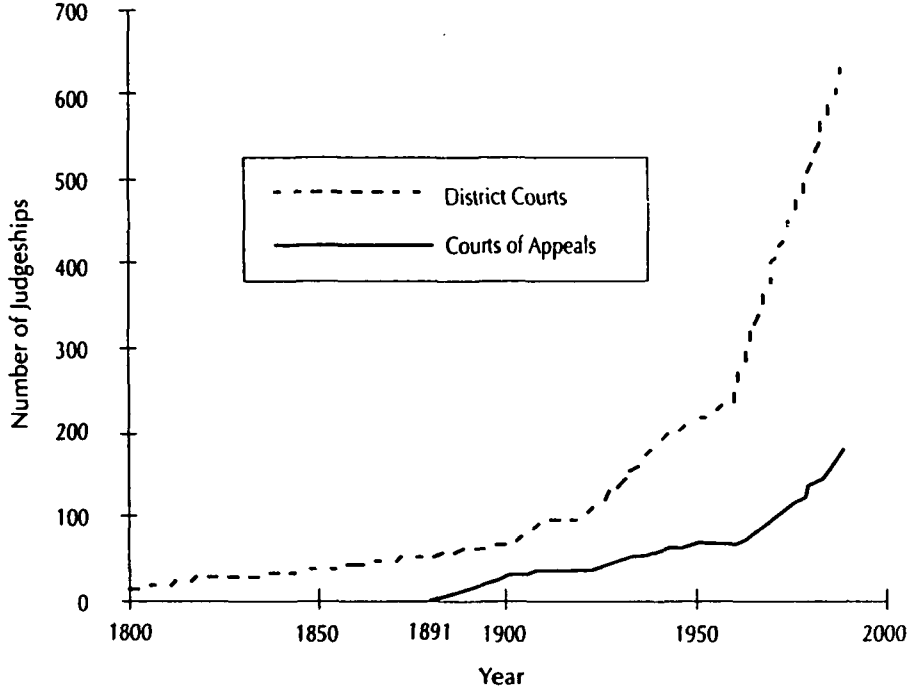
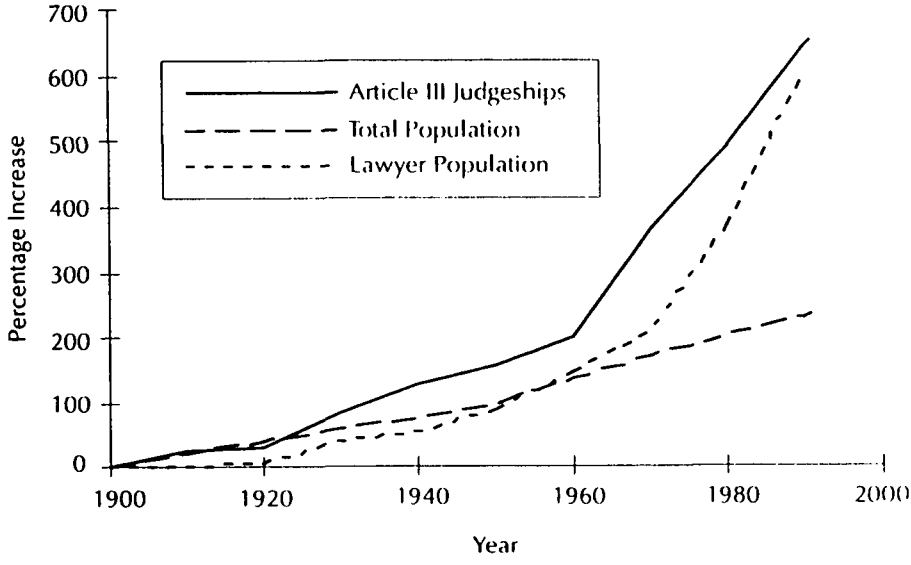
1. GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 5 (1993).

Figure 1
Number of Judgeships, 1800-1991[2]



2. Chart reproduced from GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 5 (1993).

Figure 2
Percentage increase since 1900 in total population, lawyer population, and Article III judgeships[3]



Note: Lines show percentage increases over 1900, not numerical increases.

Surprisingly, the federal judiciary has now come to agree with the more mules—more wagons approach Congress has taken. At its September, 1993, meeting, the Judicial Conference of the United States—the statutory body of federal judges, headed by the Chief Justice, which is charged with surveying the business of the federal courts and making recommendations for legislation—adopted a resolution which endorsed "carefully controlled growth" necessary to exercise "limited" increases of jurisdiction.[4] This new policy of endorsing a-little-bit-of-growth puts the judicial branch of the federal system on the same wrong path Congress has taken over the years.

History teaches that, when the congressional camel gets its nose under the tent, firm resistance is the only way to keep the whole animal out. Courts cannot hope to win a game of "how many judges and supporting personnel is too many" when Congress is the other player. In his 1992 year-end report on the state of the judiciary, Chief Justice Rehnquist complained of new congressional initiatives to make every murder with a gun a federal crime and to give all female rape victims a federal civil action for redress.[5] The Chief Justice recommended modest curtailment

3. Chart reproduced from GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 6 (1993).

4. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 6 (Sept. 1993).

5. *Chief Justice Issues 1992 Year-End Report*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1993, 1, at 2-3 (reprint of Chief Justice Rehnquist's 1992 Year-End Report).

rather than expansion of jurisdiction,[6] and he opposed the addition of more judges.[7] He observed that the long-term implications of expanding the federal judiciary should give everyone pause.[8] His assessment of the situation is clearly correct. While, however, his cautious suggestions may appear the most pragmatic ones, they will not solve the problem. Nor does the suggestion by other judges that Congress put a cap on the total number of federal judges provide an answer. If jurisdictional workload grows and the number of judges does not, support staff will make more and more judicial decisions, or the decisions will not get made. The already alarming growth in staff is set out in the footnote.[9]

Failing to make substantial jurisdictional changes to the battleground concedes the battle, if not the war. A comprehensive revision of jurisdictional grants and the adoption of a new jurisdictional policy – federal courts for federal cases – are the answers to delay, cost, and overload. If today's dysfunctional, overloaded federal court system's problems are to be solved, it will not be the result of adding more judges, more courthouses, and more judicial support staff. The answer is to reduce federal jurisdiction to truly federal interests and to arrest unwarranted future expansion.

From many possibilities, here are four recommended reductions that deserve priority:

1. Eliminate all grants of jurisdiction in specific legislation – planned general grants should control access to courts;
2. Revise general jurisdictional grants and eliminate diversity jurisdiction;
3. End routine court review of agency-determined fact matters; and
4. Restrict appeal as of right.

The reasons for each recommendation are as follows:

1. From Title 2 to Title 50 of the United States Code, one finds more than 1100 civil statutes which vest jurisdiction in United States District Courts over every conceivable sort of statutorily defined right or wrong.[10] Consider, if you will, the national importance of requiring a federal court to enforce the Horse Protection

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6. *Id.* at 3.
7. *Id.* at 1-2.
8. *Id.*
9.

Article III Judgeships, Judicial Personnel, and Staff Per Judgeship since 1900

Year	Judgeships	Personnel	Per Judgeship
1920	140	1,820	13.0
1940	250	2,218	8.9
1960	328	5,182	15.8
1980	663	13,190	19.9
1991	828	23,586	28.4

BERMANT, *supra* note 1, at 45.

10. *See, e.g.*, 15 U.S.C. § 233 (1976) (granting jurisdiction to impose penalties for violations of apple barrel standards).

Act.[11] Do we need a presidentially-appointed, Senate-confirmed, life-tenured judge to decide whether a mechanic set back the odometer on a used car[12] or a local lender put the wrong words in the disclosure statement for a fifty dollar loan?[13] Why grant federal jurisdiction over suits to protect "Woodsy Owl?"[14] The question is not whether Congress should have legislated in these areas, but whether enforcement of every federally-created right, no matter how trivial, should be placed in the national court system? Today's hodgepodge of grants takes no account of whether conferring federal jurisdiction serves national needs. The only effective and reasonable way to regain control is to eliminate all special grants and carefully revise and restrict general grants to serve truly federal purposes. If jurisdiction over enforcement of a special interest act comes within the substance of a general jurisdictional grant, federal jurisdiction should be available. However, where jurisdiction of special acts is predicated solely on the fact that it is a statute of the United States, federal jurisdiction should not be available.

2. Title 28 now contains over thirty general grants of jurisdiction to United States District Courts.[15] Some, such as the grant of federal question jurisdiction, have unclear bounds.[16] Others are broader than federal interests require. These grants should be tailored to insure that the courts of the national government try only those cases and controversies that serve national interests.

Most important among the needed general grant revisions is the repeal of diversity jurisdiction.[17] Hamilton may have been right at the time he wrote in *The Federalist* No. 80 that "state tribunals cannot be supposed to be impartial and unbiased" in actions between citizens of different states.[18] However, in today's world, it is an idea whose time has gone. Eliminating diversity jurisdiction is sure to face the same strong pressures which have stopped such efforts in the past. Unfortunately, lawyers again will lead the attack. They will raise the same cry, "protect us against local prejudice,"[19] as though we still lived in the isolation of colonial times when diversity was created and as though this is their true aim. In reality, "prejudice" is almost always a not-so-soft euphemism for maintaining the option to choose a forum to the lawyer's liking in each individual case. Most times the real reason has to do with delay, jury pools, predicted judicial temperament, or court location.

Diversity is a lawyer-preserved anachronism that overloads federal courts with non-federal cases while it belittles state court systems. It mixes state and federal

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11. Horse Protection Act, 15 U.S.C. § 1821 (1988).

12. 15 U.S.C. § 1984 (1988).

13. Truth in Lending Act, 15 U.S.C. §§ 1631-1632 (1988).

14. 18 U.S.C. § 711a (1988).

15. *See, e.g.*, 2 U.S.C. § 437h (1988) (granting the U.S. District Courts jurisdiction of matters relating to elections and the disclosure of campaign funds).

16. 28 U.S.C. § 1331 (1988).

17. 28 U.S.C. § 1332 (1988).

18. THE FEDERALIST No. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

19. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945); Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

jurisprudential and procedural controls in a way which inhibits a consistent development of procedural rules and precedent by either forum. State law must be followed in federal diversity cases,[20] but States, and indeed federal courts, cannot control whether 28 U.S.C. § 1652 will continue to make state statutes and case precedent the federal rule of decision.[21] Federal courts also control whether they will certify an unsettled state issue to the State's court of last resort. Unless a question is certified, the federal court will make its own *Erie* guess.[22] On the other hand, no matter how well-crafted a federal court's opinion may be, its decision does not bind any state tribunal, even in an identical case.[23] Finally, the exercise of diversity jurisdiction stacks lines of legislative and juridical authority which should remain parallel if the federal and state systems are to maintain their proper constitutional relationship.

Local prejudice may be present in some areas today. In our past, the right to assert removal jurisdiction in a diversity case[24] required a showing of prejudice.[25] Wherever prejudice is proven to exist today, the right of removal, if asserted, would be proper. Merely because prejudice sometimes can be shown, however, is no justification for maintaining automatic, unreasoned removal. It is a certainty that talks of local prejudice cannot apply to the tens of thousands of diversity cases filed annually which involve plaintiffs who chose to litigate in the federal courts of their own home state! Maintaining a federal court option for lawyers in every diversity case actually encourages provincial behavior and discourages any needed local reform. Meaningful change will come when a State recognizes that it has the duty to see that courts in its system function fairly for all litigants if the State hopes to share in the economic progress of the nation as a whole.

Congress should not continue this insult to able, honest, impartial state court systems just because of a few areas of local prejudice or to give lawyers a choice of forums. How many members of Congress would support legislation that expressly stated that out-of-state litigants could not get a fair trial in their state courts? Why do such legislators refuse to repeal diversity jurisdiction when its true basis is this exact premise? Except when a defendant can show local prejudice exists, diversity cases should remain in the courts whose law controls their decision.

3. The present federal agency review jurisdiction is overbroad. Agencies are unique legal creatures which are both quasi-legislative and quasi-judicial. Congress does not review every legislative function of agencies. Why should federal courts be required to review fact findings by the Cotton Board when it sets a policy to promote the use of cotton?[26] When the National Labor Relations Board decides which employees should comprise a bargaining unit or determines that a

20. *Erie R.R.*, 304 U.S. at 64.
21. 28 U.S.C. § 1652 (1988).
22. *Erie R.R.*, 304 U.S. at 64.
23. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).
24. 28 U.S.C. § 1441 (1988).
25. Van Dusen v. Barrack, 376 U.S. 612 (1964).
26. 7 U.S.C. § 2106 (1988).

company has or has not committed an unfair labor practice,[27] every factual determination in that decision should be final. If an agency should adopt a course of abusing its fact-finding prerogative, the best path to correction lies through Congress, not the courts. Jurisdiction to review agency action should be limited to issues which implicate constitutional values or agency action which exceeds statutory power.

4. Appeals as of right are part of the fabric of today's federal jurisdiction. But, they are not a part of constitutional due process. Nationwide, over eighty percent of all federal appeals are affirmed.[28] Those cases which are reversed or modified carry no assurance that the appellate decision was correctly made. All appeals delay finality of decision. Our overloaded system cannot continue to offer full appellate review in every action filed. Appellate review should be available only by certification or certiorari in all civil and criminal actions unless the case involves significant national interests.

II. Conclusion and Proposal

Adding judges and courts to try the cases and appeals identified above is just like adding mules and wagons. Form should follow function, not vice versa. The proper cure for excessive workload does not lie in increasing the size of the federal judiciary, rather it only will be found in limiting jurisdiction. Congress should adopt a new guiding policy for what gets into the federal judicial system—a policy that reduces federal jurisdiction and permits no new grant of jurisdiction that does not serve an identified national purpose. A workable approach to creating such a policy would be through a permanent judicial planning agency with members chosen by each branch of government. Such an agency should be charged with holding public hearings and making recommendations to Congress for curtailing and revising present jurisdictional grants as well as developing a proper policy to govern future legislation affecting jurisdiction.

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27. 29 U.S.C. § 160 (1988).

28. Administrative Office of the United States Courts, 1990 Annual Report of the Director 121 (1990).