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Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction

Nancy Levit
University of Missouri - Kansas City, School of Law

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*Nancy Levit**

The quantity of litigation in the federal courts has reached unprecedented heights. This "crisis of volume"[1] has attracted the attention of legislators, scholars and, most particularly, judges. Numerous proposals to relieve the overburdened courts, through increasing resources or altering institutional structures, remain in the realm of theory.[2] The judiciary has been left to divine self-help measures to reduce litigants' use of the federal courts. The federal bench that must manage this caseload explosion includes a cadre of recently appointed federal judges.[3] Many of these judges embrace the New Federalism, an initiative to shift governmental power and responsibility back to the states.[4]

This Article posits that the combination of judicial overload and injudicious federalism is operating to shunt certain classes of litigants away from federal courts. The Supreme Court as well as numerous district and appellate courts are creating new procedural and substantive theo-

* Assistant Professor, University of Missouri-Kansas City School of Law; J.D., University of Kansas, 1984; B.A., Bates College, 1980. This article is dedicated to the Honorable Frank G. Theis, of the United States District Court for the District of Kansas, who still believes that federal courts should be open and just. I am grateful to Jack Balkin, Dennis Corgill, Martin Levit, Doug Linder, Joan Mahoney, Ibrahim Wani and Ray Warner, all of whom were generous with helpful comments on at least one incarnation of this article.

1 Hellman, *Courting Disaster*, 30 STAN. L. REV. 297, 297 (1986). The premise that the litigation explosion is evil often goes unchallenged. Increased litigation may result from an expansion of individual rights and remedies, a generally positive development, rather than from the failure of other social institutions. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and The Adjudication Process*, 49 OHIO ST. L.J. 95, 96 n.4 (1988).

2 *See, e.g.*, Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987); Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987); Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457 (1984); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307 (1983).

3 President Reagan has appointed a startling number of these judges on the federal bench. By November of 1988, he had installed 79 judges on appellate courts and 272 judges on district courts—more than 48 percent of all federal judges. Cohodas, *Reagan's Legacy Is Not Only On the Bench*, 46 CONG. Q. 3392 (Nov. 26, 1988). These judges, who are "predominantly white, male and wealthy," are promoting a conservative agenda. Coyle, *The Judiciary: A Great Right Hope*, 10 NAT'L L.J., April 18, 1988, at 22.

More significant are his appointments to the Supreme Court. In January of 1987, President Reagan appointed Justice Antonin Scalia to the Supreme Court, and elevated Justice William Rehnquist to the position of Chief Justice. In November of 1987, the High Court seat vacated by Justice Powell was filled by President Reagan's appointment of Justice Anthony Kennedy. These appointments solidify a conservative bloc comprised of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia and White. Comment, *The Pendulum Swings: The Rehnquist Court and the De-Emphasis of Individual Liberty in Criminal Procedure Analysis*, 65 U. DET. L. REV. 291, 291-93 (1988). *See also* Estreicher, *Conserving the Federal Judiciary for a Conservative Agenda*, 84 MICH. L. REV. 569 (1986); Comment, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225 (1987); Gotschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (June-July 1986).

4 Shenefield, *The* Parker v. Brown *State Action Doctrine and the New Federalism of Antitrust*, 51 ANTITRUST L.J. 337, 337 (1982).

ries to restrict federal jurisdiction. Federal courts are increasingly using the doctrines of preclusion, preemption, abstention and remand to shuttle cases or decision-making authority back to state courts. Complementing this procedural routing of cases is an expansion of summary procedures and a dramatic reduction in the scope of substantive constitutional rights.

Federal docket-clearing practices are eliminating the possibility of substantive relief and the protection of a federal forum for a spectrum of politically underrepresented and powerless classes. Equally important, this manipulation of jurisdiction is unprincipled and inconsistent. While conservative[5] judges urge judicial restraint, they often practice selective activism. At times caseload concerns seem paramount to federal courts, while at other times courts ignore the access-expansive effects of their decisions. Indeed, the malleability of the overload issue suggests it is being used as an instrument to further other goals. The selective use of caseload as a justification for restricting Article III jurisdiction leads to a decrease in the uniformity and predictability of decisions, and it blurs the boundaries of already ill-defined theories of federal jurisdiction.

This Article questions the propriety of the judiciary's use of administrability concerns in the formulation of jurisdictional theories. While court efficiency appears to be a deserving goal, the current method of its implementation is through a reduction of court access to particular classes of litigants. The Article analyzes the concept of administrability and posits that administrative efficiency is actually a value-laden argument for selecting which litigants should be permitted access to federal courts.

This Article also critically examines whether the adjustment of jurisdictional theories by the judiciary is either an effective docket-clearing mechanism or a desirable institutional practice. Analysis of the political and ideological assumptions underlying jurisdictional manipulation and the implications of judicial molding of Article III jurisdiction raises serious separation of powers and fairness concerns regarding the quest for administrative efficiency.

Finally, the Article offers a new, access-expansive approach to jurisdiction. The proposed ratchet theory of jurisdiction creates a guiding principle of jurisdictional analysis. If, as a number of Supreme Court justices and commentators have suggested, the Constitution operates substantively like a one-way wrench—rights may be expanded by constitutional interpretation, but not contracted—a jurisdictional analog is imperative. Federal courts should adopt jurisdictional rules that offer the greatest chance of merits determinations.

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5 While there is no adequate definitional capsule of "liberal" or "conservative," I use "liberalism" as shorthand for the political views that government regulation and social welfare programs are good and necessary, that autonomy is valuable, and that courts must be open to protect constitutional rights from majoritarian power. *See* West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985). I use "conservatism" as descriptive of the political tendency to favor local or state government control and community values, a commitment to the free market, a distaste for social welfare programs, and a desire to reduce access to courts for certain types of suits. *See generally* I. KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA (1972).

I. The Burgeoning Federal Docket

Between 1960 and 1983, district court filings rose 250% while cases docketed in the courts of appeals surged 686%.[6] A long line of surveys provide supporting evidence of the upward caseload trend in federal courts.[7] The increasing complexity of cases brought in federal courts amplifies the burden generated by caseload growth.[8] Additional factors straining the institutional capacity of the federal courts include the increasing sophistication of procedural maneuvering,[9] and the development of satellite litigation concerning such issues as Rule 11 sanctions[10] and attorneys' fees.[11]

The litigation explosion complainants have their detractors. Social scientists have questioned the empirical basis for the claim of unprecedented caseload growth.[12] Selective recapitulations of huge cases, atroc-

6 R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 61-67 (1985). During the same span, the volume of filings in the Supreme Court increased by about 115%. *Id.* at 74. Judge Posner further endorses his premise that the federal courts are overworked by examining other indicators such as the swell in the number of published opinions, the greater number of concurring and dissenting opinions and the increase in the amount of trials completed. *Id.* at 66-73. *See also* Marvell, *Are Caseloads Really Increasing?*, 25 JUDGES J. 34 (Summer 1986) (since 1950 civil caseloads have doubled every 15 to 20 years); Wermeil, *Appeals Court Judges in Unique Session, Fret About Quality of Decision-Making*, Wall St. J., Nov. 1, 1988, at B10, col. 4 ("By the year 2000, the number of cases filed each year in the [federal] appeals courts will rise to 75,000 from the current level of 37,524," according to Judge Donald Lay of the Eighth Circuit, while "the number of appeals court judges will increase to 289 from the 168 currently authorized by Congress.").

7 *See, e.g.*, Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981); Heydebrand and Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of the U.S. District Courts*, 11 JUST. SYS. J. 303 (1986).

8 *See* Clark, *supra* note 7, at 125-48.

9 Courts often remark on the procedural machinations of the litigants before them. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 421 (1979) (appellees failed to appeal a temporary restraining order, but instead "initiated two months of procedural maneuvering in both the state and federal courts"); Century Products, Inc. v. Sutter, 837 F.2d 247, 248 (6th Cir. 1988) ("[i]t is pointless to proceed with time consuming procedural maneuvering in this court"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987) (the district court proceedings were slowed repeatedly by defendant's "imaginative delaying tactics").

10 The amendment of FED. R. CIV. P. 11 was intended in part to stem the tide of the surge in litigation. *See* George v. Bethlehem Steel Corp., 116 F.R.D. 628, 630 (N.D. Ind. 1987) ("mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts"). *See also* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987). However, it has had the opposite effect by spawning side litigation on the issue of sanctions. *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986) (reversing district court's imposition of sanctions and commenting that Rule 11 should be interpreted in a manner that will not encourage litigation); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 752 (7th Cir. 1988) (reversing and remanding district court's imposition of sanctions for more specific factual findings "[t]o avoid prolonging and complicating Rule 11 satellite litigation").

11 *See, e.g.*, United Nuclear Corp. v. Cannon, 564 F. Supp. 581, 592 (D.R.I. 1983) ("[f]ee applications under 42 U.S.C. § 1988 and kindred statutes have become a burgeoning form of satellite litigation in the federal courts").

12 This critique of judicial gridlock appears to have been pioneered by Marc Galanter. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). His theme has been replayed, with slight variations, by a number of other researchers. *See, e.g.*, Schulhofer, *The Future of the Adversary System*, 3 JUST. Q. 83 (1986); Sarat, *The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

ity stories concerning petty filings[13] and war stories have been criticized as failing to offer proof of overall trends.[14] Judges have been lambasted for "crying wolf."[15]

Skeptics are met with an almost vitriolic response from certain judges. The evidence of disbelievers is attacked as "very spotty" and the suggestion is made that they "might be indulging in the joys of contradicting received wisdom."[16] Judge Harry Edwards documents a substantial increase in the workload per judge and concludes that "perceptions of a system in crisis are neither wholly accurate nor wholly baseless."[17]

No comprehensive study exists which considers all of the necessary variables to adequately measure and evaluate the workload of the federal courts. However, even if the critics are accurate, and judges' complaints concerning the size of their dockets are overstated, judicial perception in this instance strongly influences practice. Judges are not only the ones feeling overburdened, they are also the ones deciding cases. Those in charge of the bench possess powerful tools to express their displeasure when they think they are overworked.

The alteration of theories of recovery, standing, procedure and restraint as a means to handle case overload is openly acknowledged and even advocated by a number of judges. One of the most direct in his confrontation of the problem and most specific in his proposed solutions is Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. In *The Federal Courts: Crisis and Reform*, Posner proposes a direct reallocation of federal court cases to state courts.[18] Indeed, his thesis is that neither structural and internal reforms nor resource expansion will solve the caseload volume crisis. Instead, Posner advises rethinking both jurisdictional and substantive doctrines to reduce the number of cases in the federal system. Posner's approach is to reduce the scope of federal jurisdiction by paring down the statutory and constitutional rights that currently occupy the federal bench.[19] Judge Posner

13 *See, e.g.*, *In re* Green, 669 F.2d 779, 787 (D.C. Cir. 1981) (prescribing procedure for handling suits filed by a pro se prisoner who filed over 600 complaints). This petitioner was described by Judge Edwards as "the most prolific prisoner litigant in recorded history." Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 902 (1983).

14 Neubauer, *Are We Approaching Judicial Gridlock? A Critical Review of the Literature*, 11 JUST. SYS. J. 363, 364 (1986).

15 Clark, *Judge Posner's Theology and the Temples of the Law*, (Book Review), 1985 WIS. L. REV. 1183, 1185 n.13 (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)). ("Crying wolf has a long and honorable history. The Chief Justice normally considers it his institutional responsibility to complain about excessive work or insufficient personnel.").

16 R. POSNER, *supra* note 6, at 76.

17 Edwards, *supra* note 13, at 895.

18 R. POSNER, *supra* note 6. Although Posner recognizes that federal judges should enforce rights likely to be disfavored in state courts, R. POSNER, *supra* note 6, at 182, 186, he suggests shipping to state courts two-thirds of all diversity cases, half of the civil rights, admiralty and Jones Act cases, and 10% of state prisoner cases. *Id.* at 189 n.31.

19 Posner advances a grab bag of substantive proposals. He suggests relegating "social questions," such as "[c]apital punishment, control of pornography, education of aliens, [and] regulation of conception" to the states. *Id.* at 197. He would permit federal courts to strike down state laws under the fourteenth amendment only if the laws countenance a life, liberty, or property deprivation "in violation of a fundamental social norm *held by most of the nation*." *Id.* at 194 (emphasis in original).

should be commended on two counts. First, when he adjusts jurisdictional theories to take case overload into consideration, he does so explicitly. Second, in both his judicial opinions and law review writings, he attempts to make a principled distinction with respect to when overload is a permissible consideration.

Judge Posner's theories have already crept into his judicial opinions.[20] In *Smith v. DeRobertis*,[21] his majority opinion held that the simultaneous trial of two criminal defendants in the same courtroom before two different juries does not violate due process. The opinion appears to make the due process rights of a criminal defendant turn on the case-processing interests of the federal system.[22] Posner reasoned that "judicial economy is not a trivial goal in this era of massive case loads."[23]

In *Phelps v. Duckworth*,[24] Judge Posner lamented that federal habeas corpus review for state petitioners has become "a web of technicalities." Posner's devotion to judicial economy is so extreme that he characterized a coerced confession as a "somewhat insecure foundation" for nullifying a state conviction in a federal habeas corpus proceeding.[25] Posner's attempt to elevate judicial economy from the level of a "trivial goal" threatens to turn justice into one.

While Judge Posner's particular solutions may be somewhat idiosyncratic, the results he reaches in individual cases are genuinely mainstream. Other judges also express the view that certain types of cases are unjustifiably occupying too much of the federal courts' time.[26] In *Vicory v. Walton*,[27] the Sixth Circuit required the civil rights plaintiff, a state prisoner, to prove that state remedies were inadequate to handle his claim of property deprivation. However, the threshold showing of inadequacy required by the *Vicory* court—a "systematic problem with the state's corrective process"[28]—was far greater than any inadequacy-of-state-remedy

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He urges that "if a court cannot honestly determine whether [a constitutional] right exists then it should be denied; doubts should be resolved against the claimant." *Id.* at 273.

20 In addition to those cases discussed in the text, see Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 200 (7th Cir. 1983), in which Judge Posner addresses the issue of when claims are separate for purposes of Rule 54(b) certification for appeal. In developing a presumption against characterizing a pleading as containing multiple claims for relief—to reduce the number of claims certified for immediate appeal—Judge Posner focused on the "grave practical objections to reading the rule broadly. The caseload of the federal courts of appeals has increased faster than that of any other component of the federal judiciary, and is now eight times as great as it was in 1960, while the number of court of appeals judges has less than doubled." *Id.*

21 758 F.2d 1151, 1152 (7th Cir. 1985).

22 *Id.*

23 *Id.*

24 772 F.2d 1410, 1419 (7th Cir.) (Posner, J., concurring), *cert. denied*, 477 U.S. 1011 (1985).

25 *Id.* at 1418.

26 The Honorable Francis L. Van Dusen called for either a congressional solution to manage the caseload of the federal courts or the exercise of judicial restraint to make the federal fora less available by creating limitations on justiciable issues. Van Dusen, *Comments on the Volume of Litigation in the Federal Courts*, 8 DEL. J. CORP. L. 435, 436, 448 (1983). *See also* Smith, *The Role of the Federal Courts*, 88 CASE & COM. 10, 14 (1983) (Judge Henry Friendly of the United States Court of Appeals for the Second Circuit remarks that courts must "avert the flood by lessening the flow"); *Hearings on the State of the Judiciary And Access to Justice*, 95th Cong., 1st Sess. 6-10, 272-92 (1977) (views of Chief Justice Warren Burger advocating the abolition of general diversity jurisdiction).

27 721 F.2d 1062, 1064-65 (6th Cir. 1983).

28 Smith v. Rose, 760 F.2d 102, 108 (6th Cir 1985).

burden previously imposed by Supreme Court rulings.[29] The expressed basis for the *Vicory* requirement was that "[s]ection 1983 damage suits take up a large part of the time of the federal courts."[30] The *Vicory* court was clearly less concerned with remedying due process violations than with remedying the crowded federal courtscape burdened with inmate section 1983 suits.[31]

Similarly, in *Thurman v. Rose*,[32] the court determined that a section 1983 inmate-petitioner who complained of a government property deprivation failed to state a claim. Holding that the availability of a state law post-deprivation remedy defeated the existence of a section 1983 cause of action, the court emphasized that "there can be no reason to have a parallel tort law developing in the already overburdened federal courts."[33]

Many judges candidly recognize the role case overload plays in their decisions.[34] Many more do not.[35] As the remainder of this Article discusses, these caseload concerns underlie theoretical shifts in a variety of procedural and substantive areas.

Case overload or the perception of overload has led an array of federal judges to tinker with both procedural and substantive theories in an effort to whittle down the volume of cases in their courts. The scope of federal jurisdiction for certain types of cases is shrinking. The purpose behind some of these transformations in theory is often not openly

29 *Id.* ("a deprivation of due process is no less a constitutional violation for being aberrant rather than systematic").

30 *Vicory v. Walton*, 721 F.2d at 1065 n.4.

31 *Smith v. Rose*, 760 F.2d at 108. *See also* Emory v. Duckworth, 555 F. Supp. 985, 991 (N.D. Ind. 1983) (denying inmate's motion for appointment of counsel in a § 1983 conditions case and then granting the prison superintendent's motion for summary judgment based on the inmate's lack of effective *pro se* response to the motion, meanwhile noting that the number of § 1983 *pro se* prisoner cases "has mushroomed tremendously in the past few years").

32 575 F. Supp. 1488, 1491 (N.D. Ind. 1983).

33 *Id.*

34 In Dunton v. County of Suffolk, 748 F.2d 69, 70 (2d Cir. 1984), the court justified its consideration of a motion for a writ of prohibition as a motion for reconsideration or rehearing as a "creative solution . . . that will help to reduce unnecessarily swollen appellate dockets." In Breest v. Moran, 571 F. Supp. 343 (D.R.I. 1983), the United States District Court for the District of Rhode Island denied a prisoner's habeas petition which challenged his transfer from a New Hampshire to a Rhode Island prison. The court indicated its distinct displeasure at being troubled by the substance of the complaint:

> Having been fairly tried and convicted of a heinous crime, and having received a sentence commensurate with his malefaction, he has whiled away the time by concocting a parade of horribles, dressing his creations in the garb of successive applications for post-conviction relief, and loosing them upon a variety of courts. The cumulative effect of this tomfoolery has been to clog further already-overburdened federal and state courts and profligately to waste both judicial resources and tax dollars.

Id. at 346.

35 *See, e.g.*, Duva v. Bridgeport Textron, 632 F. Supp. 880, 884 (E.D. Pa. 1985) (holding that the plaintiff's Title VII claims are outside the subject matter jurisdiction of the court, ostensibly because the scope of the plaintiff's EEOC charge had not given the individual defendant supervisors sufficient notice that they would be named as defendants in a lawsuit; but in actuality the court emphasized the institutional interest in stringent enforcement of procedural rules to reduce the federal court caseload, and then dismissed the pendent state claims against the individual defendants).

Commentators have already expressed the view that overly busy courts are far more likely to render flawed and sloppy decisions. Dressler, *A Lesson In Incaution, Overwork, and Fatigue: The Judicial Miscraftsmanship of* Segura v. United States, 26 WM. & MARY L. REV. 375, 391, 415 n.204 (1985).

stated, but the patterns become evident when viewed in historical perspective.

II. Limiting the Scope of Federal Jurisdiction

A. *The Recent Endorsement of Summary Adjudication*

In 1986, the Supreme Court decided three cases which delineate a substantially new attitude toward summary judgment.[36] As recently as 1979, the Court had noted that summary judgment was highly inappropriate to determine fact-intensive issues such as state of mind requirements. In *Hutchinson v. Proxmire*,[37] the Court stated that proof of actual malice in a public figure defamation suit "does not readily lend itself to summary disposition." The Supreme Court's 1986 trilogy signaled dramatic changes in application of the rule.

In *Anderson v. Liberty Lobby, Inc.*,[38] the Supreme Court held that a district court considering a summary judgment motion in a public figure libel action must consider whether the plaintiff can show actual malice by clear and convincing evidence. By requiring the trial judge to "bear in mind the actual quantum and quality of proof necessary to support liability" under the applicable substantive law,[39] *Anderson* makes summary judgment easier for defendants to obtain since it imports higher trial burdens of proof that the nonmovant must shoulder into the dispositive motion stage. In a striking departure from the logic of *Hutchinson*,[40] *Anderson* reflects a willingness to view summary judgment favorably, even when the primary issue is state of mind. Moreover, *Anderson* is an invitation to litigants and trial courts to engage in "a full blown paper trial on the merits."[41] In dissent, Justice Brennan concluded that the *Anderson* procedure would undermine litigants' constitutional right to a jury trial.[42] Moreover, *Anderson* is not a first amendment decision, but a clear token of the Supreme Court's new attitude toward summary judgment. Justice Brennan noted that the majority did not limit its holding to the context of libel and thus "change[d] summary judgment procedure for

36 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

37 443 U.S. 111, 120 n.9 (1979).

38 477 U.S. 242 (1986).

39 *Id.* at 254.

40 In a footnote, the Court attempts to distinguish *Hutchinson* by stating that its comment in that case concerning the difficulty of resolving the actual malice inquiry at the summary judgment level was "simply an acknowledgment of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.' " *Id.* at 256 n.7 (quoting Calder v. Jones, 465 U.S. 783, 790-91 (1984)).

41 *Id.* at 261 (Brennan, J., dissenting). The appellate decision in *Anderson*, by now Supreme Court Justice Antonin Scalia, stated that the imposition of an "increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984).

42 477 U.S. at 267.

all litigants, regardless of the substantive nature of the underlying litigation."[43]

In *Celotex Corp. v Catrett*,[44] the Court examined another facet of the Rule 56 procedure and used broad language in support of *granting* summary judgment. The Court stated that Rule 56 does not require "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."[45] The movant may discharge its burden simply by showing "that there is an absence of evidence to support the nonmoving party's case."[46] In addition to analyzing the summary judgment burdens in a manner favoring the movant, the *Celotex* Court employed sweeping language favoring the motion: "[S]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' "[47]

The final summary judgment decision in the trilogy, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[48] emphasized the liberality of summary judgment standards and infused summary judgment analysis with the requirement that the plaintiff's claim make "economic sense."[49] The district court had granted summary judgment to more than twenty defendants in this complex antitrust case, finding that an inference of attempted monopolization was unreasonable. The Third Circuit reversed and held that sufficient circumstantial evidence of concerted action tended to show that an injury had occurred.[50] The Supreme Court reversed, remanded and ordered that summary judgment be reinstated.

Focusing on what constitutes a "genuine" issue of fact, the Supreme Court stated: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."[51] *Matsushita* thus permits factually weak claims to be weeded out by encouraging the district court

43 *Id.* at 257 n.1 (Brennan, J., dissenting). Indeed, lower courts have applied the *Anderson* standards "in a wide range of cases not involving first amendment issues." *See* Comment, *Justice Delayed is Justice Denied: Summary Judgment Following* Anderson v. Liberty Lobby, Inc., 30 ARIZ. L. REV. 171, 180 (1988).

44 477 U.S. 317 (1986). *Celotex* was a wrongful death action against an asbestos manufacturer. Celotex moved for summary judgment, claiming that the plaintiff had failed to produce evidence that any of its products caused the decedent's death. The plaintiff produced three documents which she claimed raised genuine factual issues concerning her husband's exposure to defendant's asbestos products. Celotex argued that the documents were inadmissible hearsay. The district court granted defendant's summary judgment motion, holding that plaintiff failed to prove her decedent had been exposed to Celotex's products. The D.C. Circuit reversed because it ruled that defendant's motion for summary judgment had not adduced any affidavits or other evidence to disprove plaintiff's theories. The Supreme Court reversed.

45 *Id.* at 323 (emphasis in original).

46 *Id.* at 325.

47 *Id.* at 327 (quoting FED. R. CIV. P. 1). This is the first time a Supreme Court majority opinion has brought Rule 1 of the Federal Rules of Civil Procedure, the "fast, fair and friendly" rule, into play in support of the issuance of summary judgment.

48 475 U.S. 574 (1986).

49 *Id.* at 587.

50 *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d. 238, 304-05 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

51 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586 (footnote omitted).

to engage in both a quantitative and qualitative determination of the evidence.[52] Perhaps more significant than *Matsushita*'s emphasis on the availability and utility of the summary judgment procedure was the Supreme Court's focus on economic rationality.[53] The Court held: "It follows from these settled principles that if the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[54] The result and reasoning in *Matsushita* virtually command the trial judge to invade the jury's province to ascertain the "economic sense" of each plaintiff's claim.

A combined reading of *Matsushita*, *Anderson*, and *Celotex* clearly establishes the Supreme Court's new attitude toward summary judgment procedure.[55] Contrary to past doctrines of restraint,[56] the High Court is cultivating an aggressive approach to the use of summary judgment to encourage more rapid pretrial disposition of cases. The very mission of the summary judgment procedure is to eliminate the need for a trial.[57] The reinvigorated standards applicable to the processing of summary judgment motions invite broad judicial delving into and weighing of evidence. This beckons ad hoc decisions and injects a dangerous amount of unpredictability into the summary judgment procedure.[58]

The new summary judgment burdens favor civil defendants, since plaintiffs must clear a higher hurdle to overcome a summary judgment motion. Summary judgment procedure already possessed a pro-defendant slant; the new standards simply add to the imbalance.[59] A process that expedites the administration of justice at the possible expense of fairness to plaintiffs is far too costly. Finally, the *Matsushita* touchstone of economic rationality introduces a utilitarian calculus, and a concomitant political tilt,[60] to pre-trial procedural analysis. For federal courts anxious

52 Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 186 (1987).

53 While the Supreme Court recognized that "the defendant's refusal to deal might well have sufficed to create a triable issue," it held that due to economic factors, the defendant lacked a motive to join the alleged conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587. In Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962), an antitrust case, the Supreme Court held that summary judgment should be used sparingly when motive is an element of the claim. The *Matsushita* Court failed to refer to *Poller*.

54 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587.

55 *See* Jacobs, *Supreme Court's 1986 Summary Judgment Trilogy: A Proposed Analytical Model*, 54 DEF. COUNS. J. 502, 507 (1987).

56 *See, e.g.*, Addickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970).

57 FED. R. CIV. P. 56 advisory committee's note on 1963 amendment.

58 *See* Stempel, *supra* note 1, at 108 (trial judges will become involved "in more activities that look suspiciously like pretrial factfinding").

59 Defendants, who use the motion far more than plaintiffs, "are disproportionately comprised of society's 'haves': banks, insurance companies, railroads, business organizations, governments and government agencies, [while] [p]laintiffs are disproportionately comprised of society's 'have nots': individuals, business sole proprietorships, and smaller entities." Stempel, *supra* note 1, at 161 (footnotes omitted).

60 A full blown examination or critique of the "law and economics" approach is beyond the scope of this article. *See, e.g.*, Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487 (1987):

to clear their dockets, the new criteria will produce a greater number of dismissals before trial.[61]

B. *Streamlining: The Elimination of "Overlapping" Remedies*

Federal courts are also striving to find ways to package disputes more efficiently. One method of streamlining cases is to limit the remedies applicable to a given set of circumstances. The notion of preemption—that one avenue of relief is unavailable when an alternative remedy exists—is creeping into a variety of public interest fields. This section will touch upon several of the most recent examples of preemption from the Supreme Court and several courts of appeals.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*[62] and *Smith v. Robinson*,[63] the Supreme Court determined that a cause of action under section 1983 may be precluded by a comprehensive statutory scheme. A number of lower federal courts picked up this theme of section 1983 preemption and have applied it to bar actions under not only section 1983, but also other civil rights statutes, when an alternate cause of action is available under Title VII of the Civil Rights Act of 1964[64] or under the Age Discrimination in Employment Act.[65]

While the courts employing preemption reason that Title VII was intended to be the exclusive avenue of relief for those circumstances to which it applies, these courts give very little thought to anything other than facial overlap of the statutes, which are all viewed as dealing with employment discrimination generally.[66] Streamlining concerns

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> The inappropriateness of pricing constitutional rights is not the only systematic difficulty economic analysis encounters in legal decisions. . . .
>
> This marketplace *assumption* of basic equality can work to limit the claims for relief of inequality the courts will find acceptable . . . . When the courts accept this model, they implicitly accept the "marketplace" assumption that actors are more or less equal. Having made that assumption, the courts are less likely to act to remedy obvious inequalities in the relative ability of speakers to have their say, as the cases demonstrate. The marketplace model conflicts directly with such claims because it tends to deny the very inequality at issue.

Id. at 514-15 (emphasis in original).

As this Article discusses below, *see* text accompanying note 325, what is important about economic analysis and jurisdictional theories is that many courts are engaging in surreptitious cost-benefit analysis: weighing the importance of court overload, without counterpoising the gravity of rights deprivations.

61 Stempel, *supra* note 1, at 168.

62 453 U.S. 1 (1981) (holding that a § 1983 claim was not available because the Federal Water Pollution Control Act contained comprehensive enforcement mechanisms).

63 468 U.S. 992 (1984) (denying plaintiff's claim for attorney's fees, which would otherwise be available under § 1983, because plaintiff had asserted a claim under the Education of the Handicapped Act).

64 42 U.S.C. §§ 2000e-1-2000ek-17 (1986). *See, e.g.*, Foster v. Wyrick, 823 F.2d 218, 222 (8th Cir. 1987) ("a Title VII disparate impact claim may not be asserted in a § 1983 action"); Bowman v. Bank of Del., 666 F. Supp. 63 (D. Del. 1987) (if Title VII is available, the substantive right violated by a private conspiracy must be derived from somewhere other then § 1985(3)); Tafoya v. Adams, 612 F. Supp. 1097 (D. Colo. 1985) (precluding concurrent claims for discrimination under § 1981 and Title VIII), *aff'd*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987).

65 42 U.S.C. §§ 621-634 (1986). *See, e.g.*, Ring v. Crisp County Hosp. Auth., 652 F. Supp. 477 (M.D. Ga. 1987) (ADEA completely preempts claims under § 1983, whether those claims are founded on the Constitution or on rights created by the ADEA).

66 *See generally* Levit, *Preemption of Section 1983 By Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265, 294-95 (1987) (significant administrative and procedural differences exist

predominate. The efficacy of the remedial mechanisms in the statutes that are argued to preempt section 1983 is unquestioned.[67] How effectively the alternative remedies redress violations of fundamental constitutional rights is ignored.

While these section 1983 preemption cases have been simmering in the lower courts, the Supreme Court recently decided a preemption case with far-reaching potential for eliminating an entire species of constitutional litigation. In *Schweiker v. Chilicky*,[68] the Court addressed the issue of what amounts to statutory preclusion of a constitutional cause of action.

Since the 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[69] the Supreme Court has developed and expanded a doctrine to protect individuals against the violation of constitutional rights by federal officials. In *Bivens* the Court held that individuals could sue for damages directly under the Constitution for the impairment of federal rights.[70] A *Bivens* action is unavailable when Congress has provided an alternative, equally effective remedy that it explicitly declares to be a substitute for a straight constitutional action.[71] Independently, a court may refuse to permit a *Bivens* suit when there are "special factors counselling hesitation."[72]

Schweiker creates a rule-swallowing interpretation of the "special factors" exception. The petitioners in *Schweiker* were Social Security Act claimants whose benefits were improperly terminated. They filed a *Bivens* action in federal court alleging that federal officials had adopted illegal policies leading to the termination of their benefits in violation of the due process clause. The Supreme Court addressed whether a *Bivens* remedy should be implied for alleged due process violations in the denial of disability benefits.

The Court ruled that the "special factors" exception precluded the suit.[73] In a remarkable departure from past rulings,[74] the *Schweiker* Court held that *because* Congress in the Social Security Act failed to provide a

between Title VII and § 1983; Title VII contains severe limitations on possible relief; positing that statutes should be preemptive of § 1983 only if complete relief is available to plaintiffs under the alternate statute).

67 In a decision going somewhat against recent trends, Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987), the Supreme Court ruled that tenants living in low-income housing projects could sue under § 1983 for violation of the Housing Act of 1937. While the opinion rested primarily on the absence of any congressional intent in the Housing Act to preclude a § 1983 claim, the majority did state that the remedial mechanisms in the Housing Act were not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law." *Id.* at 425. The Court's reasoning in *Wright* offered some hope of a sensitive inquiry into the efficacy of statutory alternatives. Those hopes were dashed by the Supreme Court's opinion this term in Schweiker v. Chilicky, 108 S. Ct. 2460 (1988), discussed more fully *infra* text accompanying notes 68-80, which clearly establishes the malleability of interpreting "Congressional intent."

68 108 S. Ct. 2460 (1988).

69 403 U.S. 388 (1971).

70 *Id.* at 397.

71 Carlson v. Green, 446 U.S. 14, 18-19 (1980).

72 *Id.* at 18 (quoting *Bivens*, 403 U.S. at 396; *Davis v. Passman*, 442 U.S. 228, 245 (1979)).

73 *Schweiker v. Chilicky*, 108 S. Ct. at 2468-71.

74 The mere fact, that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a 'special factor counselling hesita-

money damages remedy against officials whose unconstitutional conduct led to the wrongful denial of benefits, the Court would not imply one.[75] Essentially, *Schweiker* imputes to Congress the desire to leave constitutional rights without effective protection.[76] Elsewhere in the majority opinion, the Court acknowledged that a *sine qua non* of a *Bivens* action was the lack of an alternative remedy.[77] Thus, under the original formulation, a *Bivens* action is unavailable when there *is* an alternative, exclusive remedy, and under the *Schweiker* definition of the "special factors" exception, *Bivens* is also unavailable when there *is not* an alternative statutory remedy.

Schweiker is transparent in its recognition that a converse decision might result in a deluge of new *Bivens* actions in federal courts.[78] The majority observes that "[m]illions of claims are filed every year under the Act's disability benefits programs alone . . . ."[79] Concerned that the allowance of a damages remedy will open the courthouse doors to thousands of suits, the Court instead permits the unwarranted denial of benefits to the helpless to go unremedied.[80] To deny a remedy for egregious violations of federal rights out of fear that large numbers of suits might be brought in federal courts to vindicate those rights is constitutional chutzpah.

A variety of other statutory preemption issues are percolating in the lower federal courts.[81] Among the difficulties engendered by many of

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tion' in the judicial recognition of a remedy. Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent . . . .

Schweiker v. Chilicky, 108 S. Ct. at 2476 (Brennan, J., dissenting) (citing Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983); Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969)).

75 *Schweiker v. Chilicky*, 108 S. Ct. at 2468-71.

76 *See* Note, Bivens *Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1268 (1988) (arguing that no presumption of preemption should arise absent an explicit declaration of congressional intent).

77 *Schweiker v. Chilicky*, 108 S. Ct. at 2467.

78 Indeed, the petitioners argued that the sheer size of the disability benefits program was itself a "special factor" counseling against the existence of a *Bivens* remedy. *Id.* at 2480 (Brennan, J., dissenting).

79 *Id.* at 2468.

80 *Cf.* Davis v. Passman, 442 U.S. 228, 248 (1979) (holding that a direct cause of action under the Constitution may be implied for fifth amendment violations, and rejecting the argument that a deluge of federal court suits should be an institutional factor counseling limited recognition of constitutional claims). There may be a question whether the plaintiffs in *Schweiker* actually were deprived of procedural due process, since presumably they had a post-deprivation hearing. *See* Matthews v. Eldridge, 424 U.S. 319 (1976). However, the plaintiffs should have been permitted to overcome the *Bivens* "justiciability" hurdle in any event.

81 For example, administrative action by the United States Environmental Protection Agency (EPA) can preclude a citizen suit under the Clean Air Act or the Federal Water Pollution Control Act, if the EPA has commenced and is diligently prosecuting a civil action in a "court." *See* 42 U.S.C. § 7604 (b)(1)(B) (1982); 33 U.S.C. § 1365 (b)(1)(B) (1982). In Baughman v. Bradford Coal Co., Inc., 592 F.2d 215, 218 (3d Cir. 1979), the court held that an administrative hearing board can be a "court" if it has the power to grant relief to enforce an implementation plan. The *Baughman* court justified the reach of its approach by stating that "Congress intended to provide for citizen's suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief." *Id. But see* Friends of the Earth v. Conrail, 768 F.2d 57, 62 (2d Cir. 1985) (declining to follow the *Baughman* approach and ruling that "court" means court). *See generally* Comment, *Administrative Preclusion of Environmental Citizen Suits*, 1987 U. ILL. L. REV. 163.

For a discussion of older decisions limiting the availability of implied rights of action, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1302-07 (1982). A more

these preemption cases are the separation of powers problems in courts' assessment of legislative intent, and whether the efficiency motivations underlying preemption decisions justify the elimination of alternative avenues of relief. Most disturbing, though, is the judicial paring down of a wide range of public interest remedies without satisfactory analysis concerning how effectively the remaining remedies redress violations of statutory and constitutional rights.

C. *Increasing The Preclusive Effect of State and Administrative Proceedings*

Rules of preclusion conserve court resources by decreasing opportunities for repeated litigation of a single claim and opportunities for successive litigation of related claims. A persistent trend in the federal courts is toward expanding the preclusive effect of state court and administrative agency adjudications. In *Kremer v. Chemical Construction Corp.*[82] the Supreme Court held in a Title VII suit that the full faith and credit clause requires federal courts to give preclusive effect to final state court judgments after state court review of state administrative agency decisions.[83]

Four years later, in *University of Tennessee v. Elliott*,[84] the Supreme Court extended the principles of preclusion to encompass administrative as well as court proceedings. The Court held that unreviewed state administrative determinations were entitled to preclusive effect in federal court in the absence of Congressional intent "to create an exception to general rules of preclusion."[85] Importantly, in *Elliott* the Court's decision did not rest on 28 U.S.C. § 1738, which requires federal courts to give full faith and credit to judgments of state courts. State administrative determinations were given preclusive effect because the Court reached to federal common law rules of preclusion.[86]

The *Elliott* Court specifically found a lack of Congressional intent for unreviewed state administrative proceedings to have a preclusive effect on federal claims under Title VII.[87] The Court came to the opposite conclusion with respect to section 1983.[88] For statutes other than Title VII and section 1983, the breadth of the language used in *Elliott* stands as an open invitation to invoke preclusion: "it is sound policy to apply prin-

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recent enunciation of the disfavored status of implied causes of action can be found in Justice Scalia's concurrence in Thompson v. Thompson, 108 S.Ct. 513, 522 (1988)(Scalia, J., concurring), in which he submits that the Court should adopt "the categorical position that federal private rights of action will not be implied."

82 456 U.S. 461 (1982). At about the same time, the Supreme Court also ruled that the full faith and credit statute, 28 U.S.C. § 1738 (1982), required federal courts to give both issue and claim preclusive effect to state court judgments in § 1983 actions. Allen v. McCurry, 449 U.S. 90 (1980) (issue preclusion); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (claim preclusion).

83 456 U.S. at 481.

84 477 U.S. 788 (1986).

85 *Id.* at 797.

86 *Id.* at 794.

87 *Id.* at 796.

88 *Id.* at 796-97.

ciples of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity."[89]

A number of lower federal courts have accepted the *Elliott* invitation and applied preclusion rules in varied statutory contexts to a wide range of administrative agency actions that the courts deem to be "judicial" in nature. In *Mack v. South Bay Beer Distributors, Inc.*,[90] the Ninth Circuit presumes, without discussion, that *Elliott* requires preclusive effect to be given to the administrative agency's decision in Age Discrimination in Employment Act cases. Similarly, in *Martin v. Malhoyt*,[91] *Elliott* preclusion rules were applied, again without analysis, to a direct *Bivens* action and to plaintiff's section 1985 claims.

In addition to applying administrative preclusion to various causes of action without a careful examination of the propriety of extending *Elliott* into uncharted areas, courts have expansively interpreted when an administrative agency is acting in a "judicial capacity."[92] Minnesota's Office of Administrative Hearings was held to have operated in a judicial capacity in *Deretich v. Office of Administrative Hearings*[93] primarily because an independent hearing examiner "spent five days hearing the grievances and issued a fifty-six page advisory opinion."[94] The existence of an independent hearing examiner was a necessary conclusion for the court to reach, since the very administrative agency making the findings was the defendant in the discrimination suit,[95] but certainly not a sufficient basis to establish the judicial nature of the proceedings. As *Elliott* itself recognized, for an administrative body to operate in a "judicial capacity," there must be more procedural protections than simply an unbiased umpire.[96]

Coupled with the vagaries of when an administrative agency is acting in a judicial capacity is the lack of any principled distinctions by the lower courts concerning when a plaintiff has had a full and fair opportunity to litigate his or her claims before the state agency. For example, in *Yancy v. McDevitt*[97] the plaintiff contended he had no full and fair opportunity to

89 *Id.* at 797.

90 798 F.2d 1279, 1283 (9th Cir. 1986). The *Mack* court reversed and remanded because the plaintiff did not have a full and fair opportunity to litigate his age discrimination claims in an administrative proceeding concerning the denial of his benefits.

91 830 F.2d 237, 264 (D.C. Cir.), *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987).

92 Elliott had a hearing before an employee of the university. He had the right to counsel and to notice of the charges against him. He was entitled to file written motions, briefs, and arguments, and to request subpoenas. The administrative order included separate factual findings and conclusions of law. An appeal was available within the University, with further review available in the Tennessee courts. Elliott v. University of Tenn., 766 F.2d 982, 985 (6th Cir. 1985).

93 798 F.2d 1147 (8th Cir. 1986).

94 *Id.* at 1154. *Cf.* Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892 (7th Cir. 1987), in which an administrative law judge presided over a four day hearing, before which the parties engaged in extensive pre-trial discovery. Both sides were represented by counsel, who filed extensive memoranda of law. The recorded proceedings totaled 680 pages and the ALJ's opinion "contained thorough findings of fact, conclusions of law, and a cogent legal analysis applying the relevant facts to the Illinois law of employment discrimination." *Id.* at 895.

95 *See* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979) ("clearly, deferral to a state agency's fact finding is inappropriate once that agency is the defendant in a discrimination suit").

96 *See supra* note 92.

97 802 F.2d 1025 (8th Cir. 1986).

litigate his race discrimination claims before the school board that terminated him from his teaching position due to parental complaints about his behavior in intimidating children. Yancy argued that he conducted limited investigation prior to the school board hearing which did not disclose racial animus.[98] The Eighth Circuit reviewed the hearing transcript and found that because Yancy introduced evidence of discrimination and since his job was at risk, he had an incentive to litigate the issue of discrimination, which the court translated into a full and fair opportunity to litigate.[99]

Elliott's reach is disturbing. Lower federal courts are applying its rules of preclusion to a host of statutes[100] and administrative proceedings[101] unmentioned, but perhaps not unintended, by the *Elliott* Court. Equally troubling are *Elliott's* effects. Plaintiffs may not have the incentive, knowledge, or resources to adequately litigate claims at administrative stages.[102] The minimally adjudicatory administrative proceedings that qualify as performing in a "judicial capacity" mean that plaintiffs may also lack adequate procedural protections at the administrative stage.[103] Since preclusion proceeds on the assumption that the administrative body affords the equivalent of a federal judicial proceeding, courts should evaluate not only the fact-finding actually accomplished by the agency, but also the purpose of the agency forum, the relation of the decisionmakers to the case, the administrative review available, and so on. In short, courts should evaluate the full range of considerations in determining whether the administrative forum is an adequate substitute for access to the federal courts.

The ultimate effect of increasing the application of preclusion rules is to restrict access of discrimination victims to federal forums.[104] The

98 *Id.* at 1030.

99 *Id.* at 1031.

100 *See, e.g.*, Stillians v. Iowa, 843 F.2d 276, 281-84 (8th Cir. 1988) (applying *Elliott* to conclude preclusion warranted in an ADEA case); Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279 (9th Cir. 1986) (holding that administrative preclusion may be appropriate in ADEA cases where there has been adequate state court review). *Contra* Duggan v. Board of Educ., 818 F.2d 1291 (7th Cir. 1987) (concluding that preclusion principles should not apply in ADEA cases); Delgado v. Lockheed-Georgia Co., 815 F.2d 641 (11th Cir.) (refusing to apply the *Elliott* rationale to suits under the ADEA), *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987).

101 Martin v. Malhoyt, 830 F.2d 237, 264 (D.C. Cir.) (applying preclusion principles to the determination of a Police Department Adverse Action panel), *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987); Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892, 895-97 (7th Cir. 1987) (employing Illinois Human Rights Commission findings to preclude a § 1981 action); Yancy v. McDevitt, 802 F.2d 1025, 1030-31 (8th Cir. 1986) (giving preclusive effect to a school board termination hearing) *reh'g denied*, 820 F.2d 1231 (8th Cir. 1987).

102 *See, e.g.*, *Mack*, 798 F.2d at 1284 ("an employee's incentive to litigate an unemployment benefits claim is generally much less than his incentive to litigate a discrimination claim where generally the stakes are much higher").

103 Moreover, the broader systemic issues regarding the adequacy of administrative hearings go unquestioned in many opinions. *See, e.g.*, Barber v. American Security Bank, 655 F. Supp. 775, 778 (D.D.C. 1987)(holding that the Office of Appeals and Review acted in a judicial capacity because its enabling statute authorized it to hold evidentiary hearings and because the plaintiff was represented by counsel), *appeal dismissed*, 841 F.2d 1159 (D.C. Cir. 1988); Warner v. Graham, 675 F. Supp. 1171, 1176 (D.N.D. 1987) (holding, without substantive analysis, that the administrative agency afforded a full and fair opportunity to litigate the issues), *rev'd on other grounds*, 845 F.2d 179 (8th Cir. 1988).

104 Comment, *The Role of Preclusion in Title VII: An Analysis of Congressional Intent*, 71 IOWA L. REV. 1473, 1475 (1986).

preclusion cases themselves are a testament that federal courts provide a superior forum for the resolution of complicated constitutional matters.[105] It has also been persuasively argued that federal courts provide a more hospitable tribunal for victims of discrimination than do state courts or administrative bodies.[106] Indeed, deprivation of a federal forum may be tantamount to deprivation of rights because of the insensitivity and limited expertise of state bodies with respect to federal constitutional issues.[107] While expansion of the preclusion rules to increase reliance on state agencies' fact-finding limits the work of the federal courts,[108] it necessarily decreases the quality of decision-making to a least common denominator standard.

D. *Abstention: Deferring Cases*

Even if a plaintiff has a claim that is properly cognizable in federal court, the federal court may decline to hear the case under an abstention doctrine. The theories of abstention are complex.[109] The broadest of these abstention theories was created in *Younger v. Harris*.[110] As originally formulated, *Younger* abstention required a federal court to abstain from interfering with ongoing state criminal matters to promote the interests of equity, comity and federalism.[111]

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105 *See, e.g.*, Button v. Harden, 814 F.2d 382 (7th Cir. 1987) in which a state administrative body's factual *and legal* conclusions were given collateral estoppel effect, even though the Seventh Circuit acknowledged that they were arguably inadequate:

> The causal issue-whether Button's misconduct was so serious that the district would have been moved to fire him even if he had never complained to the police about his supervisors' misconduct-is tricky and the hearing officer may have misunderstood it and failed to make necessary findings; but in that case Button's recourse, if he wanted to pursue the matter in the Illinois courts, was to ask the circuit court to remand the case to the hearing officer for additional findings.

Id. at 385.

106 Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-30 (1977).

107 *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 500, 502-11 (1982); Carlson v. Green, 446 U.S. 22, 23 (1980).

108 Federal courts often have to engage in complicated preclusion analysis, and *then*, if the state agency's actions are not preclusive, federal courts must find facts anew.

109 Four primary types of abstention exist: Younger v. Harris, 401 U.S. 37 (1971) (abstention to avoid interference with ongoing state criminal proceedings); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention to avoid resolution of unclear issues of state law which will obviate the need to reach federal constitutional issues); Burford v. Sun Oil Co., 319 U.S. 315 (abstention to avoid interference with a state's regulatory scheme), *reh'g denied*, 320 U.S. 214 (1943); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, *reh'g denied*, 426 U.S. 912 (1976); and Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (abstention in favor of parallel state litigation under exceptional circumstances: where comprehensive disposition of the litigation is available, state law provides the substantive rule, and the state forum is adequate).

110 401 U.S. 37 (1971). Under the other abstention theories, federal courts may refuse to entertain jurisdiction only in limited circumstances. Under *Younger*, federal courts may exercise jurisdiction only in limited circumstances. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 691 (1987).

111 401 U.S. at 43-44. The only exceptions to *Younger* abstention applied when the state action challenged by the federal plaintiff was flagrantly unconstitutional or instituted in bad faith. *Id.* at 53-54. In 1977 Justice Brennan observed that the showings required to come within any of the *Younger* exceptions were "probably impossible to make." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977).

Younger abstention was developed to discourage the institution of federal civil rights suits that threatened state criminal proceedings.[112] The Supreme Court gradually expanded *Younger* into the civil arena,[113] and then into the realm of administrative actions.[114] The doctrine came to mandate federal abstention from *any* state proceeding in which important state interests existed, so long as the federal plaintiff had an adequate state forum for his constitutional issues.[115]

The Supreme Court's most recent *Younger* decision, *Pennzoil Co. v. Texaco, Inc.*,[116] removes the last qualifications restraining federal abstention. As one commentator noted, "[t]he decision in *Pennzoil* implies that no federal court may enjoin any state judicial or quasi-judicial proceeding, since any state interest will qualify as important and any state forum-including the one whose proceedings are allegedly unconstitutional—will qualify as adequate."[117]

Pennzoil sued Texaco in a Texas state court alleging that Texaco had tortiously interfered with Pennzoil's contract to purchase Getty Oil Co. Pennzoil obtained the largest civil judgment in history, $10.53 billion.[118] Under Texas law, the right to appeal was conditioned upon the appellant posting a supersedeas bond in at least the amount of the judgment, plus interest and costs.[119] Appeal for Texaco would have been impossible, since it could not post a bond in that amount.[120]

Before the Texas court entered its judgment, Texaco filed a complaint in federal court in New York, seeking to enjoin enforcement of the

112 Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 866-88 (1974); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 649-53 (1975). *Younger* is a judicial exception to the Anti-Injunction Act, which bars federal injunctions to stay pending state proceedings, unless one of three statutory exceptions is met. In Mitchum v. Foster, 407 U.S. 225, 242-43 (1972), decided the year after *Younger*, the Supreme Court held that § 1983 actions were "expressly authorized" exceptions to the Anti-Injunction Act.

113 *See* Trainor v. Hernandez, 431 U.S. 434, 440-47 (1977) (applying *Younger* to an action by welfare recipients challenging state attachment of their assets); Moore v. Sims, 442 U.S. 415, 423-35 (1979) (reversing lower court's interference with a pending state child abuse proceeding); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-37 (1982) (establishing standards for *Younger* abstention in civil suits).

114 *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629 (1986) (holding that the district court should have abstained from interfering with a state administrative proceeding).

115 Comment, *Civil Rights Suits that Interfere with Ongoing State Criminal Proceedings:* Younger *Abstention in the Wake of* Pennzoil Co. v. Texaco, Inc., 24 HOUS. L. REV. 917, 919 (1987) [hereinafter Younger *Abstention in the Wake of* Pennzoil]. It should be noted that sending cases to state courts simply transforms the "federal caseload" problem into a "state caseload" problem. Moreover, abstention is a particularly "clumsy tool for cleaning federal dockets because it requires the formal retention of federal jurisdiction." Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1229 n.220 (1977).

116 481 U.S. 1 (1987).

117 Younger *Abstention in the Wake of* Pennzoil, *supra* note 115, at 919. *See also* Note, *The Ultimate Expansion of the* Younger *Doctrine:* Pennzoil Co. v. Texaco, Inc., 41 Sw. L.J. 1055 (1988).

118 Post-judgment interest accrued at the rate of almost $3 million per day. Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1138 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987).

119 TEX. R. CIV. P. 364. Texas law allowed Pennzoil to levy execution on Texaco's assets unless Texaco posted a sufficient bond and to secure a lien on Texaco's real property in Texas without regard to the posting of a bond.

120 The Second Circuit estimated a worldwide cap on surety bonds ranging from $1 billion to $1.5 billion. Texaco, Inc. v. Pennzoil Co., 784 F.2d at 1138.

Texas judgment. One ground of Texaco's federal suit was a claim under section 1983 that the application of the bond statute violated the due process and equal protection clauses of the Constitution. Texaco had not raised these section 1983 claims in its post-trial motions in state court.

The federal district court granted Texaco's application for a preliminary injunction against enforcement of the Texas statute on constitutional grounds, and also declared that the ongoing state proceeding did not require abstention.[121] On appeal, the Second Circuit approved the district court's exercise of jurisdiction over the constitutional claims.[122]

The United States Supreme Court held that the federal district court improperly failed to abstain from issuing the injunction.[123] The Supreme Court concluded that because Texaco did not give the state court the opportunity to adjudicate its constitutional claims, Texaco was prevented from arguing in the federal action that Texas procedure was deficient.[124] Moreover, Justice Powell's opinion for the Court stated that *Younger* applied because "the State's interests in the proceeding are so important that exercise of the federal judicial power[s] would disregard the comity between the States and the National Government."[125]

In a concurrence, Justice Brennan, joined by Justice Marshall, criticized the plurality for reaching the *Younger* issue, which he viewed as inapplicable to either civil proceedings or to section 1983.[126] Further, according to Justice Brennan, even if *Younger* analysis is employed, abstention was still inappropriate. Justice Brennan observed that the State's interest in the case was "negligible," because Texas' only interest in the case was to assure that it was fairly adjudicated.[127] The concurrence additionally criticized the Court's requirement that a section 1983 suit claiming only violations of federal law be offered in the state forum.[128]

The implications of *Pennzoil* are alarming. First, a clear motivation underlying the decision was the desire to conserve limited federal judicial resources.[129] The Court accomplished this result by requiring federal civil rights plaintiffs to present their claims for decision in state courts. Thus, *Pennzoil* develops an unprecedented theory of abstention as " 'blind deference.' "[130]

121 The district court did require Texaco to post a $1 billion supersedeas bond. Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 261-62 (S.D.N.Y.), *aff'd in part and rev'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987).

122 Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986).

123 "In sum, the lower courts should have deferred on principles of comity to the pending state proceedings. They erred in accepting Texaco's assertions as to the inadequacies of Texas procedure to provide effective relief." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 16 (1987).

124 *Id.*

125 *Id.* at 11.

126 *Id.* at 19 (Brennan, J., concurring).

127 *Id.*

128 *Id.* at 20-21 (Brennan, J., concurring).

129 Id. at 10-17. *Younger* did not acknowledge this rationale: its comity analysis was not couched in terms of federal court inundation.

130 *Id.* at 20-21 (Brennan, J., concurring) (quoting Younger v. Harris), 401 U.S. 34, 44 (1971)).

Second, by requiring state court presentment of section 1983 claims, *Pennzoil* appears to either import a judicial exhaustion requirement into section 1983,[131] or abolish the existence of the section 1983 exception to the Anti-Injunction Act.[132] While the *Mitchum* Court acknowledged that federal suits brought under section 1983 would have to overcome the *Younger* hurdle,[133] *Pennzoil* virtually overrules the primary holding in *Mitchum* that section 1983 is an exception to the Anti-Injunction Act.

Third, *Pennzoil* creates a novel presumption of state forum adequacy.[134] This places civil rights plaintiffs in a losing situation. If they choose to reserve their constitutional claims of abusive or improper process for a section 1983 action in federal court, the very state procedures about which they complain are accorded a heavy presumption of validity. Plaintiffs are forced to tender their constitutional claims in state court or face *Pennzoil*-enhanced abstention risks in federal court. Thus, *Pennzoil* both eliminates federal court protection from the unfair effects of state court procedures and deprives section 1983 plaintiffs of a federal forum.

Fourth, the reasoning in *Pennzoil* strips the *Younger* "important state interest" requirement of any content. While the plurality in *Pennzoil* identified the interests of Texas as enforcing " 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory,' "[135] this "state interest" exists in every lawsuit filed in any court.[136]

In *Pennzoil*, the state judicial action was between two private litigants. *Pennzoil* is the first *Younger* case in which the state plaintiff was not a state official, but merely one acting "under color of" state law within the meaning of section 1983. Virtually any challenge to a state proceeding will constitute a threat to important state interests under *Pennzoil*. Since a *sine qua non* of section 1983 suits is state action, perhaps all section 1983 suits will qualify.

The new *Pennzoil* criteria for *Younger* abstention tip the balance in favor of federalism and against civil rights. *Younger* abstention is fast be-

131 Section 1983 is the principal federal court remedy for enforcing federal constitutional claims. While state courts have concurrent jurisdiction over § 1983 actions, Martinez v. California, 444 U.S. 277 (1980), *reh'g denied*, 445 U.S. 920 (1980), there has never before been a statutory or judicial obligation to offer § 1983 claims first in state court. Indeed, § 1983 specifically was created to provide a federal forum for plaintiffs whose civil rights have been infringed through unconstitutional state action, claims that might be met with hostility in state courts. *See* H.R. REP. No. 548, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 2609. No exhaustion of state administrative remedies is required before a § 1983 action may be pursued in federal court. Patsy v. Florida Bd. of Regents, 45 U.S. 496 (1982). If § 1983 claims are pursued first in state court, and then again in the context of a federal proceeding, the state court ruling may be given preclusive effect. Allen v. McCurry, 449 U.S. 90, 105 (1980).

132 *See supra* note 112.

133 Mitchum v. Foster, 407 U.S. at 243.

134 "[W]hen a litigant has not attempted to present his federal claims in related state court proceedings a federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary." Texaco, Inc. v. Pennzoil, Co., 481 U.S. 1, 15 (1987).

135 *Id.* at 13 (citations omitted) (quoting Juidice v. Vail, 430 U.S. 327, 336 (1979)).

136 In concurrence, Justice Brennan, joined by Justices Blackmun, Marshall and Stevens on this point, argued that since Texas law directs state officials merely "to do Pennzoil's bidding in executing the judgment," only Pennzoil, not Texas, had an interest in the proceedings. *Id.* at 1530-31 (Brennan, J., concurring).

coming the rule, rather than the exception.[137] *Pennzoil* requires the submission of section 1983 constitutional issues to the very forum which has an interest in validating the constitutionality of its own procedures. Under *Pennzoil*, abstention from interference with a pending state proceeding is almost mandatory, even when the State's interests are minimal, and even when a federal plaintiff is suffering constitutional abuses.

E. *Selective Activism in the Deferral and Acceptance of Cases*

Abstention, preclusion, preemption and summary adjudication are not the only mechanisms federal courts utilize to decrease their workload.[138] Increasingly, the federal judiciary is manipulating the issues it chooses to decide by relying on doctrines of justiciability, the concepts of ripeness, mootness and standing. The Supreme Court has written few influential justiciability decisions in the past several years. But then, it has not needed to. In the early and mid-1980's the Court issued a spate of decisions which shaped the political focus of the justiciability doctrines and dramatically reduced the volume of potential federal suits by diminishing the range of potential plaintiffs.

The expansion of public law litigation encouraged the development of more restrictive doctrines of standing.[139] In *Flast v. Cohen*,[140] the Court permitted taxpayers standing to challenge unconstitutional exercises of the congressional taxing and spending powers. In *Valley Forge Christian College v. Americans United for Separation of Church and State*,[141] the Court retreated from *Flast* and dramatically altered the course of the standing inquiry. The *Valley Forge* rejection of taxpayer standing to assert injury to religious autonomy[142] is in stark contrast to the Court's prior recognition that "if the Congress enacted a *statute* creating such a legal

137 Formerly, the Supreme Court held:

> [A]bstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

138 Removal and remand are not explored in depth here. However, the decision last Term in Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988), recognized for the first time an inherent power in federal district courts to remand a properly removed case in which the federal claims have been eliminated and only pendent state claims remain. The *Carnegie-Mellon* dissenters—Chief Justice Rehnquist and Justices White and Scalia—contended that remand should be permitted only for reasons authorized by statute. *Id.* at 622-23 (White, J., dissenting). However, the dissent maintained that wholesale dismissal was an available and preferable alternative. *Id.* at 625-26.

139 Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

140 392 U.S. 83 (1968).

141 454 U.S. 464 (1982).

142 The Court stated:

> Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a 'personal constitutional right' to a government that does not establish religion, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws . . . .

right, the requisite injury for standing would be found in an invasion of that right."[143]

While *Valley Forge* requires plaintiffs to show "personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees,"[144] the Court gave little content to its personal injury standard.[145] In fact, "injury" adjudication has in practice devolved to intuitive merits determinations based on the individual judge's personal evaluations of whether the plaintiff was hurt.[146] Arguably, the real tightening of standing requirements has not focused on Article III injury-in-fact, but instead has concentrated on the equally manipulable issues of causation,[147] prudential requirements[148] and the tying of standing to the specific relief requested.[149]

In *Allen v. Wright*,[150] parents of black public school students sought to challenge the legality of certain Internal Revenue Service guidelines that allegedly permitted racially discriminatory private schools to achieve tax-exempt status. The *Allen* Court denied standing because the plaintiffs had failed to show personal injury, since the plaintiffs had not applied for admission to any of the private schools.[151] In analyzing the standing question of redressability, the Court examined the substantive issues and found that "the plaintiff failed to allege that there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration."[152]

Importantly, *Allen* introduced a new factor into the standing equation: separation of powers concerns. The core of the majority's analysis

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Id. at 489 n.26 (citation omitted).

Arguably, the *Valley Forge* Court still would permit a taxpayer to challenge the validity of congressional spending action which violates the establishment clause. *Id.* at 479-80.

143 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224 n.14 (1974) (emphasis added). Indeed, as one commentator has noted, "[c]onstitutional rights seem to score lower than rights reflected in the Code of Federal Regulations and 'past practices' of an administrative agency." Burnham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 73 n.87 (1985) (citations omitted).

144 454 U.S. at 485 (emphasis in original).

145 Commentators have advocated a diametrically opposite approach: that the standing test should be satisfied by a litigant who alleges no injury to his own interests, yet who establishes the existence of a concrete dispute and the ability to fairly represent one side of the issue. *See, e.g.*, Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-47 (1968); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706-07 (1980).

146 *Compare* Freedom from Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1467-68 (7th Cir. 1988) (city resident and president of freedom from religion organization lacked injury sufficient to confer standing to challenge constitutionality of Ten Commandments monument on display in city park) *with* Saladin v. City of Milledgeville, 812 F.2d 687, 691-95 (11th Cir. 1987) (plaintiffs receiving correspondence on city stationery with seal bearing the word "Christianity" suffered adequate spiritual injury for standing purposes).

147 Warth v. Seldin, 422 U.S. 490 (1975).

148 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

149 *See infra* text accompanying notes 156-61 for a discussion of City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

150 468 U.S. 737 (1984).

151 *Id.* at 746.

152 *Id.* at 758.

was that federal courts are not the appropriate forum for "general complaints about the way in which government goes about its business."[153] Ironically, *Allen* has prompted lower federal courts to restrict access in the name of deference to coordinate branches that created the rights-infringing policies.[154] Now, "the most injurious and widespread Government actions c[an] be questioned by nobody."[155]

Similarly, in *City of Los Angeles v. Lyons*,[156] the Court stretched to reach the standing question and then fashioned a doctrine that expanded standing requirements. The Court held that Lyons had no standing to seek an injunction to prohibit the Los Angeles Police Department from using life threatening chokeholds.[157] Blurring the mootness and standing inquiries, the Court held that Lyons had no standing to seek injunctive relief because he failed to establish a "real and immediate threat" that he again would be subjected to a chokehold.[158] By collapsing mootness analysis into a standing inquiry, the Court again broadened its standing requirements. The *Lyons* demand for the probability of individual recurrence to satisfy the standing test in injunction cases constructs an impossible barrier to litigants who want to prevent harm to themselves or others.[159]

153 *Id.* at 760.

154 In Jorman v. Veterans Admin., 830 F.2d 1420, 1428 n.10 (7th Cir. 1987), for example, the plaintiffs established that during the 1970's, a segregated all-white neighborhood became a segregated all-black neighborhood. Plaintiff's expert testified that the rapid resegregation of the area was due to an infusion of Federal Housing Administration and Veterans Administration ("VA") lending in the area. In 1976, the year of highest turnover, "61% of the homes were sold with government-assisted financing." *Id.* at 1426 n.9. The lower court chose to believe defendant's expert who testified that the "influx of government-assisted loans was merely a symptom that tends to accompany resegregation." *Id.* at 1423. The court of appeals upheld the finding that the plaintiff lacked standing because the injuries they suffered were not "fairly traceable" to VA lending practices. *Id.* at 1424. The appellate court relied on *Allen*'s separation of powers logic to remove challenges to government agency programs from the purview of federal court adjudication absent an "unusually heavy" burden, *id.* at 1425, on plaintiffs to show that the government funding was a substantial factor in hastening "the inevitable resegregation." *Id.* at 1426.

Similarly, in Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987), a divided panel of the District of Columbia Court of Appeals held that a nontheist professor of philosophy lacked standing to challenge refusal of the United States Senate and House of Representatives to invite nontheists to deliver secular remarks during the chambers' morning prayer sessions. The truly muddled majority opinion seemed to rely in large part on the separation of powers principle to deny the plaintiff standing. *Id.* at 1138, 1140. As the dissent trenchantly observed, the majority even seemed to create a new category for standing inquiries: those cases that involve the exercise of legislative, but not "congressional" actions. *Id.* at 1148 n.4 (Ginsburg, J., dissenting). While Kurtz may well have lacked a tenable constitutional claim, the majority's injury-in-fact analysis relies on the separation of powers to gratuitously place many claims beyond judicial competence.

155 United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973).

156 461 U.S. 95 (1983).

157 By the time the case reached the Supreme Court, the police department had changed its chokehold policies. Thus, Lyons himself argued the case was moot. However, the Court leaped the mootness hurdle by holding that the chokehold policy could be reenacted. *Id.* at 101. *See also* Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 25 (1984).

158 461 U.S. at 105-07. While *Lyons* was moving up the ladder of appellate review, six people were choked to death by Los Angeles police pursuant to the chokehold policy. *Id.* at 116 n.3.

159 In Travelers Social Club v. City of Pittsburgh, 685 F. Supp. 929, 932-35 (W.D. Pa. 1988), a private club whose members were almost exclusively homosexuals sought declaratory and injunctive relief against various city law enforcement agencies and officials for engaging in insulting and assaultive behavior while conducting a Valentine's Day raid on the club, allegedly to search for liquor

The thesis that standing decisions are a tool for the pre-merits manipulation of issues to be decided is not novel.[160] What is important for present purposes is the way past standing decisions have circumscribed the number and the type of cases and plaintiffs that may sue in federal court. As the dissenters in *Lyons* noted, an "entire class" of constitutional litigation was removed from the reach of the federal courts' equity powers. "The federal judicial power is now limited to levying a toll for such a systematic constitutional violation."[161]

Standing cases are parallelled by ripeness decisions, which often involve the use of justiciability standards to make substantive rulings.[162] The ripeness determination may be simply that the claim presented is too "abstract,"[163] or that the issue is not an "appropriate" one for judicial decision.[164] While the ripeness doctrine was intended to avoid "premature adjudication,"[165] ripeness also has become a selective barrier to federal litigation.[166]

The Court's willingness to employ doctrines of judicial restraint in a selective manner reached a pinnacle in *Michigan v. Long*.[167] After the Michigan Supreme Court reversed Long's conviction, Long opposed the state's petition for certiorari. Long argued the Michigan Constitution afforded him more protection against improper searches and seizures than the federal Constitution, and that this independent and adequate state ground precluded federal review. While the Supreme Court ruled that clearly stated "separate, adequate, and independent [state] grounds" would avoid federal review, the Court also ruled that, when it was unclear whether a state decision rested on federal or state grounds, it would presume the decision rested on federal law and would have jurisdiction to review the case.[168] *Long* thus reversed the traditional presumption—that a state decision premised on both state and federal grounds was pre-

law violations. Although the plaintiffs presented expert testimony that officers were likely to engage in repeated abusive behavior in the future, the court flatly rejected the evidence regarding recurrence as insufficient based on *Lyons*. *See also* Coverdell v. Department of Social and Health Serv., 834 F.2d 758, 766-67 (9th Cir. 1987) (plaintiff who sought injunctive relief against a social worker who had seized her newborn child at a hospital failed to demonstrate the possibility of repetition, since the court found she did not show she was still capable of childbearing—even though she subsequently had another child—and because the protective services worker had not seized her next child).

160 *See* Tushnet, *supra* note 145, at 1715 n.72 ("Doesn't the fact that the Court issues so many inconsistent decisions tend to indicate that the entire concept of standing is awfully prone to manipulation and incoherence?"). *See also* Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

161 461 U.S. at 137 (Marshall, Brennan, Blackmun and Stevens, J.J., dissenting).

162 *See* Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 170 (1987) ("[i]t is probably a mistake to characterize this method of analysis as jurisdictional at all.").

163 Socialist Labor Party v. Gilligan, 406 U.S. 583, 586 (1972).

164 Poe v. Ullman, 367 U.S. 497, 509 (1961).

165 Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

166 *Compare* Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) (holding that a vendor's equal protection challenge to a statute prohibiting the sale of drug paraphernalia materials was not ripe because there was no evidence of discriminatory enforcement) *with* Freedman v. Maryland, 380 U.S. 51, 52-60 (1965) (striking down a film censorship statute that posed a significant risk of discriminatory implementation).

167 463 U.S. 1032 (1983).

168 *Id.* at 1040-41.

sumed to rest on independent state grounds—to favor federal review of state court decisions.[169]

Long seems to vastly expand the reach of federal court jurisdiction. Indeed, it appears to invite wholesale importation of the bulk of state criminal litigation into federal court.[170] However, this betrayal of the overburdened federal docket serves ulterior purposes. The jurisdictional presumption in favor of Supreme Court review only becomes important when a state court affords a more expansive view of individual rights than would be available under the federal Constitution.[171] This has been precisely the effect of *Long*: subsequent decisions have shown the Supreme Court's proclivity to review state decisions under *Long* primarily when the Court wants to rein in expansive constitutional interpretations by state courts.[172]

Long can be interpreted as an attempt to prevent the states from interpreting federal constitutional law expansively to protect the rights of criminal defendants.[173] However, since the Court must exercise jurisdiction to review protective individual rights decisions, it may also indicate that when caseload and conservatism clash, the Supreme Court is more interested in fostering its political goals. In fact, *Long* may even signify that the scarcity of judicial resources is not actually the driving force behind many decisions but rather a tool to further a conservative agenda. In short, the judicial restraint decisions exhibit selective restraint. The doctrines of the early 1980's were crafted to both reduce the volume of cases the federal courts must entertain and to permit the courts greater opportunity to engage in pre-merits adjudication. The Court's aggressive protection of law enforcement interests is unmatched by its decisions concerning the substantive rights of individual citizens.[174]

III. Narrowing the Scope of Substantive Rights

The decisions adjusting jurisdictional theories are but one method of reducing the federal court's workload. An equally important way the courts are cutting back their caseload is by limiting the parameters of those rights that may be redressed in federal court. Narrowing the reach

169 *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945).

170 In dissent, Justice Stevens envisioned a "docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens." 463 U.S. at 1070 (Stevens, J., dissenting).

171 If the state decision is clearly based on the state constitution, it has independent and adequate state grounds. If the state decision offers less protection than it should under the federal Constitution, the latter is open to Supreme Court review without the *Long* presumption. *See* Comment, *Supreme Court Review of State Court Cases: Principled Federalism or Selective Bias*, 36 EMORY L.J. 1277, 1287 (1987) ("The new presumption of *Long*, therefore, would operate to expand the Court's review of state decisions that overcompensate for violations of federal guarantees, because only judgments consistent with the federal Constitution can be supported on state grounds").

172 *See, e.g.*, United States v. Benchimol, 471 U.S. 453, 458 (1985) (Brennan J., dissenting) (noting that 24 of the Court's 27 summary reversals were of decisions rendered in favor of non-capital criminal defendants); Florida v. Meyers, 466 U.S. 380, 383 (1984) (Stevens, J., dissenting) (observing the Court's propensity to grant petitions for certiorari on behalf of the state and then reverse lower court reversals of convictions).

173 Such an interpretation is consistent with the substantive criminal procedure decisions emanating from the Supreme Court. *See infra* text accompanying notes 222-44.

174 *See infra* text accompanying notes 177-221.

of substantive constitutional rights also appeals to the majoritarian impulses of the New Federalist judges, who correctly perceive the countermajoritarian premise of constitutional rights.[175] These cutbacks in substantive rights have been achieved by the Burger and Rehnquist Courts' refusals to extend established rights to reach the demands of new situations and by their whittling away at particularly disfavored rights.[176]

A. *The Failure to Expand Rights*

Although privacy is not a specifically enumerated constitutional right, the Supreme Court has recognized that certain aspects of privacy are embodied as part of the fifth and fourteenth amendment concepts of liberty, due process, and equal protection,[177] the rights reserved to the people under the ninth amendment,[178] the privileges and immunities clause of article IV,[179] and the penumbras of the first, third, fourth and fifth amendments.[180] Privacy protection has been extended to decisions concerning marital choice,[181] the ability to procreate,[182] contraceptive use by unmarried couples,[183] the right to possess pornography,[184] and abortion.[185]

Recently, however, in *Bowers v. Hardwick*,[186] the Supreme Court ruled that a Georgia statute criminalizing consensual sodomy did not violate the privacy rights of homosexuals. To arrive at this conclusion, the *Bowers* majority stringently distinguished the earlier privacy cases as limited to rights associated with family, marriage and procreation.[187] The Court then concluded that the right to engage in private, consensual oral or anal sex was unrelated to those family-oriented rights.

Bowers is a sad chapter in the history of class oppression.[188] More fundamentally, it is an example of the Supreme Court's combined refusal to adapt constitutional guarantees to new situations and unwillingness to broaden the ambit of privacy rights. Prior cases establishing the right of

175 *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 112 (1970); Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1117 (1977); Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 613 (1986).

176 *See* Wright, *supra* note 60, at 492. Judge Wright maintains that although the Burger Court has been reluctant to expressly overrule the Warren Court's landmark decisions, it has damaged those rights by smaller encroachments and failures of adaptation.

177 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

178 *See* Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

179 *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 200 (1973).

180 *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977).

181 Loving v. Virginia, 388 U.S. 1, 12 (1967).

182 Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

183 Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972).

184 Stanley v. Georgia, 394 U.S 557, 565 (1969). Although *Stanley* was technically decided on first amendment grounds, the privacy theme was recognized in later opinions. *See, e.g.*, United States v. Reidel, 402 U.S. 351, 356 (1971) (*Stanley*'s focus was "on freedom of mind and thought and on the privacy of one's home").

185 Roe v. Wade, 410 U.S. 113 (1973).

186 478 U.S. 186 (1986).

187 *Id.* at 189-92.

188 *See, e.g.*, Stoddard, Bowers v. Hardwick: *Precedent By Personal Predilection*, 54 U. CHI. L. REV. 648, 649 (1987) ("the Court's opinion in *Hardwick* rests upon nothing more substantial than the collective distaste of the five justices in the majority for the conduct under scrutiny").

unmarried persons to use contraceptives, to terminate pregnancies, and to possess pornography indicate that privacy rights extend to sexual intimacy and autonomy.[189] Consensual sexual conduct[190] falls squarely within the logic of prior decisions that expanded privacy rights beyond the borders of marital sexual relations.

Bowers uses consensus values as a touchstone for the scope of privacy rights.[191] In concurrence, Chief Justice Burger supported the Court's ruling that the sodomy statute was constitutional by reference to "millennia of moral teaching."[192] Thus, *Bowers* circumscribes the right to privacy by majoritarian opinion.

The *Bowers'* Court's concern for federalism far outweighs its interest in establishing a zone of personal inviolability. Writing for the majority, Justice White emphasized the constraints of federalism:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[193]

Bowers, narrow confinement of privacy rights is part of a trend to reduce the quantum of cognizable substantive rights. This latest step is consonant with the Court's limits on the rights of other less favored classes. In *Bell v. Wolfish*,[194] the Court approved body cavity searches of pretrial detainees on the basis of "legitimate" prison security interests.[195] In *O'Lone v. Estate of Shabazz*,[196] the Supreme Court held that a minimal "reasonableness" standard should be used to review the validity of prison regulations that curtail prisoners' free exercise rights.[197] Simi-

189 *See* Roe v. Wade, 410 U.S. at 153; Eisenstadt v. Baird, 405 U.S. at 453-54; Stanley v. Georgia, 394 U.S. at 568.

190 The Georgia statute did not distinguish between homosexual and heterosexual conduct. However, the *Bowers* Court explicitly confined its privacy analysis to the rights of homosexuals. Bowers v. Hardwick, 478 U.S. at 189-96.

191 *Id.* at 192 (Proscriptions against consensual sodomy "have ancient roots . . . . Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.").

192 *Id.* at 197 (Burger, J., concurring).

193 *Id.* at 194-95.

194 441 U.S. 520 (1979).

195 The opinion did not discuss suspicion, nor did it address whether the detainees could reasonably conceal contraband while they were wearing a one-piece jumpsuit. The Court cited a single instance of an inmate attempting a body cavity concealment, and reasoned that the search technique would be an effective deterrent. *Id.* at 559.

196 482 U.S. 342 (1987).

197 Prior to *Shabazz* appellate courts had employed heightened scrutiny standards to prisoner free exercise cases, depending upon the breadth of the regulations and the level of first amendment infringement. *See, e.g.*, Shabazz v. Barnauskas, 790 F.2d 1536, 1539 (11th Cir. 1986) (deciding that restrictions of free exercise rights must be no greater than necessary to protect government interests); Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985) (requiring a higher level of review for regulations resulting in an absolute deprivation of prisoners' first amendment rights). *See* Blischak, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 467-71 (1988) (discussing prior decisions' more lenient and adaptive standards).

larly, in *City of Cleburne v. Cleburne Living Center*,[198] the Court refused to expand the list of suspect classes for equal protection purposes to include the mentally retarded, despite substantial similarities between the retarded and other powerless classes who are afforded greater protection.[199]

This past Term, in *Kadrmas v. Dickinson Public Schools*,[200] the Court addressed an equal protection challenge to a North Dakota statute permitting certain school districts to assess a user fee for bus transportation. The appellant school child and her mother, whose family income was at or near the poverty line, refused to sign the busing contract, arranged for alternate transportation to school and began an action to enjoin the school district from collecting any fee for bus service. The United States Supreme Court held that although the child was poor and although the right involved was education, the user fee statute was constitutional.[201] The Court rejected Kadrmas' equal protection challenge in sweeping terms, holding that education is not a fundamental right and poverty is not a status deserving of strict scrutiny.[202]

The Court's holding that a school district can constitutionally deny access to transportation for an indigent child who lives sixteen miles from school seems fundamentally at odds with precedent attesting to the importance of equal educational opportunities.[203] Equally perplexing are the variety of less comprehensive alternative rulings rejected by the Court.[204] The Court's prior treatment of indigency-related equal protection challenges has exhibited a careful analysis of the effect of poverty on the particular right at issue.[205] Rather than conduct a perceptive examination of the interplay of the petitioner's indigent status and the right affected, the *Kadrmas* Court divides and conquers, rejecting education as a right not significant enough and indigency as a status not desperate enough to trigger any heightened form of scrutiny. Indeed, in its flat rejection of indigency as a suspect classification, the *Kadrmas* majority seemed determined to establish a bright-line test, perhaps to keep future impoverished plaintiffs from troubling the Court with factors that might call for more sensitive constitutional inquiry.

198 473 U.S. 432 (1985).

199 This analysis does not portend well for other politically powerless classes. *See* Reid, *Law, Politics and the Homeless*, 89 W. VA. L. REV. 115 (1986). *Cf.* Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). *See also* Lyng v. International Union, United Auto., Aerospace and Agricultural Implement Workers of Am., UAW, 108 S. Ct. 1184 (1988) (upholding against first amendment and equal protection challenges Food Stamp Act provisions denying food stamps to households of striking union workers).

200 108 S. Ct. 2481 (1988).

201 *Id.* at 2491.

202 *Id.* at 2487.

203 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

204 For example, the Court could have declined to reach the merits, since Kadrmas had arranged for alternative transportation to school.

205 *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971) (given the associational interests implicated by the marital relationship, Connecticut's divorce court fees and costs requirement constituted a denial of due process to indigents); Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956) (state law imposing a set fee for trial transcript was fair on its face, but "grossly discriminatory in its operation").

The borders of equal protection were narrowed in a different way in *McCleskey v. Kemp*.[206] In *McCleskey* the defendant challenged the constitutionality of the Georgia death penalty procedure on eighth and fourteenth amendment grounds. McCleskey, a black, was convicted and sentenced to death for killing a white police officer. In his petition for habeas relief, McCleskey submitted statistical studies establishing that defendants charged with killing whites were 4.3 times more likely to be sentenced to death than defendants charged with killing blacks.[207] McCleskey also maintained that black murderers are more likely to receive the death penalty than white murderers.

The Supreme Court rejected McCleskey's equal protection claims. The Court held that to establish an equal protection violation, the defendant must show either that a law is enacted by a state legislature "*because of* an anticipated racially discriminatory effect"[208] or is administered by the decisionmaker in his case with a discriminatory purpose.[209] Since the Georgia capital sentencing scheme was facially neutral and administered in McCleskey's case without intent to discriminate, McCleskey's proof of disparate impact alone was insufficient to establish an equal protection violation.

The majority acknowledged that in the past statistical proof of discriminatory intent has been accepted in employment discrimination and venire selection cases.[210] However, the Court distinguished those cases from capital sentencing cases on the basis of the greater number of variables relevant to the death penalty decision and on the sentencer's lack of ability to rebut or explain the statistical disparity.[211] The majority expressed concern that the opposite result would open the door to equal protection challenges by a whole host of unwelcome groups with a variety of possible complaints.[212]

206 481 U.S. 279 (1987).

207 These studies were conducted by Professor David Baldus and Dr. George Woodworth of the University of Iowa. The "Baldus study" was actually two studies that examined over 2000 murder cases in Georgia. *See* McCleskey v. Zant, 580 F. Supp. 338, 353 (N.D. Ga. 1984). These multiple regression studies took into consideration 230 variables that might otherwise explain sentence disparities. *Id.* at 361.

208 481 U.S. at 298 (emphasis in original).

209 *Id.* at 292.

210 *Id.* at 293-94.

211 *Id.* at 296. The majority ignored the controls in the Baldus study that discounted the effects of 230 other variables.

212 [T]he claim that [the] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups and even to gender. Similarly, . . . other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking.

Id. at 315-16 (footnotes omitted). The argument that troupes of plaintiffs with various physical characteristics will march to the courthouse is underwhelming. Social science data sufficient to establish a claim of disparate treatment is not easily created, as the development of the studies used in *McCleskey* attests. *See* McCleskey v. Zant, 580 F. Supp. 338, 354-73 (N.D. Ga. 1984).

The Court also circumscribed the eighth amendment inquiry by holding that McCleskey had not proven the Georgia sentencing procedure operated in an arbitrary or capricious manner, because he failed to demonstrate that other similarly situated defendants "did *not* receive the death penalty."[213] The Court relegated McCleskey's statistical proof to the realm of inconsequence by holding that his statistics showed "only a likelihood that a particular factor entered into some decisions."[214] Concluding its eighth amendment analysis by holding that the statistical disparities established in the Baldus study were not comparable to the systemic defects identified in prior death penalty decisions, the *McCleskey* majority observed that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."[215]

The great failing of *McCleskey* is its unwillingness to extend current equal protection analysis into an uncharted area. McCleskey met the requirements of a traditional equal protection claim. He demonstrated that he was a member of a group that had been singled out for substantially different treatment and the degree to which his sentence depended on racial factors.[216] The *McCleskey* Court, however, departed from established fourteenth amendment jurisprudence and created a standard of personal discriminatory intent for capital cases.[217] As Justice Blackmun observed in dissent, "the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause."[218]

Not only are the proof problems in establishing an equal protection violation by showing personal discriminatory intent virtually insurmountable, the standard is hopeless for achieving fourteenth amendment goals. The eradication of a history of class oppression requires the acceptance of measurement techniques capable of pinpointing the subtle effects of discrimination.[219]

The *McCleskey* Court's refusal to apply traditional equal protection analysis in a capital case on the spurious basis of an overabundance of variables[220] attests to the Court's fear of the "judicial analogue to the domino theory."[221] The Court's reluctance to open death penalty litigation to further constitutional challenges by other disadvantaged groups is a prime example of the fusion of two Court sentiments: fear of a profusion of litigation and aversion to elaborating the rights of a disfavored group.

213 481 U.S. at 307 (emphasis in original).
214 *Id.* at 308.
215 *Id.* at 312 (footnote omitted).
216 *Id.* at 353 (Blackmun, J., dissenting). Claims of discrimination as evidenced by statistics have long been accepted in other realms. *See, e.g.*, Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).
217 481 U.S. at 297.
218 481 U.S. at 348 (Blackmun, J., dissenting) (emphasis in original).
219 *See generally* Lawrence, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
220 The majority failed to acknowledge that the Baldus study specifically *controlled for* extraneous factors.
221 Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1409 (1988).

The combination of current Supreme Court conservatism and antipathy toward a large caseload is producing narrow interpretations of existing rights. This subtle activism has taken the form of a failure to expand current rights to situations that fall squarely within the logic of prior decisions. These flat refusals by the Supreme Court to vindicate minority rights and the hesitancy to enforce existing rights reduces the sheer number of rights suits with which the federal courts must grapple—it sets a ceiling on the rights available for use.

B. *The Reduction of Existing Rights*

In the realm of criminal procedure the Supreme Court has taken a markedly activist approach. This campaign has been targeted toward an expansion of governmental power and prerogative and a correlative reduction in individual interests and claims. As Justice Brennan capsulized, a majority of the Supreme Court appears to fear "too much justice."[222]

Perhaps the most sweeping of the recent criminal procedure decisions is *United States v. Salerno*.[223] In *Salerno* the Court upheld the preventive detention provision of the 1984 Bail Reform Act against facial due process and eighth amendment challenges. The specific portion of the Act at issue permits detention prior to trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community."[224] Salerno appealed his detention, arguing that pretrial detention based on a prediction of future dangerousness was unconstitutional.[225]

The Supreme Court stated that "there is nothing inherently unattainable about a prediction of future criminal conduct" and that the Bail Reform Act's procedural safeguards were intended to improve the judicial officer's proficiency at predicting dangerousness.[226] The Court further found that detention under the Act is a regulatory rather than a punitive measure, and that the conditions of pretrial detention are not excessive in relation to the state's interests in safeguarding the community.[227] In a strident dissent, Justice Marshall observed that the majority's analysis would permit Congress to characterize any pretrial punishment as "regulatory" and thus evade strict due process scrutiny.[228]

The Bail Reform Act's procedural requirements mandate full consideration of conditional release as an alternative to detention.[229] Moreover, the *Salerno* majority envisioned a "full-blown adversary hearing" in

222 McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).
223 107 S. Ct. 279 (1987).
224 18 U.S.C. § 3142(e) (Supp. IV 1986).
225 481 U.S. at 744-45.
226 107 S. Ct. at 2103-04 (quoting Schall v. Martin, 467 U.S. 253, 278 (1984)).
227 *Id.* at 2101.
228 *Id.* at 2108 (Marshall, J., dissenting). Justice Marshall also noted that *Salerno* was the first time the Court had upheld a "statute in which Congress declares that a person innocent of any crime may be jailed indefinitely." *Id.* at 2105-06.
229 18 U.S.C. § 3142 (Supp. IV 1986).

federal court for each contested detention application.[230] However, the assumption of procedural protection undergirding the *Salerno* opinion has not come to pass. Many courts are failing to explore the adequacy of detention alternatives.[231] Many more courts are failing to afford extensive detention hearings.[232]

The *Salerno* ruling approves a constitutionally abusive process. *Salerno* permits the detention of presumptively innocent citizens absent proof of dangerousness beyond a reasonable doubt. The procedural safeguards on which the *Salerno* Court rested its decision have not been forthcoming, since the evidentiary hearing, consideration of individual defendants' "dangerousness," and evaluation of alternatives to detention demands more time and attention than many federal district courts have.[233] Thus, the statutory authorization of preventive detention is being interpreted as a mandate for detention.[234]

But if *Salerno* calls for a commitment of court time and resources to the attention of criminal defendants' rights, how does it fit the overload pattern? Perhaps it is too uncharitable to view *Salerno* as a hoax. However, if district courts are overburdened, they may simply afford less procedural protection to those accused of crimes. *Salerno* also picks up the refrain of the second overload theme: When the Supreme Court must choose between a course that arrives at a rights-narrowing outcome and one which adds to the caseload strain, the Supreme Court will sacrifice judicial time in favor of rights-restriction. The Court's concern for the federal caseload yields to its desire to restrict substantive rights. This may signify that overload is a facile problem—a tool to reach a political outcome, rather than an end itself.

The collective impact of several other criminal procedure decisions is equally forceful. In *Maryland v. Garrison*,[235] the Supreme Court approved a search, even though the police searched the wrong apartment. Despite a clear violation of the warrant requirement,[236] the Court ruled that the officers had made a good faith mistake, and since their conduct

230 107 S. Ct. at 2103. This statement is disingenuous at best, coming from a majority that has repeatedly recognized the time constraints and caseload burdens of the lower federal courts.

231 Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 322 (1987).

232 *See, e.g.*, United States v. Friedman, 837 F.2d 48, 49-50 (2d Cir. 1988) (reversing district court order which contained only implicit findings relating to risk of flight); United States v. Jackson, 823 F.2d 4, 6 (2d Cir. 1987) ("[r]ather than making explicit findings of fact, however, the [district] court relied principally on the statutory presumption that no conditions can reasonably assure a defendant's presence at trial where the defendant is charged with a narcotics offense with a possible penalty of imprisonment for ten years or more"); United States v. Bell, 673 F. Supp. 1429 (E.D. Mich. 1987) ("there is nothing in the record to suggest that the government or defendant actually addressed the question of appropriate conditions of release").

233 *See, e.g.*, United States v. Spilotro, 786 F.2d 808, 815 (8th Cir. 1986) (permitting the district court to amend *sua sponte* at any time the conditions of release, because "requiring a remand of the case to the releasing judicial officer in order to amend conditions of release could waste limited judicial resources").

234 In United States v. Bess, 678 F. Supp. 929 (D.D.C. 1988), the district court affirmed the magistrate's *sua sponte* invocation of the statutory presumption of dangerousness for a crime with which the defendant had not been formally charged.

235 480 U.S. 79 (1987).

236 *Id.* at 90 (Blackmun, J., dissenting).

would not be deterrable by invoking the exclusionary rule, the evidence obtained was admissible.[237]

In fifth amendment jurisprudence, the Court similarly expanded the scope of permissible governmental action. In *Colorado v. Connelly*,[238] the Supreme Court ruled that a criminal defendant's confession is involuntary only if it was coerced by the government. Thus, confessions coerced by private individuals or compelled by mental illness are constitutionally admissible.[239] The *Connelly* Court stretched to decide the constitutional issues. As one commentator noted, "[t]he Court could have held simply that a suspect's own psyche cannot unconstitutionally 'compel' him to confess."[240] Instead, the Court held that only *police*-coerced confessions are involuntary. Justice Brennan drew the unavoidable conclusion: confessions "coerced by parties other than police officers are now considered 'voluntary.' "[241] The Court's antipathy toward the exclusionary rule is matched only by its lack of concern for the rights of criminal defendants.[242] *Connelly* finds a home for both of these biases.

The Court is whittling away at constitutional protection for criminal defendants. Examples abound of the High Court's active constriction of criminal defendants' rights. Of course, this is nothing new.[243] What distinguishes many of these recent decisions from their lineal predecessors is the transformative impact the new decisions will have on the caseload of the federal courts.[244] The sweep of recent cases will cordon off exten-

237 *Id.* at 84-89. *See also* Illinois v. Krull, 480 U.S. 340 (1987) (approving a good faith search pursuant to a statute later determined unconstitutional). *But see* Arizona v. Hicks, 480 U.S. 321 (1987) (holding police manipulation of an item to check for identification numbers not within the "plain view" exception to the fourth amendment).

238 479 U.S. 157 (1986).

239 The *Connelly* Court stated that the fifth amendment's "sole concern . . . is governmental coercion, . . . [not] 'moral and psychological pressures to confess emanating from sources other than official coercion.' " *Id.* at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)), and that "[t]he most outrageous behavior by a private party . . . does not make that evidence inadmissible." *Id.* at 166.

240 Survey, *Leading Cases—Constitutional Law—Criminal Law and Procedure*, 101 HARV. L. REV. 119, 185 (1987).

241 Colorado v. Connelly, 479 U.S. at 176 (Brennan, J., dissenting).

242 Criminal defendants have fared no better in fourth amendment jurisprudence. *See, e.g.*, California v. Greenwood, 108 S. Ct. 1625 (1988) (fourth amendment does not prohibit warrantless search and seizure of trash left for collection); O'Connor v. Ortega, 480 U.S. 709 (1987) (upholding a warrantless search of a government employee's office and desk under a reasonableness standard); United States v. Leon, 468 U.S. 897 (1984) (establishing a good faith exception to the fourth amendment warrant requirement); New York v. Quarles, 467 U.S. 649 (1984) (establishing a "public safety" exception to the fifth amendment *Miranda* warnings). *See contra* Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273 (1987) (maintaining that the decisions of the Rehnquist Court have been moderate, predictable expansions of Warren and Burger Court precedents). *Cf.* Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (holding that the aggravating circumstance of "heinous, atrocious and cruel" in Oklahoma's death penalty statute was unconstitutionally vague).

243 *See*, Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

244 Another distinguishing feature of the recent rights reduction decisions is the class implications of these cases. The Supreme Court seems to be creating new classes within the disfavored criminal defendant category by distinguishing between "good" criminal defendants—those who are closer to factual innocence—and "bad" criminal defendants—those who are either factually guilty or *legally* innocent, when the guilt/innocence distinction is absolutely irrelevant to the issue or right at hand. This distinction has crept into the areas of habeas review, jury instructions and search and seizure decisions. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 495 (1986) (emphasis added) (a federal court may grant habeas relief without a showing of cause for a procedural default "where a constitu-

sive sections of criminal jurisprudence and insulate these areas from post conviction challenge.

C. *Constricting Statutory Interpretation*

In addition to curtailing constitutional rights and failing to expand and adapt rights to the demands of new situations, the federal courts are limiting their caseload by narrowly interpreting statutes that confer positive rights. The scope of employment discrimination, habeas corpus, civil rights, and other remedial statutes are being pared down by recent federal decisions. This constricting interpretation takes many forms: strict adherence to procedural dictates,[245] reduction in suable entities,[246] foreclosure of available remedies,[247] and adoption of interpretations that will lead to reduced limitation periods,[248] to name but a few.

An increasing chokehold is being applied to the civil rights statutes, the primary devices for constitutional attack on abusive government action. In addition to increasing the possibilities for wholesale preemption of the section 1983 cause of action,[249] recent Supreme Court decisions have reduced government entity liability by restrictively interpreting the contours of supervisor liability[250] and by conferring greater immunities.[251] In addition, the Court has reduced the ambit of the compensable constitutional tort.[252] An undesirable motivating factor behind the con-

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tional violation has probably resulted in the conviction of one who is *actually* innocent."). *See also* O'Neill, *The Good, the Bad and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 383 (1984).

245 *See, e.g.*, Florida v. Long, 108 S. Ct. 2354 (1988) (restrictively interpreting the notice value of prior precedents to avoid a far reaching imposition of retroactive liability under Title VII).

246 *See infra* notes 254-260.

247 *See supra* notes 62-81 and accompanying text.

248 *See, e.g.*, McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988) (holding that the Age Discrimination in Employment Act's stringent definition of "willfulness" in its liquidated damages provision must be met under the Fair Labor Standards Act (FLSA) for the three year limitations period for "willful" violations of the FLSA's overtime and record keeping provisions to apply).

249 *See supra* notes 62-67 and accompanying text.

250 See the progression from City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (plaintiff must prove an "affirmative link between the [municipality's] policy and the particular constitutional violation alleged" to establish municipal liability), to Pembaur v. City of Cincinnati, 475 U.S. 469 (1985) (plaintiff must sue the municipal policymaker with final responsibility for establishing the policy in question), to City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988) (supervisor who terminated employee did not possess the final policymaking authority), representing the ever expanding avenues for municipalities to escape liability for § 1983 purposes. *Praprotnik* confirms the fears that municipalities would be permitted to engage in an "endless renvoi," Saye v. St. Vrain Valley School Dist., 650 F. Supp. 716, 719 (D. Colo. 1986), in which one official possesses the titular power to terminate employees, while another official actually exercises the power, and both successfully deny liability on the grounds that they lack, "respectively, the responsibility and the authority for the firing decision." Young v. Sedgwick County, 660 F. Supp. 918, 925 (D. Kan. 1987).

251 The boundaries of good faith immunity were extended to encompass warrantless searches by law enforcement officials. Anderson v. Creighton, 107 S. Ct. 3034 (1987). Moreover, the test of official good faith immunity was transformed from a subjective, *see* Wood v. Strickland, 420 U.S. 308, 322 (1975), to an objective one, *see* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982), which has reduced the need for inquiry into the intent of the actor and correlatively has increased the number of cases which may be disposed of by motion practice.

252 *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (the due process clause is not implicated by negligent acts of state officials which cause loss or injury); Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (damages based on the abstract value of a constitutional right are not a permissible element of compensatory relief in § 1983 suits). *See generally* Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*

striction of section 1983 is the perceived burden of civil rights suits on the federal court docket.[253]

The Supreme Court has accepted certiorari on two cases that have the potential to delete vast areas of civil rights litigation. In *Will v. Michigan Department of State Police*,[254] the Court agreed to consider whether a state and its officers are "persons" subject to suit under section 1983. The lower court decision in *Will* determined that states and state officials sued in their official capacity were not "persons" within the meaning of the statute.[255] *Will* possesses the potential to cripple section 1983 by eliminating the major defendant in many civil rights suits.

A second threat on the horizon is *Patterson v. McLean Credit Union*,[256] in which the Supreme Court announced that it will reconsider its twelve-year old holding in *Runyon v. McCrary*[257] that minorities may sue private parties for discrimination under section 1981. In 1968 the Supreme Court determined that section 1982, the companion provision to section 1981, forbids private discrimination in the rental and sale of property.[258] In *Runyon* the Court relied on the firm historical relationship between section 1981 and 1982, and concluded that it was "now *well-established* that . . . § 1981 prohibits racial discrimination in the making and enforcement of private contracts."[259]

There is a tremendous amount at stake in *Patterson*. Many of the rights protected by the *Runyon* interpretation of section 1981 are not redressable via Title VII. Because of its state action requirement, section 1983 is equally unavailable to remedy private discrimination. If *Runyon* is overruled, the Court would be playing fast and loose with stare decisis.[260] Even if *Runyon* is not overruled, it is conceivable that *Patterson*

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55 FORDHAM L. REV. 1 (1986). *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 25 (1980) ("the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights").

253 *See* Lumbert v. Illinois Dep't of Corrections, 827 F.2d 257, 259 (7th Cir. 1987) (upholding dismissal of a prisoner's petition for failure to pay partial filing fee of $7.20 and noting that the plaintiff "ha[d] filed more than thirty lawsuits, all as an inmate, since 1980"). *See also* Vail v. Board of Educ., 706 F.2d 1435, 1456 (7th Cir. 1983) (Posner, J., dissenting) (dissent from the majority's view that a terminated athletic director who had a state employment promise was deprived of due process, deploring "the displacement of the whole of state law into the federal courts" and stating "[w]e are witnessing the trivialization of the Constitution").

254 108 S. Ct. 1466 (1988).

255 Smith v. Department of Pub. Health, 428 Mich. 540, 410 N.W. 2d 749 (1987), *cert. granted sub nom.* Will v. Michigan Dep't of State Police, 108 S. Ct. 1466 (1988).

256 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 1419 (1988).

257 427 U.S. 160 (1976). Indeed, the plaintiff petitioned the Court for a writ of certiorari on the question: "Does 42 U.S.C. § 1981 encompass a claim of racial discriminations . . . including a claim that petitioner was harassed because of her race?" The Court, sua sponte, requested the parties to brief and argue "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?" Patterson v. McClean, 108 S. Ct. at 1420 (citations omitted).

258 Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

259 427 U.S. at 168 (emphasis added) (footnote omitted).

260 Only an institutional compulsion of the highest order could justify the betrayal and disillusionment that reversal would inevitably engender in the victims of racial prejudice. It would take a special form of hubris for a justice of the Supreme Court to be so certain that his or her reading of a 120 year old legal fiction was so much better than the contrary reading of seven conscientious colleagues in 1976; so much better than the consistent reading of the contemporary Congress; and so much better than the passionately held reading

could become a stare decisis decision which encourages adherence to past precedent in statutory, but not constitutional, cases. Moreover, the Court will be depriving minorities of a cause of action essential to unearthing entrenched discrimination.

The Supreme Court also has curtailed federal jurisdiction in the area of habeas corpus at an increasingly rapid rate. Habeas corpus has long been the disfavored stepchild of federal review. Federal habeas review for state petitioners implicates the proper allocation of responsibility between state and federal courts and is perceived as an unwarranted burden on the federal judiciary.[261] Recent Supreme Court decisions not only have openly acknowledged the perceived burden of federal habeas petitions, but gradually have incorporated the notion that habeas is an encumbrance into the rationales for the theories that restrict the availability of habeas review.[262]

While habeas has long had its detractors,[263] the recent reduction of federal review of habeas petitions is occurring at a dramatic pace. During the 1970's the Supreme Court issued a series of decisions[264] which held that a habeas petition could present issues not raised at trial only if the petitioner established good cause for the procedural default and prejudice from the inability to raise the issues on habeas. The Court also ruled that fourth amendment claims could not be relitigated in a habeas petition if there were a full and fair opportunity to present those claims in state court.[265]

In the past few years the process of eroding habeas protection has accelerated. In 1982 the Supreme Court applied the procedural default rules to federal prisoners petitioning for habeas relief.[266] The same year,

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of at least four current colleagues to justify overruling a generous construction of a legislative ban on the scourge of our racial prejudice.

Neuborne, *The Run on* Runyon: *Will Stare Decisis Become Bankrupt?*, 10 Legal Times May 19, 1988, at 16.

261 Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130 (1986); Pagano, *Federal Habeas Corpus for State Prisoners: Present and Future*, 49 ALB. L. REV. 1 (1984); Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983).

262 *See, e.g.*, Smith v. Murray, 477 U.S. 527, 539 (1986) ("[P]rofound societal costs that attend the exercise of habeas jurisdiction" justify the enforcement of procedural default rules).

263 *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (maintaining that trial and sentencing errors can never be completely eradicated and that attempts to achieve perfect justice through habeas review are cost-ineffective); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing that habeas review should be restricted to cases in which the petitioner makes a showing of factual innocence); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?* 21 DE PAUL L. REV. 740 (1972) (advancing a variety of proposals to limit habeas corpus).

264 *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). The Warren Court had refused to use procedural defaults as bars to habeas litigation, *see* Fay v. Noia, 372 U.S. 391, 421-22 (1963), out of a distrust for state procedural protection of criminal defendants. The Burger Court's habeas cases took a very different view of the need for deference to state proceedings. *See, e.g.*, Wainwright v. Sykes, 433 U.S. at 90.

265 Stone v. Powell, 428 U.S. 465 (1976). *See generally* Robbins & Sanders, *Judicial Integrity, the Appearance of Justice and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One* Stone, 15 AM. CRIM. L. REV. 63 (1977).

266 United States v. Frady, 456 U.S. 152 (1982). The rationale was somewhat altered. No longer was the concern for comity paramount, *see supra* text accompanying note 261, but the focus was on

in *Engle v. Isaac*,[267] the Court drastically narrowed the cause and prejudice test for state procedural defaults. In *Engle* the Court held that even if a constitutional claim were not something of which counsel should have been apprised given the current state of the law, "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial."[268] The Court also narrowed the availability of habeas relief in other ways. In *Rose v. Lundy*,[269] the Court required the dismissal of any habeas petition containing unexhausted as well as exhausted claims.[270] And the Court developed a deferential standard of review for state court findings of fact.[271] Recent decisions have expanded the category of questions characterized as issues of fact, thus reducing the range of issues open for independent redetermination on habeas review.[272]

During the 1985-86 term in the companion cases of *Murray v. Carrier*[273] and *Smith v. Murray*,[274] the Court sharply restricted habeas review of claims involving procedural defaults. In *Carrier*, the Court ruled that attorney inadvertence or ignorance would not suffice for cause, unless it rose to the level of ineffective assistance.[275] While *Smith* involved a relatively simple application of the test of cause developed in *Engle* and *Carrier*,[276] the Court employed language that may foreshadow an additional hurdle for procedural default claims. The *Smith* court ruled that the failure to object to trial errors precludes litigation of the error on habeas

emphasizing the finality of criminal judgments and avoiding "a long series of collateral attacks." *Frady*, 456 U.S. at 157.

267 456 U.S. 107 (1982). *See generally* Levit, *The Burger Court and Federal Review for State Habeas Petitioners After* Engle v. Isaac, 31 U. KAN. L. REV. 605 (1983).

268 456 U.S. at 130. While the Court acknowledged two years later that a constitutional claim may be "so novel that its legal basis is not reasonably available to counsel," Reed v. Ross, 468 U.S. 1,16 (1984), this exception to the *Engle* cause and prejudice formulation is narrow. *See* Amadeo v. Zant, 108 S. Ct. 1771 (1988) (holding that a concealed memorandum from the district attorney's office which was designed to result in the underrepresentation of blacks and women on juries satisfied the cause and prejudice test).

269 455 U.S. 509 (1982).

270 While *Rose* was an attempt to force a more economical packaging of habeas petitions, the decision necessarily injects delay into habeas proceedings by requiring exhaustion of unexhausted claims. *Id.* at 525-28 (Blackmun, J., concurring) (the majority's decision will actually "increase rather than alleviate the caseload burdens on both state and federal courts."). *Id.* at 522.

271 Sumner v. Mata, 455 U.S. 591 (1982) (state court factual conclusions must be presumed correct).

272 *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1036-37 (1984) (determinations regarding "partiality" of jurors is a question of primary fact which must be afforded a presumption of correctness); Harris v. Pulley, 852 F.2d 1546, 1557 (9th Cir. 1988) (state trial court's factual findings regarding the prejudicial effect of pretrial publicity are presumed correct on habeas review); Brooks v. Kincheloe, 848 F.2d 940, 944 (9th Cir. 1988) (merits of dispute concerning witness' status as a government informant were factual); Flugence v. Butler, 848 F.2d 77, 79 (5th Cir. 1988) (medical inquiry into defendant's competence is factfinding, which is presumed to be correct); Meeks v. Cabana, 845 F.2d 1319, 1322-23 (5th Cir. 1988) (state court findings as to testimony regarding witness credibility are entitled to a presumption of correctness); Ballard v. Johnson, 821 F.2d 568, 571 (11th Cir. 1987) (presumption of correctness afforded to state court finding that petitioner effectively waived *Miranda* protections).

273 477 U.S. 478 (1986).

274 477 U.S. 527 (1986).

275 477 U.S. at 485-88.

276 On appeal, Smith's counsel failed to raise the issue of improper admission of psychiatric testimony. 477 U.S. at 531.

absent a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."[277]

The danger lurking in the articulation of the *Smith* standard is evidenced by a concurring opinion in a case decided the same day as *Smith*. In *Kuhlmann v. Wilson*,[278] the concurrence of four justices concluded that " 'the ends of justice' require federal courts to entertain such petitions *only* where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[279] Moreover, in *Carrier* the Court provides an innocence exception for cases of procedural default,[280] which is the first time the innocence inquiry has been injected into a prevailing habeas test. The *Carrier-Smith-Kuhlmann* recognition of innocence as a cognizable habeas issue may evolve into a standard that requires a procedurally defaulting habeas petitioner to prove factual innocence. And there is no fundamental philosophical constraint to prevent a factual innocence standard, once developed, from being universally applied to habeas petitions, not just to those petitioners committing procedural defaults.

This capsule of habeas history indicates the increasing rapidity with which the Court is tossing procedural roadblocks in the path of habeas petitioners. More importantly though, the collateral review cases in recent terms manifest a different concern and focus than past habeas decisions.[281] The Supreme Court repeatedly justifies its habeas rulings by emphasizing the problem of the federal caseload.[282] The fundamental purpose of habeas review is to preclude the detention of persons held "in custody in violation of the Constitution or laws or treaties of the United States."[283] Instead of concentrating on analyzing constitutional issues

277 *Id.* at 539.

278 477 U.S. 436 (1986).

279 *Id.* at 454 (emphasis added).

280 477 U.S. 478, 496 (1986) ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

281 The underlying presumption of habeas is that the fundamental right to liberty protected by the habeas process warrants the fail-safe mechanism of a federal court reevaluating the merits of federal constitutional claims. *See generally* Brown v. Allen, 344 U.S. 443 (1953). However, Justice Jackson's concurrence in *Brown* has proven prophetic: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Id.* at 537 (Jackson, J., concurring). *See also* Rose v. Lundy, 455 U.S. 509, 547 (1982) (Stevens, J., dissenting) (The sheer volume of habeas cases "has led this Court into the business of creating special procedural rules for dealing with this flood of litigation.").

Two pending cases offer the Court the opportunity to directly limit the number of successive habeas petitions. In Dugger v. Adams, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988), and Zant v. Moore, 824 F.2d 847 (11th Cir. 1987), *cert. granted*, 108 S. Ct. 1467 (1988), the government is claiming an "abuse" of the writ stemming from its repeated use.

282 *See, e.g.*, *Carrier*, 477 U.S. at 487-88 (observing that federal district courts do not have the time to hold evidentiary hearings to ascertain the real cause of procedural defaults). In actuality, the number of habeas petitions as a portion of the federal courts' dockets has remained constant, while the number of prisoners has more than doubled. "So we have two-and-one-half times the number of prisoners, filing approximately the same number of petitions." Robbins, *Whither (or Wither) Habeas Corpus? Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 267 (1986).

283 28 U.S.C. § 2254(a) (1982). *See also* Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690-91 (1982), in which Professor Peller convincingly argues that statutory history, language, and the demands of justice require federal habeas review for all constitutional claims.

affecting life and liberty, the Supreme Court illegitimately has become concerned with the institutional structuring of the habeas review process.

IV. Deceptive Appearances Decisions

The jurisdiction tinkering theory discussed above is not all encompassing. No single theory, however unifying, can explain the entirety of decisions emanating from the Supreme Court or lower federal courts. However, many more cases fit the pattern than might first appear. Indeed, a number of decisions which at first glance might appear to beckon disadvantaged plaintiffs into federal court are, in actuality, illusory. Not only are some of these seemingly liberal decisions not welcoming, not jurisdiction expanding, and not rights creating, they are actually hostile to the underprivileged and powerless, and contain within them the seeds of future destructive jurisprudence.[284]

Several examples will illustrate the point. In *Satterwhite v. Texas*,[285] the defendant was charged with the capital crime of murder during the commission of a robbery. The district attorney requested a psychiatric evaluation of Satterwhite's competency to stand trial. Defense counsel was not served with a copy of the motion requesting evaluation. During his sentencing proceeding, the State introduced the testimony of the examining psychiatrist that Satterwhite presented a threat to society. A majority of the Court concluded that the use of the psychiatric testimony at the capital sentencing proceeding violated the sixth amendment because of the lack of notice to counsel.[286]

The majority then questioned whether the sixth amendment violation could be considered harmless error.[287] Although the majority concluded that the admission of the psychiatric testimony under the circumstances of Satterwhite's case was not harmless, the dissent focused succinctly on the true danger of the *Satterwhite* ruling: "Until today's ruling, this Court never had applied harmless-error analysis to constitutional violations that taint the sentencing phase of a capital trial."[288]

With its sixth amendment violation holding, *Satterwhite* appears to arrive at a result favorable to a capital defendant. In actuality, *Satterwhite* is an insidiously dangerous decision for *all* defendants who have errors that affect the sentencing phase of their capital trials. By importing a harmless error standard into the sentencing phase of capital trials, the

284 If this pattern of judicial decision making were viewed in political theory terms, it might appear to resemble Herbert Marcuse's notion of repressive tolerance. *See* Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE 81 (1965) ("What is proclaimed and practiced as tolerance today is in many of its most effective manifestations serving the cause of oppression."). Actually, the vast expansions of individual rights brought about during the Warren Court years are *more* repressively tolerant, in the true sense of the theory, than the decisions of the Burger and Rehnquist Courts, which are simply repressive, and not tolerant.

285 108 S. Ct. 1792 (1988).

286 *Id.* at 1797.

287 *Id.* at 1797-99. While the Court recognized that sixth amendment violations that pervade an entire proceeding cannot be harmless error, *id.* (citing Holloway v. Arkansas, 435 U.S. 475 (1978)), it pointed to various errors in noncapital cases and an error in a capital case, Gilbert v. California, 388 U.S. 263 (1967) (admission of lineup identification testimony obtained in violation of right to counsel), that have been judged by the harmless error standard.

288 *Id.* at 1800 (Marshall, J., dissenting).

Supreme Court has created a vehicle to effectively shut down a wide range of constitutional challenges to capital sentencing proceedings.[289] A similar sleight of hand was practiced in the crafting of *Thompson v. Oklahoma*.[290] In *Thompson* the Court considered whether a defendant could be executed for a murder in which he participated at the age of 15. Justice Stevens, writing for himself and Justices Brennan, Marshall, and Blackmun, concluded that execution of persons under 16 violated the eighth amendment's " 'evolving standards of decency.' "[291] In a concurrence, Justice O'Connor provided the essential fifth vote to reverse the death sentence. However, the basis for Justice O'Connor's decision was that the Oklahoma Legislature did not explicitly permit capital punishment for persons under the age of 16.[292]

While Justice O'Connor acknowledged that a large majority of state legislatures have outlawed the death penalty for 15-year-olds and that "strong counterevidence would be required to persuade" her that a national consensus does not exist,[293] Justice O'Connor leaves room for future state legislatures to set a statutory minimum age.[294] More importantly, she delineates precisely the sort of statistical and legislative history evidence that would compel her to join the four dissenting justices and uphold a state statute imposing the death penalty on juveniles.[295] Indeed, in the absence of proof of societal consensus, proof which she recognizes is unavailable,[296] Justice O'Connor appears to defer to state legislatures that clearly indicate a desire to permit juveniles to be death-eligible.[297]

Death penalty opponents are running out of arguments. Following the *Furman-Gregg*[298] restructuring of capital statutes, capital defendants advanced several new waves of innovative constitutional challenges.[299] The latest spate of Supreme Court decisions, including *Thompson*, *Satter-*

289 In arriving at this decision, the Court may be creating far *more* work for itself and the federal district and appellate courts, because harmless error analysis necessitates factual inquiry. This indicates that when the goals of caseload reduction and merits adjudication against disfavored groups compete, the Court may be more concerned with the results than the process.

290 108 S. Ct. 2687 (1988).

291 *Id.* at 2691 (quoting Trop v. Dulles, 356 U.S. 86 (1958)).

292 *Id.* at 2711 (O'Connor, J., concurring).

293 *Id.* at 2706-07.

294 *Id.* at 2711 ("[T]he approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.").

295 *Id.* at 2708-11.

296 *Id.* at 2706-07.

297 Thus, the ruling in *Thompson* should not be greeted as a victory for death penalty abolitionists. Not only does *Thompson* leave explicitly unresolved the larger question of whether the imposition of the death penalty on juveniles comports with current eighth amendment jurisprudence, Justice O'Connor's concurrence, with its brief writing and legislation drafting guidance, steers capital litigation down a path that could easily arrive at a 5-4 decision upholding state legislation, as long as that indicates a clear intent to permit the application of the death penalty to juveniles.

298 Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

299 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987), *discussed supra* notes 206-21 and accompanying text; Lockhart v. McCree, 476 U.S. 162 (1986) (rejecting the contention that death-qualified juries are more conviction prone); Pulley v. Harris, 465 U.S. 37 (1984) (state proportionality review is not required by the eighth amendment).

white, and *Tison v. Arizona*,[300] is narrowing the range of litigable issues in capital cases. Even decisions such as *Thompson*, which at first blush appear to provide a greater quantum of rights to capital defendants, are actually rights constricting. Consequently, the death penalty is becoming a more easily attainable method of punishment, and constitutional challenges in capital cases are increasingly easy to dispatch. The hoped-for effect is fewer capital cases in the federal court system.[301]

The pattern of promising but dangerous decisions is playing out in noncapital cases as well. For example, in *Webster v. Doe*,[302] a discharged employee sued the Director of the Central Intelligence Agency, claiming he was dismissed because of his homosexuality. The Supreme Court's specific holding that judicial review of constitutional claims is not precluded by section 701(a)(2) of the Administrative Procedures Act (APA)[303] is far overshadowed by the broad ruling that congressional intent precludes judicial review of individual employment decisions under the APA.[304] Moreover, the reviewability of the constitutional claims exception is illusory, at least in Doe's case. Since *Bowers v. Hardwick*[305] makes clear that homosexual conduct is punishable under criminal laws, it is extraordinarily doubtful that Doe's status as a homosexual would provide the basis for a constitutional claim.

The difficulty with decisions that appear to open the courthouse doors is that litigants may be misguided. While *Satterwhite*, for example, seems to invite challenges to the types of evidence introduced in the sentencing phase of a capital trial, it portends the expansion of the harmless error standard into a wide range of outcome-determinative evidentiary issues. The deceptive appearances decisions are perhaps more dangerous for their appearances than for their individual deceptions, since they invite greater use of access and rights constricting theories.

V. The Substantive Effects of Jurisdictional Manipulation

The link between the caseload burden felt by federal judges and their views on substantive constitutional rights and jurisdictional theories is becoming apparent. Some of the caseload-concern decisions involve purely procedural adjustments made solely to lessen the input of judicial resources,[306] adjustments which do not tinker with jurisdictional doctrines and in no way affect substantive rights. These decisions are either benign or helpful and they are not subject to the same critiques as juris-

300 481 U.S. 137 (1987) (holding that a state statute permitting imposition of the death penalty on a person who did not kill, attempt to kill or intend a killing is constitutional).

301 The Court has moved from handling broad systemic challenges to capital punishment statutes to a more narrow error-based pattern of review. There are even indications the Court is tiring of its appellate review function. *See, e.g.*, Franklin v. Lynaugh, 108 S. Ct. 2320, 2330 (1988) (A four-justice plurality rejected petitioner's argument that the jury instructions failed to permit the jury to consider the full range of mitigating circumstances and held that the state's treatment of mitigating evidence had been upheld in 1976 and should not be examined further by the Court.).

302 108 S. Ct. 2047 (1988).

303 5 U.S.C. § 701(a)(2) (1982 & Supp. IV 1986).

304 108 S. Ct. at 2053.

305 478 U.S. 186 (1986), *discussed supra* notes 186-93 and accompanying text.

306 See *supra* note 34 for a mention of the ameliorative impact of Dunton v. County of Suffolk, 748 F.2d 69 (2d Cir. 1984).

diction altering decisions. However, when docket concerns have an impact on the formation of jurisdictional doctrines, this creeping pragmatism has a number of institutional and substantive effects.

A. *The Menace of the "Least Dangerous Branch"*

Most importantly, the judiciary is treading in legislative territory.[307] The case overload problem is seemingly structural—too many cases and too few courts, judgeships or resources to process them. If the problem is one of architecture, institutional reforms should be the province of the legislature. Federal courts which import caseload analysis into their jurisdictional theories to effect structural changes are engaging in the systematic displacement of the legislative prerogative.[308] Separation of powers was intended as an institutional constraint to prevent judicial domination. Individual judges are basing institutional decisions on their own views of the respective roles of federal and state courts and of legislative intent. Not surprisingly, this leads to unpredictable and inconsistent usage of legislative intent.

The institutional facet of the problem has additional ramifications. By historical example,[309] the deference to state courts will lead to a decrease in the uniformity of decisions. Indeed, substantive constitutional rights may vary directly with geography. Additionally, the question of institutional competence surfaces. The overall quality of state, as opposed to federal, decisions has long been a matter of debate.[310] Numerous commentators argue persuasively that federal judges possess the

307 *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980) (discussing congressional and judicial authority to control the jurisdiction of article III courts).

308 Indeed, Professor Martin Redish argues that judge-made abstention creates a "considerably greater risk of judicial usurpation" than active judicial lawmaking because there is little the legislature can do to combat inactivity. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114 (1984).

309 Following Roe v. Wade, 410 U.S. 113 (1973), which left open the possibility of state regulation of abortion in the last two trimesters of pregnancy, courts have handled a spate of varying state statutes concerning notice, funding, information and other procedures. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down a Pennsylvania statute requiring doctors to report the names of women seeking abortion to the state and requiring women desiring abortions to be exposed to medically unnecessary information); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (holding unconstitutional a municipal ordinance requiring parental consent for minors obtaining abortions and imposing a 24 hour waiting period); H. L. v. Matheson, 450 U.S. 398 (1981) (upholding a Utah statute requiring physicians to notify the parents or guardians of unemancipated minors before performing an abortion). *Compare* Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (holding unconstitutional a parental notification provision which failed to provide a judicial bypass alternative, but upholding a 48 hour waiting period) *with* Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) (striking down a judicial bypass procedure that entailed particular pleading and notice requirements that could span up to 22 days). *See also* Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1157-58 (E.D.N.C. 1974) (discussing the state's regulation of abortion procedures, the court noted: "That the state is ordinarily willing to leave such matters to the professional judgment of the attending physician strongly suggests that the program for regulating abortion clinics is a thinly disguised effort to evade *Roe* and *Doe*.").

310 *See* Neuborne, *supra* note 106, at 1118-30.

institutional independence, as well as the familiarity and expertise, to more effectively vindicate unpopular federal rights.[311]

Even if the historical presumption that federal courts are less biased or more skilled does not hold true—particularly given the current federal appointments—the point is that litigants are being denied constitutionally[312] and congressionally[313] mandated access to a federal forum. Federal courts have a constitutional obligation to exercise jurisdiction, rather than chip away at it.[314]

For those cases that are not shuttled back to state courts, the *selective* consideration of overload interferes with principled decision-making. This will lead to a similar sort of entropy on the federal level: blurring the boundaries of already imprecise jurisdictional doctrines. Moreover, the combination of selective activism[315] and restraint[316] looks increasingly less like judging and more like politics.[317] Political predilections of individual judges are determing the scope of article III jurisdiction. Since the current political leaning of a majority of federal court judges is conservative, doctrines of judicial restraint are becoming mere conduits for the implementation of conservative value adjudication.

B. *Deconstructing Administrability*

Even if administrative efficiency was not being used as an excuse for targeted constitutional adjustments, administrability itself may be a ruse. The liberal-conservative battle regarding court access has played out over the years with liberals maintaining that current doctrines of justiciability and jurisdiction hurt underprivileged and marginal groups. Conservatives responded that this position was value-laden, and therefore not good legal argument. Conservatives, and now many law and economics adherents, called for neutral principles of adjudication,[318] one of which is the efficient administration of the federal caseload.

311 *See* Weinberg, *supra* note 115, at 1241 ("The presumption that state courts will vindicate every constitutional right breaks down, and has always broken down, when the question is the race question. That is why Congress struck the balance in favor of providing the option of a federal forum in section 1983."); Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 330 (1976) (federal judges possess greater technical competence to interpret federal statutes than state judges). *But see* Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1070 (1982) (maintaining that there is an absence of evidence that state judges are insensitive to federal constitutional claims). *See generally* Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

312 U.S. CONST. art. III, § 1.

313 28 U.S.C. § 1331 (1982).

314 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 375 (1821). *See also* Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

315 The reluctance to adhere to precedent is evident in the *Patterson* call for a reconsideration of the decade old *Runyon* decision. *See supra* notes 256-60 and accompanying text.

316 *See supra* notes 175-221 and accompanying text.

317 *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.").

318 *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-20 (1959) (adjudication must be made on the basis of neutral principles that transcend immediately desired results); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-19 (1971)

However, this "neutral" concept of administrability is loaded with a series of assumptions that are pro-elitist and anti-civil rights. A primary ideological assumption of administrative efficiency is that the court system should handle only a few good cases.[319] This notion disenfranchises not just a large number of litigants, but large numbers of certain classes of litigants.

Access to federal courts is being limited at a far more rapid pace for certain types of plaintiffs and defendants.[320] However, the latest round of jurisdictional triage targets more than the usual suspects: civil rights litigants, habeas petitioners and public interest litigants. More broadly, the curtailment of federal jurisdiction works against the disadvantaged and powerless classes,[321] those who cannot afford a better attorney,[322] the have-nots as opposed to the haves.[323] The impact of recent jurisdictional and substantive narrowing certainly falls more heavily on civil rights and habeas litigants. However, the recent jurisdictional theories are more fundamentally inhospitable to the economically weaker side in almost any federal court suit. Even the "purely procedural" remodeling contains less-than-subtle repressive biases.[324]

The second underlying assumption of administrative efficiency is that administrability should be a paramount value; that it is a value which is on par with or surpasses[325] the worth of any substantive right, the meaning of which can only come through interpretation. Because of this unexplicit and predetermined weighting process, the jurisdiction-tinkering decisions are failures in judicial craft and analysis. Even if separation of powers were not a concern, courts are engaging in what should be complicated cost-benefit analysis, weighing overload as an institutional cost. However, many courts are oversimplifying the calculus by failing to engage in a rights-balancing process: the courts consider only one half of the equation. Overload has become the determinative issue, rather than one of a number of factors. Indeed, it is highly questionable that the sheer number of cases in federal court should even be a consideration in determining constitutional issues.

Finally, and perhaps most dangerous of all is the notion that administrability is apolitical. Indeed, the hidden aspects of administrative efficiency are unexpressed and reformulated class choices. This seem-

(supporting neutral principles concept). *But see* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664 (1960) ("Adherence to neutral principles, in the sense of principles which do not refer to value choices, is impossible in the constitutional adjudicative process.").

319 *See supra* notes 19-20 and accompanying text. This could be seen as a Posnerian analog to the Marine recruit theme of desiring "a few good men."

320 In 1977, Professor Louise Weinberg documented the federal court barriers that were being created to disadvantage public interest litigants. Weinberg, *supra* note 115, at 1192. *See also* Weinberg, *The New Judicial Federalism: Where Are We Now*, 19 GA. L. REV. 1075 (1985).

321 *See supra* notes 73-80 and accompanying text.

322 The sophistication and technical expertise in matters of federal jurisdiction demanded by the recent onslaught of jurisdiction-narrowing decisions may be available only at a large law firm, which has the personnel, resources and time to devote to the crafting of complicated arguments.

323 *See supra* note 59.

324 *See supra* notes 36-61 and accompanying text.

325 Perhaps because of its "neutral" content?

ingly neutral value of efficiency, which is being used to justify institutional changes, is not without its class and political implications. This is not to say that politics has no place in judging, just that political assumptions must be made express and the premises upon which "neutral" principles of adjudication rest must be examined.

C. *A Ratchet Theory of Jurisdiction*

Political monasticism probably is not attainable for the judiciary. It is not even desirable. The notion that there can or should be pure merits adjudication is false to the basic structure of civil rights litigation, which is a process that seeks structural, procedural and, on occasion, political reforms as well as fact adjudication. However, the use of an overabundance of cases as a doctrinal justification for *closure* of court access runs afoul of constitutional commands. Even though there may be an increase in the volume of federal litigation, the use of caseload concerns to restrictively alter jurisdictional theories is illegitimate because of the purposes of article III.

The alteration of jurisdictional theories based on the caseload crisis is an unwarranted use of substantive law to serve procedure. Procedure should serve substance in constitutional litigation. When in doubt, judges should adopt rules that make it easier for litigants attempting to vindicate constitutional rights to be in federal court.[326]

It may seem inequitable and downright unsportsmanlike to posit that civil rights and public interest law litigants may call for systemic reforms that widen court access while law and economics adherents are not permitted to request structural changes to reduce access to the federal courts. However, this "ratchet" theory of jurisdiction[327] finds support in several Supreme Court decisions[328] and in the structure of the federal system.[329]

The judicial parallel to the congressional one-way revolving door for constitutional rights was noted by Justice Stevens: "the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[330] Applying the ratchet theory of rights to jurisdictional analysis makes sense, at least within the caseload context. A

326 This view is diametrically opposed to the proposals addressed by Judge Posner, *see supra* note 18, which operate to shift the presumption so as to disfavor federal vindication of constitutional claims.

327 The "ratchet" phrase apparently was first employed by Professor Cohen in his argument that congressional power to alter constitutional rights operates only in one direction: to expand, but not contract constitutional protections. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

328 *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress can enact laws that enforce or strengthen the guarantees of due process and equal protection under the fourteenth amendment, but "Congress [has] no power to restrict, abrogate, or dilute these guarantees."); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (Congress cannot "validate a law that denies the rights guaranteed by the Fourteenth Amendment.").

329 Brennan, *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 26 (1985) ("[i]t is the very purpose of a constitution . . . to declare certain values transcendent, beyond the reach of contemporary political majorities."). Similarly, while state courts may not limit rights beneath constitutional minima, they may extend those rights more expansively than the Constitution requires.

330 Michigan v. Long, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (emphasis in original).

purpose of article III jurisdiction is to vindicate federally created rights.[331] The need for access to a federal forum is particularly acute when there is a possibility that federal rights will not be protected otherwise.[332] The remedial responsibility of federal courts should prevent the jurisdictional door from revolving backward if the only impetus for the reversal is a case-processing concern. Without a similar theory of jurisdiction, the ratchet theory of rights is meaningless, because rights will simply be denied at the earlier, jurisdictional stage.

VI. Conclusion

In one sense, the entire overload controversy does devolve to a battle of systemic political visions. If one believes that the system of laws is fair to underprivileged and marginal groups, then federal court access is not viewed as a constitutional necessity, and the federal caseload may be pared down for efficiency reasons. On the other hand, those who think that laws do not adequately protect underprivileged and marginal groups, and that there are too many social, class and institutional misfeasances, believe it is the special role of the federal courts to protect people from systemic malfunctions. The different visions lead to different views of the proper procedural role of the federal courts. This brings the caseload riddle full circle: perhaps a formidable amount of federal litigation is a good thing,[333] particularly if insensitivities to constitutional rights are not being remedied by other social institutions.

It may be argued that the shunting of cases from federal to state courts and the paring down of federal remedies is simply a trend toward more efficient packaging of disputes. This efficiency or administrability argument is at the heart of the caseload versus rights controversy. As the substantive rights cases[334] make clear, the names of federalism and efficiency are being invoked as reasons for the federal courts to shirk their duties to protect against serious threats to constitutional freedom.

More fundamentally, an unacknowledged and elitist premise has seeped into many federal decisions: that the role of the federal judiciary is to handle only a few deserving cases. As the Honorable Jonathan Varat suggested, "we might well think that the quality of justice would be better served, however, if federal courts did more slightly less well than too little extremely well."[335] If jurisdictional theories reflect considerations not of justice to the individual litigant, but of how much justice

331 *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 239-42 (1971).

332 It may be argued that currently the federal courts are stocked with conservative judges and state court judges are left to implement more liberal visions of the Constitution. *See, e.g.*, Note, Miranda *and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986); Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21 (1982). However, the offices will outlast the views of those who occupy them, *see* Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459 (1987), while the nature of the federally created rights sought to be vindicated should remain if not a relative constant at least an evolving but irreducible quantum.

333 *See supra* note 1.

334 *See supra* notes 175-244 and accompanying text.

335 Varat, *Economic Ideology and the Federal Judicial Task*, 74 CALIF. L. REV. 649, 655 (1986).

society can pragmatically tolerate, this social judgment demands a more honest evaluation.