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Federal Jurisdiction: Legislative and Judicial Change

Carl McGowan*

Congress is presently considering legislation abolishing federal court jurisdiction over disputes between citizens of different states. Concurrently, the Burger Court has restricted federal jurisdiction in the areas of standing, abstention, and habeas corpus review. The divestitures of federal jurisdiction by these two means pose distinct problems relating to the proper allocation of judicial power within our federal system. Judge McGowan examines these problems and concludes that notions of finality, efficiency, and a due regard for the competence of state court systems militate in favor of reposing greater reliance on state courts, but that the Supreme Court should proceed with caution in restricting or foreclosing federal courts to those who seek to vindicate federally protected rights.

The existence side by side of full-scale state and federal court systems has been a distinctive feature of "Our Federalism," to use the phrase which Justice Black employed with almost mystical reverence. Characterized by large areas of overlapping subject matter and many points of inevitable contact, it is a phenomenon not to be found in most of the other federal republics around the globe. For us, however, the balance to be struck between the dual judicial sovereignties has been a constant preoccupation throughout our national existence, engaging deeply held loyalties and exciting controversies of frequently high emotional intensity between differing visions of the limits of state and federal power. It has, in terms of ultimate significance, been one of our great and continuing political issues.

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It is an issue, however, that also implicates less dramatic—but often no less important—interests than those deriving from clashing philosophies of government. These are considerations of a professional and technical nature that inhere in the distribution of functions between state and federal courts, having to do with such things as achieving maximum efficiency in the allocation of resources to dispute resolution; promoting clarity, certainty, and finality in the law; and easing the burdens of litigation. Views can and do differ about how to further these goals, and such differences, although they lack the sharpness of debate grounded in political ideology, complicate the task of reaching an accommodation.

It is not surprising, therefore, that the balance at any one point in time is not a stable one; and the history of our dual judicial sovereignies is marked by tremendous variations in the allocation of tasks between the two systems, as well as in the degree of impingement of one upon the other. It is commonplace that, although the First Congress was quick to create, under the option afforded it by the Constitution, inferior federal courts and to invest them with some portion of the jurisdiction contemplated by article III, those courts for over three-quarters of a century were cast in a singularly modest role. It was not until the Civil War and its aftermath caused a rising tide of nationalism that the business of the federal courts was substantially enlarged. But the force of that development was significantly broken


6. The only major types of lower federal court jurisdiction provided by the First Judiciary Act, ch. 20, 1 Stat. 73 (1789), were admiralty jurisdiction, concurrent jurisdiction with the state courts over private civil actions between a citizen of the forum state and an alien or citizen of another state, and jurisdiction over civil suits brought by the United States. Id. §§ 9, 11. Limited jurisdiction over patent cases was provided for in the immediately subsequent years. Act of Apr. 10, 1790, ch. 7, § 5, 1 Stat. 109; Act of Feb. 1, 1793, ch. 11, § 5, 1 Stat. 318.

7. In 1863, Congress passed a statute providing for the removal to federal court of suits against federal officers. Act of Mar. 5, 1863, ch. 81, § 5, 12 Stat. 755. The Civil Rights Acts of 1866, ch. 31, 14 Stat. 27; 1870, ch. 114, 16 Stat. 140; and 1875, ch. 114, 18 Stat. 335, included jurisdictional provisions whose modern day counterparts are 28 U.S.C. §§ 1343, 1344, & 1443 (1970). Most significantly, the lower federal courts were invested with general federal question jurisdiction, at the option of either party, in the 1875 Judiciary Act, ch. 137, §§ 1, 2, 18 Stat. 470. Diversity jurisdiction was also
when Reconstruction faltered and then foundered in the swift undertow of the return to normalcy.\(^8\)

The New Deal and World War II loosed new impulses toward the exertion of national power,\(^9\) and the federal courts moved with them. The social and economic changes generated by these great events presented the Warren Court with numerous opportunities to reexamine the Constitution in the context of a society which would not have been recognizable by its framers. Constitutional reinterpretation wrought by the federal judiciary,\(^10\) together with great activity by the Congress in the fields of civil rights,\(^11\) environmental protection,\(^12\) openness in government,\(^13\) and health and safety,\(^14\) flooded the federal courts with a whole new kind of litigation which, when added to normal judicial burdens, has imposed severe strains both in terms of sheer volume\(^15\) and in the novelty and complexity of the issues tendered.

True to our tradition of chronic concern with the functioning of the expanded to include residents of any two different states, with the action to be brought in the state of the defendant's residence or where the defendant was present. \textit{Id.} § 1.

8. \textit{See}, \textit{e.g.}, The Act of Mar. 3, 1887, 24 Stat. 552, raising the jurisdictional amount in federal question and diversity cases to $2,000, limiting the provisions for removal to federal court, and inserting stricter venue requirements.


15. For statistics and comments on the increasing caseloads of federal courts, see notes 45-69 \textit{infra} and accompanying text.
dual court system, the present moment is one of ferment in the field of federal jurisdiction. Faced with the alternative of embarking upon a course of seemingly endless expansion of the federal judiciary, the Congress appears to be seriously considering the elimination of one of the major heads of federal jurisdiction—and one going back to the First Judiciary Act of 1789—diversity of citizenship.\footnote{16} At the same time, and perhaps due at least in part to a sense of frustration as it has observed Congress continually expanding the jurisdiction of the federal courts, the Supreme Court appears to be limiting access to them by such means as restricting the concept of standing, narrowing the reach of federal habeas,\footnote{17} and insisting to a greater degree upon noninterference by federal courts with state court proceedings.

This latter development has, whether deservedly or not, caused new clouds of controversy to swirl about the Supreme Court, emanating from those who had previously hailed the generally expansive jurisdictional rulings of the Warren Court.\footnote{18} It is unhappily not the fate of the Court as an institution to be free of periodic alarums and excursions of this kind. But this situation may prompt the neutral observer to reflect that, where federal jurisdiction is concerned, it would be well if the principal regulator of that jurisdiction, the Congress, were consciously and continuously to keep its jurisdictional grants under review, in order to relieve the federal courts of those responsibilities which the public interest no longer compels them to discharge. The shaping of federal jurisdiction to newly emerging needs inevitably involves expansion, but effective judicial performance in these new areas can be hampered by legislative neglect of the counterforce of contraction.

The present moment is thus an opportune one in which to contrast the direct limitation of access to the federal courts by legislative action with the more oblique impact on such access effected by evolving judicial doctrine. Part I of this article will consider the first means of limiting access by reference to a proposal pending in Congress which would virtually eliminate diversity jurisdiction. The manner in which the judiciary limits access is capable of examination in a variety of decisional contexts, but will be analyzed in part II in the context of federal habeas corpus jurisdiction in order to keep the discussion within reasonable bounds.

\footnote{16}{See H.R. 9622, 95th Cong., 1st Sess., 123 CONG. REC. 11222 (daily ed. Oct. 18, 1977); notes 19–97 infra and accompanying text; note 6 supra.}

\footnote{17}{See discussion at notes 98–201 infra and accompanying text.}

I. FEDERAL JURISDICTION OVER CLAIMS BETWEEN PARTIES OF DIVERSE CITIZENSHIP

Diversity of citizenship has been a basis of federal jurisdiction since the First Judiciary Act in 1789. Indeed, while the current Congress is considering abolishing diversity jurisdiction and further expanding federal question jurisdiction, the First Congress chose to allow federal trial courts to hear, in addition to maritime controversies, private civil suits only between parties of different state or national citizenship.

Actually, there are two types of suits that have been generally referred to as diversity cases, but this label properly belongs only to one of these. "Diversity of citizenship" refers to the situation in which the plaintiff resides in a different state than does the defendant. In early 1978, the House of Representatives passed a bill introduced by Congressman Kastenmeier which would completely abolish this diversity of citizenship jurisdiction. The legislation would retain, however, federal jurisdiction over suits between aliens or foreign states, on the one hand, and citizens of the United States, on the other. Such alienage, as well as diversity, jurisdiction has existed since 1789. A

19. First Judiciary Act of 1789, ch. 20, §1, 1 Stat. 73.
20. See notes 34–37, 47–50, and 98 infra and accompanying text.
21. First Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73. The jurisdictional amount was $500. Id. It was not until the Judiciary Act of 1875, ch. 137, §§ 1, 2, 18 Stat. 470, that diversity jurisdiction was expanded to include cases in which neither party resides in the forum state.
23. H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. 1553 (daily ed. Feb. 28, 1978) §§ 1(c)(1), (2). The amount-in-controversy requirement would be raised from $10,000 to $25,000, which approximately compensates for the growth in monetary inflation since 1958, when the requirement was raised from $3,000 to $10,000. Act of July 25, 1958, Pub. L. No. 85–554, 72 Stat. 415 § 2. In 1976, the amount in controversy was less than $25,000 in over one quarter of all diversity cases. Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 9622 Before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess., at 223–24 (1977) [hereinafter cited as Hearings on H.R. 9622] (statement of Charles Alan Wright).
24. Alienage jurisdiction has always encompassed suits between the alien (or foreign state) and a citizen of a non-forum state. The First Judiciary Act, ch. 20, § 1, 1 Stat. 73 (1789). See also note 21 supra.
bill identical to the Kastenmeier proposal is presently under consideration in the Senate.\textsuperscript{25}

The Kastenmeier proposal would also retain federal interpleader.\textsuperscript{26} The Federal Interpleader Act\textsuperscript{27} does not contain the \textit{Strawbridge v. Curtiss}\textsuperscript{28} requirement of complete diversity—that every plaintiff reside in a different state from every defendant.\textsuperscript{29} The minimal diversity requirement in interpleader,\textsuperscript{30} together with a low ($500) jurisdictional amount,\textsuperscript{31} and liberal venue and personal service provisions,\textsuperscript{32} has the potential of greatly facilitating the settlement of multiparty claims in which personal jurisdiction over all necessary parties cannot be effectuated in the courts of any state.

Support for the Kastenmeier bill or other proposals sharply curtailing diversity jurisdiction has been forthcoming from the Judicial Conference of the United States, the National College of Trial Lawyers, the ACLU, the NAACP,\textsuperscript{33} and the "Bork Commission."\textsuperscript{34} In his annual message to the ABA in 1976, Chief Justice Burger called for abolition of diversity jurisdiction.\textsuperscript{35} Perhaps most significantly, in 1977 the Conference of State Chief Justices adopted a resolution expressing the willingness of the state courts to assume all or part of the federal diversity jurisdiction.\textsuperscript{36}

It thus appears likely that the federal courts may soon be relieved of

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  \item 28. 7 U.S. (3 Cranch) 267 (1806).
  \item 29. 28 U.S.C. § 1332 (1970) requires complete diversity in ordinary diversity suits. However, complete diversity is not a constitutional requirement. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (sustaining federal interpleader action in which complete diversity did not exist).
  \item 31. \textit{Id.} § 1335(a).
  \item 32. \textit{Id.} §§ 1397, 2361.
  \item 33. STAFF OF HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., SECTION BY SECTION ANALYSIS OF H.R. 9622 at 4 (Comm. Print 1977) [hereinafter cited as SECTION BY SECTION ANALYSIS OF H.R. 9622].
  \item 34. DEP'T OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, REPORT ON THE NEEDS OF THE FEDERAL COURTS (R. Bork, Chairman, 1977) [hereinafter cited as BORK COMMISSION REPORT].
  \item 36. 9 THE THIRD BRANCH, Aug. 1977, at 6. For the significance of this resolution, see the discussion at notes 61-65 infra and accompanying text. \textit{See also} ALI STUDY, supra note 4, §§ 1301-07 (comments at 99-161, 468, showing ALI's recommended changes in diversity jurisdiction which would eliminate approximately one-half of the current federal diversity caseload). The Department of Justice has sponsored legislation in the current Congress which would eliminate the assertion of diversity by an in-state plaintiff. \textit{See} 9 THE THIRD BRANCH, Oct. 1977, at 5.
\end{itemize}
FEDERAL JURISDICTION

the obligation to settle those disputes which originally were the only significant category of dispute within their jurisdiction. It should be noted, however, that the current legislation is not the first attempt to severely curtail diversity jurisdiction. Such legislation was twice favorably reported out of the Senate Judiciary Committee in the 1930's, and controversy concerning the propriety of federal diversity jurisdiction had existed even before that time. It appears likely that a major reason for the retention of this basis of jurisdiction in the face of such challenges has been a reluctance to divest the federal courts of the one major grant of authority which the founding fathers decided they must have. With some circularity, the long tradition of diversity jurisdiction may have contributed heavily to its continuance, even though a persuasive rationale for diversity has become increasingly difficult to explicate.

Admittedly, certain of the arguments voiced over the years against this source of jurisdiction have been time-bound, directed principally at evils peculiar to the context in which the arguments were raised. For instance, the effort by Senator Norris to abolish the jurisdiction in the 1930's was in response to the unsympathetic attitude displayed by the federal courts towards organized labor. Ultimately, of course, the Norris-LaGuardia Act, prohibiting federal courts from enjoining labor activities, met Senator Norris' particular objection to diversity jurisdiction.

As long ago as 1928, however, an argument was stated against retention of diversity jurisdiction which remains equally relevant to the contemporary situation. After examining the rationales put forth for diversity, Henry Friendly, long before his transition to the federal bench, concluded that diversity was "out of the current of [the] nationalizing forces" of that day. The work of the federal courts in administering federal law would grow as "a reflex of the general growth of federal political power, [which] will not abate, since it is

37. S. REP. No. 530, 72d Cong., 1st Sess. (1932); S. REP. No. 691, 71st Cong., 2d Sess. (1930). Both proposals were, of course, defeated.
39. Id. at 8–10.
responsive to deep social and economic causes," and these "unifying tendencies of America here make for a recession of jurisdiction to the States." Central to Judge Friendly's prescient analysis was the notion that federal courts should not needlessly divert their energies away from matters that they are best suited to entertain, the determination and application of federal law. Implicit in this notion is the realization that there are practical limits to the number of cases which can be effectively handled by the federal courts.

The growing federal workload is presently the primary impetus behind proposals to curtail severely, or to abolish altogether, diversity jurisdiction. The number of civil cases filed in the district courts in 1977 was 130,597, an increase of over eleven percent from 1975, and of almost fifty percent from 1970 when the last increase in the number of federal district court judgeships was authorized. Approximately one quarter of the civil suits filed last year—nearly 30,000 cases—were grounded in diversity. Of course, the proportion of all federal suits which are based in diversity has fallen during this period, since the growth in the federal caseload is primarily the result of a great expansion in the number of suits raising a federal question. The extension of most of the provisions of the Bill of Rights to actions taken by the states, in conjunction with the broadening of the scope of these provisions and those of the due process and equal protection clauses of the fourteenth amendment, have multiplied the number of such suits. These developments, and the reemergence of post-Civil War statutes as a means of vindicating federal rights against state officers, have combined to increase greatly the range of controversies encompassed within federal question jurisdiction. In addition, the Civil Rights Acts of the 1960's, and comprehensive and far-reaching

44. Id.
46. 1977 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 81 [hereinafter cited as 1977 REPORT]. The years referred to are fiscal years.
47. The number of civil cases filed in 1975 was 117,320. Id.
48. The number of civil cases filed in 1970 was 87,321. Id.
49. 29,784 civil suits with jurisdiction grounded in diversity were filed in 1977. Id. at A-25. In approximately one-half of these cases, the plaintiff was a resident of the forum state.
50. For instance, over 13,000 civil rights cases (excluding prisoner petitions) were filed in 1977, as compared with 5,138 in 1971. Id. at 82. See HART & WECHSLER, supra note 5, 1977 Supplement at 5.
federal legislation dealing with problems such as environmental protection, occupational safety, and consumer protection, have created new causes of action for private litigants and expanded the regulatory and enforcement responsibilities of the federal government and, concomitantly, of the federal courts.

Thus, diversity jurisdiction can hardly be blamed for the growing burden on the federal courts, and the movement to curtail that jurisdiction is not intended to remove the effective causes of that burden. Rather, it proceeds from the view that, assuming the federal courts are in a condition of excessive strain, those cases which least require a federal forum should be the first to be removed from the federal docket. This approach may be contrasted with that of the recent judicial actions described in part II of this article. The efforts to reduce the scope of federal habeas corpus, limit federal court interference with state judicial processes, and place greater reliance on state remedial processes directly cut back the caseload growth that has resulted from the increase in federal question cases.

Of course, an alternative way to deal with the increasing burden on the federal courts is to increase the number of federal judges. The current Congress is expected to authorize a nearly thirty percent increase in district and appellate judgeships. An ever-expanding number of judges, however, is not a satisfactory solution, particularly at the appellate level. As the number of appeals court judges increases, it

52. See notes 11-14 supra.

53. Litigation under the Social Security statute has greatly increased in recent years, although the basic legislation was enacted in the 1930's. See note 9 supra. 10,095 Social Security cases were filed in 1977, as opposed to 1,792 Social Security cases filed in 1971. 1977 REPORT, supra note 46, at 82.

54. In 1977, the civil cases pending (as opposed to filed) in federal district courts numbered 153,606, an increase of 9.6% over the previous year. 1977 REPORT, supra note 46, at 80. Nevertheless, largely as a result of the enactment of the Speedy Trial Act of 1974, 18 U.S.C. § 208 (1976), requiring expedited treatment of criminal cases, the median interval from filing to trial in federal civil cases in which trial was completed has lengthened to twelve months. 1977 REPORT, supra note 46, at 161.

becomes increasingly difficult to administer the work of the circuits or to resolve cases en banc. Furthermore, if the number of circuits were significantly increased, the likelihood of inter-circuit conflict, requiring resolution by the Supreme Court, would also increase. Finally, even if the number of federal lower court judges could be substantially augmented without loss in effectiveness, it would be impossible to reduce the workload of the Supreme Court without substantially restructuring the federal judicial system.

We have seen that under the Kastenmeier proposal, the federal district courts would be relieved of adjudicating nearly all of the approximately 30,000 diversity cases, of a total of over 170,000 civil and criminal filings, currently heard each year. It has been argued that this unloading would serve no useful purpose since these cases simply end up in state courts where the dockets are often more crowded than those of the federal courts. Notwithstanding this fact, it is pointed out in favor of the divestiture that, although the total increase in the caseload of the state courts would equal the total decrease in the caseload of the federal courts, the increased burden upon the courts of any one state would be slight: the 30,000 cases now heard by 373 federal judges would be adjudicated before more

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56. The entire court of appeals, as well as the district courts in the circuit, are bound by the decisions of that court of appeals, which are usually made by three-judge panels. Thus, it may be desirable to hear particularly important or novel cases en banc, where all the judges of the court of appeals for the circuit who are in regular active service participate. JUDICIAL CODE AND JUDICIARY ACT, 28 U.S.C. § 46(c) (1970).


58. The proposal retains federal "alienage" diversity jurisdiction for the federal courts. Note 23 supra and accompanying text. As Professor Wright has noted, however, "in terms of workload it makes little difference whether alienage jurisdiction is retained." SECTION BY SECTION ANALYSIS OF H.R. 9622, supra note 33, at 1.


60. Id. at 4-5, 6.

61. E.g., Frank, Federal Diversity Jurisdiction—An Opposing View, 17 S.C.L. REV. 677, 680-81 (1965). In his testimony before the House subcommittee, Mr. Frank stated that in Chicago, for example, there is a delay of 37 months for state civil jury trials, but only 11 months for federal civil jury trials. Hearings on H.R. 9622, supra note 45, at 234 (statement of John Frank).


63. Although Congress has authorized 398 federal district judgeships, 25 of these judgeships were vacant as of June 30, 1977. 1977 REPORT, supra note 46, at 3.
than 5,600 state court judges. In fact, if all these diversity cases were shifted to the courts of the states, their dockets would be increased by an average of approximately one-half of one percent.

Moreover, there is reason to conclude that the decrease in the burden upon the federal courts will not be offset by an exactly commensurate increase in the burden upon state courts. First, as Professor Charles Alan Wright has pointed out, there is a threshold issue which must be considered in federal diversity that is not present if the case is heard in state court: whether or not the requirements of diversity jurisdiction are met. State courts of general jurisdiction generally need not inquire into the true domicile of the parties, whether there can be pendent jurisdiction, and other technical matters involved in the assertion of federal diversity jurisdiction. Second, federal judges are less familiar with state law than are the judges of the state courts. This may increase the time necessary to render a decision or lead to invocation of the expensive, delay-producing mechanisms of abstention or interjurisdictional certification. Indeed, the increased use of


Only 1,713 diversity cases were appealed from the district courts to the courts of appeals in 1977 (approximately six percent of all diversity filings arising from the district courts in that year). See 1977 Report, supra note 46, at 68, A-25. Thus, the removal of diversity jurisdiction would not have as great an impact upon the federal appellate caseload as it would have on the caseloads of the district courts. In addition, assuming that a comparable percentage of these diversity cases will be appealed in state courts, the resulting increase in the caseload of state appellate courts will be slight. Indeed, as a general rule, state appellate courts have lower workloads than do the circuit courts. For example, in 1975, approximately 20% more appeals were filed before each federal appellate judge than were filed before each state appellate judge. Compare 1977 Report, id. at 65a with 1978 Report, supra.

65. These figures are based on the 1978 Report, supra note 64. Forty-two states, representing 84.4% of the population, replied to questionnaires and reported that about 5,632 judges handled 6,285,865 cases filed in state courts of general jurisdiction in 1975. Assuming a proportionate level of filings for the remaining 15.6% of the population, the total state filings for 1975 were approximately 7,448,000.


67. It should be noted that whereas federal district courts do not encompass territory in more than one state, all of the courts of appeals except that of the District of Columbia Circuit routinely hear diversity appeals from more than one state. It is unlikely that those appointed to the federal bench are at the time of their appointment familiar with the law of more than one state. Thus, the difficulties engendered by the Erie doctrine may be especially apparent at the federal appellate level.


certification by federal courts of state law questions to the highest court of the state is a strong, independent indication of the disutility of diversity jurisdiction. When a federal judge finds it necessary to resort to this procedure, he has conceded that at least to some extent he can act only as the "ventriloquist's dummy." 

In order to evaluate fully the appropriateness of the elimination of most federal diversity jurisdiction, it is important to recognize that it is but one aspect of a larger effort to redistribute cases, as well as to improve the efficiency of the federal courts. Indeed, it certainly would be unfortunate if the federal courts were to be divested of cases which it is conceded they are constitutionally empowered to hear, simply because of currently heavy caseloads. It is thus significant that in addition to severely curtailing diversity jurisdiction, the Kastenmeier legislation would also abolish the amount-in-controversy requirement for federal question cases. Currently, only a few types of federal question cases are subject to this requirement. It has never applied to section 1983 suits against state officers, where jurisdiction is based on 28 U.S.C. section 1343 rather than the general federal question jurisdictional provision, 28 U.S.C. section 1331. Then, in 1976, the Ninety-Fourth Congress enacted a further exception to the amount-in-controversy requirement, for suits against federal officers. Thus, in addition to a small number of miscellaneous private actions raising a federal question, the requirement currently applies only to

that where there is doubt as to local law . . . resort to [available certification procedure] is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." See also Wright, The Federal Courts and the Nature and Quality of State Law, 13 WAYNE L. REV. 317, 325-26 (1967).


71. This expression was coined by Judge Jerome Frank in Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942). But see Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 HARV. L. REV. 317, 320-21, 326-27 (1977).

72. It is a healthy sign that the Kastenmeier proposal has made progress in the same Congress that seems destined to authorize the largest single expansion of the federal judiciary in our nation's history. H.R. 7843, 95th Cong., 2d Sess., 129 CONG. REC. 718 (daily ed. Feb. 7, 1978) (remarks of Rep. Rodino). That Congress in this respect is dealing directly with the federal caseload problem indicates that the curtailment of diversity is not merely a docket unloading device.

73. U.S. CONST. art. III.


suits arising under federal common law, and to constitutional challenges to state law not encompassed by section 1983.\textsuperscript{77}

Removal of the amount-in-controversy requirement for these cases would go far toward establishing that federal courts have the jurisdictional power to adjudicate all federal questions, although the exercise of such power would continue to be constrained by equitable considerations of self-imposed judicial restraint discussed in part II of this article. Given the current anomalous situation wherein a price tag on admission to federal court is attached to certain constitutional claims but not to others, it seems eminently reasonable that a comprehensive and uniform federal question jurisdiction be established. It is also not surprising that an effort to open up the federal courts for vindication of any federal claim should be undertaken simultaneously with the effort to channel non-federal question cases into state courts.

Indeed, throughout the congressional testimony on the Kastenmeier diversity proposal there was a usually unstated assumption that, at this time in our nation's history, state cases belong in state courts and, for the most part, federal cases belong in federal court.\textsuperscript{78} One factor sometimes said to support this view is that, under the \textit{Erie} doctrine,\textsuperscript{79} federal courts must decide diversity cases on the basis of state law, an often difficult task. But at the same time, the \textit{Erie} doctrine denies the fruits of that effort any authoritative reach beyond the immediate case being decided. As a result, independent of whether \textit{Erie} chokes off the creativity of federal judges or delays the decision-making process in diversity cases,\textsuperscript{80} bringing state law cases into the

\textsuperscript{77} E.g., Preiser v. Rodriguez, 411 U.S. 475 (1973). Until this term, implied rights of action for damages against municipalities were also under section 1331. See Monell v. Department of Social Serv. of the City of New York, 46 U.S.L.W. 4569 (1978).

\textsuperscript{78} Chief Justice Burger has stated explicitly that: "As a matter of principle, there is no reason for federal jurisdiction where no federal question is at stake and when state courts are available to provide an adequate forum." \textit{Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 9622 Before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess., at 143 (1977) [hereinafter cited as \textit{Hearings on H.R. 9622}]} (statement of Hon. Edward T. Gignoux, quoting letter from Chief Justice Warren E. Burger). \textit{See W. BURGER, YEAR-END REPORT ON THE JUDICIARY 3-4 (1978).}

\textsuperscript{79} \textit{Erie R.R. Co} v. \textit{Tompkins}, 304 U.S. 64 (1938).

federal courts under diversity jurisdiction may well impede the development and evolution of authoritative state law.\textsuperscript{81}

Of course, abolishing diversity will not erase \textit{Erie} or the occasional need for federal courts to pass on matters of state law. But in practice the \textit{Erie} doctrine is relevant primarily to diversity cases.\textsuperscript{82} Moreover, that the converse situation—whereby state courts must pass on questions of federal law—will remain even if federal diversity jurisdiction is abolished is not an argument against such abolition. That state judges must become expert expositors of federal law—and recent decisions of the Supreme Court mentioned hereinafter indicate that they are expected to be such—does not imply that federal judges should use their limited resources ascertaining and applying state law.\textsuperscript{83}

Finally, it is necessary to recognize that even if elimination of diversity only decreases the burden on federal courts at the expense of state courts, and even if the quality of the adjudication of such cases is not improved or perhaps is marginally reduced, the opportunity cost of continuing diversity jurisdiction is continued delay in the adjudication of federal civil rights, environmental, labor and other cases, which I think it is agreed generally present stronger arguments for resolution within the federal judicial system.

The traditional justification which has been advanced in favor of diversity jurisdiction is the possibility of bias in the state courts against the out-of-state party. While this explanation is not to be found in the constitutional debates or the legislative history of the First Judiciary Act,\textsuperscript{84} it does find support in a passage by Chief Justice Marshall:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation,


\textsuperscript{82} Not all diversity cases require application of \textit{Erie}. \textit{See}, e.g., Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 951–53 (2d Cir.) (court found that federal law may control even though jurisdiction was based on diversity of citizenship), \textit{cert. denied}, 358 U.S. 829 (1958).

\textsuperscript{83} \textit{Erie} is sometimes put forward as a reason to continue federal diversity jurisdiction. The argument is that exposure to issues of state law unfamiliar to federal judges broadens their experience and creativity, and also affords new insight into the development of state law. \textit{But see} Note, \textit{The Effect of Diversity Jurisdiction on State Litigation}, 40 Ind. L.J. 566, 584–85 (1965) (concluding that state courts generally ignore federal decisions on matters of state law). \textit{See also} Wright, \textit{supra} note 69.

to parties of every description, . . . the constitution itself either entertains [such] apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.\textsuperscript{85}

There are several difficulties with this argument, however, when used as a rationale for the broad diversity jurisdiction that now exists. The first of these is that there is no reason to suppose that the statutory or common law of a state would favor a resident more often than it would favor a nonresident. The equal protection and due process clauses of the fourteenth amendment, as well as the privileges and immunities clause of article IV, guarantee that a state may not have one set of substantive rules govern claims by or against residents and another set govern claims by or against nonresidents. Thus, the bias rationale must be related to prejudice on the part of state juries as factfinders or on the part of state judges, either as factfinders or in applying state law. Since federal juries are composed of residents of the state in which the federal court sits, albeit from a larger geographical area, differential federal and state jury bias is not likely. Admittedly, because federal judicial districts are generally larger than state judicial districts, federal juries will tend to be more heterogeneous, but this factor relates only to possible jury bias on the basis of the rural/urban prejudice, not to state jury bias against an out-of-state resident.

Nor do I see any incentive for state judges to exhibit bias against an out-of-state party merely because he is a non-resident. Even if this possibility does exist in a few state trial or appellate courts, it would seem to be weak support for placing nearly 30,000 cases in the federal rather than in the state courts. Moreover, if a litigant is clearly denied due process in the state courts solely on the basis of his residence, he may raise this fourteenth amendment claim in a petition for review by the Supreme Court.\textsuperscript{86}

Even assuming there does exist significant bias against out-of-state litigants, at least those from distant regions of the country, this cannot serve as a rationale for the full panoply of federal diversity jurisdiction. Since 1789, the jurisdiction has given the in-state plaintiff access to the

\textsuperscript{85} Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

\textsuperscript{86} As a response to the bias argument, some opponents of broad diversity jurisdiction have concluded that it should be retained where there is an actual showing of bias against the out-of-state party. See Wechsler, \textit{Federal Jurisdiction and the Revision of the Judicial Code}, 13 \textit{Law & Contemp. Prob.} 216, 234–40 (1948).
federal courts, and since 1875, actions between citizens of different non-forum states have been included within diversity jurisdiction. The granting of federal jurisdiction over these suits is more convincingly explained as generalized protection against bias within state legislatures and judicial systems against interstate commercial activity. In his study of historical bases of the jurisdiction, Henry Friendly concluded that indeed there existed "a vague feeling that the new [federal] courts would be strong courts, creditors' courts, businessmen's courts." Whatever may have been the validity in 1789, 1875, or 1922 of arguments invoking the need for protection of interstate commerce and mobility, the American Law Institute appears to have been fully justified in concluding in 1969 that free movement in interstate commerce had been "spectacularly achieved" and that neither creditors nor business activity would be encumbered by elimination of federal diversity jurisdiction.

As often occurs in controversies among lawyers, the debate over federal diversity jurisdiction has been phrased in terms of which side of the disagreement bears the burden of persuasion. Those in favor of retaining the jurisdiction argue that the proponents of change bear the burden, while those who argue for elimination of diversity assert that because federal jurisdiction is permissive, proponents of it continually bear the burden of explaining why the jurisdiction should be either granted or retained.

I am disposed to side with those who would place the burden of persuasion on the advocates of diversity jurisdiction. The federal courts, unlike the state courts, are courts of limited jurisdiction; the potentially broad scope of the nine constitutionally authorized sources of jurisdiction allows Congress to expand, reduce, or alter the precise limits of federal judicial authority in response to the changing needs of

87. Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78. Somewhat inexplicably, however, a resident defendant cannot remove an action to federal court.
89. See Taft, Possible and Needed Reforms in the Administration of Justice in the Federal Courts, 47 A.B.A. REP. 250, 258-59 (1922) ("no single element in our governmental system has done so much to secure capital . . . throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.").
the federal system. As long as the federal courts could effectively operate with increasing caseloads, little harm resulted from adding to, but seldom subtracting from, their jurisdiction. Today, however, the structure of the federal judicial system cannot accommodate the continued expansion deriving from congressional recognition of new and urgent social problems, and consequently, delay and congestion have become commonplace. In these circumstances, it is necessary to weigh anew the reasons for and against each basis of federal jurisdiction. It is difficult to understand why federal courts should be required to hear cases solely because the litigants are of diverse citizenship, thereby drawing their energies away from the formulation of federal law to the ascertainment and application of state law.

Moreover, substantial harm may result from diversity jurisdiction even beyond its effect on the adjudication of other, more pressing federal judicial business. As long as litigants can choose whether to proceed within the state or federal judicial systems, they will opt for that system which in their view provides better judges, procedures, facilities and efficiency, all other factors being equal. It probably remains true that the federal system is more attractive than many state systems in these respects. But if the justification for diversity jurisdiction comes down to the proposition that the federal courts provide "better justice" than do state courts, then we must ponder why this better justice should be granted on the fortuitous basis of diverse citizenship, when it is denied in suits between parties residing in the same state. More fundamentally, we must ask why differentials in quality of adjudication should be tolerated. It is surely difficult to believe that the Founding Fathers thought they were randomly dispensing better justice to some than to others when they provided for diversity jurisdiction. If indeed state courts do not generally adjudicate controversies as satisfactorily as do federal courts, a proposition which seems nearly impossible to prove or disprove empirically, then the appropriate course of action is to improve the quality of state judicial processes. Although much progress has been and is being made toward improving state judicial systems, that cause remains one of our most important pieces of unfinished business. Continued access to the federal courts in diversity cases blunts one of the strongest incentives to carry on with that task.

Federal jurisdiction should be maintained only in those situations where the need for federal adjudication is clear. I agree with the

95. See id. at 1116.
96. Professor David L. Shapiro argues that diversity jurisdiction is needed more in some federal districts than in others, depending on relative docket congestion of the state
consensus of those who testified before the Kastenmeier subcommittee that, with respect to diversity jurisdiction, this need exists only in the area of federal interpleader, which is the sole effective means for settlement of some controversies, and alienage jurisdiction, which may implicate foreign policy considerations and which serves the traditional purpose of diversity jurisdiction to the extent that bias may still exist in state courts against foreign litigants.

No such considerations are demonstrably operative with respect to diversity cases involving non-aliens and the policies underlying state law. If those who lived under the Articles of Confederation justly entertained fears of bias against out-of-state litigants, those fears are surely belied by the past two hundred years in which the federal republic has survived and flourished. It is demeaning to the very concept of that republic to continue a jurisdiction which serves no significant purpose other than to protect against that bias, and which itself needlessly interferes with the pursuit by the federal courts of their nationalizing functions.

The Supreme Court is currently asserting its confidence that state judges are fully capable of entertaining and resolving—competently and with devoted acceptance and understanding of the principles of the Constitution—many questions of federal law.\(^9\) It is peculiarly appropriate, therefore, that the Congress should, by acting to curtail diversity jurisdiction, accord similar recognition to the ability and willingness of the state courts to apply state law fairly to all citizens who come before them.

II. JUDICIAL RETRENCHMENT IN THE AREA OF FEDERAL SUPERVISION OF STATE COURT PROCESSES: HABEAS CORPUS

A. Federal Supervision in the Contemporary Era

As suggested above, the federal courts themselves play an important role in shaping the contours of federal jurisdiction. The Su-
Supreme Court, as the final interpreter of the provisions of article III and of legislative grants of jurisdiction within the contemplation of that article, and also as the authoritative expositor of the appropriate use of judicial restraint in the exercise of federal jurisdiction, is able to effect expansion or contraction of the caseload of the federal courts and to remove altogether certain types of cases from their jurisdiction. Although the Burger Court appears to be developing somewhat restrictive interpretations of certain constitutional and statutory jurisdictional prerequisites, much of the narrowing of federal jurisdiction effectuated by the Court has proceeded from exercise of discretion to decline to adjudicate cases within the congressionally authorized federal judicial power. The Court's rationales for thus limiting the effective scope of federal remedial authority have heavily implicated federalism concerns similar to those described in the first section of this article. These concerns have been most apparent in the Court's decisions in two areas: the contraction of the scope of federal habeas, and the delineation of the circumstances appropriate for abstention in the face of related state court proceedings.

The latter development has occurred primarily through expansion of the Younger doctrine. Younger v. Harris, decided in 1971, itself followed a traditional maxim of our dual judicial structure: a federal court should not enjoin a state criminal proceeding brought in good faith as long as the federal claim may be raised as a defense in the state proceeding.


99. See text accompanying notes 137–46 infra.

100. 401 U.S. 37 (1971).


102. Although Dombrowski v. Pfister, 380 U.S. 479 (1965), may have cast doubt on its continuing viability, the principle of federalism espoused in Younger was not new. See Douglas v. City of Jeannette, 319 U.S. 157 (1943). (Dombrowski held that threatened state court proceedings may be enjoined where a criminal statute infringing freedom of expression is overbroad or vague "on its face."). See generally Fiss, Dombrowski, 86 Yale L.J. 1103 (1977). In addition, Samuels v. Mackell, 401 U.S. 66 (1971), decided the same day as Younger, established that the principle applies to requests for declaratory relief as well as to injunctions.
expanded the doctrine considerably. Federal courts have been admonished not to issue equitable relief against proceedings "of substance on the merits" already initiated in state courts,\textsuperscript{103} against civil proceedings brought by the state,\textsuperscript{104} against civil or criminal contempt proceedings (even though the state is not a party thereto),\textsuperscript{105} or if there are state proceedings against parties whose interests are closely "intertwined" with those of the federal plaintiff.\textsuperscript{106} Moreover, in \textit{Huffman v. Pursue, Ltd.},\textsuperscript{107} the Court appears to have established a general requirement that state appellate remedies be exhausted before affirmative equitable relief can be provided by a federal court. Apparently, under these circumstances, failure to perfect a state appeal forever bars adjudication of the constitutional claim in the lower federal courts.\textsuperscript{108} The \textit{Huffman} exhaustion doctrine thus is analogous to that of federal habeas\textsuperscript{109} as it exists in 1978, where failure to pursue state procedures for adjudication of federal defenses generally precludes collateral relief.\textsuperscript{110}

It is not surprising that the recent developments in \textit{Younger} and in federal habeas have proceeded along similar avenues. Federal habeas corpus and federal equitable relief against state proceedings are both mechanisms for federal court supervision of the application of due

\begin{enumerate}
\item 103. Hicks v. Miranda, 422 U.S. 332, 349 (1975).
\item 104. Trainor v. Hernandez, 431 U.S. 434, 444 (1977). The Court in \textit{Trainor}, however, declined to rule expressly upon whether \textit{Younger} principles apply to all civil litigation. \textit{Id.} at 444 n.8. \textit{Huffman v. Pursue, Ltd.}, 420 U.S. 592, 604 (1975), provided inferential support for the \textit{Trainor} ruling by holding \textit{Younger} applicable to civil proceedings "in aid of and closely related to criminal statutes." \textit{Id.}
\item 107. 420 U.S. 592 (1975).
\item 108. \textit{See, e.g.}, \textit{id.} at 609 n.21 ("Appellee may not avoid the standards of \textit{Younger} by simply failing to comply with the procedures of perfecting its appeal within the Ohio judicial system.").
\item 109. Both are doctrines of judicial, rather than administrative, exhaustion, and both require exhaustion only of \textit{state} processes; thus petition for certiorari in the Supreme Court need not be filed.
\item 110. \textit{See Wainwright v. Sykes}, 433 U.S. 72, 87 (1977). The Court in \textit{Sykes} extended the rule announced in \textit{Francis v. Henderson}, 425 U.S. 536 (1976) (barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver), to failure to object to admission of a confession at trial. 433 U.S. at 87. The Court refused, however, to rule upon whether \textit{Francis} should apply "where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court." \textit{Id.} at 88 n.12. Nevertheless, it seems that \textit{Francis} and \textit{Sykes} portend no habeas relief in the latter situation. \textit{See} text accompanying notes 144–46 \textit{infra}.
process principles by state courts.111 One major distinction between the mechanisms is temporal: the issue in habeas is whether a federal court should intervene to vindicate federal rights after the state court system has had the opportunity to adjudicate the federal question, while the issue raised in the Younger cases is whether a federal court should adjudicate the federal claim before the state judicial system has completed its consideration of that claim. Reducing federal interference with, or supervision of, state court application of due process principles thus requires the placement of limitations on both habeas and anticipatory equitable relief.

Nor is it especially surprising that restrictions on federal habeas and expansion of the Younger doctrine should be occurring at the present time. Both an expansive federal habeas jurisdiction and a broad tolerance of federal interference with state proceedings would seem appropriate either when substantive federal law is undergoing rapid change, or when it is perceived that the particular institutional perspective of state courts will result in less than complete enforcement of federal guarantees. The period of constant expansion of the scope of federal guarantees appears to have largely come to an end, and indeed there has been some retreat from the broad definitions previously given to substantive federal rights.113 At the same time, state courts in the modern era do not exhibit the hostility toward federal law visible in earlier times; indeed, some state courts are in fact giving more expansive definition to state due process guarantees than the Supreme Court has given to similar federal guarantees.114 The need for federal supervision in order to ensure full implementation of federal rights may accordingly be less than it was heretofore.

That we have so recently seen a considerable expansion in the substantive scope of federal constitutional protections has an additional and more subtle relationship to the current contraction of federal habeas and expansion of the Younger doctrine. Broadening the scope of federal guarantees has meant that federal issues govern and become

111. The drafters of article III clearly intended this function to be performed by Supreme Court review of state court decisions. Today, however, the limited resources of that Court and the certiorari policy make direct review by the Supreme Court a seldom invoked exception, rather than the general rule. See note 115 infra.
112. See notes 51–53 supra and accompanying text.
decisive in an ever wider variety of circumstances. If an operative assumption of our dual judicial structure is that federal courts should be the ultimate arbiters of controversies implicating federal rights, then the enlargement of federally guaranteed rights must result in more disputes being channeled into the federal courts. But this result may conflict with other values implicit in our judicial system, relating to efficiency, finality, and the preservation of mutual respect between the state and federal judicial systems. The restrictions on federal supervision imposed by the recent habeas and Younger decisions may be viewed as ways of responding to these concerns by limiting the role of federal courts and preserving the role of state courts without directly cutting back on the substantive scope of federal rights themselves.

While the Court has done some substantive cutting back as well, it is possible to overestimate the extent to which the Burger Court has effected a retrenchment of the scope of substantive constitutional rights enunciated during the years of the Warren Court. Several recent cases may be interpreted as proceeding from the principle that state procedures and institutions must be pursued and accorded respect before a federal remedy will be imposed. For example, the denial of relief in Paul v. Davis was apparently based on the conclusion that one's reputation is not a "liberty" or "property" interest of constitutional magnitude. An alternative basis for the decision in Paul, as suggested later by Justice Stevens, would view that case as setting up an "exhaustion" requirement of sorts: an individual may not obtain federal relief against state deprecation of his liberty interest unless the state-provided remedies are proven inadequate, and until he has pur-

115. It is well established that the norm contemplated by the Founding Fathers was that most federal claims would be heard initially in state court, with a limited appeal to the Supreme Court. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49 (1923). In the first 90 years of our nation's history, state courts were considered fully competent to adjudicate most federal claims, although Supreme Court review was provided. It has been argued that the enactment of the fourteenth amendment established that the federal courts were to be entrusted with the task of vindicating federal rights. See Harrison v. NAACP, 360 U.S. 167, 180-81 (1959) (Douglas, J., dissenting).


117. See note 113 supra.


sued these state remedies.\footnote{121} Similarly, the holding in \textit{Ingraham v. Wright},\footnote{122}—that schools need not afford notice and hearing prior to the application of corporal punishment—was not based on the proposition that students have no liberty interest in protection from physical discipline. Rather, the Court expressly recognized such an interest but found it bounded by the state's common law concerning the right of public school authorities to punish students physically. Because this common law right was limited and was complemented by a common law tort remedy for abuse, the fourteenth amendment's guarantee of procedural due process did not require notice and hearing.\footnote{123} Like \textit{Paul, Ingraham} can be interpreted as proceeding from the view that state institutions and procedure must be pursued and accorded respect before a federal remedy will be imposed.\footnote{124}

These views of \textit{Paul} and \textit{Ingraham} are not offered as rebuttal to those who object to the Burger Court's approach to liberty interests nor as defenses of the two decisions themselves. Rather, these views suggest that a major concern of the Burger Court has been to assure that state judicial processes are accorded full respect by the federal courts, and that this concern is evidenced in areas other than those which directly involve the invocation of federal jurisdiction and remedial authority. Although this article is primarily about federal jurisdiction, it is important to recognize that the Court's actions on this front are not being undertaken in a vacuum; the values and considerations of federalism underlying these actions have surfaced in other decisions as well.

\section*{B. Habeas Corpus Jurisdiction Over State Prisoners}

\subsection*{1. The Brown-Noia Approach to Federal Habeas}

Last Term, in \textit{Wainwright v. Sykes},\footnote{125} the Court's most recent habeas decision, Justice Rehnquist identified four questions which may be asked about habeas for state prisoners, all of which implicate important considerations of federalism:

(1) What types of federal claims may a federal habeas court consider; (2) where a federal claim is cognizable by a federal habeas court, to what extent must that court defer to a resolution of the claim in prior state proceedings; (3) to what

121. \textit{See Ingraham v. Wright}, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting) (expressing no opinion as to the merits of this explanation).
123. \textit{Id.} at 672.
extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court; (4) in what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?\textsuperscript{126}

How one would answer these questions depends upon one's conception of the role of state courts in adjudicating federal claims and vindicating federal rights. And this conception, in turn, is inevitably shaped by one's view of the competence of state court systems and judges. The Burger Court seems inclined to answer these questions in ways that will restrict federal jurisdiction, in striking contrast to the Court's expansion of federal habeas over the previous two decades. In \textit{Brown v. Allen},\textsuperscript{127} decided in 1953, the Court held that no matter how fully the state courts had considered an issue of federal constitutional law, that issue may be redetermined by a federal court presented with a petition for habeas corpus. Then, in 1963, \textit{Fay v. Noia}\textsuperscript{128} closed the circle by holding that a failure to raise a claim properly in state court, resulting in a refusal by the state court to decide the claim on the merits, does not preclude such consideration by a federal habeas court. Indeed, the federal court would be required to consider the claim unless the procedural default amounted to a "deliberate bypass" of state court remedies by the defendant.\textsuperscript{129} That same Term, in \textit{Townsend v. Sain},\textsuperscript{130} the Court made clear that, in addition to an independent determination of all issues of federal law, the federal court must hold an evidentiary hearing and determine the historical facts bearing on the federal claims, if a state court has not given the defendant an adequate hearing on the factual issues.

It has been suggested that once the relitigation rule of \textit{Brown v. Allen} was announced, the holding in \textit{Noia} became inevitable.\textsuperscript{131} The former rule allowed a defendant to press his claim in both state and federal court—in effect, giving him two opportunities to present issues of federal law. If failure to litigate the claim in state court were held to bar raising the claim on federal habeas, the defendant would be denied even one bite of the apple. The perceived inequity in denying the defendant a federal hearing for failing properly to litigate his claim in

\begin{footnotes}
\item[126] Id. at 78-79.
\item[127] 344 U.S. 443 (1953).
\item[129] Id. at 438-40.
\item[130] 372 U.S. 293 (1963).
\end{footnotes}
state court—allowing two bites of the apple or no bite at all—may have lent support to advocates of a broad habeas jurisdiction, in which all constitutional claims are automatically reviewable whether or not raised in the state proceedings. 132

Noia noted one exception to this broadened review: where the defendant has intentionally foregone raising his claim in the state courts. 133 In this situation the competing objectives of respect for state judicial processes, finality, and efficient administration of justice argue in favor of prohibiting the raising of the claim on federal habeas. The imposition of the heavy penalty of a bar to federal habeas would certainly encourage defendants to allow state courts to pass on their constitutional claims. Of course, the salient question after Noia became what constituted "a deliberate bypass." 134

2. The Current Approach: Limiting the Availability of Federal Habeas Review

The decisions in Brown, Noia, and Townsend engendered a heated and voluminous debate in the literature, 135 and launched several attempts by state court judges and others to get Congress to enact countervailing legislation. 136 However, until the 1975 Term, the scope of the federal habeas corpus remedy for state prisoners remained basically unchanged.

In the last two Terms the Court has significantly undermined the broad holdings of Brown and Noia. In Stone v. Powell, 137 the Court held that where there has been a full and fair opportunity to litigate a fourth amendment claim in state court, that issue may not be raised in a federal habeas proceeding. Stone thus squarely cuts back, at least in the fourth amendment context, on the relitigation rule enunciated in

134. "The test announced in Fay was not actually applied in that case. The Court held that habeas relief was available notwithstanding the client's participation in the waiver decision, and notwithstanding the fact that the decision was made on a tactical basis." Wainwright v. Sykes, 433 U.S. 72, 95 n.3 (1977) (Stevens, J., concurring). See also id. at 94 n.1 (Stevens, J., concurring) (courts have generally not followed Noia's suggestion that the waiver must be made personally by the defendant; however, a deliberate bypass has sometimes not been found where the claimed right is deeply embedded in the Constitution, the procedural default was insubstantial, or the result would be unjust).
Moreover, Stone also implies an approach different from that of Noia. The holding in Stone was not merely that fourth amendment claims which were actually fully and fairly litigated in the state courts will no longer be relitigated on federal habeas corpus. Rather, Stone held more broadly that a petitioner may not raise his fourth amendment claim on federal habeas if there was an "opportunity" to litigate the claim fully and fairly in the state courts. This wording of course encompasses the Noia situation—in which the defendant fails to avail himself of a full and fair opportunity to pursue his fourth amendment claim in state court. Indeed, it is not surprising that Brown and Noia should simultaneously be undermined, for, in the view of at least some commentators, the latter was logically compelled by the first.

This suggests that the general rule announced in Stone could have been set forth as a fundamental and comprehensive alternative to the Brown-Noia approach to federal habeas. This alternative would provide a system whereby, rather than allowing habeas litigation of the constitutional claim in virtually all instances, such litigation would be allowed only where the claim could not be fully and fairly litigated in the state courts. The salient question would then become what constitutes a full and fair opportunity to adjudicate a constitutional claim.

However, there exist two sources of difficulty with such a system. First, it may be desirable to treat different constitutional claims differently for purposes of federal habeas. While the "full and fair opportunity to litigate" rule may be appropriate for fourth amendment claims, a less stringent standard—allowing for greater habeas review—may be preferable for other types of claims. Second, it may not be desirable to apply the same standard in cases in which the petitioner failed to raise his constitutional claim in the state courts as is applied in cases in which the petitioner did litigate his claim in the state courts.

The Supreme Court has recognized that whether the claim has been raised in state proceedings and what type of claim is being pressed are relevant factors in ascertaining the appropriateness of federal habeas

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138. Id. at 482.
139. This is subject, of course, to the Noia exception where there has been a "deliberate bypass."
140. This much is stated in Stone. Essential to the holding in that case was the Court's determination that one fundamental purpose of the exclusionary rule—discouraging police activity in violation of fourth amendment rights—is adequately achieved upon its pre-conviction application at trial, and state review. Thus, the Court concluded that: "In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." 428 U.S. at 494–95 (emphasis added).
review. Thus, the holding in *Stone* was explicitly limited to fourth amendment claims, leaving open the development of alternative standards for relitigation of other constitutional claims.\textsuperscript{141} And in other cases the Court has set forth an approach to the *Nola* situation—in which the habeas petitioner failed to raise his claim in state proceedings—which does not directly refer to the full and fair opportunity rule enunciated in *Stone*.

First, in *Francis v. Henderson*,\textsuperscript{142} decided the same Term as *Stone v. Powell*, the Court held that a state habeas petitioner is barred from raising a defective grand jury indictment claim which state law requires to be raised before trial unless he can show both cause for his noncompliance with the state procedural rule and actual prejudice from the alleged defect in the indictment process.\textsuperscript{143} Last Term, in *Wainwright v. Sykes*,\textsuperscript{144} the Court imported the "cause" and "prejudice" standard enunciated in *Francis* to bar habeas review of an alleged *Miranda* violation where the petitioner had, contrary to the state's contemporaneous objection rule, failed to object to admission of his confession at trial. Although the Court explicitly refused to speculate as to whether the cause and prejudice standard would be applied to the *Nola* factual situation—where the petitioner failed to pursue state appellate remedies—*Sykes* leaves little doubt that the lenient *Nola* rule has been replaced by a stricter waiver doctrine.\textsuperscript{146}

\textsuperscript{141} In response to Justice Brennan's "hyperbol[ic]" dissent, the majority emphasized that its holding was limited to fourth amendment claims. *Id.* at 494–95 n.37.

\textsuperscript{142} 425 U.S. 536 (1976).

\textsuperscript{143} *Id.* at 542. *Francis* applied to federal habeas for state prisoners the rule which had been applied three Terms earlier to habeas for federal prisoners. In *Davis v. United States*, 411 U.S. 233 (1973), the Court concluded that the "deliberate bypass" standard of *Kaufman v. United States*, 394 U.S. 217 (1969), the counterpart of *Nola* for federal prisoners, was superseded with regard to grand jury claims by a provision of the Federal Rules of Criminal Procedure. *Fed. R. Crim. P.* 12(b)(2). That provision required that claims based on "defects in the institution of the prosecution or in the indictment" be raised prior to trial, and that failure to do so would "constitute waiver thereof," from which relief could be granted only "for cause shown." *Id.* In *Francis*, the Court simply held, without attempting to distinguish *Nola*, that "considerations of comity and federalism require" that a state procedural rule serving the same interests as Rule 12(b)(2) be given "no less effect." 425 U.S. at 541. The Court then proceeded to read its *Davis* opinion as establishing two necessary elements of the "for cause shown" standard: a showing of "cause" for the defendant's failure to raise his grand jury claim before trial and a showing of "actual prejudice." *Id.* at 542.

\textsuperscript{144} 433 U.S. 72 (1977).

\textsuperscript{145} *Id.* at 88 n.12.

\textsuperscript{146} See *id.* at 87 ("To the extent that the dicta of *Fay v. Nola* may be thought to have laid down an all-inclusive rule rendering state timely objection rules ineffective to bar review of underlying federal claims in federal habeas proceedings... its effect was limited by *Francis*, which applied a different rule......").
The Court's recent decisions are better explained as an exercise of equitable discretion, growing out of concerns of federalism, to withhold federal remedial power which is within the congressionally authorized federal judicial authority, rather than as new statutory or constitutional interpretations. Initially, it is important to recognize that federal habeas jurisdiction over state prisoners depends largely, if not entirely, upon the existence of an authorizing statute. That statute extends, in language which has remained essentially the same since its enactment in 1867, federal habeas review to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." Admittedly, the Stone opinion could be read as asserting that once an individual has received the opportunity for one full and fair hearing on his fourth amendment claims, he has received all of the process due him under the Constitution, and his custody is not unconstitutional even if the first court's determination might be erroneous from a habeas court's perspective. Similarly, the Francis-Sykes cause and prejudice standard could be understood as extending to the habeas context the denial of Supreme Court appellate jurisdiction where there exists an adequate and independent state procedural ground for sustaining the conviction.

However, the Court itself noted in Francis and in Sykes that the standard there set forth was neither constitutionally nor statutorily compelled. Rather, it was related to the appropriate exercise of judicial

147. Federal habeas over state prisoners is not expressly required in the Constitution. Although article 1, § 9, cl. 2 provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended ....," this Suspension Clause apparently was intended only to protect federal prisoners. See Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50, 63 & n.73 (1956); Developments in the Law—Federal Habeas Corpus, supra note 135, at 1272. Moreover, in light of Congress' plenary power under article III to decide not to create lower federal courts, and to control their jurisdiction once created, it is difficult to argue that a state prisoner has a constitutional right to a federal, as opposed to a state, habeas forum. Finally, only a very broad reading of the fourteenth amendment's due process clause would create a right to a federal habeas remedy for a prisoner confined under state authority. See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1513-14 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; Developments in the Law—Federal Habeas Corpus, supra note 135, at 1266-74.


149. However, if one full and fair opportunity to litigate a constitutional claim were to imply that the individual is not in custody in violation of the Constitution, then it is difficult to ascertain the jurisdictional basis for reversal on direct appeal of the state court's conclusion, after full and fair consideration, that an allegation of constitutional error is without merit.

150. 425 U.S. at 538-39.

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power. *Stone*, too, is best understood as an exercise of discretion not to assert jurisdiction admittedly within the federal habeas power. The considerations of comity, orderly procedure, and finality which underlie both the waiver doctrine of *Francis-Sykes* and the non-relitigation rule of *Stone* appear to be within the habeas statute’s conferral of discretion upon the habeas court to “dispose of the matter as law and justice require.”

Whether seen as new statutory construction, as the making of constitutional common law, or as an exercise of judicial restraint, the Court in the last two Terms clearly has restricted the scope of federal habeas review. As Justice Rehnquist noted in *Sykes*, the Court’s habeas decisions illustrate an “historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”

3. *The Meaning of Stone and Francis-Sykes*

I foresee three major areas of uncertainty in the wake of *Stone*, *Francis*, and *Sykes*. First, the substance of the standards there announced—“full and fair opportunity” in *Stone*, and “cause and prejudice” in *Francis* and *Sykes*—must be fleshed out. Second, to the extent the standards are not commensurate, it must be determined which governs in cases where the claim was not raised in state proceedings. Third, we may hazard a prediction as to which constitutional claims, besides those raised in *Stone*, *Francis*, and *Sykes*, the standards set forth in these opinions apply.

a. *Prerequisites to Federal Habeas Relief.* Whatever the precise meaning of “full and fair opportunity” might be, it does seem clear that the standard focuses on the adequacy of the judicial process which led to the petitioner’s incarceration. This is a fundamentally different approach to federal habeas—and one which held sway at an

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152. See 428 U.S. at 494 n.37. Alternatively, *Stone* may be read as holding that judge-made rules, as a form of “constitutional common law” devised to effectuate constitutional rights, are not appropriate for habeas review once there has been a full and fair opportunity to litigate them at trial or on direct appeal. See Monaghan, *The Supreme Court, 1974 Term, Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 23, 27–30 (1975). Under this theory, an allegation of violation of the Court-imposed *Miranda* warnings would also be barred from habeas review if the *Stone* standards were met. Dicota in *Sykes* suggest that, indeed, *Stone* applies also to *Miranda* violations not going to the voluntariness or reliability of the confession. See text accompanying notes 149–50 supra.


154. 433 U.S. at 81.
earlier time in the history of that jurisdiction—than the approach represented by the relitigation rule of *Brown v. Allen*. The latter inquires as to whether the state court made any errors of constitutional law; if the answer is yes, the prisoner's detention violates the Constitution, and assuming the error was not harmless, habeas corpus must issue. In the words of the late Professor Hart:

[*Brown v. Allen*] seems to say that due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process or of the prisoner's personal opportunity to avail himself of this process . . . but relates essentially to the avoidance in the end of any underlying Constitutional error . . . .

*Fay v. Noia* expressly articulated this view of due process, and set forth a lengthy analysis of the history of federal habeas jurisdiction, in an attempt to show that the federal habeas statute contemplates relitigation of constitutional questions in a federal forum.

*Stone* 's focus on the sufficiency of the process by which the state court resolved the prisoner's constitutional claims, on the other hand, does not necessarily attempt to determine whether the state court's application of constitutional standards was "correct" in some absolute sense. Notwithstanding the version of history advanced by Mr. Justice Brennan's opinion for the Court in *Fay v. Noia*, all of the commentators apparently agree that this second type of approach was followed by the Supreme Court, for all types of constitutional claims, at least until 1923, and Mr. Justice Harlan's dissent in *Noia* asserts that it uniformly controlled analysis until the decision in *Brown v. Allen*.

The consensus seems to be that, prior to 1915, a state prisoner was not deemed to be held "in violation of the Constitution" unless the convicting court lacked jurisdiction. If a state prisoner had been

158. 372 U.S. at 456–60 (Harlan, J., dissenting). Although Justice Powell's opinion for the Court in *Stone* does not expressly take a side in this historical debate, see 428 U.S. at 474–78, his earlier concurring opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), which urged the Court to adopt the position it eventually accepted in *Stone*, denounced the *Noia* Court's historical analysis and aligned itself with the version of history advanced by the commentators. *See id.* at 252–56 (1973) (Powell, J., concurring).
159.  *See Developments in the Law—Federal Habeas Corpus, supra* note 135, at 1045–50. The concept of jurisdiction was expanded at this time to encompass two classes of cases beyond those in which the court lacked subject-matter competence: first, those in which conviction was grounded on an unconstitutional statute; and second, those in which detention was based on an illegality in the sentence, rather than in the judgment of conviction. *Id.*
committed by a court with jurisdiction, he had been accorded due process, regardless of any errors of law which the court may have made. During this period, the Supreme Court repeatedly emphasized that the writ of habeas corpus was not intended to serve as a substitute for a writ of error.

In 1915, in the case of *Frank v. Mangum*, the Supreme Court adopted an approach which demanded more than a proper exercise of jurisdiction by the state court. While retaining a focus on the state court process which led to detention, rather than the mere presence or absence of error by the state court, the Supreme Court scrutinized the state proceedings in their entirety in order to determine whether Mr. Frank had received a fair opportunity to raise and litigate his claim that his trial had been unconstitutionally prejudiced by mob domination. Since the state courts had fully and fairly adjudicated the merits of this claim, the Court refused to reconsider it upon collateral attack; the state had provided adequate “corrective process,” and thus Frank’s custody was not in violation of the due process clause of the Constitution. The Court did imply, however, that, had the state failed to provide adequate “corrective process,” habeas corpus would have been available.

Notwithstanding the result in *Frank*, the Court reached the merits of a mob-domination claim raised upon habeas corpus in *Moore v. Dempsey*, decided in 1923. The reasoning of the opinion, however, is quite unclear. As Mr. Justice Harlan later noted: “The decision . . . is sufficiently ambiguous to have meant all things to all men.” Justice Brennan, writing for the majority in *Noia*, relied heavily on the *Moore* case to support his view that, with the exception of *Frank*, relitigation of federal questions has always been the rule in federal habeas proceedings. On the other hand, Justice Harlan read *Moore* as a continuation of the approach taken in *Frank*. Under his interpretation, habeas corpus relief was available only because the state appellate court’s perfunctory treatment of the question of mob domination deprived the petitioner of a fair opportunity to litigate his claim.

161. *Id.* at 335-36, 344-45.
162. *Id.* at 335.
163. 261 U.S. 86 (1923).
165. *Id.* at 421-22.
166. *Id.* at 457-58 (Harlan, J., dissenting). Justice Harlan concluded that *Frank*’s “adequate process” approach governed all habeas corpus cases until it was supplanted by the relitigation model of *Brown v. Allen*. *Id.* at 456-60 (Harlan, J., dissenting). The editors of the Hart & Wechsler casebook suggest the possibility of a third interpretation, which mediates between the approaches of *Frank* and *Brown*. In this view, *Moore* is
Disagreement over the meaning of Moore should not obscure the fact that, in the view of Justice Harlan and the commentators, the federal habeas jurisdiction over state prisoners underwent a considerable expansion sometime between enactment of the Habeas Corpus Act of 1867 and the Supreme Court's decision in Brown v. Allen. Rather than completely breaking with the past, Stone v. Powell signifies a return to the "adequate process" approach of Frank, at least for fourth amendment claims.

The Francis-Sykes cause and prejudice standard neither seeks to prevent constitutional error nor expressly concerns itself with the adequacy of the state's corrective process. Instead, the standard, like the "deliberate bypass" rule which preceded it, is largely a waiver doctrine. As with all waiver rules, it seeks to promote efficiency in adjudication and finality in the law by providing that otherwise available rights or defenses cannot be asserted unless timely pursued. A generally stated exception to any waiver doctrine—which is applicable on direct review—is that waiver of constitutional claims must be knowing and intelligent. As the Chief Justice acknowledged in his concurrence in Sykes, one difficulty with the majority opinion's "cause" requirement is that once trial has begun, the defendant himself does not participate in deciding whether to assert constitutional error in the process of the trial. Thus, were it required that the defendant personally decide not to assert a constitutional right, as Noia implies, neither Noia nor the "cause" portion of Francis-Sykes would preclude habeas relief for a petitioner whose procedural default occurred during the state court trial itself. Noia involved a procedural default (failure to appeal) properly attributable to the defendant himself. Sykes did not, and therein may lie the reason why Noia does not satisfactorily dispose of the issue presented in Sykes. The majority in Sykes dealt with this difficulty by ignoring it, stating merely that Sykes failed to explain why he had not objected at trial to the introduction of his incriminating statement.

regarded as holding that certain types of constitutional claims—such as an allegation of mob domination—would always be cognizable on habeas, regardless of the adequacy of the prior state consideration, while other types of claims, which do not go to the basic integrity of the state's criminal process, would be reviewable on federal habeas only if they were not fully and fairly considered by the state courts. HART & WECHSLER, supra note 147, at 1469.

169. 372 U.S. at 439. See also note 134 supra.
170. The procedural default in Sykes was failure to object contemporaneously to introduction of an inculpatory statement made by the defendant. 433 U.S. at 91.
171. Id. at 91 & n.14.
It would have been more satisfactory for the Court to recognize that the problem alluded to is presented not only on habeas review but also on direct review in a unitary system. Generally, claims of trial error not raised during trial may not be heard on appeal.\textsuperscript{172} However, the federal system and most state systems provide an exception to this rule, under the "plain error" doctrine,\textsuperscript{173} with additional protection afforded by the constitutional guarantee that service of counsel must meet a minimum standard of adequacy.\textsuperscript{174} Although the term "plain error" is not without ambiguity, it does at least provide a logical standard to govern situations similar to the one presented in \textit{Sykes}, where the trial counsel, rather than the habeas petitioner, makes the decision not to assert constitutional error. Whether the Court will move toward a plain error standard to deal with cases such as \textit{Sykes} remains to be seen. But the waiver standard does not seem sufficient in cases where the defendant did not participate in the procedural default.\textsuperscript{175}

\textit{b. Which Prerequisites Apply to Which Constitutional Claims.} There is little doubt that the rules enunciated in \textit{Francis-Sykes} and in \textit{Stone} are not commensurate. Even if the \textit{Francis-Sykes} cause standard is roughly analogous to \textit{Stone}'s opportunity standard, \textit{Francis-Sykes} requires, in addition to a showing of cause, that the petitioner demonstrate that the procedural default was prejudicial to him. Justice White, concurring in \textit{Sykes}, interpreted this requirement as merely enunciating a "harmless error" rule in addition to the waiver rule of the cause requirement.\textsuperscript{176} The majority expressly refused to

\textsuperscript{172} Whether a procedural default should bar raising a constitutional claim is a question which also arises on Supreme Court review of state court decisions. Generally, as a matter of federal jurisdiction, procedural default constitutes an adequate and independent state ground for rejection of the constitutional claim. See Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1815). However, there may be an exception to this rule even on direct review in cases of egregious error. See Henry v. Mississippi, 379 U.S. 443 (1965).


\textsuperscript{174} U.S. CONST. amend. VI.

\textsuperscript{175} The majority opinion in \textit{Sykes} stressed that the defendant is normally held responsible for trial decisions made by counsel. 433 U.S. at 91 & n.14. See Estelle v. Williams, 425 U.S. 501 (1976). See also note 134 supra.

Justice White in concurrence expressed the view that with respect to errors made at trial, if counsel is aware of the applicable law, there is no cause for his failure to abide by the state's procedural rules. In Justice White's view, such a failure amounts to a "deliberate bypass" within the meaning of \textit{Noia}. See 433 U.S. 98-99 (White, J., concurring).

\textsuperscript{176} Id. at 99.
explain what a showing of prejudice required, but did state that "the other evidence admitted at trial was substantial to a degree that would negate any possibility of actual prejudice" to Sykes from the admission of his confession. Of course, habeas courts have always had equitable discretion to deny relief even when constitutional error is found, where that error is harmless. The Court's careful enunciation of a prejudice standard suggests that that standard is meant to place a greater limitation on federal habeas relief than does the harmless error rule.

Since the standards in Stone and in Francis-Sykes are not equivalent, it becomes important to ascertain which will govern situations in which the petitioner failed to litigate his constitutional claim in the state court. I think the answer is that the standard will depend on what type of constitutional claim is asserted. Francis and Sykes involved, respectively, a challenge to grand jury composition and a challenge to the introduction of an inculpatory statement, and in these situations the Court has decided that the cause and prejudice standard should apply. However, the Court explicitly noted in Sykes that the "full and fair opportunity" rule of Stone might provide an alternative ground for deciding whether petitioner Sykes could raise his constitutional claim in a federal habeas action. The footnote went on to state that, if this approach were taken, the question facing the court would be whether the "bare allegation of a Miranda violation (without accompanying assertions going to the actual voluntariness or reliability of the confession)" is proper for federal habeas corpus review where the Stone standard has been met.

177. Id. at 90–91.
178. Id. at 91.
179. Cf. Fed. R. Crim. P. 52(a). The harmless error rule incorporated in the federal rules is not worded as a prejudice standard. It states that, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Id. The Sykes prejudice standard, on the other hand, would apparently exclude even errors affecting substantial rights if other evidence of the petitioner's guilt is sufficient. See 433 U.S. at 91.

180. Perhaps the Court intended for the standard to protect petitioners whose guilt appears to have been wrongly inferred as a result of constitutional error. If so, the prejudice standard would be consistent with certain dicta in Stone suggesting that the "full and fair opportunity" non-relitigation rule is limited to alleged constitutional errors which are not guilt-related. See 428 U.S. 465, 491 n.31. Of course, under Sykes, even if the petitioner is able to show prejudice, he is denied habeas relief unless he can also show "cause." Stone, on the other hand, suggests that with respect to claims going to innocence or guilt, habeas relief may be available even if there was a full and fair opportunity to litigate the claim in state courts. See id. at 494–95 n.37.

181. See 433 U.S. at 87 n.11.
182. Id.
This statement can be read as indicating that the strict *Stone* standard would not be appropriate in situations where more than a "bare allegation of a *Miranda* violation" is made. In such situations the defendant would be afforded habeas relief upon a showing of cause and prejudice, even though he bypassed a full and fair opportunity to litigate his claim in the state courts. This interpretation is consistent with the statements in *Stone* implying that where an allegation of constitutional violation casts doubt on the guilt of the petitioner by, for instance, striking at the reliability of the factfinding process itself, federal habeas review is not precluded merely because the petitioner was afforded a full and fair opportunity to litigate his claim in the state courts. 183 The Court in *Stone* contrasted claims going to the reliability of the factfinding process with the "typical Fourth Amendment claim," in which "a convicted defendant is usually asking Society to redetermine an issue that has no bearing on the basic justice of his incarceration." 184

*Stone* failed to explain, however, the criteria for determining which types of claims should remain available for litigation on habeas despite a full and fair opportunity to litigate them in state court. Justice Brennan read the above-quoted passage to mean that the Court will move in the future to restrict the availability of habeas for all claims that are not "guilt-related," and he proceeded to list claims which might fall into this category. 185 This forecast may have been unduly gloomy. First, several of the listed claims appear to bear some relation to the reliability of the factfinding process, and thus are at least somewhat "guilt-related." For example, the right to a jury trial is at the very heart of the constitutional guarantee of a fair trial, and the right to a speedy trial ensures that guilt or innocence will be determined on the basis of reasonably fresh evidence.

The exclusion of evidence resulting from unduly suggestive pre-trial identification procedures and the extension of the right to counsel to encompass pre-trial line-ups protect the integrity of the factfinding process by reducing the danger of mistaken identifications. Moreover, the privilege against self-incrimination was intended, in part, to pre-

183. See 428 U.S. at 479 (an "illegal search and seizure [does] not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable;'" quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)); 428 U.S. at 491–92 n.31 ("Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.").

184. Id. at 491–92 n.31.

185. Id. at 517–18 (Brennan, J., dissenting) (double jeopardy, entrapment, self-incrimination, *Miranda* violations, and claims of invalid identification procedures).
clude use of unreliable statements by an accused person. Indeed, the Court’s opinion in *Stone* indicates an awareness of the possible distinction between self-incrimination and right to counsel claims (at least where more than a “bare” *Miranda* violation is involved), on the one hand, and fourth amendment claims, on the other. In discussing the development of the federal habeas jurisdiction, the Court described a line of cases in the courts of appeals which held that fourth amendment claims could not be raised by federal prisoners petitioning for relief under section 2255. According to the *Stone* Court,

> [t]he primary rationale advanced in support of those decisions was that Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not “impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable . . . .”

Although the Court further noted that this rationale was rejected in *Kaufman v. United States*, which held that fourth amendment claims could be raised on a section 2255 motion, *Kaufman* appears to have been all but overruled by *Stone*.

I believe, however, that there is a more fundamental problem with Justice Brennan’s analysis. The Court should not, and perhaps will not, consign all claims which are not “guilt-related” to the full and fair hearing approach set out in *Stone*. That phrase does not adequately capture the range of factors that the Court actually considered in *Stone*. I would focus instead on the Court’s quotation of the “intolerable restraints” language from *Fay v. Noia* and its statement that a fourth amendment claim has no bearing on the “basic justice of . . . incarceration.”

Certainly, the extent to which a claim relates to the reliability of the factfinding process is one factor to consider in evaluating the “basic justice” of a prisoner's incarceration. But are not claims that the state court lacked jurisdiction, or that a prisoner was convicted under an unconstitutional statute (for instance, one that contravenes first amendment rights), also core cases? From a historical standpoint, they certainly are, yet they relate to the prisoner’s “innocence” only in the most existential sense.

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186. *Id.* at 479.
188. 428 U.S. at 492 n.31.
189. Claims which seriously undermine the legitimacy of the guilt-determination—for example, claims of mob-domination, lack of counsel, excessive pre-trial publicity, knowing use of perjured testimony and, notwithstanding Justice Brennan's projected “enemies list,” denial of the right to a jury trial—are among the strongest cases for exercise of the federal habeas jurisdiction.
190. Perhaps substantive due process claims should also be considered core cases.
Beyond these core cases, analysis might turn on several factors. In addition to the lack of a connection between fourth amendment claims and the reliability of the factfinding process, *Stone* focused on three criteria which might be relevant to future decisions. First, the Court noted that the fourth amendment exclusionary rule is a judge-created remedy designed to effectuate, rather than to become a part of, the underlying constitutional right.\(^{191}\) In other words, the rule is an example of what Professor Monaghan has denominated "constitutional common law."\(^{192}\) The Court might be more willing to limit supervision of alleged errors in applying this judicially created remedial law than of alleged errors in dealing with rights directly guaranteed by the Constitution.

Second, the Court observed that the exclusionary rule is not a "personal constitutional right" designed to redress the injury to the defendant's rights, but rather a remedy created to safeguard fourth amendment rights in general by deterring unlawful police conduct.\(^{193}\) To the extent that a claim only protects the rights of people other than the habeas petitioner, it clearly states a weaker challenge to the basic justice of his incarceration.\(^{194}\)

Finally, the *Stone* Court devoted considerable attention to the functional inquiry of whether the purpose behind the fourth amendment exclusionary rule—deterrence of police misconduct—would be materially advanced by allowing fourth amendment claims to be re-litigated in a federal habeas proceeding. The Court doubted that any significant increase in deterrence would occur and, as a result, was unwilling to incur the costs of extending a broad habeas remedy to such claims.\(^{195}\) In contrast, the purposes underlying personal rights guaranteed directly by the Constitution—even those, such as the right not to be placed in double jeopardy and the right to a properly constituted grand jury, which do not relate to the reliability of the

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\(^{191}\) 428 U.S. at 486. Other examples might include the *Miranda* requirements, designed to protect the privilege against self-incrimination, and the right to counsel at a pre-trial line-up, intended to safeguard the right of confrontation and, more generally, the right to a fair trial. *See* United States v. Wade, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

\(^{192}\) *Monaghan*, supra note 152.

\(^{193}\) 428 U.S. at 487–88.

\(^{194}\) In this regard, I would distinguish fourth amendment claims from claims of *Miranda* or *Wade-Gilbert* violations. At the time the fourth amendment's exclusionary rule is applied, it is too late to repair the damage to the defendant's constitutional rights, whereas exclusion of evidence obtained in violation of *Miranda* or *Wade-Gilbert* rights does serve to protect the underlying constitutional rights of the person on trial, as well as of future suspects.

\(^{195}\) *Id.* at 482–95.
factfinding process at trial—would seem to be furthered in almost every case by allowing relitigation upon federal habeas.

CONCLUSION

In the last two decades, federal habeas corpus has been an important instrument for implementation of an expanding array of federal rights. The recent judicially created limitations on the circumstances in which that remedy may be invoked contemplate that, with few exceptions, state courts are willing and able to afford full protection for these federal rights.\textsuperscript{196} This development mirrors the \textit{Younger} doctrine extensions mentioned earlier, which were expressly based on the assumption that "state judges will be faithful to their constitutional responsibilities."\textsuperscript{197} To some degree, these developments may contain a self-justifying element: to the extent that they create incentives for improvement in the quality of state court processes of decision, the need for federal supervision should decrease.

Nevertheless, it would be unfortunate to presume that state and federal courts are invariably interchangeable. We should bear in mind Chief Justice Warren's statement that "[i]t is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."\textsuperscript{198} Elimination of federal diversity jurisdiction would enable a shift toward a more appropriate distribution of judicial power for our contemporary situation. But retrenchment in the area of federal authority over cases involving federal law should proceed with caution.

In the early part of the nineteenth century, Justice Story was able to "cheerfully admit that the judges of the state courts are . . . of as much learning, integrity and wisdom, as those of the courts of the United States."\textsuperscript{199} At the same time, however, he found a manifest purpose in the Constitution to give the Supreme Court appellate jurisdiction over state courts.\textsuperscript{200} In the absence of significant alteration of the federal judicial structure,\textsuperscript{201} direct federal appeal is no longer a viable means of ensuring state court compliance with federal law.

\textsuperscript{197} Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975).
\textsuperscript{198} 1959 ALI PROCEEDINGS 33. See also Neuborne, \textit{supra} note 94.
\textsuperscript{199} Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
\textsuperscript{200} \textit{Id}.
\textsuperscript{201} See note 57 \textit{supra}. 
Today, also, we can "cheerfully admit" that state courts are generally competent to vindicate federal rights, but still recognize that there may be a meaningful number of cases in which state courts fail to afford citizens their federal constitutional rights. As long as this is true, there must be retained a core federal habeas jurisdiction and meaningful avenues for affirmative federal relief from state judicial actions that are not in harmony with the national Constitution.