Mario Cuomo was not the first to choose the governorship of New York over the opportunity to be Chief Justice of the United States. In 1795, John Jay, the first Chief Justice, resigned from that life tenured post so that he could become the governor of New York.\(^1\) Later, he declined reappointment as Chief Justice because he allegedly believed the Supreme Court and, by extension, the whole federal judiciary would never have "great influence in the national life."\(^2\)

If John Jay could look at the state of the federal judiciary in 1995, his head would spin. Today, the federal courts' power reaches every aspect of our lives including state elections,\(^3\) carjacking,\(^4\) child support,\(^5\) and even the most intimate part of...
family life: the relationship between husband and wife. None of these examples even begins to take into consideration the numerous federal courts that are currently monitoring, if not running, prisons, hospitals and even entire school districts.

Ironically, if we could resuscitate John Jay today and ask him to resume the Chief Justiceship, he would probably turn it down again, but for an entirely different reason: he would complain that the growing caseload has increasingly transformed federal judges into administrators and managers no different than any other bureaucrat.

THE CASELOAD PROBLEM AND ITS SOURCES

The workload of every federal judge has grown exponentially over the last thirty years to become the most pressing concern for the federal judiciary. In 1962, there were 4800 appeals to the United States Courts of Appeals and 100,000 district court filings. In 1993, there were 50,224 appeals and 229,850...
district court filings, an increase of approximately 1,000% in appeals and an increase of approximately 230% percent in district court filings. Yet, the number of federal judges increased only from 353 to 701, not nearly enough to keep pace with the increased workload.

Contrary to the opinion of many, even federal judges cannot expand time. The more cases a federal judge is forced to decide, the less time and attention he or she can give to each individual case. Under such pressure, judges must rely more and more on law clerks and central staff attorneys. The quality of adjudication in such a situation deteriorates.

Two important factors have contributed most to the caseload that the federal courts now shoulder. The first is that the pace of our lives has become faster and much more complicated since John Jay declined reappointment. When he graced the Court, people rode in horse-drawn carriages. They used pens and paper and other tools primitive by contemporary standards. Business transactions were carried on by human beings in proximity to each other, usually in the same state. Disputes were relatively few and simple to resolve. No one ever heard of or even dreamed of multi-district litigation. John Jay even had the leisure of serving as ambassador to England at the same time he sat on the Court.

Today, we have supersonic jets, trains, cars, faxes and the Internet. In the blink of an eye, we buy and sell goods, stocks, bonds and other incomprehensible derivative investments across state lines and national borders with people we never see. And, of course, we need ever increasing and more complicated regulations to control our sophisticated transactions. These ever-proliferating regulations and rules generate ever-


13. Id. at 7.

14. MECHAM, supra note 11, at 10.

15. But see Daniel J. Meadon, Toward Orality and Visibility in the Appellate Process, 42 MD. L. REV. 732, 735 (1983) (arguing that the reliance placed on central staff by federal judges has improved the quality of appellate adjudication).
proliferating disputes. New products leave us novel and convoluted product liability cases. We have class actions that grow into multi-district class litigation.\textsuperscript{16}

This increasing complication and litigiousness of our society reflects our culture and shows no indication of abating. This process is driven by two factors. The first is an unstoppable engine: the advancement of technology and the social thinking connected with it. The second factor, the one we can control, is the federalization of traditionally state law questions. Congress has dramatically expanded the jurisdiction of the federal courts through creating or making certain rights or crimes a matter of federal law.

As we all know, under the Constitution federal courts have always had jurisdiction of federal questions, diversity suits, admiralty and certain other cases.\textsuperscript{17} Judges used to complain that diversity cases were the culprits that clogged our calendars, but statistics show that diversity cases have not been increasing nearly as much as federal question cases.\textsuperscript{18}

The number of federal question cases has increased exponentially because, for whatever reasons of its own, Congress relishes creating a federal case out of any issue that it believes has national and political significance. Congress accomplishes this by passing a federal statute typically asserting its power under the Commerce Clause. The conduct to be elevated to a federal crime "affects commerce," says Congress, however slight the linkage between the conduct and interstate commerce.\textsuperscript{19}


\textsuperscript{17} U.S. CONST. art. III, § 2.


Because we are "all-connected" in today's high-tech world, almost any conduct can fall into the ever expanding category of "affecting commerce." Moreover, Congress enjoys something tantamount to the final say as to whether certain conduct affects commerce under the Supreme Court's deferential review standard.\(^{20}\)

Accordingly, many traditionally state court matters, including some relatively minor infractions, become federal questions overnight. A garden variety fraud becomes a federal crime if the perpetrator happens to mail one letter to consummate it.\(^{21}\) Possessing a gun in the vicinity of a school becomes a federal crime simply because you are within 1000 feet of a school.\(^{22}\) The Employee Retirement Income and Security Act of 1974\(^{23}\) basically federalizes what used to be state law wrongful discharge claims. Violence in the home appears to be on the way to becoming a federal crime.\(^{24}\) Last year's crime legislation alone federalized numerous crimes.

And, every time Congress acts to federalize state law questions, the federal courts receive a flood of filings. For example, the expansion of the federal criminal jurisdiction increased the criminal filings per sitting district judge nearly 70% between 1980 to 1992: from fifty-eight to eighty-four cases.\(^{25}\) This has taken its toll on the federal courts. In 1992 federal district judges spent 36.5% of their time on criminal matters.\(^{26}\) The disturbing result is that after the district judges adjudicate criminal matters, they do not have sufficient time available for basic federal question cases that deal with constitutional

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(analyzing the proliferation of federal crimes and urging Congress to curtail the federalization of criminal law).

20. Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (stating that the Court is "constrained in [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause").

21. 18 U.S.C. § 1341 (Supp. V 1993); see also § 1343 (extending mail fraud statute to cover communication in interstate commerce).


25. SCHWARZER & WHEELER, supra note 18, at 3.

rights, federal-state relationships, state to state relationships, 
and other important federal concerns.27

IN LIGHT OF THE LITIGATION ONSLAUGHT, CAN CORE VALUES 
BE PRESERVED?

We must ask ourselves what role the federal courts should 
play within a nationwide system of justice, which is increasing-
ly under stress. There is no “politically correct” or “constitu-
tionally correct” answer, because the founding fathers envi-
sioned a living, breathing and malleable Constitution.28 Even 
so, all of us believe in certain fundamental core values within 
the federal judiciary. Let us enumerate some of them, and see 
if they are at risk:

Judicial Independence: Federal judges must be able to decide 
cases in an atmosphere free from fear that an unpopular deci-
sion will be a threat to their livelihood or existence.29 For that 
reason, Article III provided life tenure and protection from 
salary decrease.30 Although the autonomy to make important 
and possibly unpopular decisions is at the heart of this protec-
tion, judicial independence also depends on the basic ability of 
a judge to function adequately and properly as an adjudicator 
and judicial scholar. This ability can be affected by more than 
a threat to job security. An overwhelming and, yes, impossible 
docket in the working and practical world threatens the quali-

27. U.S. CONST, art. III, § 2. Pursuant to Article III, Congress has 
passed enabling legislation conferring jurisdiction upon federal courts in 
diversity cases (28 U.S.C. § 1332 (1989)), federal questions (§ 1331), ad-
miralty (§ 1333), commerce (§ 1337), patents (§ 1338), postal matters (§ 
1339), and bonds (§ 1352). THOMAS E. BAKER, REPORT TO THE FEDERAL 
JUDICIAL CENTER: A PRIMER ON THE JURISDICTION OF THE U.S. COURT OF 
APPEALS § 2.01 (1989).

28. See generally OWEN J. ROBERTS, THE COURT AND THE CONSTITU-
tION 2 (1951) (commenting that federal courts are frequently “called upon 
to announce propositions nowhere expressly stated in the Constitution”).

29. MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL OR-
DER 4 (1991) (discussing the need to insulate federal courts from the 
direct influences of the political process).

30. “The judges, both of the supreme and inferior courts, shall hold 
their offices during good behaviour, and shall at stated times, receive for 
their services a compensation, which shall not be diminished during their 
ty and independence of a judge's work even more than other activities aimed at undermining the independence of the federal courts. A judge cannot be said to be independent when the press of work is so great that there is insufficient time to perform necessary analysis and reflection.

*Limited Jurisdiction:* Federal courts were conceived as national courts of limited jurisdiction operating within a system of federalism. Unlike state courts which are designed to hear all legal disputes within a fixed geographic area, the federal courts were never intended to handle more than a small percentage of the nation's legal disputes. Our Constitution's structure explains the importance of this core value. Federal courts were intended to complement state


32. That federal courts are courts of limited jurisdiction is a fact widely recognized throughout our nation's history. See RAOUl BERGER, FEDERALISM: THE FOUNDER'S DESIGN 13-15 (1987) (noting the Framers' conception that federal judicial authority would extend only to specifically defined cases); ALFRED CONKING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 64 (New York, Gould & Co. 1831) (stating that "the circuit courts possess no powers except such as both the constitution and the acts of Congress concur in conferring upon them").

33. See supra notes 19-20 and accompanying text.

34. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Concern is rising about the effect of continuing expansion in the federal judiciary on state rights in our dual system of government. See FEDERAL COURTS STUDY, supra note 31, at 8 (warning that the indefinite expansion of federal courts "is likely to come at the expense of the states, and thus impair the fundamental constitutional concept of limited federal government").
court systems, not to supplant them. Federal courts were designed to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not undertake.\textsuperscript{35} Without federal courts there would be no \textit{Brown v. Board of Education}\textsuperscript{36} and similar landmark cases and principles such as "one man one vote."\textsuperscript{37} Opening federal courts to the usual litigation of state courts turns this concept of limited jurisdiction on its head. It also undermines the basic concept that federal courts are structurally different from state courts and designed to perform a separate function. Strangely enough, transferring state court matters to federal courts also runs counter to the current call by Congress,\textsuperscript{38} governors\textsuperscript{39} and even the President\textsuperscript{40} for a return of power to the states.

\textit{Equal Justice}: Every federal judge takes an oath to "administer justice without respect to person" and to "do equal right to the poor and to the rich."\textsuperscript{41} I have heard that oath administered about a dozen times, but it still to this day moves, excites and invigorates me. This oath hopes to ensure that bias or partiality and economics play no role in the administration of justice. This core value speaks to a concern with fairness. Courts must decide cases in a manner that fully understands the relevant individual circumstances of the litigants, that

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\textsuperscript{35} The Founders intended the Constitution to bestow relatively narrow functions upon the federal judiciary. \textit{The Federalist} No. 78 (Alexander Hamilton).
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\textsuperscript{36} \textit{347 U.S. 483} (1954).
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\textsuperscript{38} Recent Congressional support for limiting federal regulation of state and municipal government is indicative of the move to "shrink the federal government and return power . . . to the states." \textit{Senate Votes to Limit Unfunded Mandates}, \textit{Washington Post}, Jan. 28, 1995, at A1.
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\textsuperscript{39} New Jersey governor Christine Todd Whitman is a prominent advocate of the state power movement. Stephen Handelman, \textit{New Jersey's Rising Star of Conservatism}, \textit{Toronto Star}, Mar. 12, 1995, at E7 (stating that Whitman is "at the leading edge of the national movement to devolve power to the states from the federal government").
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\textsuperscript{40} See Bill Clinton, \textit{What is Good Government?}, \textit{Newsweek}, Apr. 10, 1995, at 29 (calling for the downsizing of federal government and the decentralization of power).
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\end{footnotesize}
appreciates the nuances involved. To do this, federal courts must give litigants ample opportunity to be heard, and judges must have sufficient time to make deliberative decisions. Lately, the ability to adhere to this core value has led judges to express concern that, faced with a crushing caseload, it is difficult to administer the individual, tailored and discerning attention that each case deserves.42

Excellence: Throughout our history, the federal courts have handled our society’s most contentious issues.43 These cases present high factual, legal and administrative complexity. The federal courts have been equal to the task because they are repositories of legal competence, including a superlative court system with superior resources that attracts talented lawyers as candidates for judgeships and support staff. Excellence has many more components, encompassing also the quality of the nomination process, training given to judges, resources provided for support staff and, in particular, a limited enough jurisdiction so that judges can become sufficiently expert with subject matter and procedure, and have time available for contemplation and reasoned decision. Excellence cannot be maintained in the face of a case onslaught which allows insufficient time and opportunity for excellent disposition. Last year I filed twenty-seven opinions for publication in the federal reporter. Could I achieve that volume without heavily relying, and over relying, on law clerks, librarians and support staff? Can I competently read, digest and research thirty-nine cases seven times each year? In addition, when federal courts become high production factories, they will no longer attract as judges the legal minds necessary to achieve quality.44

I believe the above core values are at risk because of the huge burdens faced by federal courts through federalization of state court crimes.

42. See supra note 31 and accompanying text.
43. See, e.g., supra note 9 and accompanying text.
44. See supra note 31.
A PROPOSAL: DE-FEDERALIZATION

These two factors—the increasing sophistication and complication of our way of life and the federalization of state law questions—force us to search for a solution to the problem facing the federal judiciary. Some commentators have proposed a cap on the number of federal judges. In light of the inexorable progress of the two factors discussed above, a cap on the number of judges seems unrealistic. If we limit the number of federal judges while more cases are coming into the courts, we must make every federal judge into a super-judge complete with super powers, or the quality of justice will suffer. On the other hand, dramatically expanding the judiciary as Judge Stephen Reinhardt of the Ninth Circuit proposes is no panacea, although expansion to some degree appears inevitable. Expansion of the judiciary may not be able to keep pace with the combined growth caused by our two factors. Moreover, expanding the judiciary will not necessarily improve the quality of justice. As Judge Jon O. Newman of the Second Circuit and Judge Gerald B. Tjoflat of the Eleventh Circuit forcefully argue, expanding the judiciary may permit the political process to reward more and more politically savvy candidates who may not be the most qualified. Expansion may also threaten collegiality, lessen the efficiency of the courts, and produce more and more uncertainty in the law because of a multitude of conflicting precedents. We can already see all these predictions coming true in the Ninth Circuit which comprises California, Arizona, Montana, Idaho, Oregon, Washington, Alaska, Hawaii and the Northern Mariana Islands. Thirty-eight

46. Particularly when the lawyer population in our country has now increased to three lawyers per 1,000 people. See Ty Ahmad-Taylor, Lawyers Live Where Clients Are, Data Show, N.Y. TIMES, July 15, 1994, at B7.
50. See, e.g., United States v. Valdez-Corral, 33 F.3d 60 (9th Cir. 1994) (noting the conflicting precedent on the standard of review for
court of appeals judges serve on that court.51

Finally, dramatically expanding the federal judiciary simply is not in the spirit of the limited role assigned to it by our constitutional scheme. That scheme calls for a relatively small, specialized federal court system.52 In adding more and more judges to handle the creeping increase in newly-minted "federal" matters, we will fundamentally change the character of the federal judiciary, turning it into a bureaucracy.53

If neither imposing a moratorium on the number of federal judges nor dramatically expanding that number offers a solution to the caseload problem, where must we look for an answer? Of the two factors which have contributed most to the increase in caseload,54 the growing sophistication and complication of our way of life appears to be beyond our control. Therefore, we must by necessity address the second factor, the federalization of state law questions.

If our goal is to maintain a manageable caseload consisting of specialized cases envisioned by Article III, then we must re-think the federalization process and look for alternatives. Congress can slow federalization of state law questions or de-federalize some others that are now federal questions. What Congress can do, Congress can undo. Instead of rushing to federalize the politically hot crime or issue of the week, Congress should seek solutions by taking full advantage of the existing state law enforcement and state court systems now in place. Congress could even exercise its appropriation power55 to provide states with financial assistance in dealing with critical problems, rather than use that money to federalize issues and pass the cases into the federal courts. Only after it has ascertained that the states cannot adequately deal with the problem, even with federal assistance, should Congress federalize a matter.

53. Id. at 187.
54. See supra text accompanying notes 15-27.
Reasons for De-federalization

My proposal is borne of several considerations, other than the size of the federal docket. First, the increasing federalization of traditionally state law questions changes the political balance of the Constitution's concept of federalism by gradually eroding the sovereignty of the states, leaving only cases with minor significance for the state courts. The state will have no choice but to retreat in its roles as a law giver and law enforcer before the rising tide of federal jurisdiction. This retreat has already begun. As a consequence, any attorney who pursues a fraud case with some significance in state court rather than federal court may face malpractice lawsuits. This is because knowledgeable clients are becoming aware that federal courts are now applying federal fraud laws, which many believe favor plaintiffs. In effect, gone is the day when the state had the power to define fraud or to regulate conduct within its own borders as far as fraud is concerned. The federal Racketeer Influenced and Corrupt Organizations (RICO) legislation where a plaintiff can obtain treble damages and attorney's fees, is another example of why state courts are being left behind.

This prospect, I believe, is contrary to the design of federalism as expressed in the Constitution. When the founding fathers assembled in Philadelphia during that hot summer, they undoubtedly envisioned a republic built upon the existing state systems and endowed the federal government only with limited, enumerated powers. To ensure that the citizens of our new country totally understood their intentions, the founding fathers quickly proposed and enacted the Tenth Amendment which proclaims that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although this amendment does not appear to have been given

58. See U.S. CONST arts. I-III.
59. U.S. CONST. amend. X.
much teeth by the Supreme Court, it does emphasize the constitutional concept of a federal government with limited, enumerated powers. The Tenth Amendment retains at least a modicum of content, which the growing federalization of state law questions threatens to erode to nothing. It may even be predicted that the fifty sovereign states will be reduced to fifty Lilliputians in our federal system. This has brought Judge Jim Carrigan of the U.S. District Court for the District of Colorado to ask, “Shall the constitutional concept of a central government of limited powers pass into history?”

One may argue that the federalization of state law questions is based on the power to regulate commerce, a power expressly delegated to the federal government. Federalization is thus consistent with the Tenth Amendment. This argument jibes with the current Supreme Court’s interpretation of both the Commerce Clause and the Tenth Amendment. The Supreme Court is extremely deferential to Congress with respect to the question of what affects commerce. But this attitude, coupled with the insignificant effect the Supreme Court has given to the Tenth Amendment, means that anything goes so long as Congress whispers “commerce” as it federalizes state law questions.

Constitutional scholars have begun to voice substantial objections against such use of the Commerce Clause. First and

60. Compare United States v. Darby, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”) with New York v. United States, 112 S. Ct. 2408 (1992) (Congress may not compel states to regulate conduct according to congressional instructions).

61. Carrigan & Lee, supra note 26, at 50.
foremost is the glaring realization that this process could ultimately reduce the states to non-entities. This defeats the design of the Constitution as envisaged by the founding fathers and undermines basic concepts of federalism and comity. Second, interpreting the commerce power as the omnipotent power trivializes a written constitution that grants limited, enumerated powers to the federal government. By continuing to interpret the commerce power so inclusively and powerfully, that clause alone may encompass all the work of government. The remaining language in the Constitution that grants powers to the federal government will have no purpose. Such a broad, inflexible interpretation of the commerce power effectively treats it as a general grant of police power beyond the wildest expectations of the founding fathers. As Judge Carrigan states,

when the Framers adopted the Commerce Clause, with no dissent and almost no discussion, they weren't thinking of local street crimes. They were concerned that some of the 13 states might impose trade barriers to discriminate against products from other states. Thus, Congress was empowered to ensure free trade among the states so that merchants in the young nation wouldn't have to contend with 13 different systems of protective tariffs.\(^6\)

The broad interpretation of the commerce power may even bring under its umbrella something other than the local street crimes which Judge Carrigan discusses, \emph{i.e.}, violence in the home, and even the bedroom.\(^6\) Matrimonial law could easily be encompassed under federal law, since most marriages use products, or at the least, affect interstate commerce. The O.J. Simpson trial could with little difficulty be in U.S. District Court, by making it a crime to use the knife, which was in interstate commerce, to commit murder. Do we really want a federal court to spend months involved in such a local criminal matter? What if Mr. Simpson had driven the Bronco across state lines? Such a broad interpretation of the Commerce Clause deserves strong criticisms.

\footnotetext{65}{Carrigan & Lee, supra note 26, at 51.}  
\footnotetext{66}{See supra note 26 and accompanying text.}
Finally, the importance of showing deference to Congress does not mean that Congress has carte blanche to do anything. The Supreme Court maintains this deference with an understanding that Congress act responsibly. The Supreme Court and the American people expect Congress to cherish this deference given it by using its commerce power judiciously and even sparingly. Possessing substantial power does not mandate that one always exercise it to the maximum. Power savors best when exercised with restraint. Power also savors best when exercised with creativity, not resorting to the same Pavlovian response to every problem.

Most current uses of the Commerce Clause to federalize state law questions are based on a belief that any legal issue with a national implication must receive a national response. Some think that this reasoning demands that the issue become a federal question justiciable in the federal courts. Certainly, problems with national implications must receive a national response; however, the national response need not be to federalize the question under the Commerce Clause. Alternatives exist.

Congress resorts to federalization to produce two results: (1) a uniform law for the entire country; and (2) greater deterrent effect. Innovative use of its spending power, however, may achieve the same goals without the unfortunate byproduct of inundating the federal courts with essentially state law questions. For instance, the federal government may provide funding to the states for identified purposes on the condition that the states formulate effective regulation and rigorously enforce those regulations according to the standards set by the federal government. This method will unquestionably encourage uniformity.

Moreover, the federal government could also participate in and financially subsidize efforts to standardize the laws among the states. A good example of such efforts are the restatement projects conducted by the American Law Institute and National Conference of Commissioners on Uniform State Laws. In so doing, the federal government will promote uniformity.

68. Id.
The second goal, deterrence, can also be enhanced without resorting to federalization. One method is to require the states to provide adequate penalties for certain infractions and crimes. A prime example is the regulation of traffic and driver licensing. No one can deny that these activities carried out on the highways affect commerce and that rules governing these activities are perfect candidates for federalization under the Commerce Clause.\textsuperscript{69} Congress, however, has not federalized traffic regulations and driver licensing. Instead, it provides funding to the states on the condition that the states impose certain uniform regulations.\textsuperscript{70} Today, the federal-state cooperation in this area produces uniform speed limits\textsuperscript{71} and other traffic regulations that provide more than adequate deterrence. Congress has used the same method to achieve a national drinking age limit.\textsuperscript{72}

Federal-state cooperation effectively achieves the end result of federalization without the pain of having to federalize all traffic regulations and overwhelming the federal courts with traffic violation cases. This demonstrates that the financial appropriation power under the Constitution\textsuperscript{73} may be as effective as the commerce power\textsuperscript{74} in regulating conduct in our society.

Even if Congress does feel the need to federalize a state law question, Congress should encourage or require that the matter be pursued in state court. The founding fathers envisioned that states would be primarily responsible for criminal law enforcement and it is well settled that state courts must entertain federal criminal cases as well as federal civil cases.\textsuperscript{75} In

\begin{itemize}
\item \textsuperscript{69} See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (holding that a federal statute conditioning receipt of highway funds on the adoption of a minimum drinking age is a valid use of Congress's spending power).
\item \textsuperscript{70} Id. at 205.
\item \textsuperscript{71} 23 U.S.C. § 141(a) (1988).
\item \textsuperscript{72} Dole, 483 U.S. at 203.
\item \textsuperscript{73} U.S. Const. art. I, § 8, cl. 1.
\item \textsuperscript{74} Id. art. I, § 8, cl. 3.
\item \textsuperscript{75} SCHWARZER & WHEELER, supra note 18, at 11 n.28 (citing Thomas M. Mengler, Federal Criminal Jurisdiction 5-9 (unpublished manuscript on file with author)). See also Testa v. Katt, 330 U.S. 386, 389 (1947) (holding that state courts are obligated to enforce valid federal penal laws).
\end{itemize}
the earlier years of the Republic, state courts had concurrent jurisdiction over federal crimes. Little reason exists why we should not do the same now, particularly when docket congestion has been a serious problem for the federal courts. By requiring state governments to pursue certain federal crimes in state courts, Congress would still receive all the satisfaction and credit of making a federal matter out of a serious problem, while sparing the federal courts from the jurisdiction of adjudicating many essentially state law matters that are more properly within the province of the state courts.

Questions that May be De-federalized

In keeping with the spirit of these observations, I propose that Congress consider de-federalizing most, if not all, federal questions which derive federal character solely from the use of an instrument of interstate commerce, such as telephone lines and transportation lines. These questions are primarily state law questions. When a federal court adjudicates such a question, it does no more than what a state court does, except that it first must take extra time to ascertain whether a long distance phone call was made, or whether a telegraph was sent, or exactly what technicality put the case in the lap of the federal court.

Drug trafficking, gun dealing, mail fraud, bank fraud, Federal Employers Liability Act, and even securities fraud cases all fall within this category and may properly be dealt with by the state courts. On the other hand, anti-discrimination statutes such as the Civil Rights Act of 1964

76. Testa, 330 U.S. at 390.
81. Id. § 1341 (Supp. V 1993).
82. Id. § 1344.
and the Age Discrimination in Employment Act of 1967 can be viewed differently even though Congress expressly cited the Commerce Clause when federalizing certain issues under these acts. These statutes can more properly be considered as inspired by, and intended to implement, the Equal Protection Clause under the 14th Amendment. Congress cited the Commerce Clause because of the state action requirement laid down by the Supreme Court in *The Civil Rights Cases*.

In the more traditional state law questions with which we have been dealing, several advantages in adjudicating them in the state courts are clear. First, leaving state law matters to state law will save the time spent on ascertaining federal jurisdiction because there would be no need to determine whether an instrument of interstate commerce was used. This factor alone will save a great deal of time. The authority of state law does not depend upon whether certain conduct affects interstate commerce, since states have general police power and may regulate any aspect of life. Second, state courts are more accustomed to adjudicating matters of state law than federal courts. State courts have intimate knowledge of the state law issues. They need less time dealing with such issues and produce higher quality work in this area.

Finally, state courts have accumulated a great deal of experience in adjudicating a large number of cases. As Judge Newman describes, state court systems “are already geared to handle high volume.” They appear to be doing better than the federal courts when volume is concerned. Indeed, over 98% of all civil cases and over 99% of criminal cases are currently


89. 109 U.S. 3, 11-12 (1883).
filed with the state courts. 91

Statistics cited by Judge Newman also answer the objection often voiced against de-federalization, which is that the state courts are as congested as the federal courts and will not be able to deal with the cases reallocated from the federal courts. Judge Newman has calculated that reallocation of about 70,000 cases from the federal courts to the state courts will reduce the federal docket by 30%, but will only increase the state courts' caseload by 1%. 92 A 1% increase in volume should not pose a problem for the state court systems that have substantial experience and capability in dealing with high volume. Moreover, Congress may redirect the funding saved from de-federalization to support any increased costs to the state court systems.

CONCLUSION

Once Congress de-federalizes those "federal" questions which derive their federal character solely from the use of means of interstate commerce, the federal courts will be left with truly federal questions. These are questions that arise under the Constitution, truly federal statutes (such as those anti-discrimination statutes inspired by the Constitution), and treaties. They would address the large concerns of our Republic, such as the relationship between the federal government and the state, between one state and another, between the federal government and the territories, between the federal government and a foreign country, and between governmental power (federal or state) and the individual. The federal courts will not enmesh itself with the states' law-giving and enforcing functions with respect to those rules that govern essentially private conduct in our society, and will be spared a large part of its present caseload. Ultimately, the sovereignty of the states will be preserved and efficiency in the administration of justice at both the state and federal level will be improved.

91. Schwarzer & Wheeler, supra note 18, at 34.