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LOGIC WITHOUT EXPERIENCE: THE PROBLEM OF FEDERAL APPELLATE COURTS

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The life of the law has not been logic: it has been experience.
—Oliver Wendell Holmes, Jr. (1881)[1]

INTRODUCTION

Behold the lucky federal district court judge. Conventional wisdom holds that her job is becoming easier and more gratifying as the Supreme Court cuts back on federal jurisdiction and thus on the scope of her authority, and both the Court and amendments to the Federal Rules of Civil Procedure expand her discretion to exercise the remaining authority. Meanwhile, political scientists tease her with the promise of promotion, suggesting that the number of district court judges elevated to federal courts of appeals is high and getting higher. On all three fronts—jurisdiction, discretion, and promotion—many scholars lament the trends.

This Article argues that the conventional wisdom is wrong, but that this fact is not cause for scholarly celebration. The Supreme Court (with help from the courts of appeals) has actually begun to expand federal jurisdiction and contract judicial discretion, although

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1 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881).

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few have noticed. The new jurisdictional trend is worrisome because the Court has not acknowledged—much less explained—its change of direction. As a result, the new rules are often unclear and inconsistent with existing precedent, leaving lower courts with little guidance in applying the changing doctrines and litigants with incentives to fight over jurisdiction instead of over the merits. At the same time, the diminished discretion imposes its own costs on litigation in the federal courts. Reduced discretion affects docket management to the extent that it limits or eliminates procedural devices that can resolve cases efficiently; it reduces courts' ability to police the behavior of lawyers and litigants, increasing incentives for misbehavior; and it is detrimental to the relationship between state and federal judicial systems, both because it moves primary responsibility for managing judicial federalism from district courts to appellate courts and because it often replaces contextual decisionmaking with rigid rules.

Looking at all of these consequences together, it becomes clear that the federal court system is not functioning as it should. District courts are likely to confront more cases and more issues unrelated to the merits of each case, and have less flexibility in resolving cases accurately and efficiently. Moreover, the simultaneous trends have produced an internally inconsistent and inexplicable regime in which the combination of fuzzy rules on jurisdictional questions and clear rules limiting trial court discretion on other issues misallocates judicial resources between trial and appellate courts.

Why would appellate courts create such an untenable situation? I contend that the culprit is inexperience. The majority of judges forging these rules and fueling these trends, whether on the courts of appeals or the Supreme Court, are not familiar with the realities of the litigation process. Thus there are not, as some scholars argue, too many former district court judges on the federal appellate bench, there are too few. Without sufficient hands-on experience at the trial level, appellate judges—on both the Supreme Court and the courts of appeals—have little or no understanding of how their decisions play out on the ground. Scholars have missed this problem because they typically worry that the promotion of district judges will create a professionalized (and thus overly bureaucratic) cadre of judges or encourage district judges to render decisions that increase their likelihood of elevation. But far more worrisome are the negative effects on the litigation process of having too few appellate judges with trial court experience. If we want to temper the two doctrinal trends and mitigate their deleterious consequences, as well as prevent further deterioration in the functioning of district courts, we ought to promote increased appellate exposure to district court perspectives. Only by

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increasing the number of former district judges on the appellate bench might we see relief from the problems that currently plague litigation.

This Article proceeds in four steps. Part I catalogs the doctrinal changes that have expanded federal jurisdiction, and Part II shows how the general trend toward expanded discretion masks the diminishing discretion in particular procedural contexts. I examine the negative consequences of these changes in Part III. Finally, Part IV looks at causes and cures, including prospects for the future based on current trends in judicial appointments.

I. THE FRUITS OF INEXPERIENCE: EXPANDING JURISDICTION

For about three decades beginning in the early 1970s, Supreme Court decisions tended to restrict the scope of federal jurisdiction. Perhaps in response to perceived excesses of the Warren Court, the Burger and Rehnquist Courts created, expanded, or reinvigorated doctrines that limited access to federal courts, especially for civil rights plaintiffs.[2] Teachers of federal jurisdiction courses began describing their classes as lessons in how to be shut out of federal court. Then, in a sudden burst of enthusiasm around the turn of the century, the Court unexpectedly held in favor of federal-court jurisdiction in a host of cases.[3] Since the recent expansion of jurisdiction cannot be adequately assessed outside the historical context, I begin with the era that saw the constriction of federal-court jurisdiction and then turn to the more recent change in direction.

In documenting the ebb and flow of federal jurisdiction, I do not mean to express any view about the legal soundness or wisdom of either trend. I describe the earlier, restrictive doctrines and their collective jurisdictional consequences merely to contrast them to the more recent change in direction. In particular, I do not suggest that the recent trend is incorrect, only that it is insufficiently transparent or explained.[4] It is also heedless of the consequences for lower fed-

2 *See infra* Part I.A.

3 *See infra* Part I.B.

4 Were the Court to forthrightly overrule some of its earlier cases, justifying its action as a necessary corrective to overly strict limits on federal jurisdiction (especially for civil rights claimants), it might well be correct. But the expansion of jurisdiction appears thoughtless and unjustified (even if justifiable). Some commentators applaud the loosening of particular restrictions on jurisdiction, but only in a single doctrinal context and usually without considering either the adequacy of the Court's analysis or the effect on district courts. *See* Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. & POL'Y F. 119, 141–44 (2001) (praising recent standing case); Robert C. Post, *The*

eral courts. Combined with the contraction of discretion identified in Part II, this trend leaves federal district judges with a variety of problems that I explore in Part III.

A. *Closing the Federal Courts*

The Burger Court wasted no time before cutting back on access to the federal courts for plaintiffs alleging violations of constitutional rights. In 1971, in *Younger v. Harris*,[5] the Court manufactured "Our Federalism" as a barrier to suits seeking to prevent patently unconstitutional state criminal prosecutions.

Harris was indicted in California for distributing political leaflets,[6] and charged with violating the same statute that the Supreme Court had upheld some forty years earlier in *Whitney v. California*.[7] *Whitney* was expressly overruled in *Brandenburg v. Ohio*,[8] and thus the unconstitutionality of Harris's prosecution was quite clear. Harris (along with several others who were found to lack standing) brought suit in federal court under § 1983, asking the court to enjoin the county district attorney from prosecuting him.[9]

Under existing doctrine, Harris was entitled to his injunction. The Court's reversal of *Whitney* left no doubt about the statute's unconstitutionality, and federal statutes clearly authorized both the exercise of jurisdiction and the issuance of the injunction. Section 1983 was enacted—as the Court explicitly recognized a year later—in part to prevent violation of federal constitutional rights by state prosecu-

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Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 21–41 (2003) (praising recent sovereign immunity case); Thomas D. Rowe, Jr. & Edward L. Baskauskas, *"Inextricably Intertwined" Explicable at Last?* Rooker-Feldman *Analysis After the Supreme Court's* Exxon Mobil *Decision*, FED. CTS. L. REV., at 11–25 (May 2006), http://www.fclr.org/docs/2006fedctslrev1.pdf (praising recent case narrowing *Rooker-Feldman* doctrine); Kristen M. Shults, Comment, Friends of the Earth v. Laidlaw Environmental Services: *A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001, 1011–18 (2001) (praising recent standing case); Adam P.M. Tarleton, Note, *In Search of the Welcome Mat: The Scope of Statutory Federal Question Jurisdiction After* Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 84 N.C. L. REV. 1394, 1407–08 (2006) (praising recent federal question case); Paul A. Avron, *The Little Doctrine that (Almost) Could: The Supreme Court Clarifies the Narrow Scope of the* Rooker-Feldman *Doctrine*, FED. LAW., Jan. 2006, at 22, 23 (2006) (praising recent case narrowing *Rooker-Feldman* doctrine).

5 401 U.S. 37 (1971).

6 *Id.* at 38–40.

7 274 U.S. 357, 359, 380 (1927).

8 395 U.S. 444, 449 (1969).

9 Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971).

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tors and judges.[10] For that reason, § 1983 is an expressly authorized exception to the federal Anti-Injunction Act, which otherwise bars federal courts from enjoining state-court proceedings.[11] Moreover, federal courts had been enjoining state criminal proceedings for much of the previous eighty years.[12] The three-judge district court accordingly issued the requested injunction.[13]

The Supreme Court reversed in a notoriously opaque opinion.[14] Invoking both equity doctrines and principles of federalism, the Court held that federal courts could not issue injunctions against ongoing state criminal proceedings.[15] Commentators have criticized virtually every aspect of the decision.[16] Nevertheless, over the next sixteen years, the Court extended *Younger*'s limitations to cases seeking declaratory judgments,[17] state administrative proceedings,[18] state pro-

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10 *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972).

11 *Id.* at 228–29, 243.

12 *See, e.g.*, Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 641–59 (1979); Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1148–63 (1977); Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 743, 765–66 (1974).

13 *Harris*, 281 F. Supp. at 516–17.

14 Younger v. Harris, 401 U.S. 37 (1971).

15 *Id.* at 40–41.

16 The Court ignored both the historical purposes of § 1983 and the fact that equitable barriers were not thought to apply across different jurisdictions at the time of its enactment, and thus that its drafters almost certainly contemplated that it could be used by *federal* courts to enjoin unconstitutional *state* criminal prosecutions. *See, e.g.*, Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 232–34; Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 971–1000 (1987); Ralph U. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 649–83 (1975); Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 997. Justice Black's majority opinion also incorrectly attributes the phrase "Our Federalism" to "the early struggling days of our Union of States," *Younger*, 401 U.S. at 44–45, when in fact it had first been used by Justice Frankfurter in 1939, and had appeared in the United States Reports only sporadically since. *See* Michael G. Collins, *Whose Federalism?*, 9 CONST. COMMENT. 75, 75–78 (1992). For other criticism of *Younger*, see, for example, LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 128–31 (1994); George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking* Younger *Abstention*, 59 GEO. WASH. L. REV. 114, 119–25 (1990); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 534–46 (1989); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84–95 (1984); Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 477–87 (1978); William H. Theis, Younger v. Harris*: Federalism in Context*, 33 HASTINGS L.J. 103, 155–72 (1981).

17 Steffel v. Thompson, 415 U.S. 452, 473–75 (1974).

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ceedings initiated *in response to* the request for federal injunctive relief (and thus that were *not* ongoing at the time of the request),[19] and state civil lawsuits.[20] The expanded doctrine thus channeled many constitutional challenges to state statutes into state courts.

Younger was the earliest example—and perhaps the one most lacking in constitutional, statutory, historical, or precedential basis—of the three-decade-long trend of restricting access to federal courts, but it is far from the only example. After *Younger*, the Court sequentially began to expand or develop other doctrines that narrowed federal jurisdiction, especially for plaintiffs complaining that their federal rights had been violated.[21]

Between 1975 and 1992, the Court imposed increasingly high barriers to standing. To ensure that the federal courts decide only actual cases and controversies, the Supreme Court has always required that plaintiffs have standing: that is, that they show an actual harm to themselves that the lawsuit seeks to remedy.[22] Beyond this constitutional minimum, however, the standing doctrine has ebbed and flowed over time. After liberally granting standing in such cases as *Flast v. Cohen*[23] and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[24] the Court backtracked for almost twenty years. Beginning with *Warth v. Seldin*[25] in 1975, the Court began a pattern of reading complaints narrowly,[26] requiring plaintiffs to establish their cases on the merits in order to obtain standing,[27] and gradually reading into the Constitution what had originally been judicially-

18 Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 626–29 (1986); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 436–37 (1982).

19 Hicks v. Miranda, 422 U.S. 332, 342 n.11 (1975).

20 Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10–11 (1987).

21 I leave to one side the doctrines governing the habeas corpus jurisdiction of the federal courts. While these doctrines have also followed the trends identified in text—it became harder to have a claim heard on the merits during the last third of the twentieth century, followed by some easing of restrictions since 2000—statutory changes complicate the picture and make it beyond the scope of this Article.

22 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

23 392 U.S. 83, 105–06 (1968).

24 412 U.S. 669, 688–90 (1973).

25 422 U.S. 490 (1975).

26 *Id.* at 517–18 (holding that there was no standing because construction plaintiffs (sellers) had failed to show the availability of willing buyers, and low-income plaintiffs (buyers) failed to show the availability of willing sellers).

27 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 758 (1984).

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created "prudential" limits subject to elimination by Congress.[28] By 1990, the Court commented that the generous notion of standing in the 1973 *SCRAP* case had "never since been emulated by this Court."[29] Plaintiffs—especially public interest plaintiffs challenging governmental actions with broad impact, such as environmental regulations—faced almost insurmountable hurdles before they could obtain judicial consideration of their claims on the merits.

Together, *Younger* and standing barriers kept many constitutional challenges out of federal court, but not all. In particular, plaintiffs who sought compensation for concrete constitutional injuries—illegal searches, discriminatory treatment, denials of due process—that state courts (or state administrative agencies) had failed to remedy faced no hurdles under either *Younger* or standing doctrines. Because the state proceedings had ended, *Younger* did not counsel restraint; because the harms were clear, concrete, and individualized, plaintiffs satisfied even the most stringent requirements of standing.

Enter 28 U.S.C. § 1738, the Full Faith and Credit Act. Originally enacted in 1790, it provides that judgments in the states (and territories) "shall have the same full faith and credit in every court within the United States . . . as they have" in the state (or territory) which issued them.[30] Before 1980, however, "federal courts frequently disregard[ed] this statutory mandate, and instead . . . decide[d] cases with regard to a general federal law of res judicata."[31] The Supreme Court itself often determined the preclusive effect of a prior state-court judgment by looking to general federal law rather than to the law of the state issuing the judgment, without even mentioning § 1738.[32] Lower

28 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992); Gollust v. Mendell, 501 U.S. 115, 125–26 (1991); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37–42 (1976).

29 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990).

30 28 U.S.C. § 1738 (2000). For the original language, see Act of May 26, 1790, ch. 11, 1 Stat. 122.

31 *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1334 (1977); *accord* Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 59 (1982) ("[T]he statute frequently has been overlooked or disregarded by the federal courts.").

32 *See, e.g.*, Brown v. Felsen, 442 U.S. 127, 138–39 (1979); Montana v. United States, 440 U.S. 147, 162–64 (1979); Union & Planters' Bank v. City of Memphis, 189 U.S. 71, 75 (1903); *see also* Durfee v. Duke, 375 U.S. 106, 109 (1963). In *Durfee*, the Court was faced with determining the preclusive effect of a prior state-court judgment on a case originally brought in a second state's court but removed to federal court. *Id.* at 107–09. Although the Court relied on § 1738, it did so entirely in the context of the statutory requirement that the courts of each *state* give full faith and credit to the judgments of other states. *Id.* at 107 ("The case before us presents questions arising under" the Constitution's Full Faith and Credit Clause, which is applicable to state

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federal courts followed suit. Sometimes they ignored § 1738 entirely, sometimes they suggested that the contours of preclusion were up to the federal court to define, and sometimes they noted explicitly that other federal policies—including those embodied in civil rights statutes—could overcome the dictates of § 1738.[33] The 1973 edition (not revised until 1988) of *Hart & Wechsler's The Federal Courts and the Federal System,* the most exhaustively comprehensive federal courts casebook, contains a single short paragraph on § 1738's directive to federal courts, simply noting without case citation or discussion that § 1738 protects prior state-court judgments "[n]ot only in other state courts but also 'in every court within the United States and its Territories and Possessions.'"[34]

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courts only); *id.* at 109 ("Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it."); *id.* at 110 (discussing exceptions to the doctrine that "a judgment of a court in one State is conclusive upon the merits in a court in another State").

33 *See, e.g.*, Winters v. Lavine, 574 F.2d 46, 54–55 (2d Cir. 1978) ("Notwithstanding the existence of § 1738 . . . there are a number of cases in this circuit which have analyzed the issue of the extent to which the prior state court judgment precludes the subsequent Federal Civil Rights Act lawsuit and make no references whatever to § 1738 or to the concepts of res judicata and collateral estoppel which would be employed by the courts of the state in which the prior judgment was rendered."); Red Fox v. Red Fox, 564 F.2d 361, 365 n.3 (9th Cir. 1977) ("[T]he implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of [§ 1738]."); Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974) (holding that "'other well-defined federal policies . . . may compete with those policies underlying section 1738'" (quoting Am. Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir. 1972))); *Am. Mannex Corp.*, 462 F.2d at 690 ("[Section 1738] does not necessarily mean, however, that a federal court is invariably bound to a state's own interpretation of res judicata or judicial estoppel."); Midgett v. United States, 603 F.2d 835, 845 (Ct. Cl. 1979) (state preclusion rules must yield to "important and established federal policy"); Williams v. Sclafani, 444 F. Supp. 906, 916 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1046 (2d Cir. 1978) (noting that "relaxed principles of res judicata" apply in civil rights suits); Schwegmann Bros. Giant Super Mkts. v. La. Milk Comm'n, 365 F. Supp. 1144, 1147 (M.D. La. 1973) ("While the federal court hearing the second case will give great consideration to the State's interpretation of its doctrines of res judicata and judicial estoppel, it is not necessarily bound by those interpretations."); *see also* Atwood, *supra* note 31, at 71–72 & nn. 63–65 (collecting cases that show the inconsistency of Supreme Court precedent and the lower courts' failure to develop coherent law on the preclusive effects of state-court judgments). *See generally* William H. Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U. L. REV. 859 (1976) (arguing that civil rights claims should usually not be barred by res judicata).

34 PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO, & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 842 (2d ed. 1973) (quoting § 1738). The 1983 first edition of another casebook, written shortly after

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As the law stood in 1980, then, the Full Faith and Credit Act was moribund, especially in civil rights cases. Within a few years, however, the Supreme Court had resurrected the statute as a formidable barrier for civil rights plaintiffs seeking to litigate federal claims in federal court. The Court first held both that § 1738 applied even in civil rights cases brought under 42 U.S.C. § 1983 and that it barred the relitigation of issues previously litigated in state court (usually called issue preclusion).[35] Four years later, it extended the doctrine to preclude federal litigation of claims that might have been, but were not, litigated in the earlier state-court proceeding (usually called claim preclusion).[36] By 1986 the Court had applied § 1738 to bar claims that *could not* have been raised in the earlier state-court suit because they were within exclusive federal jurisdiction,[37] extended federal common law res judicata doctrine to preclude relitigation of issues decided in some state administrative proceedings,[38] and held that Title VII of the 1964 Civil Rights Act—the federal employment discrimination statute—did not create an exception to § 1738.[39] Especially for plaintiffs with both state and federal claims, these doctrines converted forum selection into a decision fraught with potentially dispositive consequences. And for defendants in criminal cases or quasi-criminal administrative or judicial proceedings, the doctrines served to eliminate their ability to seek federal review of their federal claims except through the tortuous (and increasingly difficult) method of obtaining a writ of habeas corpus.

Civil rights plaintiffs were not the only parties excluded from federal court during this period. In two tort cases decided three years apart, the Court narrowed the scope of both federal question jurisdiction and pendent jurisdiction. Under 28 U.S.C. § 1331, federal courts

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the Supreme Court began the resurrection of § 1738 in *Allen v. McCurry*, 449 U.S. 90 (1980), contains only a one-page note on *McCurry* (in the chapter on *Younger v. Harris*, 401 U.S. 37 (1971)), which suggests that even in the early 1980s federal courts scholars did not view § 1738 as an important doctrine. *See* MARTIN H. REDISH, FEDERAL COURTS 712–13 (1st ed. 1983).

35 *Allen*, 449 U.S. at 103–05.

36 Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81–85 (1984).

37 *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373–79 (1996); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379–87 (1985).

38 Univ. of Tenn. v. Elliott, 478 U.S. 788, 796–99 (1986).

39 Kremer v. Chem. Constr. Corp., 456 U.S. 461, 468–83 (1982); *see also Matsushita*, 516 U.S. at 380–86 (finding no exception to § 1738 under section 27 of the Securities Exchange Act of 1934); Parsons Steel, Inc., v. First Ala. Bank, 474 U.S. 518, 523–26 (1986) (finding no exception to § 1738 under Anti-Injunction Act relitigation exception).

have jurisdiction over cases "arising under" federal law.[40] The exact contours of this grant of jurisdiction have bedeviled courts for more than a hundred years, especially in the context of what Justice Frankfurter called the "litigation-provoking problem": a federal question embedded in a state cause of action.[41] The seminal case of *Smith v. Kansas City Title & Trust Co.*[42] allowed jurisdiction in just such a situation, holding that jurisdiction exists whenever "the right to relief depends upon the construction or application of the Constitution or laws of the United States."[43] But in 1986, in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,[44] the Court backed away from *Smith*, holding that

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'[45]

The Court engaged in a similar analysis of congressional intent in *Finley v. United States*.[46] *Finley* addressed the reach of pendent-party jurisdiction, the doctrine governing whether a plaintiff may join additional defendants when the claims against those defendants lack independent subject matter jurisdiction but arise from the same transaction or occurrence as the claims giving rise to the primary lawsuit.[47] Prior to *Finley*, the Court had adopted a rule allowing pendent-party jurisdiction in federal courts unless "Congress in the statutes conferring jurisdiction . . . expressly or by implication negated its existence."[48] In *Finley*, the Court reversed the presumption, requiring "an affirmative grant of pendent-party jurisdiction" by Congress.[49] In so

40 28 U.S.C. § 1331(a) (2000).

41 Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting).

42 255 U.S. 180 (1920).

43 *Id.* at 199.

44 478 U.S. 804 (1986).

45 *Id.* at 817 (quoting 28 U.S.C. § 1331(a)). As the dissent in *Merrell Dow* pointed out, a congressional intent against creating a private cause of action—essentially a decision to relegate statutory claims to federal agencies in the first instance—is not the same as a congressional preference for state courts over federal courts; indeed, to the extent that Congress chose agencies for reasons of uniformity and expertise, its decision suggests a congressional view that if *any* court is to adjudicate statutory claims, it should be a federal court. *Id.* at 831–32 (Brennan, J., dissenting).

46 490 U.S. 545 (1989).

47 *Id.* at 549.

48 Aldinger v. Howard, 427 U.S. 1, 18 (1976).

49 *Finley*, 490 U.S. at 553.

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holding, the majority eviscerated the doctrine of pendent-party jurisdiction, since if Congress affirmatively grants jurisdiction there is no need for a doctrine whose sole purpose is to determine whether there is jurisdiction over additional parties not within the statutory grant.[50] Congress quickly responded to *Finley*'s contraction of jurisdiction by authorizing pendent-party jurisdiction a year later.[51] Nevertheless, *Finley*, like *Merrell Dow*, is an example of the Court's sharp contraction of federal-court jurisdiction during the last decades of the twentieth century.

In 1996, the Court embarked on its most controversial doctrinal innovation limiting federal jurisdiction. The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[52] Early interpretations extended states' sovereign immunity to suits in admiralty[53] and suits brought by their own citizens,[54] neither of which are within the language of the Amendment. A careful examination of both these precedents and the historical circumstances surrounding the adoption of Article III and the Eleventh Amendment indicates that the extension of immunity beyond the language of the Amendment rested primarily on the Court's conclusion that the Constitution was not intended to erase whatever common law immunity states enjoyed prior to its ratification.[55]

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50 *See id.* at 556–57 (Blackmun, J., dissenting). Moreover, since the Court did not persuasively distinguish pendent-party from pendent-claim jurisdiction as a matter of constitutional or statutory interpretation (but simply as pragmatically different), *Finley* put in jeopardy even the twenty-year-old liberalization of pendent-claim jurisdiction. *See* Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 260 ("Notwithstanding Justice Scalia's unwillingness to limit or impair pendent claim and ancillary jurisdiction, *Finley*'s premises create a wedge for chipping away at those doctrines."); Wendy Collins Perdue, Finley v. United States: *Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 567–68 (1990) ("By characterizing *Gibbs* as inconsistent with the requirement of statutory authorization of jurisdiction, the Court has in essence declared pendent-claim jurisdiction to be an unconstitutional usurpation of power.").

51 Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 1367 (2000)); *see infra* notes 103–05 and accompanying text.

52 U.S. CONST. amend. XI.

53 *Ex parte* New York, 256 U.S. 490 (1921).

54 Hans v. Louisiana, 134 U.S. 1 (1890).

55 For an overview of this history, see *Seminole Tribe v. Florida*, 517 U.S. 44, 78–92 (1996) (Stevens, J., dissenting); *id.* at 101–23 (Souter, J., dissenting). For a list of some of the voluminous scholarship supporting this interpretation, see *id.* at 110 n.8 (Souter, J., dissenting).

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If states' immunity from suit was derived from common law rather than from the text of the Constitution or its amendments, however, we would expect that Congress, acting under any of its constitutionally authorized powers, could abrogate that immunity just as it could change any other common law doctrine. And indeed, until 1996, that assumption held. One 1989 decision by a badly fractured Court explicitly upheld a congressional abrogation of immunity.[56] More telling is the Court's adherence to what it termed the "clear statement rule": that Congress must clearly state its intent to abrogate state immunity.[57] The clear statement rule determines whether Congress *has* abrogated state immunity, and thus necessarily depends on a prior determination that Congress *may* abrogate that immunity.

Despite this historical and precedential support for a congressional power of abrogation, in the 1996 case of *Seminole Tribe v. Florida*[58] the Court overruled its prior precedent and held that Congress could subject states to suit *only* when it acted under the powers given to it by Section 5 of the Fourteenth Amendment.[59] "The Eleventh Amendment," the Court held, "restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[60] In so holding, the Court effectively constitutionalized what had previously been thought to be a common law barrier to suits against the plaintiff's own state.[61] Over the next five years, the Court used the *Seminole Tribe* analysis to invalidate five different federal statutes that purported to abrogate state sovereign immunity.[62]

This trend of restricting jurisdiction is not news. It has been amply identified, explored, and criticized in the literature (although each doctrine is usually treated individually, rather than amalgamated

56 Pennsylvania v. Union Gas Co., 491 U.S. 1, 13–23 (1989).

57 *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 232 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 255 n.7 (1985).

58 517 U.S. 44.

59 *Id.* at 59–66.

60 *Id.* at 72.

61 For an explanation and critique of this process of "constitutionalization," see *Alden v. Maine*, 527 U.S. 706, 760–95 (1999) (Souter, J., dissenting).

62 *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78–91 (2000) (Age Discrimination in Employment Act); *Alden*, 527 U.S. at 712–14 (Fair Labor Standards Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670–72 (1999) (Lanham Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–39 (1999) (Patent and Plant Variety Protection Remedy Clarification Act).

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as I have done).[63] Indeed, many scholars are still focusing on the contraction of jurisdiction.[64] But these critiques now miss the mark: What has not been previously noted is the extent to which the last six years or so have seen a reversal in direction. Beginning with a trickle of cases in the late 1990s and exploding in three unrelated cases in the single 2004 Term, the Court has directly or indirectly undermined the doctrines that had narrowed federal jurisdiction. I turn to this new expansion of jurisdiction in the next subpart.

B. Expanding Federal Jurisdiction

The recent jurisdictional changes have taken several forms. In the context of standing, it is a somewhat amorphous shift in emphasis and results suggesting a more generous view of standing without any change in doctrine. The change is even more subtle for *Younger* and the preclusion doctrines, as the Court has cut back not on those doctrines but on a related doctrine that serves a similar purpose and had been used by lower courts to fill in the gaps between *Younger* and preclusion. For state sovereign immunity, however, the reversal is stunning, with the Court upholding three federal abrogations that are

63 In addition to the sources cited *supra* notes 12 & 16 (criticizing *Younger*), and 50 (criticizing *Finley*), see, for example, Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1493–94 (1991); Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. REV. 495, 503–10 (1997); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 20–24; Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367, 379–94 (1990).

64 *See, e.g.*, Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173, 1185–1202 (2002); Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 538–39 (2004); E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims for Monetary Damages and Raising* Younger *Abstention Sua Sponte on Appeal*, 81 N.D. L. REV. 475, 489–96 (2005); Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1660–64 (2002); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 282–83 (2005); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1728–33 (2004); Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1954–75 (2003); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1291–1312 (2005); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1225–34; Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1117–52 (2006).

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indistinguishable from those so recently invalidated. Similarly, the Court has substantially revised the *Merrell Dow* rule (although without admitting it has done so) and potentially opened the federal courts to a host of nondiversity-based state-law claims. And after construing pendent jurisdiction narrowly in *Finley*, it recently interpreted the new supplemental jurisdiction statute—enacted in response to *Finley*—much more broadly than its drafters intended. This subpart begins with the most obvious changes and then discusses the more subtle shifts.

1. State Sovereign Immunity

Seminole Tribe and its progeny rested on two independent doctrinal bases, both of which have now been undermined. First, in *Seminole Tribe* itself, the Court held that Congress can only abrogate state sovereign immunity when it uses the power granted by Section 5 of the Fourteenth Amendment, not when it acts under its Article I powers.[65] Subsequent cases then turned on the Court's narrow interpretation of Congress's Section 5 powers. When acting pursuant to Section 5, the Court held, Congress can outlaw behavior beyond that actually prohibited by the Fourteenth Amendment itself only if the legislation is a "congruent and proportional" response to a "widespread pattern" of unconstitutional action by the states.[66]

Between 1996 and 2001, the Court applied these requirements quite strictly. Because Congress had not documented a pattern of unconstitutional discrimination by the states against the aged or the disabled, neither the Age Discrimination in Employment Act (ADEA) nor the Americans with Disabilities Act (ADA) was held to be a valid exercise of Section 5 powers.[67] A history of state actions with a disparate impact on either group was insufficient, because only intentional (and, in the context of age and disability, irrational) discrimination

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65 Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

66 *See Garrett*, 531 U.S. at 365 ("congruence and proportionality"); *id.* at 368 ("history and pattern"); *id.* at 372 ("congruence and proportionality"); *id.* at 373 ("serious pattern" and "marked pattern"); *id.* at 374 ("congruent and proportional"); *Kimel*, 528 U.S. at 81 ("congruence and proportionality"); *id.* at 90 ("widespread pattern"); *id.* at 91 ("widespread and unconstitutional . . . discrimination"); *Fla. Prepaid*, 527 U.S. at 639 ("congruence and proportionality"); *id.* at 645 ("widespread and persisting deprivation of constitutional rights"); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("congruence and proportionality"); *id.* at 526 ("widespread and persisting deprivation of constitutional rights"); *id.* at 531 ("widespread pattern").

67 *Garrett*, 531 U.S. at 374 (holding abrogation of state sovereign immunity in the ADA unconstitutional); *Kimel*, 528 U.S. at 87–92 (holding abrogation of state sovereign immunity in the ADEA unconstitutional).

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violates the Constitution. Similarly, the absence of any pattern of *unconstitutional* state infringement of intellectual property—that is, infringement without the possibility of compensation—led the Court to invalidate two different congressional statutes purporting to allow states to be sued for trademark or patent infringement.[68]

In 2000 and 2001, eight federal courts of appeals applied this line of precedent to determine whether Congress had validly abrogated state sovereign immunity in the 1993 Family and Medical Leave Act (FMLA),[69] which, among other things, requires employers to provide unpaid leave for employees caring for an ill family member.[70] Seven of the eight easily found the abrogation unconstitutional because the FMLA was not a valid exercise of Congress's Section 5 powers as defined by the Supreme Court.[71] These courts reasoned that since Congress had found *no* evidence of unconstitutional action by states in their allocation or denial of family-care leave, the FMLA was not a congruent and proportional response to a widespread pattern of unconstitutional state action.[72]

By a six-to-three vote, the Supreme Court nevertheless upheld the FMLA's abrogation in 2003, holding in *Nevada Department of Human Resources v. Hibbs*[73] that Congress had validly enacted the FMLA as a measure to combat gender discrimination.[74] Unfortunately, that holding is flatly inconsistent with the precedent. The Court relied on evidence that *gender-neutral* state limitations on *parenting* leaves have a disparate impact on women. Congress did not study the effect of lack of family-care leaves, and the Court offered no support for its bald declaration that neutral state laws on both types of leave "implicate

68 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (holding that the Lanham Act does not abrogate state sovereign immunity); *Florida Prepaid*, 527 U.S. at 643–44 (1999) (holding the Patent and Plant Variety Protection Remedy Clarification Act unconstitutional).

69 29 U.S.C.A. §§ 2611–54 (West 1999 & Supp. 2006). For a list of the eight decisions, see *infra* note 71.

70 29 U.S.C. § 2612(a)(1)(c) (2000).

71 Laro v. New Hampshire, 259 F.3d 1, 16–17 (1st Cir. 2001); Lizzi v. Alexander, 255 F.3d 128, 134–38 (4th Cir. 2001); Townsel v. Missouri, 233 F.3d 1094, 1096 (8th Cir. 2000); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 226–29 (3d Cir. 2000); Kazmier v.Widmann, 225 F.3d 519, 527–33 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559, 561–62 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 67–69 (2d Cir. 2000). *But see* Hibbs v. Nev. Dep't of Human Res., 273 F.3d 844, 851–61 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

72 *See, e.g.*, *Hale*, 219 F.3d at 68–69.

73 538 U.S. 721.

74 *Id.* at 728–40.

the same stereotypes."[75] Moreover, even the evidence of "discrimination" in parental leaves (with the exception of three states with facially discriminatory parental leave policies, which presumably could have been challenged in court) amounted to no more than a finding that "'the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'"[76] In other words, Congress had the same type of evidence in enacting the FMLA that it did in enacting the ADA: that neutral state policies often have a disparate impact on a disadvantaged group. But the Court has consistently held that neutral statutes with a disparate impact on even the most protected groups do not violate the Constitution unless they are enacted with an intent to discriminate.[77] *Hibbs* is difficult to reconcile with the earlier cases.[78]

One might have written off *Hibbs* as an aberration, had not the Court upheld a similar abrogation the next year. Having previously struck down the abrogation of immunity in Title I of the ADA (banning disability discrimination in employment) as beyond Congress's Section 5 powers,[79] the Court in *Tennessee v. Lane*[80] upheld the abrogation in Title II of the ADA (banning disability discrimination in public accommodations). *Lane* involved a wheelchair-bound plaintiff who claimed that the state's failure to accommodate his disability denied him access to state courts.[81] Relying on the same evidence of discrimination that it found insufficient in the Title I case, the majority held that Title II was a valid exercise of congressional power under Section 5 insofar as it "implicat[ed] the accessibility of judicial services."[82] Again, however, there was no evidence of intentional dis-

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75 *Id.* at 731 n.5.

76 *Id.* at 728 n.2 (quoting 29 U.S.C. § 2601(a)(5) (2000)).

77 *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279–81 (1979) (disparate impact on women does not violate Constitution); Washington v. Davis, 426 U.S. 229, 238–48 (1976) (disparate impact on racial minorities does not violate Constitution); *cf.* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (pregnancy discrimination does not violate Title VII because it is not gender discrimination); Geduldig v. Aiello, 417 U.S. 484, 494–505 (1974) (distinction based on pregnancy does not violate the Constitution).

78 For elaboration of the arguments in this paragraph, see Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 238–48.

79 *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 87–92 (2001).

80 541 U.S. 509, 530–34 (2004).

81 *Id.* at 513.

82 *Id.* at 531.

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crimination in the legislative record.[83] It is hard to see *Hibbs* and *Lane* as anything other than a withdrawal from the narrow interpretation of Section 5 taken in the earlier cases, and therefore as an expansion of the federal courts' jurisdiction to hear claims against state defendants alleged to have violated plaintiffs' federal statutory rights.

Even more recently, the Court has undermined the core *Seminole Tribe* holding that Congress lacks power under Article I to abrogate state sovereign immunity. In *Seminole Tribe* and its progeny, the Court concluded that the states retained any immunity except that "surrender[ed] . . . in the plan of the convention," that is, altered by the Constitution itself.[84] The Court held that the Commerce Clause of Article I, Section 8 does not represent such a surrender, despite its broad allocation of authority to Congress. Indeed, as noted earlier, the Court stated that Congress could not use *any* of its Article I powers to abrogate sovereign immunity.[85] Nevertheless, in *Central Virginia Community College v. Katz*,[86] the Court held that states do not have immunity from bankruptcy proceedings,[87] which are derived from Congress's Article I, Section 8 power to establish "uniform laws on the subject of bankruptcies."[88] The majority justified its conclusion that the bankruptcy power, unlike the commerce power, constituted a surrender of state immunity primarily by an historical analysis suggesting that the framers recognized the need for uniform bankruptcy laws that did not vary from state to state or require debtors to engage in multiple discharge proceedings.[89] As the dissent pointed out, however, this argument does not distinguish the commerce power, which was also enacted largely for purposes of uniformity[90] nor does it demonstrate that the framers intended to extinguish state immunity

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83 As the dissent pointed out, "there [was] *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials." *Id.* at 543 (Rehnquist, C.J., dissenting).

84 Seminole Tribe v. Florida, 517 U.S. 44, 68 (1996) (quoting Monaco v. Mississippi, 292 U.S. 313, 321–23 (1934)); *id.* at 70 n.13 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)); *see also* Alden v. Maine, 527 U.S. 706, 713 (1999) (finding immunity retained "except as altered by the plan of the Convention or certain constitutional Amendments").

85 *See supra* notes 58–61 and accompanying text.

86 126 S. Ct. 990, 1004–05 (2006).

87 *Id.* at 994.

88 U.S. CONST. art. I, § 8, cl. 4.

89 *Katz*, 126 S. Ct. at 1002–05.

90 *Id.* at 1008 (Thomas, J., dissenting).

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from suit rather than simply grant to Congress the power to pass bankruptcy laws governing private individuals.[91]

Katz went further than simply allowing Congress to use its bankruptcy authority to abrogate state immunity. The federal bankruptcy statutes contain no "clear statement" of an intent to abrogate, and, as the Court noted in *Seminole Tribe*, "it has not been widely thought that the federal . . . bankruptcy . . . statutes abrogated the States' sovereign immunity."[92] Thus, even aside from the constitutional question, the Court ought to have upheld the state's immunity on statutory grounds. But the Court did not consider the statutory question relevant. It held instead that the Bankruptcy Clause itself abrogated state immunity without any need for further congressional action.[93] In other words, although Clause 3 of Article I, Section 8 (the Commerce Clause) does not even grant Congress the power to subject states to suit, Clause 4 of the same Section (the Bankruptcy Clause) abrogates state sovereign immunity all by itself.

The depth of the inconsistency with existing precedent is difficult to overstate. Besides the already-noted conflict with *Seminole Tribe*, the *Katz* Court repeats the Court's initial mistake that the Eleventh Amendment was enacted to correct. In *Chisholm v. Georgia*[94] in 1793, the Court held that the Article III grant of federal jurisdiction over suits "between a State and Citizens of another State" eliminated the states' prior immunity from suit.[95] The Eleventh Amendment was adopted specifically to overturn *Chisholm*,[96] as its language confirms: It says not that the judicial power does not *extend* to such suits, but that the judicial power "shall not be *construed* to extend" to such suits.[97] The Amendment seems to be directed at the judiciary, warning judges against interpreting the mere adoption of the Constitution as extinguishing the states' common law immunity. (Whether Congress, by further action, could abrogate this common law immunity has already been discussed.[98]) Yet interpreting the Constitution to erase state immunity is exactly what the Court did in *Katz*. In short, *Katz*, like *Hibbs* and *Lane*, cannot be reconciled with the precedent, and unexpectedly expands the availability of a federal forum in certain cases.

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91 *Id.* at 1009.

92 Seminole Tribe v. Florida, 517 U.S. 44, 72 n.16 (1996).

93 *Katz*, 126 S. Ct. at 1005.

94 2 U.S. (2 Dall.) 419 (1793).

95 *Id.*

96 *See, e.g.*, JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 21 (1987).

97 US. CONST. amend. XI (emphasis added).

98 *See supra* notes 58–62 and accompanying text.

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2. Federal Question and Supplemental Jurisdiction

Despite its somewhat cavalier treatment of precedent and its confusing rationale, *Merrell Dow* was praiseworthy in its unequivocal clarity: no private cause of action, no jurisdiction. But in one of a trio of blockbuster federal jurisdiction cases in 2005, the Court unanimously recast *Merrell Dow* as a fuzzy balancing test. In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[99] the Court upheld federal jurisdiction over a state-law claim that turned on a question of federal tax law. It did so despite the fact that the tax provision at issue did not create a private cause of action.[100] It held that *Merrell Dow*—despite the "broad language" that "on its face supports"[101] a more restrictive interpretation disallowing jurisdiction—stands for the proposition that a federal court has jurisdiction over a federal question embedded in a state cause of action when "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[102] This revisionist history not only expands federal jurisdiction in ways not contemplated by *Merrell Dow*, but also—as I discuss in Part III—fails to guide lower courts as to the contours of this unpredictable expansion. And ironically, the same Court that found the tax law question substantial enough to justify federal-court jurisdiction nevertheless limited its consideration to the jurisdictional question alone, noting that the case provided "no occasion to pass upon the proper interpretation of the federal tax provision at issue here."[103] Resolution of the "actually disputed and substantial" federal question would have to wait for another day.

The second important 2005 case involved supplemental jurisdiction. A year after *Finley* eviscerated pendent-party jurisdiction, Congress enacted 28 U.S.C. § 1367, which was designed to overturn *Finley* and codify the remainder of the judicially-developed doctrines governing pendent and ancillary jurisdiction. Section 1367(a) authorizes federal courts to exercise "supplemental" jurisdiction over claims transactionally related to claims over which a federal court does have original jurisdiction, including supplemental claims "that involve the

99 545 U.S. 308 (2005).

100 *Id.* at 311.

101 *Id.* at 317.

102 *Id.* at 314. As one reader of this Article noted, the sentence quoted in text is one that only a lawyer could love.

103 *Id.* at 311 n.1.

joinder . . . of additional parties."[104] Had § 1367(a) been enacted alone, its broad grant of supplemental jurisdiction would allow multiple plaintiffs or multiple defendants to be joined in a single federal lawsuit even if only one plaintiff and one defendant met the jurisdictional requirements. By itself, then, § 1367(a) threatens to overturn long-established doctrines, such as the rule requiring each plaintiff joined in a diversity-based suit (under Federal Rule of Civil Procedure 20) or included in a diversity-based class action (under Rule 23) to meet the minimum jurisdictional amount.[105] These rules prevent a plaintiff who does not meet the jurisdictional requirements for diversity from piggybacking on the claims of a plaintiff who does meet them.

Congress thus included in the statute additional provisions limiting § 1367(a). The legislative history makes quite clear that the limitations contained in § 1367(b) were designed to codify and maintain prior limitations (except for the limitation of *Finley* itself) on pendent-party jurisdiction, including the anti-piggybacking doctrines governing jurisdiction over parties joined under Rules 20 and 23.[106]

Unfortunately, § 1367(b) is abysmally written.[107] Its plain language conflicts with its undoubted purpose. Section 1367(b) precludes supplemental jurisdiction over a specified list of claims by or against additional parties in diversity cases if those claims do not independently satisfy the requirements of diversity jurisdiction.[108] The list of prohibited claims includes "claims by plaintiffs against persons made parties under Rule . . . 20 . . . of the Federal Rules of Civil Procedure."[109] Thus § 1367(b) maintains the prior judge-made rule generally barring a diversity plaintiff from suing multiple defendants unless her claim against each defendant satisfies the requirements of

104 28 U.S.C. § 1367(a) (2000).

105 *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (Rule 23 class action); Clark v. Paul Gray, Inc., 306 U.S. 583, 589 (1939) (Rule 20 joinder).

106 *See* Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 819 (E.D. Pa. 1997); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 (1991).

107 I say this with apologies to the trio of respected law professors who drafted the legislation, one of whom is my co-author. *See* Rowe et al., *supra* note 106.

108 The requirements for diversity jurisdiction, specified in 28 U.S.C. § 1332, are that the parties are from different states and the amount in controversy is above $75,000. The Supreme Court has long interpreted the statute as also requiring "complete diversity" so that no plaintiff can be a citizen of the same state as any defendant. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806).

109 28 U.S.C. § 1367(b).

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§ 1332.[110] But § 1367(b) does not list—and thus apparently does not prohibit—claims *by* parties (plaintiffs) joined under Rule 20, nor does it refer to Rule 23 at all. It therefore appears on its face to allow multiple plaintiffs to join together even if only one of them meets the jurisdictional requirements of diversity, thus overruling the anti-piggybacking doctrines. Between 1995 and 2004, ten federal Courts of Appeals considered this question, creating a six-to-four circuit split.[111]

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[112] a divided Supreme Court finally resolved the split, holding that § 1367(b) permits plaintiffs who do not meet the minimum jurisdictional amount to join with plaintiffs who do, under both Rule 20 and Rule 23, thus overruling the earlier anti-piggybacking doctrines.[113] Whatever the merits of interpreting § 1367 as overruling longstanding jurisdictional doctrines, or of privileging text over congressional intent, *Allapattah* undoubtedly expands federal-court jurisdiction, allowing claims that were previously relegated to state courts. It is therefore part of the new change in direction.[114]

Most recently, the Court expanded jurisdiction by narrowing the probate exception to federal jurisdiction in *Marshall v. Marshall*.[115] The Court has long held (on the basis of perhaps questionable histori-

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110 *See, e.g.*, Walter v. Ne. R.R. Co., 147 U.S. 370, 374 (1893); E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 933 (2d Cir. 1998); Libby v. City Nat'l Bank, 592 F.2d 504, 510 (9th Cir. 1978); Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11, 13 (5th Cir. 1961); *see* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704, at 110–16 (Supp. 2006).

111 For circuits that held that § 1367(b) overruled *Clark* or *Zahn* or both, see *Olden v. LaFarge Corp.*, 383 F.3d 495, 502 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir. 2003), *aff'd*, 125 S. Ct. 2611 (2005); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 114–17 (4th Cir. 2001), *cert. dismissed*, 536 U.S. 979 (2002); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 933–40 (9th Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930–33 (7th Cir. 1996); *In re Abbott Labs.*, 51 F.3d 524, 525 (5th Cir. 1995), *aff'd by an equally divided Court*, 529 U.S. 333 (2000). For circuits that held that § 1367(b) did not change the prior doctrines, see *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 132–37 (1st Cir. 2004), *overruled by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 960–62 (8th Cir. 2000); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221–22 (3d Cir. 1999); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 637–41 (10th Cir. 1998).

112 125 S. Ct. 2611 (2005).

113 *Id.* at 2621.

114 As I will discuss in Part III, *Allapattah* is also a prime example of the Court's heedlessness of the effect of its decisions on the trial courts, because its reasoning creates more difficulties for those courts than it solves.

115 126 S. Ct. 1735, 1746–49 (2006). The plaintiff, Vickie Lynn Marshall, is better known by her stage name, Anna Nicole Smith.

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cal evidence[116]) that federal courts lack jurisdiction over matters relating to wills and estates even if the prerequisites for federal jurisdiction are otherwise met.[117] Lower courts had applied the doctrine in a variety of circumstances. Some found jurisdiction lacking in cases in which the federal court must rule on the validity of the will in order to decide the issue before it.[118] Others denied jurisdiction in cases which, if brought in state court, would have been in probate court rather than in a court of general jurisdiction.[119] And many ruled against jurisdiction if they found that exercising jurisdiction would "impair the policies served by the probate exception,"[120] including efficiency and federalism. Thus, for example, a widely-cited Seventh Circuit opinion by Judge Posner found federal jurisdiction lacking in a diversity case alleging tortious interference with an expected inheritance.[121] In *Marshall*, however, the Court narrowed the probate exception to cases involving "the probate or annulment of a will and the administration of a decedent's estate" or the "dispos[al] of property that is in the custody of a state probate court."[122] As with the narrowing of the *Rooker-Feldman* doctrine, discussed next, the Court's decision in *Marshall* deprived federal district courts of a tool they had been using to manage both federalism and overcrowded dockets.

3. Federal Interaction with State-Court Proceedings

In addition to *Grable* and *Allapattah*, the Court in 2005 decided a third case that significantly expanded the jurisdiction of the federal courts while providing little guidance: *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,[123] which narrowed the scope of the *Rooker-Feldman* doctrine.[124] The existence of multiple parallel court systems in the United States creates numerous problems for managing litigation, es-

116 *See* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1500–02 (2001); John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77, 117–36 (1997).

117 *See, e.g.*, Markham v. Allen, 326 U.S. 490, 494 (1946).

118 *See, e.g.*, Turja v. Turja, 118 F.3d 1006, 1008–09 (4th Cir. 1997); Blakeney v. Blakeney, 664 F.2d 433, 434 (5th Cir. 1981).

119 *See, e.g.*, Reinhardt v. Kelly, 164 F.3d 1296, 1299–1302 (10th Cir. 1999); Bedo v. McGuire, 767 F.2d 305, 306–07 (6th Cir. 1985).

120 Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982).

121 *Id.* at 713–17.

122 Marshall v. Marshall, 126 S. Ct. 1735, 1739 (2006).

123 544 U.S. 280 (2005).

124 *Id.* at 284 (confining the *Rooker-Feldman* doctrine to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting disctrict court review of those judgments").

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pecially cases involving litigants who, in the words of the judges who must deal with them, "refuse to accept adverse decisions"[125] and repeatedly subject the courts to "vexatious and unmeritorious litigation."[126] Both the *Younger* doctrine and the interjurisdictional preclusion doctrines of full faith and credit are designed to deal with some aspects of the problem. But some cases slip through the cracks of *Younger* and preclusion, especially since state preclusion doctrines vary widely.[127] If a federal-court plaintiff who has already been to state court seeks damages (or perhaps even declaratory relief), *Younger* will not bar the suit, nor will it bar an injunction that conflicts with a prior state-court injunction as long as the state proceedings are completed. And § 1738 might not bar a subsequent federal suit if, for example, the state judgment is still on appeal,[128] or the state retains the mutuality doctrine and the federal plaintiff adds a new party to the suit,[129] or the federal plaintiff adds a new claim that purportedly arises from the state judgment itself and therefore could not have been raised in the state suit.

For twenty years, federal district courts used the *Rooker-Feldman* doctrine in an attempt to fill these gaps between *Younger* and preclusion and prevent litigants from jumping ship to federal court if they are dissatisfied with the results in state court. The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.*,[130] decided in 1923, the Court held that lower federal courts lack jurisdiction to entertain "appeals" from state-court judgments, because 28 U.S.C. § 1257 implicitly reserves that power to the Supreme Court itself.[131] For six decades, lower courts applied *Rooker* sporadically, often using it interchangeably with doctrines of preclusion (which, as noted earlier, were in some disarray).[132] Then in 1983, just as the Supreme Court was rediscovering preclusion, it decided *District of Columbia Court of Appeals v. Feldman*,[133] clarifying *Rooker* and giving the doctrine its name. In *Feldman*, the

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125 Homola v. McNamara, 59 F.3d 647, 651 (7th Cir. 1995).

126 Fariello v. Campbell, 860 F. Supp. 54, 58 (E.D.N.Y. 1994).

127 On the variety among state preclusion doctrines, see Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 963–83 (1998).

128 *See id.* at 973 & nn.129–34 (listing states in which judgment pending appeal is not given preclusive effect).

129 *See id.* at 966–67 & nn.80–88 (listing states that still adhere to mutuality doctrine).

130 263 U.S. 413 (1923).

131 *Id.* at 416.

132 *See* Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1343–44 (1980).

133 460 U.S. 462 (1983).

Court held that lower federal courts have no jurisdiction to hear "challenges to state-court decisions in particular cases arising out of judicial proceedings"[134] or to decide questions "inextricably intertwined" with state-court judgments.[135]

Despite the lack of any further guidance from the Supreme Court, the lower federal courts relied on the doctrine to find jurisdiction lacking in more than 500 cases during the 1990s alone.[136] Most lower courts described *Rooker-Feldman* as barring any suit in which federal relief would nullify or modify the state judgment,[137] or in which the federal court could not rule for the plaintiff without holding the state-court judgment erroneous.[138] Since *Rooker-Feldman* is jurisdictional—protecting federalism interests rather than simply ensuring finality and repose for the prevailing party, as preclusion doctrines do—lower courts could often use the doctrine not only to fill in the gaps between preclusion and *Younger* but also as a backstop when the affirmative defense of preclusion was inadvertently or deliberately waived.

The Supreme Court remained acquiescent, denying review when review was sought, until 2005, when *Exxon Mobil* limited the *Rooker-Feldman* doctrine to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review

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134 *Id.* at 486.

135 *Id.* at 483 n.16.

136 *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1087–88 (1999).

137 *See, e.g.*, Gulla v. N. Strabane Twp., 146 F.3d 168, 171 (3d Cir. 1998) ("'void the state court's ruling'" (quoting FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996))); Jones v. Crosby, 137 F.3d 1279, 1280 (11th Cir. 1998) ("review, reverse, or invalidate"); Bates v. Jones, 131 F.3d 843, 856 (9th Cir. 1997) (en banc) (Rymer, J., concurring) ("reverse or modify"); Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (same); Goetzman v. Agribank FCB, 91 F.3d 1173, 1177 (8th Cir. 1996) ("would change the state court result"); Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996) ("effectively nullify"); *FOCUS*, 75 F.3d at 840 ("render that [state] judgment ineffectual"); Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995) ("effectively reverse the state court decision or void its ruling"); Landers Seed Co. v. Champaign Nat'l Bank, 15 F.3d 729, 732 (7th Cir. 1994) ("effectively reverse"); Howell v. Supreme Court of Tex., 885 F.2d 308, 311 (5th Cir. 1989) ("reverse or modify"); Stern v. Nix, 840 F.2d 208, 212 (3d Cir. 1988) ("effectively reverse"); Anderson v. Colorado, 793 F.2d 262, 263–64 (10th Cir. 1986) ("reverse or modify"; "undo").

138 *See, e.g.*, Catz v. Chalker, 142 F.3d 279, 293–95 (6th Cir. 1998); Jordahl v. Democratic Party of Va., 122 F.3d 192, 202–03 (4th Cir. 1997); Datz v. Kilgore, 51 F.3d 252, 253–54 (5th Cir. 1995); Keene Corp. v. Cass, 908 F.2d 293, 296–97 (8th Cir. 1990).

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and rejection of those judgments."[139] Any new claim brought in federal court and not previously in state court, the Court suggested, prevented the use of the *Rooker-Feldman* doctrine: "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party,'" then *Rooker-Feldman* does not bar jurisdiction.[140] The Court also appeared to abandon the "inextricably intertwined" part of the doctrine.[141] One commentator has wittily—but probably accurately—provided an obituary for *Rooker-Feldman.*[142]

4. Standing

The Court began to relax standing barriers in 1997, in *Bennett v. Spear,*[143] which allowed ranchers and other water-users to challenge an administrative agency's determination that a particular irrigation project had to be curtailed in order to protect the Lost River Sucker and the Shortnose Sucker, two fish on the endangered species list.[144] The Court did not change the standing doctrine itself, but applied both the prudential and constitutional requirements narrowly. It permitted the suit notwithstanding three plausible government arguments. The government contended that the harm was uncertain, as it was not clear whether curtailing the irrigation project would actually reduce the plaintiffs' water supply.[145] It also argued that the cause of the harm was not the agency's determination but the as-yet-unidentified decision by a different entity to reduce the allocation of water to the plaintiffs.[146] Finally, the government challenged the plaintiffs' standing on the ground that they were not seeking to further the purposes of the statute (the protection of endangered species) but were instead challenging the alleged overprotection of endangered species.[147]

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139 Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005); *see also id.* at 291 (noting that *Rooker-Feldman* bars jurisdiction when federal-court plaintiff is "complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment").

140 *Id.* at 293 (quoting GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993)).

141 *See* Rowe & Baskauskas, *supra* note 4, at 11–16.

142 Samuel Bray, *Rooker Feldman (1923–2006),* 9 GREEN BAG 2D 317 (2006).

143 520 U.S. 154 (1997).

144 *Id.* at 179.

145 *Id.* at 167–68.

146 *Id.* at 168–71.

147 *Id.* at 171–74.

Three years later, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*,[148] the Court made clear that *Bennett* was no aberration. In this more traditional environmental case, plaintiffs sued a polluter under the Clean Water Act, claiming that they no longer enjoyed looking at, fishing from, or swimming in the polluted river.[149] Over the dissent of Justice Scalia—who had authored *Bennett*—the Court found these allegations sufficient to show injury to the plaintiffs.[150]

The contrast between *Bennett* (and *Friends of the Earth*) and an earlier case under the same citizen-suit provision of the Endangered Species Act[151] illustrates the Court's shift in attitude. In *Lujan v. Defenders of Wildlife*,[152] the Supreme Court denied standing to environmentalists seeking to challenge a ruling by the Secretary of the Interior denying extraterritorial application of the Endangered Species Act.[153] Justice Scalia's majority opinion derided as "fantasy"[154] the plaintiffs' stated intent "to return to the [foreign] places they had visited before," where they would be harmed by the effects of American actions in violation of the Endangered Species Act.[155] The real fantasy, however, is the suggestion that the "injuries" in *Lujan*, *Bennett*, and *Friends of the Earth* are substantively different. One scholar has commented that "[i]n a short span of just eight years [between *Lujan* and *Friends of the Earth*], the Court appears to have issued a major retrenchment upon *Lujan*'s logic, if not its holding."[156] Despite the

148 528 U.S. 167 (2000).

149 *Id.* at 177.

150 *Id.* at 183.

151 16 U.S.C. § 1540(g)(1) (2000) ("[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.").

152 504 U.S. 555 (1992).

153 *Id.* at 578.

154 *Id.* at 567.

155 *Id.* at 564.

156 Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 327 (2001); *see also* Sam Kalen, *Standing on Its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 2 (1997) ("[T]he *Bennett* decision . . . marks a turning point in the treatment of standing in environmental cases."); *id.* at 32 ("[*Bennett*] may doom the current law of standing."); Shults, *supra* note 4, at 1003 ("[T]he decision in *Laidlaw* is significant because it appears that the Court is opening its doors to allow in more environmentalists by . . . signaling a shift toward a less formalistic and more pragmatic approach to the standing doctrine."); Ronald K. Christensen, Recent Development, *Supreme Court Expands Standing Under the Endangered Species Act*, 18 J. LAND RESOURCES & ENVTL. L. 146, 157–58 (1998) ("The [*Bennett*] decision has significantly broadened standing for citizen suit under the ESA. The Supreme Court's will-

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absence of any formal doctrinal change in the law of standing, then, the trend toward opening federal court doors after thirty years of slamming them shut is apparent in this context as well.

II. The Fruits of Inexperience Redux: Diminishing Discretion

Coinciding with the expansion of jurisdiction is another trend that has gone largely unnoticed by scholars: District court discretion is diminishing in significant ways. The rise of managerial judging has increased trial judges' discretion in some ways,[157] as has the expanded scope of summary judgment in the wake of a noted trilogy of 1986 Supreme Court cases.[158] Both have been subject to scholarly criticism.[159] But these critics, perhaps distracted by the focus on manage-

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ingness to take the wording of 'any person' at face value provides broad opportunity for citizens to challenge governmental decisions and actions under the ESA."); Hudson P. Henry, Note, *A Shift in Citizen Suit Standing:* Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 247 (2001) ("*Laidlaw* signals a continuation of the Court's discomfort with Justice Scalia's purely private law model of litigation."); Stephen Lanza, Note, *The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in* Friends of the Earth v. Laidlaw Environmental Services, Inc., 52 ADMIN. L. REV. 1447, 1461–66 (2000) ("[T]he prevailing reaction [to *Laidlaw*] was that the Court has lowered the threshold for citizen standing . . . .").

157 *See generally* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1574–1615 (2003) (discussing the increase in discretionary activity and concluding that the risks of such activity have not been realized); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425–26 (1982) (discussing the greater power given to judges for "case management").

158 *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See generally* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005) (describing and criticizing the increased use of summary judgment in the wake of the 1986 trilogy); David L. Shapiro, *The Story of* Celotex*: The Role of Summary Judgment in the Administration of Civil Justice, in* CIVIL PROCEDURE STORIES 343, 359–69 (Kevin M. Clermont ed., 2004) (describing *Celotex* and its consequences); Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 86–88 (2006) (describing frequency of judicial citation to *Celotex*).

159 *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990); Redish, *supra* note 158, at 1339–55; Resnik, *supra* note 157, at 376–80; Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 558–62 (2006). *But see* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1991–98 (1989); *see also* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989) (examining discretion in the context of evidence rules); Shapiro, *supra* note 158, at 363–64 (noting but not necessarily endorsing criticism of the trilogy of cases).

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rial judging, have missed a parallel diminution in another kind of discretion: discretion over the adjudicative process itself.

There are many types of discretionary decisions.[160] Indeed, the Federal Rules of Civil Procedure themselves deliberately incorporate much of the flexibility of the old equity regime, and judicial discretion is therefore a leitmotif of federal civil procedure.[161] I focus here on a narrow type of discretion, one limited to matters in which trial judges arguably have a special expertise when compared to appellate judges: managing dockets, policing lawyers and litigants, and mediating judicial federalism. Discretion in these three areas plays a large role in judges' ability to resolve cases quickly and efficiently, something that managerial judging has not been shown to accomplish.[162] It is also adjudicative, in the sense that discretionary decisions in these contexts take the traditional form of a judicial decision (often with a written opinion) reviewable on appeal, and are therefore subject to all of the usual procedural safeguards. Managerial discretion, on the other hand, largely takes the form of judicial pressure on the parties to settle cases and does not manifest itself in a judicial decision, nor is it ever reviewed by an appellate court.[163] Thus, in this Part I try to show that despite the increase in one type of district court discretion, appellate courts have been taking from trial judges' decisions that ought to remain largely within a district court's discretion.[164]

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160 Marcus, *supra* note 157, at 1565–74 (describing a typology of judicial discretion).

161 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975 (1987).

162 *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 87–93 (1996); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 676–82 (1998).

163 *See, e.g.*, Resnik, *supra* note 157, at 417–31 (criticizing the rise of managerial judging, partly because it is unreviewable). Although summary judgment is adjudicative rather than managerial, it shares several characteristics with managerial judging that distinguish it from the discretionary decisions I examine in the Article. First, like managerial judging, it is largely a pre-trial tool. More important, however, is that courts of appeals have largely abdicated their oversight of trial court rulings on summary judgment, see, for example, Tidmarsh, *supra* note 159, at 555–56 & nn. 179–85, which undermines the adjudicative safeguards.

164 It is possible to argue that some diminution of discretion is the inevitable product of any legal system: that any system of discretion slowly accretes into a system of rules unless care is taken to guard against this hardening of the legal arteries. What I suggest in this Article is that district court judges are in a better position to recognize and counter this tendency where it is detrimental to the legal system.

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A. *Docket Management*

At the same time that many circuits—and, eventually, the Supreme Court—were interpreting § 1367(b) to expand the scope of federal jurisdiction, many were interpreting § 1367(c) to contract the district courts' discretion to decline to exercise supplemental jurisdiction. This is problematic because district courts need flexibility to resolve cases efficiently, especially when their jurisdiction is expanding. Supplemental jurisdiction also has implications for judicial federalism, insofar as it determines whether state-law claims will be litigated in state or federal court.

Before the enactment of § 1367, supplemental jurisdiction was a judge-made doctrine governed largely by the Supreme Court's decision in *United Mine Workers v. Gibbs.*[165] In *Gibbs,* the Supreme Court delineated the reach of the federal courts' supplemental jurisdiction, and then noted that it "need not be exercised in every case in which it is found to exist," because supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right."[166] Citing considerations of "judicial economy, convenience and fairness to litigants," the Court listed several circumstances favoring or counseling against the exercise of jurisdiction over state-law claims.[167] Twenty years later, the Court noted that under *Gibbs,* "the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity."[168]

Section 1367(c) addresses the *Gibbs* discretion ambiguously. The statute provides that "the district courts may decline to exercise supplemental jurisdiction" in four listed circumstances.[169] The first three merely list the circumstances *Gibbs* announced as examples of factors mitigating against the exercise of jurisdiction.[170] The last, § 1367(c)(4), confers on district courts discretion to decline jurisdiction "in exceptional circumstances, [if] there are other compelling reasons for declining jurisdiction."[171]

The inevitable question is whether to interpret § 1367(c)'s list—including "exceptional circumstances"—as codifying or as narrowing

165 383 U.S. 715 (1966).

166 *Id.* at 726.

167 *Id.* at 726–27.

168 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1988). The Court held that the discretion included the district court's decision whether to dismiss or to remand a state-law claim. *Id.*

169 28 U.S.C. § 1367(c) (2000).

170 *Id.* § 1367(c)(1)–(3).

171 *Id.* § 1367(c)(4).

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the virtually unfettered discretion accorded the district court by *Gibbs*. The legislative history suggests a congressional intent to leave the discretion unchanged.[172] The language, however, is ambiguous: Is § 1367(c)(4) a somewhat inartfully worded catch-all exception, under which the court retains full discretion to consider such factors as judicial economy and convenience, or is it a narrow provision requiring courts to identify circumstances (and reasons against the exercise of jurisdiction) analogous to those described in the first three subsections of § 1367(c)?

At least four courts of appeals have read § 1367(c) as curtailing district court discretion.[173] Two of them explicitly acknowledge that their interpretation deprives district courts of discretion previously held.[174] Although the doctrinal niceties differ somewhat, these four courts have held that district courts may decline to exercise supplemental jurisdiction *only* under one of the three specifically enumerated circumstances or an equivalently exceptional situation. As the Ninth Circuit put it, "declining jurisdiction outside of subsection (c)(1)–(3) should be the exception, rather than the rule."[175] In particular, a district court may not decline jurisdiction for reasons of judicial economy or convenience unless it first finds the presence of the listed circumstances: "[W]hile supplemental jurisdiction *must* be exercised in the absence of any of the four factors of section 1367(c), when one or more of these factors is present, the additional *Gibbs* considerations may, by their presence or absence, influence the court in its decision concerning the exercise of such discretion."[176] A fifth court of appeals, while not deciding the precise reach of § 1367(c) or its relationship to the *Gibbs* factors, has held that § 1367(c)(2) is "a limited exception to the operation of the doctrine of pendent jurisdiction."[177] No court of appeals has yet upheld a district court's declining of jurisdiction outside of the enumerated circumstances.[178]

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172 *See* Shirin Malkani, *Upside Down and Inside Out: Appellate Review of Discretion Under the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 1997 ANN. SURV. AM. L. 661, 674–79.

173 *See* Itar-Tass Russian News Agency v. Russian Kurrier, Inc., 140 F.3d 442, 447–48 (2d Cir. 1998); McLaurin v. Prater, 30 F.3d 982, 984–85 (8th Cir. 1994); Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1555–61 (9th Cir. 1994); Palmer v. Hosp. Auth., 22 F.3d 1559, 1569 (11th Cir. 1994).

174 *Itar-Tass*, 140 F.3d at 447; *Executive Software*, 24 F.3d at 1556.

175 *Executive Software*, 24 F.3d at 1558; *see also Itar-Tass*, 140 F.3d at 448 (quoting *Executive Software*, 24 F.3d at 1558).

176 *Palmer*, 22 F.3d at 1569.

177 Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 789 (3d Cir. 1995).

178 One commentator suggests that six circuits have "interpreted the statute as a codification of *Gibbs*" and as conferring "unlimited discretion" on district courts.

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The combined effect of this interpretation of § 1367(c) and the Supreme Court's interpretation of 1367(b) in *Allapattah* is an illustration of the intersection between expanding jurisdiction and shrinking discretion: More claims will fall within a district court's jurisdiction and it will have less discretion to dismiss or remand them. Jurisdiction over state-law claims is simultaneously expanded and made mandatory—in circumstances in which it was previously either discretionary or altogether nonexistent. In particular, the courts of appeals are depriving the district courts of the power to decide whether, under all the circumstances, it is sensible and efficient to let a state court decide state-law claims between two nondiverse parties.

Although the Supreme Court has yet to weigh in on the § 1367(c) controversy, it has shut down other district court attempts to manage exploding dockets. For example, it has recently rejected the practice of "hypothetical standing," which allowed a court to assume the plaintiff had standing if it was clear that the case should ultimately be dismissed on the merits.[179] Hypothetical standing is an efficient method of resolving easy cases, because it allows courts to avoid more difficult—but ultimately irrelevant—issues, and it also serves to prevent a proliferation of possibly conflicting lower court opinions on standing. But in *Steel Co. v. Citizens for a Better Environ-*

Rachel Ellen Hinkle, *The Revision of 28 U.S.C. § 1367(c) and the Debate Over the District Court's Discretion to Decline Supplemental Jurisdiction*, 69 TENN. L. REV. 111, 120–21 (2001). In four of the cases cited, one of the listed factors was unarguably present. *See* Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996) ("[I]t was an abuse of discretion to retain the state-law claims on a theory of supplemental jurisdiction after dismissal of the federal claims upon which supplemental jurisdiction depended."); Anglemyer v. Hamilton County Hosp., 58 F.3d 533, 541 (10th Cir. 1995) ("After resolving all her federal claims, the district court exercised its discretion and dismissed Ms. Anglemyer's remaining state law claims. *See* 28 U.S.C. § 1367(c)(3) . . . ."); Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995) (noting that a district court may, in its discretion, *retain* state-law claim "notwithstanding the early demise of all foundational federal claims"); Diven v. Amalgamated Transit Union Int'l & Local 689, 38 F.3d 598, 599 (D.C. Cir. 1994) ("Since appellants' non-federal claims against the local union predominate over the related federal cause of action against the national union, we affirm the district court's [refusal to exercise supplemental jurisdiction]."). In one of the cases cited, the court affirmed the district court's decision to *retain* jurisdiction on grounds of judicial economy (and its dismissal of the state-law claim on the merits), despite the dismissal of the federal claim before trial. Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). Finally, in *Borough of West Mifflin*, discussed *supra* note 177 and accompanying text, the court of appeals reversed a district court's remand of an *entire case* (including the federal claim) to the state court from which it had been removed, and remanded to the district court for a determination of whether the state-law claims substantially predominated over the federal claim. 45 F.3d at 790.

179 *See, e.g.*, United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

ment,[180] the Supreme Court put an end to hypothetical standing, demanding that courts determine standing before the merits in every case.[181]

One might defend the result in *Steel* by arguing that a court's constitutional lack of authority to adjudicate in the absence of standing necessitates the cumbersome and inefficient rule. However, the Court's commitment to initial resolution of threshold questions of adjudicative authority is inconsistent. Within two years after *Steel*, the Supreme Court approved presumptions of adjudicatory authority in three situations similar to that disallowed in *Steel*. Most analogously, the Court allowed a court to resolve the statutory question of class certification before deciding whether the putative class members had standing.[182] It also ruled that a district court can decide "a straightforward personal jurisdiction issue" before determining whether it has subject matter jurisdiction if the latter "raises a difficult and novel question."[183] Finally, courts are permitted to finesse the question of state sovereign immunity by holding instead that as a matter of statutory interpretation, the federal cause of action does not reach states as defendants.[184]

Each of the four cases—including *Steel*—involves the interaction between a difficult question of the federal courts' constitutional authority and another, easier, issue. Both efficiency and the canon of avoiding unnecessary constitutional questions[185] cut in favor of allowing the federal court to reach the easier, and dispositive, question by presuming its own authority to act. The holding in *Steel* is thus inconsistent with the other cases, as well as with the avoidance doctrine.[186]

Why, then, was the Court so unwilling to allow courts flexibility in the context of hypothetical standing? I suggest that it is because each

180 523 U.S. 83 (1998).

181 *Id.* at 94. For discussions of *Steel Co.*, see, for example, Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 260–66 (2000); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 270–349 (1999); Joan Steinman, *After* Steel Co.: *"Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 857–77 (2001).

182 Ortiz v. Fibreboard Corp., 527 U.S. 815, 830–31 (1999).

183 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 588 (1999).

184 Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 779–80 (2000).

185 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

186 For an argument that in other contexts the Supreme Court is similarly forcing lower courts to decide ultimately unnecessary constitutional questions, in violation of the avoidance doctrine, see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 851 (2005).

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of the other three cases involved the order of decision of two purely legal questions. What is unique about *Steel* is not that it involves a threshold question of adjudicatory authority, but that it juxtaposes the purely legal question of standing against the mixed questions of law and fact that make up the decision on the merits. Supreme Court Justices with too little practical experience were too quick to assume that the legal question must be paramount, and thus saw hypothetical standing as fundamentally different from the other cases in which lower courts resolved questions in a somewhat unorthodox order.

In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[187] the Supreme Court disapproved another common practice lower courts had developed to deal efficiently with complex litigation. Under 28 U.S.C. § 1407(a), "[w]hen civil actions involving one or more common questions of fact are pending in different districts," the Judicial Panel on Multidistrict Litigation[188] may transfer them "to any district for coordinated or consolidated pretrial proceedings."[189] Section 1407(a) further provides that the actions "shall be remanded" to their separate transferor courts for trial, but other provisions contradict that mandatory language and suggest greater flexibility. Under 28 U.S.C. § 1404(a), district courts retain the power to "transfer any civil action to any other district . . . where it might have been brought," if the transfer is "[f]or the convenience of parties and witnesses" or "in the interest of justice."[190] Rule 14(b) of the Panel's own rules provides that cases should be remanded "unless ordered transferred by the transferee judge to the transferee or other district under 18 U.S.C. § 1404(a) or 28 U.S.C. § 1406."[191] Relying on § 1404(a) and Panel Rule 14(b), transferee courts—with the approval of many courts of appeals—began in the early 1970s to retain some consolidated cases for trial.[192] Efficiency was a primary concern.[193] Transferee courts

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187 523 U.S. 26 (1998).

188 The Panel is created pursuant to 28 U.S.C. § 1407(d) (2000).

189 *Id.* § 1407(a).

190 *Id.* § 1404(c).

191 Rule 14(b), Rules of Procedure of the J.P.M.L.

192 *See, e.g.*, *In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1531–35 (9th Cir. 1996), *rev'd sub nom. Lexecon*, 523 U.S. 26; *In re* Fine Paper Antitrust Litig., 685 F.2d 810, 818–20 (3d Cir. 1982); Pfizer, Inc. v. Lord, 447 F.2d 122, 123 (2d Cir. 1971) (per curium); *see also* MANUAL FOR COMPLEX LITIGATION (THIRD) § 31.132, at 254 (1995) (noting that a "transferee judge may transfer cases for trial to any district, including the § 1407 transferee district, permitted by 28 U.S.C. 1404"); Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 497 (1989) ("It is not uncommon for a transferee judge . . . to transfer to his own . . . district . . . the actions which were previously assigned to him or her."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581 n.42

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used this technique judiciously: As of September 30, 1995, transferee courts had retained only 279 of the 3,787 cases that ultimately required a trial.[194] Nevertheless, in 1998 the Supreme Court in *Lexecon* interpreted the statutory scheme to prohibit a transferee court from transferring cases to itself.[195] The Court relied on the mandatory language of § 1407(a), rejecting the argument—which serves to reconcile the apparently contradictory provisions of § 1407(a) and § 1404(a)—that § 1407(a) limits the Panel rather than the transferee court.[196] The Supreme Court in *Lexecon* thus interpreted ambiguous statutory language to deprive trial courts of a longstanding tool for managing litigation. Moreover, there is at least some indication that *Lexecon,* while decreasing adjudicative discretion, has resulted in increased use (or misuse) of *managerial* discretion: Transferee courts, reluctant to send cases back to transferor courts for trial, instead hold them for many years trying to get the parties to settle.[197]

B. Dealing with Lawyers and Litigants

Appellate courts have also narrowed district court flexibility in dealing with both multi-forum litigation and difficult lawyers. Managing obstreperous, unethical, or overly litigious parties and attorneys is a pervasive problem for trial courts. The variety of factual settings and the ingenuity of lawyers ensures that new questions will continue to arise. The choice of tools is thus best left to the discretion of trial court judges. In particular, trial court judges are best able to devise solutions to two perennial problems: repeat litigants and lawyers who skate close to (or over) ethical lines. But appellate courts have not seen it that way.

Parties who lose in federal court sometimes bring the same or a related suit in state court. One response to this problem is simply to

(1977) (listing authorities supporting a transferee judge's ability to transfer an action to the transferee district for trial).

193 *See, e.g.*, *Am. Cont'l Corp.*, 102 F.3d at 1532 ("Permitting the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases."); *Pfizer*, 447 F.2d at 125 ("[The district judge] indicated that he felt that because of the complexity of these cases the interests of judicial efficiency made it highly desirable that the judge who conducted the pretrial proceedings continue as the trial judge.").

194 *Lexecon*, 523 U.S. at 33 (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 32 (1995)).

195 *Id.*

196 *Id.* at 35–36.

197 *See* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).

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leave the solution to the state court, which must apply federal law to determine whether the federal judgment should be given preclusive effect. But neither Congress nor the courts have found this to be an adequate response, in part because it is time-consuming and inefficient and in part because of a lingering mistrust of state courts in this context. Thus, the Anti-Injunction Act,[198] which generally bars federal courts from enjoining state-court proceedings, includes what is commonly called the "relitigation exception"[199]: A federal court is permitted to enjoin state proceedings in order to "protect or effectuate its judgments."[200] Under this provision, the federal court itself determines whether its prior judgment should be given preclusive effect, and enjoins the state suit if it answers in the affirmative.[201]

Although issuing an injunction against a state proceeding might be an appropriate response in some circumstances, it has drawbacks. It lacks finality, insofar as it enjoins the prosecution of the suit but does not actually dismiss the case. To the extent that the enjoined party might try to evade the injunction (perhaps by filing suit in another jurisdiction), enforcement demands more district court resources, including a potentially difficult and expensive contempt hearing. Moreover, issuing an injunction against a state-court proceeding might be seen as intruding on state-court independence, and might therefore create additional friction between state and federal courts.[202]

For these reasons, many lower courts developed an alternative to enjoining a preclusion-barred state-court suit. Using either the removal statutes[203] or the All Writs Act,[204] these courts removed the case

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198 28 U.S.C. § 2283 (2000).

199 *See, e.g.*, Rivet v. Regions Banh, 522 U.S. 470, 478 n.3 (1998).

200 28 U.S.C. § 2283.

201 *See, e.g.*, Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146–47 (1988).

202 *See, e.g.*, NAACP v. Metro. Council, 125 F.3d 1171, 1174 (8th Cir. 1997), *vacated*, 522 U.S. 1145 (1998), *reinstated*, 144 F.3d 1168 (8th Cir. 1998); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 864 (2d Cir. 1988).

203 28 U.S.C. §§ 1441–47 (2000 & Supp. III 2003); *see, e.g.*, Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 604, 607 (7th Cir. 1997); Carpenter v. Wichita Falls Indep. Sch. Dist. 44 F.3d 362, 365 (5th Cir. 1995); Ultramar Am. Ltd. v. Dwelle, 900 F.2d 1412, 1413 (9th Cir. 1990); Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 757 (2d Cir. 1986).

204 28 U.S.C. § 1651(a) (2000); *see, e.g.*, Montgomery v. Aetna Plywood, Inc. 231 F.3d 399, 410–12 (7th Cir. 2000); Bylinski v. Allen Park, 169 F.3d 1001, 1003 (6th Cir. 1999); NAACP v. Metro. Council, 144 F.3d 1168, 1171–72 (8th Cir. 1998); Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993); Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders, 988 F. Supp. 486, 495–97 (D.N.J. 1997); Nowling v. Aero Servs. Int'l, Inc., 734 F. Supp. 733, 737–38 (E.D. La. 1990). One commentator, writing in 1999, concluded that "[n]early every court which has consid-

from state to federal court and then dismissed it as precluded. The availability of three options—leaving it to the state court, enjoining the suit, or removing the case—gave the district courts the flexibility to deal with each individual case in its own context. Between 1998 and 2002, however, the Supreme Court closed off the removal option. In *Rivet v. Regions Bank*[205] it ruled that the removal statutes did not authorize this type of res judicata removal,[206] and in *Syngenta Crop Protection, Inc. v. Henson*[207] it held the All Writs Act unavailable.[208] Federal courts faced with litigants who won't take no for an answer must now always invoke the more cumbersome and weighty injunctive remedy.

Some lawyers and litigants go further than simply filing duplicative state-court suits. In our adversary system, some lawyers will inevitably be tempted to act unethically to further their clients' interests. Federal Rule of Civil Procedure 11 places primary responsibility for policing litigation-related lapses in the hands of district court judges, and confers on them great flexibility and discretion. After multiple amendments, Rule 11 on its face now allows judges to impose sanctions on their own initiative or in response to a motion, and gives them almost unlimited discretion to determine appropriate sanctions.[209] As long as the procedural niceties are observed, courts imposing sanctions on lawyers (as opposed to parties) are constrained only by the requirement that the sanction "[s]hall be limited to what is sufficient to deter repetition of [the] conduct or comparable conduct by others similarly situated."[210]

Rule 11 also specifies the types of attorney conduct that may result in sanctions. Before 1983, the Rule permitted sanctions only if an attorney acted with subjective bad faith.[211] In that year, Rule 11 was amended to require attorneys to act "reasonabl[y] under the circum-

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ered this question has concluded that the All Writs Act may serve as an independent basis for removal jurisdiction . . . ." Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 411 (1999) (cataloging and criticizing the courts' use of the All Writs Act for this purpose). Other commentators also criticized the use of the All Writs Act to remove cases. *See, e.g.*, Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 815–20 (2000).

205 522 U.S. 470 (1998).

206 *Id.* at 472.

207 537 U.S. 28 (2002).

208 *Id.* at 34.

209 FED. R. CIV. P. 11(c).

210 FED. R. CIV. P. 11(c)(2).

211 *E.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986).

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stances," which courts interpreted as mandating an objective reasonableness test.[212] Due to other problems in administering Rule 11 after the 1983 amendments, the Rule was amended again in 1993.[213] Although the substantive standard of reasonableness was retained,[214] various procedural changes were made. In particular, the 1993 amendments provide that in response to a motion for sanctions, the party whose submission is challenged has a twenty-one-day "safe harbor" during which to withdraw the challenged submission without penalty.[215] If the judge initiates Rule 11 proceedings sua sponte, however (by issuing a show cause order), there is no safe harbor period.[216]

Allowing the judge to impose sanctions sua sponte—after a hearing—serves the basic goals of Rule 11 by increasing the likelihood of sanctions, thus adding to the Rule's deterrent value. Additionally, it prevents repeat players from ignoring each others' violations out of a willingness to play along, a fear of later retaliation, or an unwillingness to risk antagonizing the judge or delaying the proceedings. And, as the Supreme Court has noted, the district courts, "on the front lines of litigation," are "best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted."[217] The reasonableness standard, moreover, allows courts to impose sanctions that might deter future violations, without having to call into question the good faith of the sanctioned party. Imposition of sanctions, then, is quintessentially a situation in which to recognize the trial courts' relative superiority.

Nevertheless, several courts of appeals have severely limited the district courts' discretion in Rule 11 cases. The Second Circuit has done so most unequivocally. In *In re Pennie & Edmonds LLP*,[218] that court reversed a district court's sua sponte imposition of sanctions for the submission of false affidavits.[219] The circumstances strongly suggested that the lawyers knew that their clients' affidavits were untrue.[220] The district judge, apparently unwilling to tarnish the

212 *See, e.g.*, *id.* at 1536–38; Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056, 1060 (4th Cir. 1986); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205 (7th Cir. 1985); Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253–54 (2d Cir. 1985).

213 *See* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1009–12 (1999).

214 *See* FED. R. CIV. P. 11(b).

215 *See* FED. R. CIV. P. 11(c)(1)(A).

216 *See* FED. R. CIV. P. 11(c)(1)(B).

217 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990).

218 323 F.3d 86 (2d Cir. 2003).

219 *Id.* at 93.

220 *See id.* at 87.

reputation of a well-respected law firm with a finding of subjective bad faith, found that the attorneys had acted in good faith but unreasonably, and imposed a nonmonetary sanction.[221] The court of appeals reversed—over the dissent of a district judge sitting by designation—holding that because of the absence of a safe harbor period, sanctions imposed by a judge sua sponte require bad faith rather than objective unreasonableness.[222] Because the district court had found the attorneys to be acting in good faith, the court of appeals held that no sanctions could be imposed.[223]

While no other circuit has yet explicitly adopted the Second Circuit's approach, several seem to be moving in that direction. The Eighth Circuit, for example, held in *MHC Investment Co. v. Racom Corp.*[224] that the lack of a safe harbor means the Rule 11 standards should be "*applied* with particular strictness" if the judge imposes sanctions sua sponte.[225] Less than a year later, however, the court cited *MHC* as holding that sanctions imposed sua sponte should be *reviewed* with particular strictness.[226] The shift transfers responsibility for punctiliousness from the district court to the court of appeals. Two other circuits have similarly applied a heightened standard of review to the sua sponte imposition of sanctions.[227] Only the First Circuit has rejected the Second Circuit's approach, but in a case in which it nevertheless reversed the district court's imposition of sanctions as an abuse of discretion.[228]

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221 The law firm involved was required to circulate the court's opinion to each lawyer in the firm, along with "a memorandum that states that it is firm policy that its partners and associates adhere to the highest ethical standards and that if a lawyer's adherence to those standards results in the loss of a client, large or small, the lawyer will not suffer any adverse consequence." Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *10 (S.D.N.Y. Jan. 16, 2002), *vacated sub nom.* Pennie & Edmonds, 323 F.3d 86.

222 For criticism of the court of appeals' decision in *Pennie & Edmonds*, see Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727, 755 (2004); Gregory P. Joseph, *'Sua Sponte' Sanctions*, NAT'L L.J., Apr. 14, 2003, at B6.

223 *Pennie & Edmonds*, 323 F.3d at 93.

224 323 F.3d 620 (8th Cir. 2003).

225 *Id.* at 623 (emphasis added).

226 Norsyn, Inc. v. Desai, 351 F.3d 825, 831 (8th Cir. 2003).

227 *See* Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. 2003) (reversing district court imposition of sanctions but explicitly declining to decide whether to adopt Second Circuit's "bad faith" requirement); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002) (reversing district court imposition of sanctions, and citing in support a case that held only that the standards should be *applied* with particular stringency).

228 Young v. City of Providence, 404 F.3d 33, 40 (1st Cir. 2005).

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Both the requirement of bad faith and the heightened standard of review illustrate the trend toward limiting trial judges' discretion and flexibility in dealing with the "front lines" of litigation.[229] They also demonstrate the courts of appeals' failure to recognize the relative superiority of district courts in striking the balance—on a case-by-case basis—between deterring unjustifiable behavior and permitting zealous representation. Every appellate reversal of a trial court's imposition of sanctions sends a clear message encouraging lawyers to use ever more aggressive adversarial tactics—and a clearer message to district court judges that it is *their* conduct which will be reviewed on appeal.

C. *Judicial Federalism*

Many of the developments described above implicate questions of the appropriate allocation of authority between state and federal courts, often known as judicial federalism. Interpretations of § 1331 and § 1367(b) set the outer boundaries of federal-court authority, and cases outside that authority must be litigated in state court if at all. Other doctrines—including *Younger*, preclusion, *Rooker-Feldman*, discretionary supplemental jurisdiction, and "res judicata removal"—govern the relationship between federal and state courts in particular cases.

One aspect of judicial federalism, however, provides an even more direct example of the superior knowledge of trial judges over appellate judges: The *Erie* doctrine. Under *Erie*,[230] federal courts sitting in diversity jurisdiction must apply state substantive law.[231] Sometimes state law is unclear, and the federal court is forced to make what is often labeled an "*Erie* guess"[232]: the court applies its best under-

229 There is a lively scholarly debate about whether discretion under Rule 11 is good or bad. *See, e.g.*, Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677 (1996); Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 554–68 (1997); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929–41 (1989); Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1990); Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 28–30 (1987); William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 36–37 (1994); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 879–80, 889–90 (1992); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 491–92 (1991).

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

231 *Id.* at 78.

232 *See, e.g.*, Rx.com Inc. v. Hartford Fire Ins. Co., 364 F. Supp. 2d 609, 613 (S.D. Tex. 2005); Genecin v. Genecin, 363 F. Supp. 2d 306, 320 (D. Conn. 2005); Amoco

standing of what the state's supreme court would hold under the same circumstances. Until 1991, almost every court of appeals explicitly deferred to district court interpretations of state law rather than deciding de novo the substance of state law.[233] In *Salve Regina College v. Russell*[234] in 1991, however, the Supreme Court held that "a court of appeals should review de novo a district court's determination of state law."[235]

Salve Regina notwithstanding, the rule of deference made sense, because the competencies of the federal district and appellate judges are quite different when it comes to state law. Federal district judges have almost always previously practiced law in the states in which they sit, and have often served on state courts.[236] In *Salve Regina College* itself, the district court judge to whom the court of appeals had—inappropriately, according to the Supreme Court—given deference had been a state trial judge for almost twenty years.[237] Court of appeals judges, on the other hand, are drawn from a larger geographic area, and only by chance might have any legal experience in the state whose law is at issue. And once ascending the bench, a trial court judge is likely to hear many more cases from her own state than will any member—or any three-judge panel—of the court of appeals, and

Ukrservice v. Am. Meter Co., 312 F. Supp. 2d 681, 693 n.12 (E.D. Pa. 2004); Baycol Prod. Litig., 218 F.R.D. 197, 209 (D. Minn. 2003); Mass. Mut. Life Ins. Co. v. Woodall, 304 F. Supp. 2d 1364, 1380 (S.D. Ga. 2003); Stein Corp. v. Johnson & Higgins, 196 F.R.D. 653, 658 (D. Utah 2000); Emig v. Am. Tobacco Co., Inc., 184 F.R.D. 379, 394 (D. Kan. 1998); Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437, 1443 (E.D.N.C. 1994); Nichols v. Merrill, Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309, 1322 (M.D. Tenn. 1989); Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 821 (N.D. Cal. 1987); Odgers v. Ortho Pharm. Corp., 609 F. Supp. 867, 870 (E.D. Mich. 1985); Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 563 n.6 (S.D.N.Y. 1977); *see also* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675–83 (1992) (describing the effect of federal courts' "Erie-guesses" upon state courts and state law).

233 *See* Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 963–1017 (1989) (concluding, based on analysis of more than 550 cases, that all but two circuits—the Ninth, which had rejected the rule of deference, and the Federal Circuit, which had never considered it—adopted some version of deference to district court determinations on state law); *see also* Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991) (concluding that as of 1991, all circuits except the Third and Ninth adopted the rule of deference).

234 499 U.S. 225.

235 *Id.* at 231.

236 *See* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 287 (2003).

237 *Salve Regina*, 499 U.S. at 229.

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thus the trial judge will also have more current familiarity with state law.

What *Salve Regina College* does, then, is to take a question that district court judges are better equipped than appellate judges to answer, and transfer ultimate responsibility for that question to the appellate judges. While technically not a question of "discretion," this change in the law perfectly captures the trend I am describing: an increase in decisionmaking in an appellate vacuum in circumstances that cry out for the more contextualized knowledge of trial court judges.

D. *Some Concluding Thoughts on Discretion*

In documenting the diminishing discretion of federal district courts, I have tried to focus on contexts in which that discretion is least likely to be dangerous or harmful. Nevertheless, discretion always carries with it the possibility of abuse. The scholarly literature on the costs and benefits of judicial discretion is extensive,[238] and a general discussion of discretion is beyond the scope of this Article. However, a few points are worth considering.

If we recognize that trial court discretion has both costs and benefits, and that some judges are more likely than others to abuse their discretion, appellate courts can take either of two approaches in an attempt to maximize the benefits and minimize the costs. They can set a baseline (or default) granting district courts broad discretion, or one granting little discretion. Over time, as individual trial judges develop a reputation for using wisely or poorly whatever discretion they are given, the appellate court can take that into account when it reviews the decisions of those judges. So the appellate court might grant broad discretion, but scrutinize the decisions of particular judges with more care; or it might grant little discretion, but exercise little oversight over the decisions of the judges thought to be most trustworthy.[239]

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238 In addition to the sources cited in notes 157–163, see, for example, AHARON BARAK, JUDICIAL DISCRETION 152–91 (Yadin Kaufmann trans., 1989); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1476–83 (1987); Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20–26 (1905); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1809–11 (1992).

239 The increase in the use of unpublished appellate opinions makes both options easier. *See, e.g.*, Patrick Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 26 (2005) (finding 81% of 2004 courts of appeals decisions on the merits are accompanied by unpublished opinions); David C. Vladek

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Which of these options one favors ultimately depends on one's view of federal district court judges. They might be mostly trustworthy, attempting to decide cases and follow the rules as best they can, with only a few potential abusers among them. Or the number of potential abusers might be large enough to give us pause. The first view points to a baseline of broad discretion with a careful appellate eye on the known bad apples; the second to a baseline of narrow discretion with greater leeway for the judges who have proven themselves thoughtful and careful. Readers will have to decide for themselves whether they have enough confidence in the district court bench to grant them the narrow form of discretion that I advocate.

To this point, my aim in the Article has been largely descriptive. I have tried to document two simultaneous recent trends: an expansion—with unclear boundaries—of federal-court jurisdiction, and a diminution of the flexibility and discretion of federal district court judges. The identification of these trends, which are contrary to conventional wisdom about current federal courts, introduces new complications as yet unaddressed in the literature. First, because the trends are occurring at the same time, the negative effects of each trend are multiplied by the other. The coincidence of the two apparently unrelated trends also raises the intriguing possibility that they stem from a common source (and thus warrant a common remedy). In the next Part, I present a normative case against the combined consequences of these two doctrinal trends. In the final Part, I turn to possible causes and cures.

III. FACING THE CONSEQUENCES

The expansion of jurisdiction and the diminution of discretion each have deleterious consequences when considered independently, and further negative consequences when considered in combination. I discuss these consequences in this Part.

First and most obvious, the expansion of federal jurisdiction increases district courts' caseloads. The literature is filled with lamentation about overcrowded federal court dockets and the delays they engender, especially in civil cases.[240] The expansion of jurisdiction—

& Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1670 (2005) ("unpublished dispositions now comprise over 80% of the output of our appellate courts"). The new Federal Rule of Appellate Procedure 32.1, which will take effect in December 2006 unless Congress disapproves it, does not eliminate unpublished opinions but only permits litigants to cite them.

240 *See, e.g.*, RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 53–123 (1996); RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59–129 (1985); Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545,

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whether directly or through the narrowing or elimination of doctrines that previously allowed trial courts to resolve cases without reaching the merits—exacerbates the problem. Especially in cases in which the correct jurisdictional rule is difficult to identify, such as the 5:4 *Allapattah* interpretation of § 1367, greater sensitivity to trial court realities might influence the decision at the margins.

The docket-crowding problem, whether derived from incontestable or doubtful jurisdictional doctrines, is exacerbated by the diminution in district court discretion. Trial courts faced with overcrowded dockets have recently lost many of the options that allowed them some flexibility in resolving cases quickly on an individualized basis, or in dealing with more global problems affecting their dockets. As I described in Part II, courts may no longer decide an easy question on the merits prior to deciding a difficult question of standing, and in many circuits they can no longer consider efficiency when determining whether to exercise supplemental jurisdiction. The inevitable duplication of effort when a multidistrict litigation case is transferred back to the original court for trial is another example of inefficiency at the level of individual cases. On a more global level, the courts' inability to remove frivolous state lawsuits attacking prior federal judgments means both that more time has to be spent dealing with such suits and that more such suits are likely to be filed; limitations on the courts' authority to punish lawyers who make objectively unreasonable assertions encourages the filing or continuation of unwarranted claims or defenses.

Docket problems are complicated by a second consequence of the recent trends, especially prevalent in the Supreme Court's recent cases on jurisdiction. In many of the cases, the Court's opinions are opaque, ambiguous, or internally incoherent, leaving the lower courts with little guidance.

The sovereign immunity cases reflect a lack of transparency in their failure to reconcile the new cases with existing precedent. As both the dissenting Justices and scholars have pointed out, there was

545–46 (2004); David Hittner & Kathleen Weisz Osman, *Federal Civil Trial Delays: A Constitutional Dilemma*, 31 S. TEX. L. REV. 341 (1990); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1643–47 (1985). I recognize that other factors also contribute to the docket problems of federal district courts, and may indeed have a greater effect than the two trends I identify in this Article. But the other factors—including the federalization of many crimes, the creation of new federal civil causes of action, and the increase in the number of state prisoners (and therefore of potential habeas petitions)—are more intractable. I focus on the relationship between trial and appellate courts both because it offers a possible solution, and because it is of inherent interest to scholars studying the federal courts.

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little difference between *Kimel*[241] and *Garrett*[242] on the one hand and *Hibbs*[243] and *Lane*[244] on the other in terms of evidence of a "widespread pattern" of unconstitutional state actions, so lower courts are left unable to determine whether other federal statutes satisfy the Section 5 test.[245] Similarly, the *Katz*[246] majority points to no persuasive distinction between the Commerce Clause and the Bankruptcy Clause that might justify the vast difference in consequences for state sovereign immunity,[247] leaving courts to wonder how to treat other provisions of Article I.[248]

The *Grable*[249] and *Allapattah*[250] cases exhibit other failings with similar consequences for lower courts. The *Grable* test for embedded federal questions is a quintessential open-ended "consider everything" standard offering neither guidance nor constraints.[251] One situation that has already divided federal district courts involves the marketing of unsuccessful tax-avoidance strategies. Plaintiffs in these suits are purchasers of the tax-avoidance techniques, who were eventually com-

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241 Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

242 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

243 Nev. Dep't. of Human Res. v. Hibbs, 538 U.S. 721 (2003).

244 Tennessee v. Lane, 541 U.S. 509 (2004).

245 *See Lane*, 541 U.S. at 538–54 (2004) (Rehnquist, C.J., dissenting); *Hibbs*, 538 U.S. at 744–59 (Kennedy, J., dissenting); Sherry, *supra* note 78, at 236–50; Nicole E. Grodner, Note, *Disparate Impact Legislation and Abrogation of the States' Sovereign Immunity After* Nevada Department of Human Resources v. Hibbs *and* Tennessee v. Lane, 83 TEX. L. REV. 1173, 1189–93 (2005).

246 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006).

247 *See id.* at 1007 (Thomas, J., dissenting) ("It is difficult to discern an intention to abrogate state sovereign immunity through the Bankruptcy Clause when no such intention has been found in any of the other clauses in Article I. Indeed, our cases are replete with acknowledgements that there is nothing special about the Bankruptcy Clause in this regard.").

248 For a brief critique of *Katz*, see Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1817–18 (2006). One commentator notes the inconsistency in an understated fashion, suggesting that Justice O'Connor's fifth vote for the majority is "somewhat surprising in light of her previous votes in state sovereign immunity cases" (she voted with the majority in *Seminole Tribe*, *Alden*, *Florida Prepaid*, *College Savings Bank*, *Kimel*, and *Garrett*, all of which struck down congressional abrogations). Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 515–16 n.109 (2006).

249 Grable & Sons Metal Prod. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

250 Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005).

251 Despite my general preference for pragmatic rather than dogmatic judicial decisionmaking, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002), jurisdictional rules call for more clarity. *See infra* text accompanying notes 268–271.

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pelled to pay not only the taxes they sought to avoid but hefty penalties imposed by the IRS. They subsequently sued those involved in creating and marketing the strategies, alleging common law fraud. In many of these cases the defendants removed the cases to federal court, arguing that the fraud claim depended on an underlying question of federal tax law. Most federal courts rejected the argument and remanded to state court, but at least one court accepted it and refused to remand.[252] Whatever the correct answer, the division shows that *Grable* is not easy to apply. And barely a year after *Grable*, the Supreme Court had to resolve another circuit split on jurisdiction over a particular type of embedded federal question.[253]

While the Court's holding in *Allapattah* is clear, by contrast, its reasoning has left lower courts struggling with difficult questions. First, *Allapattah* relied on the language of § 1367(b) to conclude that additional plaintiffs joined under Rule 20 were not within the statute's exclusions from supplemental jurisdiction.[254] However, § 1367(b) specifically prohibits the exercise of jurisdiction (where it would be inconsistent with the requirements of § 1332) over claims "by plaintiffs against persons made parties under Rule . . . 20."[255] Since Rule 20 authorizes the joinder of defendants as well as plaintiffs, this language clearly prohibits one plaintiff from suing multiple defendants unless she meets the minimum jurisdictional amount for each defendant. But what of a suit by multiple plaintiffs against multiple defendants? What should a district court do if one plaintiff meets all the jurisdictional requirements for her claims against all the defendants, but another plaintiff falls short of the minimum amount in her claims? Had there been but a single defendant, the second plaintiff could be joined under the rule of *Allapattah*. Should the mere addition of a defendant—against whom the original plaintiff states a claim that satisfies the jurisdictional amount—change the result? The clear language of § 1367(b), on which the *Allapattah* majority rests its holding, mandates the denial of jurisdiction in the multiple-defendant

252 *Compare* Stechler v. Sidley Austin Brown & Wood, LLP, No. Civ. A. 05-3485(HAA), 2006 WL 90916, at *5 (D.N.J. Jan. 13, 2006) (no jurisdiction), Samuel Trading, LLC v. Diversified Group, Inc., 420 F. Supp. 2d 885, 889–92 (N.D. Ill. 2006) (same), Snook v. Deutsche Bank AG, 410 F. Supp. 2d 519, 521–24 (S.D. Tex. 2006) (same) *and* Sheridan v. New Vista, L.L.C., 406 F. Supp. 2d 789, 792–96 (W.D. Mich. 2005) (same) *with* Becnel v. KPMG LLP, 387 F. Supp. 2d 984, 985–89 (W.D. Ark. 2005) (jurisdiction).

253 Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121, 2136–37 (2006) (distinguishing *Grable* and finding no federal jurisdiction).

254 *Allapattah*, 125 S. Ct. at 2621.

255 28 U.S.C. § 1367(b) (2000).

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case, a result one lower court has labeled "absurd."[256] Other courts have ignored the issue entirely, assuming jurisdiction in multiple-defendant cases without comment.[257]

Allapattah's second ambiguity has yet to receive any judicial attention, but it cannot escape notice for long. Given the language of § 1367(b), the holding that additional plaintiffs who lack the requisite jurisdictional amount can nevertheless join plaintiffs who meet it inevitably raises the cognate issue of additional plaintiffs who are not diverse from the defendant. The Court addressed this issue directly, holding that jurisdiction over these nondiverse plaintiffs, unlike jurisdiction over plaintiffs with insufficient claims, is barred by § 1367.[258] Here again, the holding itself is clear but the reasoning creates difficulties. The majority distinguished between the two jurisdictional requirements of minimum amount and complete diversity by reasoning that in the absence of complete diversity, the federal courts lack jurisdiction over the entire case: "In order for a federal court to invoke supplemental jurisdiction . . . it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere."[259]

As the dissent pointed out, however, lower courts had often treated the two core requirements of § 1332 similarly by dismissing not the entire case but only the diversity-destroying party, a practice approved by the Supreme Court in *Newman-Green, Inc. v. Alfonzo-Larrain.*[260] The *Allapattah* majority never mentions *Newman-Green*, and it is unclear whether lower courts retain the power to dismiss a diversity-destroying party but retain the remainder of the case: The language quoted above strongly suggests that the entire case must be dismissed

256 State Nat'l Ins. Co. v. Yates, 391 F.3d 577, 580 n.15 (5th Cir. 2004) (decided before *Allapattah* but relying on 5th Circuit precedent ultimately approved in *Allapattah*). This problem was noticed in the literature prior to *Allapattah*, but the *Allapattah* Court's reliance on the language of § 1367 brought it into sharp relief. *See, e.g.*, John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 50–56 (2001).

257 *See, e.g.*, Engstrom v. Mayfield, 159 F. App'x. 697, 700–01 (6th Cir. 2005).

258 *Allapattah*, 125 S. Ct. at 2622

259 *Allapattah*, 125 S. Ct. at 2618. For a critique of this "split the baby" approach to the jurisdictional amount and diversity of citizenship questions, see Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction:* Exxon Mobil v. Allapattah *and its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 313–19 (2006).

260 *Allapattah*, 125 S. Ct. at 2635 n.5 (Ginsburg, J., dissenting) (citing Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)).

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for lack of jurisdiction. Lower courts, however, have continued to dismiss diversity-destroying parties without explanation.[261]

The Court's opinion in *Exxon Mobil Corp. v. Saudi Basic Industries*[262] creates similar difficulties for lower courts. Two aspects of the opinion are particularly problematic. First, the Court described the reach of the *Rooker-Feldman* doctrine in two different and somewhat contradictory ways. In its general description of the doctrine, the Court twice used the language of *Feldman,* suggesting that the doctrine barred jurisdiction over claims "inextricably intertwined" with state-court judgments.[263] But in summarizing the holding in *Saudi Basic Industries* itself—which the Court said was simply a reaffirmation of *Rooker* and *Feldman*—the Court limited the *Rooker-Feldman* doctrine to "cases brought by state-court losers complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments."[264] The difference between the two descriptions is most stark in the context of a typical relitigation case: A plaintiff who loses in state court brings suit in federal court requesting relief that is inconsistent with or serves to nullify the state court's judgment. The federal claim is "inextricably intertwined" with the state-court judgment, but the injury is not "caused by" that judgment. Lower courts have divided on whether the *Rooker-Feldman* doctrine as interpreted by *Saudi Basic Industries* bars this type of federal suit.[265]

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261 *See, e.g.,* Gorfinkle v. U.S. Airways, Inc., 431 F.3d 19, 22 (1st Cir. 2005); Achtman v. Kirby, McInerney & Squires, LLP, 404 F. Supp. 2d 540, 548 (S.D.N.Y. 2005).

262 544 U.S. 280 (2005).

263 *See id.* at 286 & n.1. The only other appearance of "inextricably intertwined" in the opinion is at 291, where the Court quotes the court of appeals below.

264 *Id.* at 284.

265 *Compare* Indus. Commc'n & Elec., Inc. v. Monroe County, 134 F. App'x 314, 318–19 (11th Cir. 2005) (finding that *Rooker-Feldman* bars suit because "inextricably intertwined" with state-court judgment), Williams v. Liberty Mut. Ins. Co., No. 04-30768, 2005 WL 776170, at *1–3 (5th Cir. Apr. 7, 2005) (same), Long v. Wolfe, No. 06CV0633, 2006 WL 1371093, at *3–6 (W.D. Pa. May 18, 2006) (same), *and* Willhite v. Collins, 385 F. Supp. 2d 926, 928–29 (D. Minn. 2005) (same), *with* Turner v. Crawford Square Apartments III, 449 F.3d 542, 547–48 (6th Cir. 2006) (finding that *Rooker-Feldman* does not bar suit because injury caused by defendant, not by state-court judgment), Davani v. Va. Dept. of Transp., 434 F.3d 712, 715–20 (4th Cir. 2006) (same), Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 83–93 (2d Cir. 2005) (same), Fearing v. City of Lake St. Croix Beach, No. Civ. 04-5127, 2006 WL 695548, at *3–6 (D. Minn. Mar. 17, 2006) (same), *and* Bracht v. Grushewsky, No. 4:04 CV 1286, 2005 WL 2234578, at *2–5 (E.D. Mo. Sept. 14, 2005) (same). Several of the latter courts have erased the conflict by finding that "inextricably intertwined" is a "descriptive label attached to claims that meet the requirements outlined in [*Saudi Basic Industries*]," which has "no independent content." *Hoblock,* 422 F.3d at 86–87; *accord,* McCormick

A second problem with *Saudi Basic Industries* lies in the Court's holding that *Rooker-Feldman* can only apply if the federal suit is filed "after the state proceedings [have] ended."[266] The Court did not clarify its language, and lower courts are struggling to define the "end" of state-court proceedings. Since *Rooker-Feldman* is derived from an interpretation of § 1257, which reserves to the Supreme Court the right to review state-court judgments, it makes some sense to require a final judgment from the state's highest court. On the other hand, the purpose of *Rooker-Feldman*—to prevent state-court litigants from "jumping ship" to federal court—suggests that *Rooker-Feldman* should preclude federal jurisdiction while state appeals are pending. Lower courts have, understandably, reached a variety of inconsistent conclusions.[267]

The lack of clarity in all these jurisdictional cases has a twofold impact on district courts: Because of the ambiguities, more litigants are likely to find comfort in the decision and thus to have an arguable

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v. Braverman, 451 F.3d 382, 394–95 (6th Cir. 2006); Bolden v. City of Topeka, 441 F.3d 1129, 1142–45 (10th Cir. 2006); *Davani*, 434 F.3d at 719. One specific question that arises frequently in this context is whether a claim of constitutional or other violations in the prosecution of the state suit or the procurement of the state judgment is barred by *Rooker-Feldman* after *Saudi Basic Industries*. *Compare* Johnson v. Ohio Supreme Court, 156 F. App'x 779, 781–83 (6th Cir. 2005) (barred), Sinclair v. Bankers Trust Co. of Cal., No. 5:05-CV-072, 2005 WL 3434827, at 2–4 (W.D. Mich. 2005) (same), *and* Daniels v. Iowa, No. 4:04-CV-40420, 2005 WL 1398498, at *3–9 (S.D. Iowa May 23, 2005) (same), *with McCormick*, 451 F.3d at 392–96 (6th Cir. 2006) (not barred), *and* Goddard v. Citibank, NA, No. 04CV5317, 2006 WL 842925, at *3–6 (E.D.N.Y. Mar. 27, 2006) (same).

The high number of unpublished *Rooker-Feldman* opinions (especially among those finding that the doctrine bars the suit), at both the district and circuit court levels, is an indication that many lower courts consider *Rooker-Feldman* indispensable in resolving unimportant nuisance suits. This suggests that the Court's narrowing of *Rooker-Feldman* is likely to have a significant effect on trial court dockets, at least if lower courts take the narrowing seriously.

266 544 U.S. at 291.

267 *See, e.g.*, Guttman v. Khalsa, 446 F.3d 1027, 1031–32 (10th Cir. 2006) (finding that *Rooker-Feldman* cannot apply when federal-court suit filed while petition for certiorari to state supreme court still pending); *Hoblock*, 422 F.3d at 89 (unclear whether interlocutory orders are final enough to trigger *Rooker-Feldman*); Truserv Corp. v. Flegles, Inc., 419 F.3d 584, 590–91 (7th Cir. 2005) (interlocutory appeals are not final enough to trigger *Rooker-Feldman*); Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 24–27 (1st Cir. 2005) (holding that some interlocutory orders are final enough to trigger *Rooker-Feldman*); Soad Wattar Living Trust of 1992 v. Jenner & Block, P.C., No. 04 C 6390, 2005 WL 1651191, at *2–4 (N.D. Ill. July 1, 2005) (finding it unclear whether interlocutory orders are final enough to trigger *Rooker-Feldman*); Sinclair v. Bankers Trust Co. of Cal., No. 5:05-CV-072, 2005 WL 3434827, at *2–4 (W.D. Mich. Dec. 13, 2005) (finding that *Rooker-Feldman* applies despite filing of federal suit during pendency of state appeal).

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basis for filing in, or removing to, federal court. This further increases the number of cases on the court's docket. And, because the jurisdictional lines are not clear, the courts themselves must spend more time grappling with these jurisdictional issues.[268] Justice Thomas's concurrence in *Grable* aptly suggests that "trying to sort out" some close jurisdictional questions "may not be worth the effort it entails."[269]

In addition, the lack of clarity in jurisdictional rules means that appellate courts, reviewing jurisdictional holdings de novo, have more opportunities to disagree with lower court holdings. When jurisdictional rules are clear, there is less room for disagreement. But as with any move from rules to standards—from a formalist to a pragmatist regime—fuzzy jurisdictional rules give courts greater discretion. In the jurisdictional context, de novo review at the appellate level both doubles the number of courts that must struggle with newly difficult jurisdictional questions and gives the courts of appeals more opportunities to second-guess district court decisions on questions that now seem to have no single right answer. While I do not want to enter the extensive debate about whether rules or standards are preferable,[270] it is worth noting that jurisdictional doctrines are most in need of—and, until recently, most likely to follow—formal rules.[271] Jurisdiction law is mostly statutory, and the statutes have not often been significantly amended. Litigating jurisdictional questions distracts courts from the

268 In the year since *Grable*, for example, many defendants have removed to federal court under questionable circumstances, only to have the district court remand to state court. *See, e.g.*, Samuel Trading, LLC v. The Diversified Group, Inc., 420 F. Supp. 2d 885, 889–92 (N.D. Ill. 2006); Stechler v. Sidley Austin Brown & Wood, LLP, No. Civ.A. 05-3485, 2006 WL 90916, at *4–8 (D.N.J. Jan. 13, 2006); City of Beatrice v. Aquila, No. 4:05CV3284, 2006 WL 208831, at *3–8 (D. Neb. Jan. 25, 2006); Glorvigen v. Cirrus Design Corp., No. 05-2137, 2006 WL 399419, at *2–6 (D. Minn. Feb. 16, 2006); Snook v. Deutsche Bank AG, 410 F.Supp.2d 519, 521–24 (S.D. Tex. 2006); Sheridan v. New Vista, L.L.C., 406 F. Supp. 2d 789, 792–96 (W.D. Mich. 2005).

269 Grable & Sons Metal Prod. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2372 (2005) (Thomas, J., concurring).

270 For a sampling of the voluminous literature, see, for example, FREDERICK SCHAUER, PLAYING BY THE RULES (1991); Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement:* Marbury v. Madison *and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369, 374–76 (2003); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1702–13 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–118 (1992).

271 *See generally* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004) (arguing for clarity and predictability in jurisdictional rules, and against discretion).

merits, and has to be done twice because of the rule of de novo review, and thus ought to be made as easy as possible. Finally, the consequences of a "mistaken" jurisdictional ruling are much less substantial than in other contexts: In most cases, the only issue is whether the claim on the merits will be litigated in state or federal court. For all these reasons, formalism has a stronger claim in jurisdictional contexts than in most other areas.

More important, the move away from formalism in the jurisdictional context coincides with the move toward formalism—and away from district court discretion—in the other areas I have discussed. Both trends have the effect of transferring authority from district courts to appellate courts. But neither a preference for formalist decisionmaking nor a preference for nonformalist decisionmaking can explain or justify *both* trends. If formalism tends to foster efficiency at the cost of accuracy, and pragmatism does the reverse, the current regime is the worst of both worlds. As already noted, both the new jurisdictional rules and some of the diminution in trial-court discretion decrease efficiency in civil litigation.[272] But the contraction of district court discretion (and, to a lesser extent, the lack of clarity of the jurisdictional rules) also has a negative effect on substance. I close this Part by suggesting some reasons why district court judges are better than appellate court judges at making the very sorts of decisions that the new jurisprudence increasingly allocates to courts of appeals.

To state it briefly: Trial court judges live in the world of litigation, and appellate court judges do not. Consider issues of judicial federalism, for example. Judicial federalism is a kind of dance, with state and federal courts responsible for taking the lead in different circumstances. Identifying those circumstances is more easily done *in situ* than from a remote appellate location. Federal district court judges and their state-court counterparts are much more likely to interact and to share solutions to common problems, if only because of geographical proximity. They deal with the same law firms, are members of—or speakers to—the same bar associations, read the same local newspapers, and may often end up shuffling cases back and forth. In smaller communities, they are probably even in the same social circle. Many federal district court judges were themselves either members of, or litigators before, the state-court bench. Think how much more likely it is that a federal district court judge in Minneapolis than a court of appeals judge in St. Louis (or pick your own cities) knows well the Minnesota state-court judge(s) on whom his or her ruling will have an impact. Obviously, not every federal district court judge will

272 *See supra* Part II.A.

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fit this profile, but in the aggregate, district court judges will have a much more realistic, nuanced, and sensitive view of judicial federalism than will court of appeals judges.

Similarly, their immersion in the world of litigation gives trial court judges a greater appreciation of the costs and benefits of particular allocations of resources, and of the strengths and foibles of the lawyers who practice before them. Appellate judges see only briefs and oral arguments, and are therefore removed from the background facts that provide so much more information about the nature of a case and its participants. Thus a federal district court judge who has seen hundreds of state-law claims is in a better position to identify which ones belong in state court and which in federal court. She also knows how much time and money has already been spent on the state-law claim and can thus better evaluate the consequences of a remand to state court. Even outside the federalism context, the district court judge familiar with litigation generally can more easily sort the wheat from the chaff, and use several of the now-defunct practical doctrines to clear the losers quickly. Experience with lawyers and law firms makes it more likely that she can tell when sanctions are needed and when they are not—and how accusatory she needs to be.

Thus, not only are the two trends I have identified in this Article inconsistent with each other and independently problematic, together they have the effect of transferring particular types of decisionmaking authority to those less equipped to exercise it well, or, in the case of some of the jurisdictional doctrines, misallocating judicial resources. Appellate judges are good—perhaps better than district court judges—at making substantive law. District court judges are good at managing litigation. It makes little sense, especially in a world of scarce judicial resources, for appellate courts to take over the latter.

IV. Causes and Cures

In one sense, the two trends I identify have no cause: Neither the Justices on the Supreme Court nor the judges on the courts of appeals have affirmatively decided to expand jurisdiction or contract discretion. Presumably, the Justices are also not being deliberately opaque or inconsistent.[273] Each individual doctrinal change might be the result of a variety of forces, from views on statutory or constitutional

273 There may be some indication that the Supreme Court in the future will deliberately provide even less guidance to lower courts by ruling on the narrowest ground possible. *See* E.J. Dionne, Jr., *The Chief Justice Sets a Standard*, Wash. Post, June 20, 2006, at A17 (reporting that Chief Justice Roberts, in speech at Georgetown University Law School, suggested that the Court should decide cases as narrowly as possible).

interpretation (a move toward textualism, for example) to compromise among the Justices or the judges on a panel.

What all these doctrinal moves have in common, however, is an insensitivity to the perspective of district courts—a heedlessness of consequences of the doctrines for the real world of litigation. The disparate examples of diminishing discretion are united by their unwillingness to let pragmatic concerns enter into the resolution of legal questions, even when the "right" answer is far from clear as a matter of text, history, or precedent. In the cases expanding jurisdiction, the majority seems more interested in papering over inconsistencies than in providing guidance to the courts that will have to decipher and adhere to the decisions. Perhaps all courts, or at least all appellate courts, view (or should view) their role as making abstract legal decisions insulated from the consequences of those decisions. But I suggest that the problem lies not in a considered decision to ignore consequences, but rather in simple unfamiliarity with those consequences. Without sufficient exposure to the district court perspective, appellate courts are simply unaware of the problems that particular doctrinal choices cause. Were they more aware, it might—at least at the margins—influence their doctrinal choices.

If I am right about the cause, what is the cure? One possibility is to somehow increase appellate judges' exposure to the realities of litigation. In the United States, very few appellate judges ever take an assignment to the district bench, although there are opportunities to do so. Perhaps we should encourage (or require) court of appeals judges to sit as trial judges periodically.[274] Similarly, although district court judges already sit by designation on courts of appeals with some frequency, we might want them to do so more often. One problem with either of these solutions—more acute when a district court judge sits on a court of appeals—is that temporary assignments carry with them confounding difficulties that reduce the effectiveness of the exposure. A district judge sitting on a court of appeals is in an awkward position when it comes to questions of district court authority or discretion, and a court of appeals judge who conducts an occasional trial is likely to see only a narrow slice of litigation.

A more promising possibility is to change the make-up of the appellate bench rather than to educate the judges who are already there. In other words, we might appoint more district court judges to the

274 Several scholars have made the analogous suggestion that Supreme Court Justices ought to be required to ride circuit again. *See* Stephen G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 986 (2005).

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courts of appeals and the Supreme Court. To some degree, this might already be taking place: Between 1970 and 2001, the percentage of court of appeals judges with prior experience as federal district judges increased from 34.4% to 44%.[275]

These numbers do not give much comfort, however. Some of the doctrinal trends I identify in this Article began during this period of rising district court presence on courts of appeals, suggesting that even the current numbers are insufficient to achieve the goal of preventing inattention to the district court perspective. Moreover, to the extent the problem lies with the Supreme Court, the increased appointment of district court judges to the courts of appeals does not help: No former district court judge has been appointed to the Supreme Court since 1916, and none has sat on that Court since 1930.[276] Even at the court of appeals level, many cases will be decided without the participation of a former district court judge. Because the circuits differ in both the total number of judges and the number of judges with district court experience, the likelihood of having a three-judge panel without any former district court judges varies: In 2001, the recent high point of district court representation, it ranged from 0% in the First Circuit to 70% in the Tenth Circuit, with median of just over 15%.[277]

275 As I describe later, this trend may be reversing. *See infra* note 278 and accompanying text.

These figures, as well as all other data in this Part, are compiled from the Biographical Directory of Federal Judges prepared by the Federal Judicial Center [hereinafter Biographical Directory of Federal Judges], *available at* http://www.fjc.gov/public/home.nsf/hisj (last visited August 3, 2006).

Data was collected on all court of appeals judges sitting between January 1, 1970 and August 1, 2006. Senior judges were excluded from all calculations. For all calculations, N is the total number of judges in the circuit in the relevant year (or years), and E is the number of judges in the circuit with prior district court experience. The percentage of judges with district court experience, for Figures 1 and 3 and statements in the text, is E/N. The probability of randomly selecting a three-judge panel without a former district court judge, for Figure 2 and the statements in the text, is:

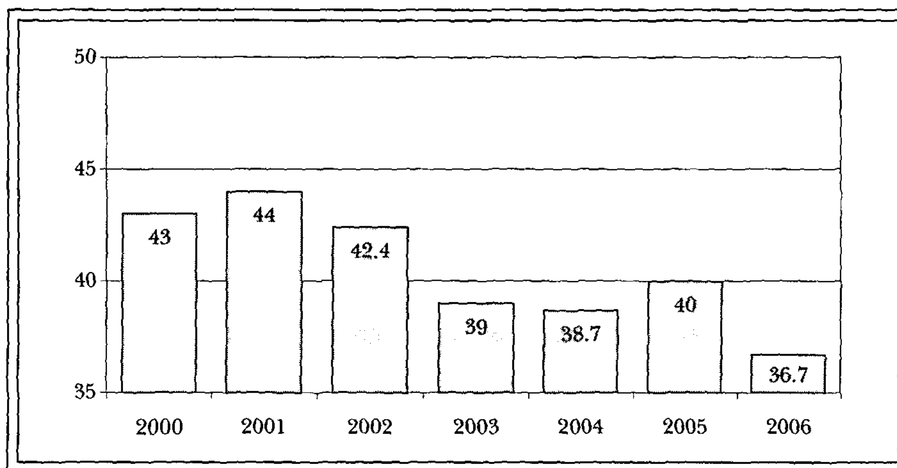
$$\frac{(N-E)(N-E-1)(N-E-2)}{(N)(N-1)(N-2)}$$

276 John H. Clarke was appointed to the Court in 1916 and retired in 1922. Edward T. Sanford was appointed in 1923 and sat until he died in 1930. Clarke was a district judge from 1914 to 1916 and Sanford from 1908 to 1923. Biographical Directory of Federal Judges, *supra* note 275.

277 The First Circuit is the only circuit with a large enough number of former district court judges—at least four out of six since 1984, and three out of five for the four preceding years—to ensure that every panel has at least one; between 1992 and 2001, five of the six First Circuit judges had district court experience, making it likely that many panels consisted entirely of former district court judges. The First Circuit has the best record on the issues I survey: It is the only circuit to have rejected the

Finally, more recent appointments suggest a reversal of the 1970-2001 trend:[278]

FIGURE 1. PERCENTAGE OF SITTING FEDERAL COURT OF APPEALS JUDGES WHO PREVIOUSLY SERVED ON U.S. DISTRICT COURTS



Second Circuit's reduction of district court discretion in the Rule 11 context. *See supra* note 228. It was also one of the four circuits that read § 1367(b) narrowly, finding no supplemental jurisdiction over claims by plaintiffs who did not meet the jurisdictional minimum. The others were the Third, with a below-median probability of producing panels without district court experience, the Eighth, just above the median, and the Tenth, which had the highest probability of producing such panels. *See supra* note 110; *infra* Figure 2. No data are perfect.

278 All data are current as of August 1, 2006. This drop is especially unexpected given that there has been a Republican administration for the past six years. Presidents usually draw judicial appointments from their own party. *See, e.g.*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES 357 (1997); DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 32 (2000); Robert A. Carp et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 485 (2006). A Republican following two or more terms of Democratic presidents, or a Democratic following two or more terms of Republican presidents, will therefore likely have fewer district court judges to draw from—the most recently appointed judges from his party when he takes office will have been appointed at least eight years before. Some will have retired, and others might be considered too old. As a president's term progresses, however, and especially into his second term, he will be able to draw from his own district court appointees. Thus, for the period between 1980 and 1992 (three terms of Republican presidents), the percentage of former district court judges on the courts of appeals increased from 39.2% to 40.9%. For Democrat Bill Clinton's two terms, it increased from 40.9% to 43%. While these increases are small, they are in stark contrast to the sharp *decrease* for the current administration's term and a half.

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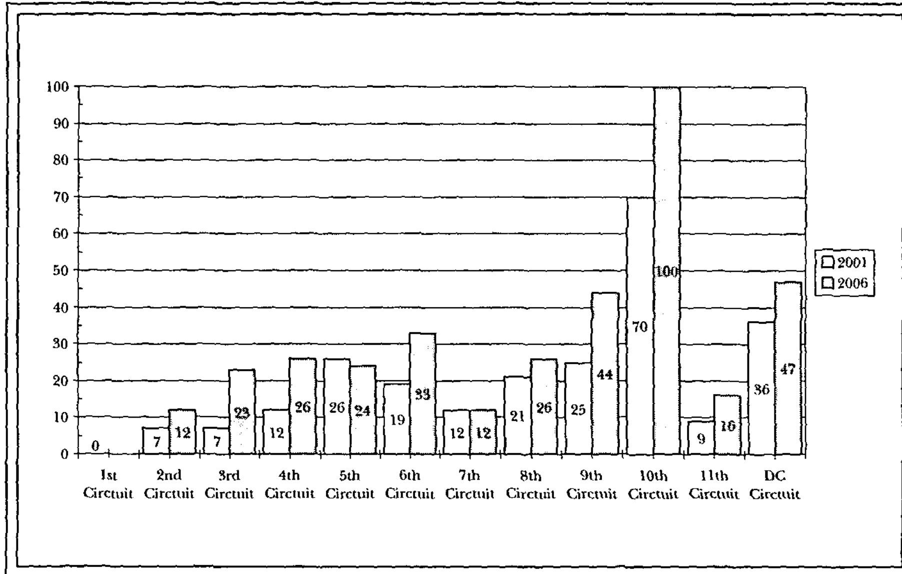
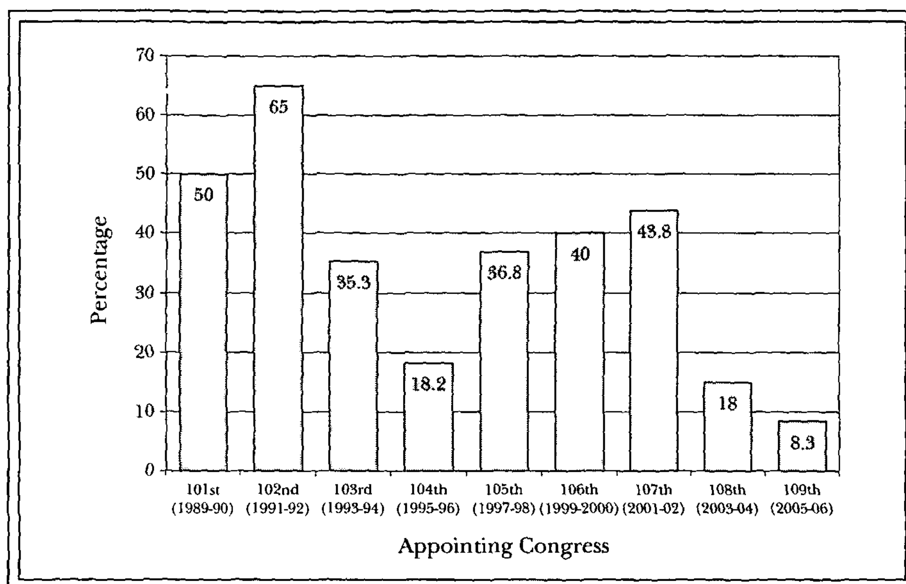
Thus we see that in 2006, the likelihood of a three-judge panel without a former district court judge ranges from 0% in the First Circuit to 100% in the Tenth, with a median of almost 24%. Similarly, between 2001 and 2006 the probability of a panel lacking any district court experience rose in all but three circuits:

FIGURE 2. PROBABILITY OF PANEL WITHOUT A FORMER DISTRICT COURT JUDGE



If we focus on new appointees only (as opposed to the combined district court experience of all sitting court of appeals judges), the recent drop is even more dramatic:

FIGURE 3. COURT OF APPEALS APPOINTMENTS WITH DISTRICT COURT EXPERIENCE



While we do not know whether this newer trend will continue, it is intriguing. If 2008 sees the election of a Democratic president, the number of appointments from the district court bench is likely to remain low for at least a few years: There will have been no Democratic district court judges appointed for eight years, limiting the number of district court judges in the likely pool of candidates.[279] And if the current trend is a deliberate choice by President Bush and his advisers, a subsequent Republican president might also choose to follow it.

However, whether the number of district court judges serving on courts of appeals continues to drop, levels off, or even increases slowly as it did between 1970 and 2001, we should not expect much change in the doctrinal trends. If the problem is indeed the lack of district court experience, only a much more dramatic increase in the number of district court judges elevated to the appellate bench has any chance of making a difference. And that is where some scholars start wringing their hands, complaining that putting too many district court judges on the courts of appeals risks two dangers: The professionalization of the judiciary—so that it becomes "technocratic, bureaucratic,

279 *See supra* note 278 (suggesting that presidents tend to pick judges from their own parties).

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[and] bloodless"[280]—and the influence that hope of promotion might exert on district judges' decisions.[281] Maybe so, but I hope this Article has suggested the risks of the converse: Appellate judges with too little trial-court experience are likely to make federal litigation more complex, time-consuming, and difficult than it needs to be. Before we decide how to make the trade-off between professionalization and expertise by reducing the number of district judges who serve on appellate courts, we ought to consider what a lack of expertise at the appellate level might do to litigation on the ground.[282]

CONCLUSION

This Article has both a descriptive and a prescriptive focus. It identifies two significant doctrinal trends that have not been previously noticed and are in fact contrary to conventional wisdom. More important, I take three normative positions in the Article: First, the Supreme Court's recent expansion of jurisdiction has paid insufficient attention to transparency, clarity, or consequences for district courts. Second, district court judges do not have enough discretion over procedural decisions that help them manage cases, litigants, lawyers, and the complexities of judicial federalism. And third, to prevent further

280 GOLDMAN, *supra* note 278, at 364; *accord* Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2176 (1993); Guido Calabresi, *The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 643–44 (2002); William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary* (Jan. 1, 2002), www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html; Lee C. *see also* Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 941 (2003) (criticizing the norm of prior judicial experience for Supreme Court Justices).

281 *See* Carp et al., *supra* note 278, at 490; Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 188–89 (1991); Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 226–41 (2003); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455 (1999); Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 170 n.5 (2006); *see also* GOLDMAN, *supra* note 278, at 305–06 (describing the Reagan administration's detailed focus on the opinions of a district court judge being considered for nomination to the court of appeals).

282 This Article is meant as a first attempt to identify the problem and suggest solutions. Further empirical research is warranted regarding both the causes and cures. We might want to look more closely at the differences between the Supreme Court and the courts of appeals; to look beyond district court experience to other types of litigation experience (including both state-court judicial experience and experience as a litigator); and to compare doctrinal developments in specific circuits with the representation of district court judges on the appellate bench, whether by appointment or by designation.

developments with a detrimental effect on district court functioning, we should appoint more federal district court judges to the federal courts of appeals (as well as to the Supreme Court). All three normative positions are out of favor among scholars—the first primarily because the great acclaim for the substantive jurisdictional rulings themselves keeps scholars from examining their foundations too closely, the second as a part of the larger movement in favor of popular sovereignty and governmental accountability, and the third out of concern for secondary consequences. In other words, my normative conclusions, like my doctrinal descriptions, are contrary to current conventional wisdom. I hope that debunking the doctrinal aspects has raised questions on the normative side as well.

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