

# Afterword: Federalism's Options

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## I. THE FIXTURES OF UNITED STATES' LEGAL FEDERALISM

Several of the essays in this symposium, *Constructing a New Federalism: Jurisdictional Competition and Competence*,<sup>1</sup> illustrate the current framework in which debates within the United States about federalism—be it legislative, judicial, or executive—proceed. The task at hand is to consider (from a rich range of perspectives) whether a particular arena about which laws are made (be it torts,<sup>2</sup> the environment,<sup>3</sup> or welfare<sup>4</sup>) belongs either to state or to

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1. Co-Sponsored by the Yale Law and Policy Review and the Yale Journal on Regulation, held in New Haven, Connecticut on March 1-2, 1996.

2. See, e.g., Robert M. Ackerman, *Tort Law and Federalism: What Happened to Devolution?*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 429 (1996); James F. Blumstein, *A Perspective on Federalism and Medical Malpractice*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 411 (1996); Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions about Federalism and Tort Reform*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION,

federal governance, or when overlapping regulatory regimes and judicial decision making are permissible. While the limits of either state or federal powers are not fixed, and the doctrinal and policy arguments change somewhat, the pervasive sense is that preexisting (albeit vague and contested) boundaries and options exist; opportunities for invention are not generous.

Judges and law professors are central voices in defining the parameters of federalism in the United States. Their discussion (which I term "legal federalism"<sup>5</sup>) reinforces an understanding of the limited options available under the current framework. Sometimes the answers are provided by efforts to mine the meaning of particular constitutional provisions, such as the Commerce Clause or other sections of Article I, or the parameters of Article III, or the Tenth and Eleventh Amendments. For example, three times in the last five years, the United States Supreme Court has struck down congressional statutes for breaking federalism's barriers.<sup>6</sup> The doctrinal frame has varied—from Commerce Clause powers to the Tenth and Eleventh Amendments—but the analytic enterprise shares common ground: the questions asked and answered by the majority opinions are about the scope of congressional authority under its constitutionally-enumerated powers and about states'

SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 371 (1996); Gary T. Schwartz, *Assessing the Adequacy of State Products Liability Lawmaking*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 359 (1996).

3. Henry N. Butler & Jonathan R. Macey, *Environmental Policy: The Forgotten Message of Federalism*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 23 (1996); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 67 (1996); see also Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 38 ARIZ. L. REV. (forthcoming 1996).

4. See Jerry Mashaw & Dylan Calsyn, *Block Grants, Entitlements and Federalism: A Conceptual Map of Contested Terrain*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 297 (1996); R. Shep Melnick, *Federalism and the New Rights*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 325 (1996); Steven D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 123 (1996).

5. Others use the term "constitutional federalism." See, e.g., Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 149 (1996).

6. *United States v. Lopez*, 115 S. Ct. 1624, 1626-34 (1995) (holding that Gun-Free School Zones Act, which made possession of firearm within school zone a federal offense, exceeded Congress's Commerce Clause powers); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1123-33 (1996) (finding aspects of Indian Gaming Regulatory Act of 1988, which provided for state negotiations with tribes relating to certain forms of gambling and authorizing suit for violations thereof, violative of Eleventh Amendment); *New York v. United States*, 505 U.S. 144, 174-83 (1992) (striking in part Low Level Radioactive Waste Policy Amendments Act of 1985 because provisions characterized as "commandeering" states exceeded congressional authority and violated Tenth Amendment). See generally Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995).

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prerogatives under the Tenth and Eleventh amendments.

When the focus shifts from constitutional to "policy" analyses,<sup>7</sup> efforts are made to develop criteria for *when* the federal government should act. For example, in a recently issued report, *The Long Range Plan for the Federal Courts*, published by the Judicial Conference of the United States,<sup>8</sup> a committee of federal judges described their presumptions against increasing the civil and criminal jurisdiction of the federal courts and listed criteria by which to assign matters to the federal and state courts. The judicial committee categorized some interests as distinctively federal; further, it relied on the concept of federal by default, that federalization is appropriate when state-based enforcement mechanisms fail.<sup>9</sup> Other commentators have also invoked the idea of states' inability to perform a particular task well as licensing a federal role.<sup>10</sup> Sometimes such discussions have a more positive tone, framed in terms of the "competency" of a particular unit of government to perform a given function "efficiently;" consideration is given to whether something about the nature of a specific issue is better served by politics of particular sizes and at certain physical distances from either people or property.

Most of these discussions entail a search for some form of "principled" bases for allocation of authority. In this symposium, on *Constructing a New Federalism*, reasons for federal action include that state regulatory regimes may do harm to out-of-staters, that states may compete with one another in a fashion

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7. As Professor Scheiber points out, law and policy are often intermingled; "in our system, questions of policy and politics are wrapped in constitutional garments so routinely that it is not quite evident at times whether such wrappings are correctly described as 'disguise.'" Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: The Devolution Proposals in Perspective*, in *YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM* 227, 294 (1996). For discussion of the distinctions between federalism claims made by the Supreme Court and by Congress, see Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, in *YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM* 187, 188-89 (1996).

8. JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (Dec. 1995) [hereinafter *LONG RANGE PLAN*].

9. *Id.* at 23-32. See, e.g., Recommendation 2 at 24-25 (advocating that criminal activity should be prosecuted in federal court "only in those instances when state court prosecution is not appropriate or where federal interests are paramount," and detailing federal interests as those that involve "substantial multistate or international aspects," "complex commercial or institutional enterprises most effectively prosecuted using federal resources," "widespread state or local government corruption," or as raising "highly sensitive issues . . . perceived as being more objectively prosecuted within the federal system"); Recommendation 6 at 28-29 (urging Congress to refrain from creating federal civil jurisdiction except when justified by federal interests, such as when cases arise under the United States Constitution, or cannot be "dealt with satisfactorily at the state level," involve foreign relations or federal government officials, are disputes among states, or affect "substantial interstate or international disputes"). These recommendations have been adopted by the Judicial Conference, while the commentary in the report is that of the Planning Committee. See L. Ralph Mecham, Cover Letter "To All Interested Parties," *id.* at 1 (Dec. 15, 1995).

10. See, e.g., Ackerman, *supra* note 2, at 446-47; Rory K. Little, *Myths and Principles of Federalization*, 46 *HASTINGS L.J.* 1029, 1077-81 (1995) (attempting to craft such principles without pejorative implications).

perceived to be destructive, or may promulgate laws that are inefficient or insufficient (on some normative metric, sometimes cast as a “race to the bottom”<sup>11</sup>), that disuniformity entailed in state variation itself inflicts social harm, and that claims of state rights are coded attempts to serve particular visions of political life at odds with what are asserted to be United States’ values.<sup>12</sup>

I find myself uneasy about the choices. In the arena of federalism that I know best, which is the courts, current practices do not fit within these parameters. As I detail below,<sup>13</sup> in a variety of settings, state and federal judges are working together, literally functioning in some instances as a merged court system, to respond to problems for which the characterization “state” or “federal” fails to capture the parameters. Reporters publish cases that include the captions of both state and federal courts,<sup>14</sup> and lawyers send me documents such as consent decrees created by virtue of coordination of judges from a group of states.<sup>15</sup> The practice of these judges and lawyers, like the creation of interstate compacts, of national, non-federal organizations, and of state-based regional programs, all crisscross state and federal lines but are

11. Analyses of the “race” are provided by Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, in *YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION*, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 177 (1996); Schwartz, *supra* note 2, and Swire, *supra* note 3. For concern about “objectify[ing] this notion of the bottom,” see Colleen M. Grogan, *Commentary, Block Grants and the Meaning of Entitlements*, in *YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION*, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 355, 357 (1996); see also ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993) (asserting that “genius” of United States’ federalism is its ability to generate competition by states).

12. See, e.g., Ackerman, *supra* note 2, at 448; Butler & Macey, *supra* note 3, at 42. See generally Blumstein, *supra* note 2. Compare Schwartz, *supra* note 2, at 367-68, arguing that in the products liability arena, theories of state law as structurally biased against out-of-staters have intellectual appeal but do not capture state rule making because of several complicating factors.

13. See *infra* Part II.

14. See, e.g., *In re Joint E. & S. Districts Asbestos Litig.*, *In re New York City Asbestos Litigation*, 737 F. Supp. 735 (E.& S.D.N.Y. & Sup. Ct. N.Y. 1990) (denying motion to disqualify special master appointed for those cases); *In re New York City Asbestos Litig.*, *In re Joint E. & S. Districts Asbestos Lit.*, 123 B.R. 7 (E. & S.D.N.Y. & Sup. Ct. N.Y. 1990) (requiring report on use of funds); *In re Joint E. & S. Districts Asbestos Litig.*, *In re New York City Asbestos Litigation*, 129 F.R.D. 434 (E. & S.D.N.Y. & Sup. Ct. N.Y. 1990) (appointing special master/referee), discussed *infra* note 82 and accompanying text.

15. See, e.g., *Cox v. Shell Oil Co.*, Chancery Court for Obion County, Tenn. (Civ. Action No. 18,844, Nov. 17, 1995), a class action settlement involving the coordination among judges from California, Alabama, and Tennessee that, in the words of the court’s opinion, represent an “unprecedented effort by three state courts to coordinate and settle competing national class actions.” *Id.* at 3. (on file with the author). A California state judge sat as a “settlement judge” for all three state courts, *id.* at 8, media notices were provided in newspapers in “13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia.” *Id.* at 11. In addition to television and news services, notice was also provided “through various online computer services.” *Id.* at 12. According to an order from the California Superior Court, the coordination resulted from conference calls by the three state judges (and presumably in accordance with requests or agreement by at least some of the litigants’ lawyers). See *Meers v. Shell Oil Co.*, Minute Order Setting Settlement Conference (Sup. Ct. Calif., Oct. 12, 1995) (both on file with the author).

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not in focus in United States legal federalism.

This diversity of arrangements among and between state and federal actors stands in contrast to the federalism described in case law and in a good deal of legal commentary,<sup>16</sup> which is both formalistic and unresponsive to an array of efforts—both within the United States and beyond this country's borders<sup>17</sup>—to reformat arrangements crafted in earlier eras. While the conveners of the symposium have chosen to describe their topic as “*Constructing a New Federalism*,” many of the participants note that not much seems all that *new*. For example, in his essay *Devolution's Price*,<sup>18</sup> Professor Peterson offers a description about what might be termed “circular” federalism, in which government assistance to needy individuals cycles through stages—based initially on state governance that, because of its failings, produces a crisis that licenses federal action, but which in turn becomes or is perceived to be so cumbersome that support erodes, followed by efforts to defederalize the activity and “return” it to state governance.<sup>19</sup> He predicts, however, that the cycle could again produce conditions leading to “[d]emands for a national solution.”<sup>20</sup> Similarly, Professor Melnick offers as a “likely chain of events” that current efforts to restructure welfare will result in cuts to “clearly needy” individuals, followed by popular attention that will prompt states to seek additional federal funding, which will be accompanied by restrictions enforced at least in part by federal courts. He concludes by asking: “Sounds familiar?”<sup>21</sup>

The familiar pattern that Professors Peterson and Melnick sketch is not only the repeated interplay between state and federal governance but also the narrow set of choices that such a pattern suggests—state *or* federal governance. The alternatives appear to be either singular state legislation or a congressional statute. In the context of federal courts' jurisprudence, the choices are often posited as either state court authority or federal court “oversight” or “intervention.”<sup>22</sup> And upon occasion, when claims are made that the activity is better termed “cooperative” federalism, commentators such as Professor Mashaw argue that the term is a misnomer, at least in the entitlement context,

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16. Perhaps in contrast, Professor Scheiber argues that, during the 1960s, some theorizing of federalism matched the expansionist aspirations of that period. See Scheiber, *supra* note 7, at 269-78.

17. As I write this essay, the press is reporting a joint alliance of American Airlines and British Air, a partner with US Air. See, e.g., Adam Bryant, *Rivals of American and British Air Quickly Assail New Alliance as Anticompetitive*, N.Y. TIMES, June 12, 1996, at C4.

18. Paul Peterson, *Devolution's Price*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 111 (1996).

19. *Id.* at 120-21.

20. *Id.* at 121.

21. Melnick, *supra* note 4, at 350.

22. Such are the terms of a good deal of the discussion of habeas corpus litigation.

because of a lack of programmatic and fiscal options.<sup>23</sup> Moreover, even if apt, the “cooperation” discussed tends to focus on what is sometimes termed a “partnership between the States and the Federal Government”<sup>24</sup> and might also be known as conditional federal spending programs.<sup>25</sup> State-state relations are not much in view. In sum, the debate comes with well-marked parameters about the nature and role of states as contrasted with the federal government and the respective spheres of each.<sup>26</sup> That the current buzz word—“devolution”—is new should not be confused with the idea of innovative opportunities.<sup>27</sup>

Consider how certain fixed elements structure much of the contemporary doctrine and discussion.<sup>28</sup> First, states are conceived to be *singular actors*, sometimes in “competition” with one other but infrequently thought to be acting in concert with others, either as joint venturers, as members of regions, or as participants in national organizations.<sup>29</sup> States are thus not only individual entities, fixed in time, but also unitary actors rather than parts of subgroups within the nation or in any dimension different than when they first

23. Mashaw & Calsyn, *supra* note 4, at 297; *see also* Sugarman, *supra* note 4, at 124. The phrase “cooperative federalism” is often used as a description of federal benefits programs (*see, e.g.*, Connecticut Dep’t. of Income Maintenance v. Heckler, 471 U.S. 524, 532, n. 22 (1985); Heckler v. Turner, 470 U.S. 184, 189 (1985) (citing King v. Smith, 392 U.S. 309, 316 (1968)), as well as in the environmental and energy area. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 767 (1982), citing Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 289, n.30 (1981). At times, joint state and federal efforts to fight crime are also termed “cooperative federalism.” *See, e.g.*, Murphy v. Waterfront Comm., 378 U.S. 52, 56 (1964) (describing governments as “waging a united front against many types of criminal activity”). In an earlier draft of his commentary, Professor Schwartz also noted the possibility of some form of common law developments and voluntary efforts, resulting in a gradual movement towards uniformity across states.

24. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); cited in United States Dep’t of Energy v. Ohio, 503 U.S. 607, 633 (1992) (White, J., joined by Justices Blackmun and Stevens, concurring and dissenting in part). An exception is the work of the National Association of Governors in crafting what became the Low Level Radioactive Waste Act, invalidated in New York v. United States, 505 U.S. 144 (1992), discussed *infra* notes 61, 165 & 168.

25. For arguments critical of congressional efforts to use its spending powers in ways claimed to exceed its regulatory powers, *see* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

26. *See* Scheiber, *supra* note 7, at 228-29 (arguing that contemporary claims are rooted in important traditions of federalism).

27. For discussion of “devolution” itself, *see* Peter H. Schuck, *Some Reflections on the Federalism Debate*, in YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 1, 15 (1996). Schuck argues that the “pervasiveness of devolution” prompts a return to the longstanding “fundamental normative question . . . [of] which conditions will suffice to rebut [the] presumption of state diversity” and support a federal government’s override. *Id.*

28. Compare Scheiber’s analysis of what he terms the “general features” of the first century of United States federalism, specifically its protection of the institution of slavery, its reliance on the state and federal governments as operating in “separate spheres” or “dual federalism” which resulted in “significant variations” on substantive policies, and the vertical and horizontal tensions that existed. Scheiber, *supra* note 7, at 233-42. Scheiber also argues that late twentieth-century federalism doctrine “incorporated essential elements of the old federal creed.” *Id.* at 295.

29. *See* discussion *infra* notes 52-56 and accompanying text. In this symposium, both Scheiber, *supra* note 7, at 285, and Gordon, *supra* note 7, at 222-23, mention such organizations.

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entered the Union.<sup>30</sup>

Second, states are seen as “*natural*” holders of power, as the presumptively correct level at which authority resides.<sup>31</sup> To the extent the federal government’s role expands, that activity is often termed an “interference” or “intervention.” Given such terms, it is not surprising that discussion of state authority is in turn accompanied by claims of “tradition” and of “preservation” of state functions.

Third, the federal government is *equated* with all forms of national power; champions of greater federal governance often argue it reflects a necessary evolution of nationalizing forces. Missing from discussions are forms of national power that are not federal, such as nationwide associations created by state governments, and other forms of inter-state, non-federal relationships, such as interstate compacts and joint ventures.<sup>32</sup>

Fourth, while the experiences of this century (including the New Deal, the Civil Rights movement, and the contemporary call for devolution) demand a

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30. Daniel Rodriguez also notes that states are assumed to be identical, rather than differentiated by their distinctive market powers or resources, by their heterogeneity or homogeneity, or by variations in their internal governance structures and capacities. Rodriguez, *supra* note 5, at 149-55 (also calling for federalism’s attention to the effects of intrastate structures on interstate regulation and competition). Gordon shares my concern that the approaches to federalism are what he terms “static,” focusing on the Supreme Court’s approach and its role in maintaining certain conceptions. Gordon, *supra* note 7, at 204-07.

31. This view is longstanding. See Scheiber, *supra* note 7, at 240 (detailing “federalism creed,” in which at beginning of this century, “most American political leaders regularly paid lip service to the idea that smaller government was better than larger” and that power properly resided in the states). Scheiber also argues that such a creed is being relied upon in contemporary discussions. *Id.* According to Paul Marquardt, a parallel principle of “subsidiarity” (“decisions are taken as closely as possible to the citizen”) is on the rise within the European Community. Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 *FORDHAM INT’L L.J.* 616, 617 (1994) (quoting preamble to 1992 Maastricht Treaty). Marquardt argues that the principle works not to advance national authority (for which it is sometimes deployed within Europe) but rather to support regional or local level decision making “at the expense of the nation-state.” *Id.* at 638. Eleanor M. Fox, *Vision of Europe: Lessons for the World*, 18 *FORDHAM INT’L L.J.* 379, 386 (1994), disagrees.

32. See, e.g., U.S. CONST., art. I, § 10 (“the Compact Clause”), discussed in Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 691-708 (1925) (detailing compacts related to land and boundaries, navigation, crime, uniform legislation, natural resources, utilities, and taxation; discussing modern technology—such as the development of electrical power and of new modes of transportation—as demonstrating the need for coordinated state action and experimentation within the country) [hereinafter Frankfurter & Landis, *The Compact Clause*]. As of 1970, more than 100 formal compacts (involving anywhere from 2 to 50 states, as well as the District of Columbia and Puerto Rico) addressed a variety of subjects, including flood control, mass transit, energy conservation, and corrections. See THE COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS 1783-1970*, at 4 (1971); VINCENT V. THURSBY, *INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT CLAUSE* (1935); FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925* (1951) (describing limited use of compacts prior to the 1920s and the creation of Port Authority and the Colorado River compacts as marking new era of use and categorizing compacts by functions such as those that regulate boundaries or create shared administrative structures); Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 *ST. JOHN’S L. REV.* 1, 8-9 (1985). For discussions of the history, some of the early agreements and compacts, and the Court’s interpretation of the respective roles of the states and of the Congress, see *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-67, 479-83 (1978) (majority and dissenting opinions).

conception of power ebbing and flowing between state and federal government, that power is imagined to run in uni-bed rivers and not to flood in unpredictable directions. For example, proponents of devolution envision a set of government powers that have sat in the federal government but are now moving “back to the states.”<sup>33</sup> United States federalism is thus cast as traveling within narrow *channels*.

These implicit and sometimes explicit assumptions can be understood as constituting a “categorical” or an “essentialist” federalism, by which I mean that it ascribes to states and the federal government particular activities as belonging to them, insists on the naturalness of the divisions, and assumes these bi-polar options. This construction of federalism is more closely associated with lawyers and judges than with commentators from other disciplines (within the United States) who work on federalism. For example, some political scientists rely on metaphors like “marble cake,”<sup>34</sup> “picket fences,”<sup>35</sup> and “matrixes”<sup>36</sup> to capture the interdependent governance of local, state, and national institutions.<sup>37</sup> In contrast, lawyers and judges are reluctant to stress the webs and connections that make problematic claims of *a priori* distinctive functions of the various levels of government and their courts.<sup>38</sup>

33. See Schuck’s discussion of devolution’s proponents, *supra* note 27, at 3-4.

34. MORTON GRODZINS, *THE AMERICAN SYSTEM*, Part II, 60-152 (Daniel J. Elazar ed., 1966) (“The Marble Cake of Government”). Jerry Mashaw, for one, has hesitations about “marble cakes” as governance structures because, he argues, “layer cake” federalism blurs less than does marble cake federalism the “lines of authority and democratic accountability.” See Mashaw & Calsyn, *supra* note 4, at 319. On the other hand, he explains that “marble cake” federalism is based on pragmatic responses to dislike of central administration. *Id.* at 322.

35. Deil S. Wright, *Revenue Sharing and Structural Features of Federalism*, 419 ANNALS AM. ACAD. POL. & SOC. SCI. 100, 109-10 (1975) (relying on former North Carolina Governor Terry Sanford’s metaphor and elaborating on the competition by professionals for funds, jurisdiction, and political support, and analyzing the discrete interests and points of view based on those actors’ positions) [hereinafter Wright, *Revenue Sharing*].

36. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 37, 200 (1987); see also Melnick, *supra* note 4, at 341 (discussing “declining political influence of subnational governments” and that “[g]eographic mobility and the higher visibility of national policies have reduced the public’s attachment to state and local governments”). Further examination of such interdependencies is provided by Larry Kramer’s *Understanding Federalism*, 47 VAND. L. REV. 1485, 1496 (1994) (discussing ways in which power is exercised by state actors in era when two party system is in decline).

37. Another metaphor—offered in a recent collaboration between a law professor and social scientist—is “mush, rather than marble cake.” Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 933 (1994).

38. As both Mashaw & Calsyn, *supra* note 4, at 298, and Scheiber, *supra* note 7, at 271, discuss, lawyers, justices, and politicians have used other terms for federalism, including “cooperative” federalism (see note 23, *supra*) and “creative federalism,” a phrase associated with Lyndon Johnson’s speech of May 22, 1964, *PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON 1963-64*, VOL. I at 704, 706 (Remarks at the University of Michigan) (discussing conferences to be held “on the cities, on natural beauty, on the quality of education, and on other emerging challenges” from which to develop “new concepts of cooperation, a creative federalism, between the National Capital and the leaders of local communities”).

However, in much of the literature of the relationship between state and federal courts, federal courts are posited as intruders; see, e.g., the discussion of federal intervention of *Younger v. Harris*, 401 U.S. 37 (1970), and a good deal of the rhetoric is about “oversight” or what Peter Schuck has called the federal “override.” Schuck, *supra* note 27, at 4. That terminology fits with more recent descriptions

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I aspire to a conversation within law that relies less on preexisting categories and that searches among evolving practices to learn something new about federalism in the United States. "State" and "federal" interests are not fixed sets<sup>39</sup> but are interactive and interdependent conceptions that vary over time.<sup>40</sup> As is illustrated by today's "devolution" discourse (insisting, for example that nationally-regulated income supports and speed limits on highways<sup>41</sup> are better suited to state governance), what today appears to be or is claimed to be "local" or "national" may in another decade be the opposite or may have moved into other spheres, be they denominated "local,"<sup>42</sup> "international,"<sup>43</sup> or "private." My point is not only that particular subject matter may go back and forth between state and federal governance but also that the tradition of allocation itself is one constantly being reworked; periodically, events prompt the revisiting of state or federal authority, and the

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of congressional activity as "regulatory or coercive federalism," and refers to legislation preempting state regulation, conditioning federal funding, and issuing mandates. See John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 933-38 (1995). For other visions of the relationship, see *infra* note 106 and accompanying text.

39. Compare Kramer, *supra* note 36, at 1496 (arguing that, while the Constitution envisioned some "boundaries—areas outside the reach of federal law, [t]hose boundaries have almost disappeared today") with William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1360-61, 1371, 1397-1400 (1994) (delineating certain decisions of governance, relating to public safety and promotion of economic development, and locating them in states as "traditional state functions," as contrasted with issues that Eskridge and Ferejohn assume have greater "externalities" affecting nonresidents or are part of "widely shared constitutional values" and thereby located as national functions). The difficulty with the Eskridge/Ferejohn approach is not only the one they recognize—the problem of identifying "what constitutes a widely shared constitutional value," *id.* at 1399, but also that "externalities" are not fixed and technology alters the understanding of what affects "outsiders," as well as how to conceptualize in and "outside." See *infra* text accompanying note 99.

40. My commentary here is thus tied to and influenced by efforts in other contexts to de-naturalize and to question the validity and utility of socially-embedded categories in essentialist terms. See, e.g., ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Essentialist assumptions, that race or gender carries particular characteristics, turn out to be deeply linked to culture, both in the identification of certain characteristics as tied to race and gender and in the ability to perceive those characteristics as telling. See generally RUTH FRANKENBERG, *THE SOCIAL CONSTRUCTION OF WHITENESS: WHITE WOMEN, RACE MATTERS* (1993).

41. See Pub. L. No. 104-59, § 205 (1996) (repealing 23 U.S.C. § 154, the national maximum speed limit provision).

42. See Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1114-15 (1994) (arguing that family law is of increasing import at the national level and deserving of federal judicial attention); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991) (explaining that while federal courts describe themselves as not involved in family law, a good deal of the federal docket—including pensions, bankruptcy, tax, immigration, and federal benefits law—affect family life). In June of 1996, some members of Congress proposed, in an effort to block same-sex marriages, a federal definition of marriage. See Marriage Protection Act, H.R. 3396, 104th Cong., 2d Sess. (1996).

43. See Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1461-62 (1994) (stating that state authority over alcohol and taxation may be affected by GATT).

lines move.<sup>44</sup>

In addition to the idea of both moving and fluid lines, another dimension to be stressed in this “noncategorical” approach to federalism is the variety of jurisdictional arrangements that lace United States history. In a self-conscious transitional effort to alter law’s appreciation for this variety, noncategorical federalism emphasizes the less conventional iterations of relationships among states and the federal government. Central, thus, to such a federalism story are moments when states enter into compacts<sup>45</sup> (such as the creation of the Port Authority<sup>46</sup> or the Interstate Agreement on Detainers<sup>47</sup>), when states adopt uniform laws (such as the Uniform Criminal Extradition Act<sup>48</sup>), enter into reciprocal agreements,<sup>49</sup> or create “active administrative” multistate agencies,<sup>50</sup> or when state and federal judges sit together creating a kind of joint court, found in no extant law book.

44. Recall that in the 1930s, the courts debated the power of the federal government to develop hydraulic power plants. See Joseph C. Swidler & Robert H. Marquis, *TVA in Court: A Study of TVA’s Constitutional Litigation*, 32 IOWA L. REV. 296 (1947).

45. U.S. CONST., art. I, § 10 (“the Compact Clause”), for which, sometimes, the consent of Congress is required. *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-60, 471 (1978) (rejecting literal reading of Clause and applying functional test under which agreements that do not “encroach” on federal power do not require congressional consent while “most multilateral compacts have been submitted for congressional approval . . . [that] historical practice” was not a requirement that all be so approved). A narrower view of the Clause is provided in Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453 (1935-36).

46. “From the point of view of geography, commerce, and engineering, the Port of New York is an organic whole. Politically, the port is split between the law-making of two States, independent but futile in their respective spheres.” Frankfurter & Landis, *The Compact Clause*, *supra* note 32, at 697. The politics of regional efforts during the 1950s and 1960s are analyzed in JAMESON W. DOIG, *METROPOLITAN TRANSPORTATION POLITICS AND THE NEW YORK REGION* (1966); congressional oversight is discussed by Emanuel Celler (then Chair of the House Judiciary Committee and in a dispute with the Port Authority) in *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961). The legal status of the Port Authority is addressed in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (resolving conflict between Second and Third Circuits about whether suits for monetary damages against PATH could be filed in federal courts or whether Eleventh Amendment’s protections of state treasuries should insulate such organizations from suits).

47. “Initially drafted by the Council of State Governments in 1956 . . . , the Agreement establishes procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction . . . .” *Cuyler v. Adams*, 449 U.S. 433, 435 n.1 (1981). *Cuyler* held that the Compact Clause applies only to those interstate agreements that provide “any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,” and that Congress may approve such compacts implicitly or explicitly, that the Interstate Agreement on Detainers had such approval, and therefore, that a federal question was presented about the interpretation of the Agreement. *Id.* at 440-42 (citation omitted). As of 1981, forty-eight States, the United States, and the District of Columbia had agreed to it. *Id.* at 435, n.1.

48. Uniform Extradition Act (U.E.A.), 11 U.L.A. 97 (1995) (enacted first in 1926 and revised in 1936, Table of Adoptions).

49. See, e.g., John H. Cushman, Jr., *10 Governors in West Agree to Create On-line College*, N.Y. TIMES, June 25, 1996, at A9 (“Without so much as a ritual shovel to break the ground . . . , the governors of 10 Western states today laid an intangible cornerstone for a new ‘virtual university’ . . .”).

50. See, e.g., the Multistate Tax Commission, upheld in *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 479 (1978). The Commission is headquartered in the District of Columbia, and according to 1995 data, has 20 members.

## Federalism's Options

For more than a century, participants in institutions have recognized the need to cross state lines without becoming instruments of the United States government. The National Conference of Commissioners on Uniform State Laws has worked since 1890 in response to the felt need for coordination in laws across states.<sup>51</sup> Other state-based national organizations include the National Conference of State Legislatures,<sup>52</sup> the National Association of Attorneys General,<sup>53</sup> the National Governors' Association,<sup>54</sup> the National League of Cities,<sup>55</sup> and the United States Conference of Mayors,<sup>56</sup> all of which play important roles in shaping local, regional, and national policy.<sup>57</sup>

The point of noncategorical federalism is not only to appreciate changing understandings of federal and of state boundaries but also to emphasize that the two need not be synonymous either with national or local governance.<sup>58</sup>

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51. Frankfurter & Landis, *Compact Clause*, *supra* note 32, at 688.

52. The National Conference of State Legislatures, founded in 1975, describes its aims to be to improve "the quality and effectiveness of state legislatures," as well as "to ensure states a strong, cohesive voice in the federal decision-making process" and "to foster interstate communication and cooperation." 1 ENCYCLOPEDIA OF ASSOCIATIONS, pt. 1, at 694 (29th ed. 1995) [hereinafter ENCYCLOPEDIA OF ASSOCIATIONS].

53. The National Association of Attorneys General, founded in 1907, sponsors national legal education seminars, including on United States Supreme Court practice. See ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 52, at 693; see also Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989) (discussing Association as example of interstate cooperation, considering conditions under which voluntary cooperation are likely, and degree to which some of the policies may raise constitutional questions).

54. The National Governors' Association, founded in 1908, describes itself as a "vehicle through which governors influence the development and implementation of national policy." ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 52, at 694-95. According to Larry Sabato, the Association (called the National Governors' Conference until 1977) was convened by President Theodore Roosevelt in 1908, but was not very influential until the 1960s. In 1966, the Association created an Office for Federal-State Relations in Washington, D.C.; in the 1970s its research arm, the Center for Policy Research and Analysis, provided important support (and subsequently became independent), and by the 1980s, it had expanded its professional staff, regional work, and national activities. LARRY SABATO, *GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNORSHIP TRANSFORMED 170-75* (2d ed. 1983).

55. The National League of Cities, founded in 1924, is a federation that pursued a "national municipal policy" and "represents municipalities before Congress and federal agencies." ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 52, at 672.

56. The United States Conference of Mayors, founded in 1932, is comprised of mayors of cities with populations of more than 30,000, to promote "cooperation between cities and the federal government." ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 52, at 673.

57. Kramer, *supra* note 36, at 1552-53. Some speak of such organizations as constituting a "Big Seven" that affect national policy. See Scheiber, *supra* note 7, at 285; Wright, *Revenue Sharing*, *supra* note 35, at 111; see also GRODZINS, *supra* note 34 (discussing cross currents in influence that run national, state, and local).

58. As Justice Frankfurter put it, "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships." *New York v. O'Neill*, 359 U.S. 1, 6, 10 (1959). In that case, Frankfurter upheld the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings, a law enacted in forty-two states and in Puerto Rico but not sanctioned by Congress, and also cited his essay, with Landis, about the "extra-constitutional forms of legal invention for the solution of problems touching more than one state." This case is itself an example of the effects of technological change and the needs of the judiciary; the Court rejected "right to travel" and "privilege and immunities" and "due process" claims made by a person in Florida, summoned to appear before a grand jury in New York. By means of the act, each participating state could compel the attendance of witnesses outside the borders in proceedings within

Moreover, this approach prompts inquiry about the role of states as *sources* of nationalizing activity (through such processes as state by state adoption of uniform laws or proposals to Congress from state-based national associations) and about when to distinguish decentralization from claims of individual state autonomy and governance.<sup>59</sup>

In the remainder of this essay, I use current developments within and across state and federal judiciaries to illustrate the distance between contemporary practices and federalism's rhetoric. With increasing frequency, state and federal judges work together on litigations that sprawl across (rather than respect) jurisdictional lines. I also discuss the pressures that contemporary technology, economic, and social practices are imposing on jurisdictional authority that has long been justified by physical presence of people and things within particular territorial boundaries.

This discussion is provided to make plain the pull toward reiteration of familiar statements of federalism and the possibilities of other arrangements among state and federal actors. From such practices might come consideration of a host of legally-sanctioned alterations. One option, of which I have urged consideration elsewhere, is the formal creation of a set of courts that are neither state nor federal but have authority over disputes that involve litigants

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a state. With videoconferencing, appearances may well be able to happen without travel back to the requesting state.

59. Such non-categorical federalism carries with it a skepticism I want to make explicit—about the capacity of scholars to offer singular justifications or unified theories about the values of federalism. I have benefitted from those scholars who offer structural approaches to federalism. See, e.g., Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Richard Briffault, *What About the "Ism?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994); Eskridge & Ferejohn, *supra* note 39; Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) [hereinafter Fallon, *The Ideologies of Federal Courts Law*]; Kramer, *supra* note 36; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994); Rubin & Feeley, *supra* note 37. I am leery, however, of efforts to sift the meaning down to a simple core that endures over time. Moreover, under a non-categorical view, the states are not a singular unit to be compared as a whole to the federal government but rather understood as likely to evidence diverse attitudes. Further, the ongoing workings of federalist arrangements are seen as continually renegotiated.

In this sense, noncategorical federalism shares some of Briffault's critique that what he terms "normative federalisms" (justifications based on claims of what federalism accomplishes) are an amalgam of historical example, empiricism, intuition and aspirations and thus unsatisfactory. Briffault, *supra*, at 1324-28. Briffault's proposed solution, however, that states and federalism exist based on constitutional stipulation, fails to solve the problem that has prompted the search for normative justification—that having said that states exist as a legal matter does not answer what degrees of local, state, regional, and national governance should result, even in constitutional doctrinal terms. Briffault proposed that, when faced with such questions, courts should examine "the impact of national action on the capacities of the states to be independent lawmakers and alternative power centers within the federal framework, rather than by a more open-ended and value-laden assessment of the conflicting political values said to be advanced or impaired by state or national action." *Id.* at 1352. The difficulty is that the very assessments for which Briffault called are themselves "open-ended and value-laden." *Id.* The point is that there is no escape from normative inquiries, which should not, I believe, be cast in pejorative terms.

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of more than one state.<sup>60</sup> Such *national* courts (as contrasted with *federal* courts) could join other institutions that are national associations of state-based actors and that reflect the increasingly common phenomenon of inevitably overlapping work among actors empowered by municipal, state, tribal and/or federal governments.

Such courts are but one option, extrapolated from the practice of state and federal judges, lawyers, and litigants embroiled in contemporary disputes. Other examples come from inventions of both state and federal legislators, such as the scheme for radioactive waste disposal (that was created at the suggestion of state governors to provide for regional inter-state dependencies but, at the behest of a non-complying state, was invalidated by the United States Supreme Court<sup>61</sup>) and congressional efforts to rely on an amalgam of state, tribal, and federal executive decision making to deal with the question of commercial gaming run by Indian tribes (also invalidated in part by the United States Supreme Court).<sup>62</sup>

Be it state compacts, *ad hoc* regulatory arrangements of a group of states (sometimes prompted by or in response to federal regulation),<sup>63</sup> mechanisms to adopt uniform laws, or the creation of new organizations to affect national political and legal life, actors—in and out of government—are trying an array

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60. See Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 254-63 (1995) [hereinafter Resnik, *History, Jurisdiction, and the Federal Courts*].

61. *New York v. United States*, 505 U.S. 144, 150-51 (1992) (majority opinion); 189-93 (opinion of Justice White, joined by Justices Blackmun and Stevens, concurring in part and dissenting in part). According to the dissenters, the bill was the product of intensive efforts by state governors to find compromises and “was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.” *Id.* at 194. Assuming that this version of the development of the Act is accurate, then the Court’s doctrine permits either lone or minority dissenting states (perhaps reticent during negotiations or subsequently governed by a party with different views) to invalidate such agreements by resort to the federal courts—hardly a scenario of democratic processes at their best.

62. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 (1996). That legislation evolved after the Court determined, absent congressional authorization, states could not bar gambling on Indian reservations. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710 (1992), gave the states a role in dealing with what was called “class III” gaming, such as casino games, slot machines, dog racing and lotteries, by providing them with a federally-enforceable obligation to negotiate in “good faith” with tribes over the such activities to create “Tribal-State Compacts.” Also included was the creation of a National Indian Gaming Commission and regulatory authority for the Secretary of the Interior.

63. See, e.g., Swire, *supra* note 3, at 82 (describing agreement of twelve eastern states and District of Columbia to adopt California-created auto emission standards) [Yale need page numbers/ new draft at 17, near fn. 55]. According to litigation about that agreement (“the Northeast Ozone Transport Commission”), several states signed a “letter of understanding” to follow New York in its adoption of some of California’s regulations. The agreement itself was borne of federal law, both regulating car emissions and permitting others to “piggy-back” on the California standards, which were permitted to differ from national regulatory requirements. Manufacturers’ efforts to stop Eastern states from using the California standards are described in *Motor Vehicle Mfrs. v. New York State Dep’t of Environmental Conservation*, 79 F.3d 1298 (2d Cir. 1996); 17 F.3d 521 (2d Cir. 1994), and in *American Auto. Mfrs. v. Commissioner Mass. Dep’t of Environmental Protection*, 31 F.3d 18 (1st Cir. 1994).

of arrangements to respond to both new and old problems. When one focuses on these *practices*, one finds a series of attempts to rely on differing forms of agreements and actions to generate more than the categorical terms of either state or federal governance. With these variations in mind, options expand beyond the bipolar list of “either state or federal.” In short, there is more here, within the United States, than the models of federalism one gleans from Supreme Court decisions and many law review articles.

I do not advance such examples as ultimate answers to issues of federalism; I do not believe any such answer exists or that relationships among the participants in United States federalism will remain static. What I do believe is that it is time to depart from the history of dichotomous alternatives (of either a state or federal domain) and of essentialized images (of both states and the federal government), so as to investigate ongoing, and to imagine new, institutional arrangements that embody the interdependence of participants within the United States.

That such new institutional arrangements need to be stressed is evidenced by both popular and academic despair—ranging from calls to reject the two major parties to claims of the end of the nation-state.<sup>64</sup> I think—with guarded optimism—that upon telling another story of twentieth century United States federalism (which includes a somewhat celebratory recitation of invention, attends to changes prompted by technology, focuses on the increased lack of insularity of the population, of states, and of the federal government, that emphasizes regional organizations both within and between states, that acknowledges Indian tribes as important *loci* of governance, and that appreciates the declining salience of physical land that has been the formative aspect of states—and nations—in centuries past), other possibilities help provide a sense of capacity and competency to meet a world that seems both familiar and full of lost promise.

As I think about how to speak with optimism about United States’ federalism and whether it is plausible that the adjective “new” is a part of the discussion, I find myself wondering about Jean Monnet, a man whose name I first learned not in the United States (where in my experience, he is rarely mentioned) but while a student one summer in Canada. Monnet is the “grand man” of the European Community, a man who imagined a connection among European countries at a time when it seemed unimaginable.<sup>65</sup> Today, German

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64. See Melnick, *supra* note 4, at 344-45 (discussing declining confidence in government, as evidenced by polls); JEAN-MARIE GUEHENNO, *THE END OF THE NATION-STATE* 4 (Victoria Elliot trans., 1995) (“It is time to realize that the idea of the nation that Europe gave to the world is perhaps only an ephemeral political form, a European exception, a precarious transition between the age of kinds and the ‘neoimperial’ age.”); MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 1-8, 317-51 (1996).

65. Robert Schuman is another. Celebratory biographies of Monnet are provided by MERRY & SERGE BROMBERGER, *JEAN MONNET AND THE UNITED STATES OF EUROPE* (Elaine P. Halperin trans.,

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beer and Greek feta cheese are affected by standards set by the European community, now comprised of 15 countries.<sup>66</sup> Jean Monnet and his powerful inventiveness is virtually invisible in United States discussions of legal federalism.<sup>67</sup> I am not here making an argument for comparative federalism but rather for inventive federalism. It is time to try to imagine more than we (in the United States) have by way of federalism's options and to see (in extant legal institutions) how ongoing, vital alterations have given rise to more than we think we have.

### II. ALTERNATIVE CONCEPTIONS: THE PERMEABLE BOUNDARIES OF JUDICIAL FEDERALISM

I have spoken at a very general level about the problems of current conceptualization of United States legal federalism. In this section, I use the example of the federal courts to illustrate how the assumption of the fixed boundaries of state and federal courts misdescribes a segment of contemporary practice and limits the potential for responding to perceived problems of the federal courts. Further, the commonplace predicates in federal courts discussions (like those in the more general topic of federalism of which federal courts are a subset) rarely take into account how much the context has changed and how territorial boundaries, a bedrock (pun intended) of court authority, are crumbling. "The federal courts" offer but one example of radical changes that are hard to acknowledge and reliance on familiar legal and rhetorical categories that obscure the need to come to terms with current—let alone future—changes.

The alteration within the federal courts most salient to this symposium is one I term the "permeable boundaries" of federal and state courts.<sup>68</sup> While

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1969); and FRANCOIS DUCHENE, *JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE* (1994); "Monnet's vision of Europe and its articulation since 1945" are described by CLIFFORD HACKETT, *CAUTIOUS REVOLUTION: THE EUROPEAN UNION ARRIVES* 11 (2d ed. 1995). A more critical view is offered by Kevin Featherstone, *Jean Monnet and the "Democratic Deficit" in the European Union*, 32 J. COMM. MKT. STUD. 149, 150 (1994) (faulting Monnet for his investment of European integration with a "particular character . . . marked by technocracy and elitism" that has weakened the Community's "democratic legitimacy").

66. The question of whether national laws should govern "traditional" foods, such as German beer, French bread, Greek feta cheese, was much debated; the current compromise is to permit certain products, as listed by the European Parliament, as exempt from the directives on food additives. See Food Additives: Parliament Votes to Protect Traditional Products, European Information Service: Agri Service Int'l (Jan. 19, 1996), No. 432; see also 70 European Community Update 7 (Oct. 12, 1995) (Court of Justice declared illegal German rules prohibiting the marketing of Mars ice cream). The conflict between Great Britain and the EC over destruction of cattle in response to the threat of "mad cow" disease is another example.

67. While such had been my impression, I thought some empiricism in order. Beginning in the early 1980s, law reviews were data based in a progressively expanding list. Looking at the more than 200 law reviews online in June of 1996, my research assistants Kavita Amar and Amy Melner searched for his name and found him invoked 23 times, discussed briefly 18 times, and considered at some length once, by Marquardt, *supra* note 31, at 621-22.

68. Several other changes have occurred that also mark the distance between description and practice within the federal courts, including the creation of a fourth set of federal judges; two sets of

federal courts' jurisprudence is anchored in the assumption that the state and federal courts are both bounded and distinct, that premise is being undermined in practice. Judges and lawyers are inventing ways to join the systems together under the rubric of what is now termed "judicial federalism,"<sup>69</sup> reflecting the shared understanding of state and federal judges of the interrelatedness and interdependence of federal and state court systems.

The idea of state and federal judges working together is relatively recent;<sup>70</sup> during the 1980s, federal and state judges began to cross jurisdictional lines to talk about shared problems. One impetus for such joint work is large-scale aggregated litigation, such as mass torts.<sup>71</sup> While formally based either in state or federal court, resolution of these cases often aspires to "global peace"—a settlement that includes all pending cases, be they filed in state or federal courts. Other incentives to coordinate come from concerns about

non-life tenured judges — magistrate and bankruptcy judges—who decide a growing segment of federal cases and comprise a fourth, bottom tier. Agencies also have become "courts," rendering adjudicative decisions on a caseload larger than that of the federal judicial docket itself.

Another major revision within the federal adjudicatory landscape is the change in the unit of decision making. Over the past decades, the aggregation of civil cases, the bringing together of claims of many different individuals to prepare them for trial, settlement, or other mode of disposition, has moved from the periphery closer to the core. See Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*].

As game theory pervades the discussion of such large scale cases, (see, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 528-57 (1991); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995)), judges, special masters, and other para-judges bob in and out as one of many sets of "players," which also reflects another change about the nature of the decision making process itself. The pretrial phase at the trial level has taken on greater importance, and alternative dispute resolution has become a part of both trial and appellate court processes.

Writing in 1955, political scientist Jack Peltason stated that the "central activity" of federal judges was "to make decisions, issue orders, and write opinions." JACK W. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 1-6, 7, 65 (1955). At the trial level, that description is no longer accurate. In 1982, I offered the term "managerial judges" to capture the shift in judicial attitude as judges established oversight of the pretrial process. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). In 1990, contemporary social scientists Wolf Heydebrand and Carroll Seron detailed the "quiet revolution taking place in American courts" and provided a rich analysis of why the judiciary had moved toward what they termed the "technocratic rationalization of justice." WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE* 1, 13 (1990). In 1994, Stephen Yeazell considered seventy-five years of procedural innovation and concluded that revised rules of procedure had the effects of reorienting the litigation process to the pretrial phase, expanding the powers of trial level judges, and contracting authority of the appellate courts. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631. A transformation in the methodology of courts is well underway and will require different modes of gauging the legitimacy of judicial actions. For further discussion, see Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Resnik, *History, Jurisdiction, and the Federal Courts*, *supra* note 60, 187-216; Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

69. See, e.g., the chapter of the LONG RANGE PLAN, *supra* note 8, at 21-38, that bears that name.

70. See J. Clifford Wallace, *Before State and Federal Courts Clash*, JUDGES' J., Fall 1985, at 36 (describing the Ninth Circuit's efforts in working with states in state-federal councils).

71. See Judith Resnik, Dennis E. Curtis, & Deborah Hensler, *Individuals within the Aggregate: Representation, Relationships, and Fees*, 71 N.Y.U. L. REV. 296 (1996); Resnik, *From "Cases" to "Litigation,"* *supra* note 68.

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prisoners' filings, rising criminal caseloads, and interest in court-based regulation of attorneys, all of which have resulted in decisions by leaders of both sets of judiciaries to create institutional arrangements to link them.<sup>72</sup>

In 1990, the Conference of Chief Justices of the State Courts and the Judicial Conference of the United States authorized the creation of a "National Federal-State Judicial Council"<sup>73</sup> to enable consideration of issues of mutual concern. In 1992, the first national conference of state and federal judges demonstrated the interest in increased coordination.<sup>74</sup> In the fall of 1994, the National Center for State Courts hosted a conference for federal and state judges, lawyers, and academics to discuss joint work related to mass torts.<sup>75</sup> A national newsletter now reports on the increasingly routine interactions of state and federal court systems.<sup>76</sup>

Note that all of these institutional changes have taken place in the 1990s. At some level, it is startling that, for the two centuries prior to this decade, state and federal judges did not meet regularly to discuss shared problems and had no institutional organizations that they shared. That separation is steeped in history, legal rules, and tradition. The current interaction is responsive to problems that are neither anchored in bounded territories such as states or

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72. See, e.g., *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 273-74 (1993) (then Chief Judge Barbara Rothstein, of the United States District Court for the Western District of Washington, discussing state-federal coordination) [hereinafter *Western Regional Conference*]; Vincent L. McKusick, *Combining Resources*, NAT'L L.J., Nov. 19, 1990, at 13 (former president of Conference of Chief Justices of State Courts arguing for coordination in context of drug cases). Over the course of this year, consideration has been given to the creation of uniform ethical rules, in part to respond to differing obligations imposed by some state laws (often incorporated into federal local ethics rules) and by directives from the Department of Justice. Negotiations between the Conference of Chief Justices of the State Courts and the Department are now underway. For discussion of the conflicts, see Linda S. Mullenix, *Multiforum Federal Practice: Ethics and Erie*, 9 GEO. J. LEG. ETHICS 89 (1995).

73. Harry W. Swegle, *Washington Perspective*, STATE COURT J., Fall 1990, at 2 ("It took 200 years to get around to it, but state and federal judges soon will begin talking to one another at the national level on a formally structured and continuing basis.").

74. Malcolm M. Lucas, *Keynote Address: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663 (1992) (introducing conference); Edward B. McConnell, *Planning for the State and Federal Courts*, 78 VA. L. REV. 1849 (1992) (describing mechanisms for coordinated work, federal judicial committees on which state judges serve, and conferences that had occurred); see also *Western Regional Conference*, supra note 72, at 237 (Reporter John B. Oakley's preface describes regional conference as implementing "principles" of 1992 meeting); William K. Slate, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173 (1994) (describing that gathering, also stemming from the 1992 meeting) [hereinafter *Middle Atlantic Conference*]; Victor Eugene Flango & Maria Schmidt, *Administrative Cooperation between State and Federal Courts*, JUDGES' J., Spring 1995, at 3 (summarizing survey of judge and court administrators about their views on areas for cooperation).

75. *National Mass Tort Conference Held in Cincinnati*, STATE JUSTICE INST. NEWS, Winter 1995, at 1, 8 (describing National Mass Torts Conference, held Nov. 10-13, 1994, in Cincinnati, Ohio). The papers presented at that conference are published in the Symposium, *National Mass Tort Conference*, 73 TEX. L. REV. 1523 (1995).

76. *Orlando Meeting Fosters Interest in Judicial Federalism; New State-Federal Councils, Conferences Are Planned*, STATE-FEDERAL JUDICIAL OBSERVER 1 (joint publication of the Federal Judicial Center and the National Center for State Courts, first issue, Jan. 1993).

federal districts nor respectful of these legal categories. Global trading, national and transnational companies, national law firms, the Internet, a population of which 17 percent move annually<sup>77</sup> and of which some 40 percent do not live in the state of their birth<sup>78</sup>—none of these are easily categorized as belonging either singularly to one state or exclusively to the national government.<sup>79</sup>

The consequences of judicial federalism are beginning to be visible—in the press, law reviews, and occasionally in the case law. Despite the formal statements of statutes and doctrine (that federal and state judicial systems are distinct and there are no mechanisms for inter-jurisdictional consolidation<sup>80</sup>), informally, federal and state judges are increasingly co-venturers working with each other.<sup>81</sup> For example, federal and state judges in charge of “All Brooklyn Navy Yard” asbestos cases literally sat in the same room, jointly convening a “state and federal court” and ruling together on issues.<sup>82</sup> In the Exxon Valdez litigation, federal and state judges coordinated scheduling both the pretrial and trial processes.<sup>83</sup> The state-created Mass Tort Litigation

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77. Peterson, *supra* note 18, at 113. According to a 1992 Census Bureau Press Release, the trend in mobility has been downward in the last four decades, declining from 20 percent in the 1950s and 1960s to 18 percent in the 1970s and 1980s. *Americans in 1990-91 Moved at Lowest Rate Since Early 1980s, Census Bureau Says* (Press Release, Nov. 17, 1992, CB92-180). The downward trend has continued in the last few years; as of 1994, the rate was 16.7 percent. *People Not Moving as Much as They Did in the Mid-80s, Census Bureau Reports* (Press Release, Sept. 12, 1995, CB95-162).

78. Gordon, *supra* note 7, at 210 (arguing that, because between 1985-90, 21 million people within the United States migrated between states, and as of 1990, some 60 percent lived in their state of birth, state geographical boundaries and shared cultures are not synonymous).

79. See, e.g., *Matsushita Elec. Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996) (holding that despite exclusive jurisdictional authority of federal courts over securities claims, state court class action settlement can preclude federal litigation).

80. See, e.g., 28 U.S.C. § 2283 (1994). The Anti-Injunction Act was relied on in part to preclude formal state-federal consolidation in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). The problems of coordination thereafter and the interrelationships between the state and federal proceedings are described in a symposium, *Civil Litigation in Mass Disasters: The Hyatt Skywalks Collapse*, 52 UMKC L. REV. 141 (1984).

81. See, e.g., William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992); see also John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233 (1993) (calling in short term for coordination and in longer term for unification).

82. See, e.g., *In re Joint E. & S. Districts Asbestos Litig.*, *In re New York City Asbestos Litigation*, 737 F. Supp. 735 (E. & S.D.N.Y. & Sup. Ct. N.Y., 1990) (denying motion to disqualify special master appointed for those cases); *In re New York City Asbestos Litig.*, *In re Joint E. & S. Districts Asbestos Lit.*, 123 B.R. 7 (E. & S.D.N.Y. & Sup. Ct. N.Y., 1990) (requiring report on use of funds); *In re Joint E. & S. Districts Asbestos Litig.*, *In re New York City Asbestos Litigation*, 129 F.R.D. 434 (E. & S.D.N.Y. & Sup. Ct. N.Y., 1990) (appointing special master/referee). All of these cases involve the joint work of Judge Helen E. Freedman of the New York State's Supreme Court and Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York. The captions vary, with state and federal cases “taking turns” as the lead.

83. See The Hon. H. Russel Holland, *The Exxon Valdez: Was There a Second Disaster?* 1, 8-12 (Presentation at the National Mass Tort Conference, Cincinnati, Ohio, Nov. 10, 1994) (on file with the author) (detailing the state and federal judicial efforts to coordinate discovery and case preparation); see also *Notice of Related Case*, a recommendation of the California State-Federal Council, in which counsel would be obliged to inform judges of related cases pending in either state or federal courts (Sept, 1994) (on file with the author).

## Federalism's Options

Committee (MTLC), comprised of judges from each of several states that have many mass tort cases, worked in conjunction with the federal district judge assigned the multi-district breast implant litigation to coordinate efforts.<sup>84</sup> More recently, federal and state judges in New York have referred breast implant cases to a shared panel of experts.<sup>85</sup>

In addition to such individual inventions, proposals have been made to change the formal prohibition on inter-jurisdictional transfers and consolidations. In 1991, the National Conference of Commissioners on Uniform Law approved the Uniform Transfer of Litigation Act, designed to enable "transfer of litigation from a court in one judicial system to a court in another judicial system."<sup>86</sup> In 1994, the American Law Institute approved a proposal for complex litigation that included provisions for consolidation in state courts of litigation across state and federal lines.<sup>87</sup>

The civil docket is not the only example of state-federal coordination. The idea of sharing resources and crossing boundaries is longstanding on the criminal side, in which "cross-designation" of federal and state agents and prosecutors makes permeable the lines between state and federal law enforcement.<sup>88</sup> In addition, federal prosecutors also cross federal district lines;

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84. Details of a proposed and now defunct settlement can be found in *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp) (MDL 926), No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994), and in Henry Weinstein, *\$3.7-Billion Breast Implant Settlement Wins Tentative OK*, L.A. TIMES, Apr. 5, 1994, at A3; Federal District Judge Sam Pointer appointed the Hon. Ann T. Cochran, who subsequently resigned from the Texas state court judicial system, to serve as claims administrator of the settlement fund. Some of the duties of the administrator are described in *In re Silicone Gel Breast Implant*, 1994 WL 578353 at \*10, \*14, \*25; see also Sandra Mazer Moss, *State-Federal and Interstate Cooperation, Case Management Techniques Move Complex Litigation, Hasten Disposition of Asbestos, Other Cases*, STATE-FEDERAL JUDICIAL OBSERVER, Apr. 1993, at 3; *Middle Atlantic Conference*, *supra* note 74, at 202-11 (detailing coordination among state and federal judges in that and other mass torts).

85. See *In re New York State Silicone Breast Implant Litigation*, Ind. No. 500,000/93, Sup. Ct. N.Y. City and *In re Silicone Gel Breast Implant Products Liability Litigation* (E.D.N.Y. 96-BI-1 & S.D.N.Y. 91-CV-6996 et al.), Order of Apr. 3, 1996 (appointing Margaret Berger to panel of experts); Richard B. Schmitt, *Judge to Pick Panel of Experts to Study Silicone Breast Implants*, WALL ST. J., June 3, 1996, at B6.

86. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM TRANSFER OF LITIGATION ACT (1992) (prefatory note) (approved by the National Conference, Aug. 1991 and approved by the American Bar Association, Feb. 1992), reprinted in AMERICAN LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY at 551 (App. C) (1994) [hereinafter ALI, COMPLEX LITIGATION].

87. ALI, COMPLEX LITIGATION, *supra* note 86, at 201-16. For distinctions between the two, see Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

88. In 1870, Congress gave the Attorney General of the United States the authority to appoint special attorneys to assist in the "trial of any case." Act of June 22, 1870, ch. 150, 16 Stat. 162, 164 (now codified, as amended, at 28 U.S.C. § 515(a) and § 518(b)). Since then, Congress has provided additional authority for cross-designation under specific statutes. See, e.g., 42 U.S.C.A. § 5776a(e) (West 1995) (child abduction cases). Parallel statutes exist in many states. See, e.g., COLO. REV. STAT. ANN. § 20-1-201(1)(c) (West 1995) (authorizing appointment of special prosecutorial deputies, including United States attorneys and their assistants); see also J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 153 (1995) (discussing designation by federal authorities in Arizona and Oregon of tribal prosecutors as special assistant United States Attorneys).

the “Unabomber” case is to be presented by a group of government lawyers “designated as special attorneys in at least a handful of jurisdictions, including Montana . . . Sacramento and New Jersey.”<sup>89</sup> These practices of joint and cross designations might well be understood as “prosecutorial federalism” and are a key element of government law enforcement.<sup>90</sup>

The physical boundaries of state and federal courts (even with the “100 mile bulge”<sup>91</sup>) have so often been inscribed that it is hard to see that the lines

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Courts have often affirmed prosecutorial authority to cross-designate, declined to require specificity in the commissions of such designees, and welcomed the use of such coordinated activity of both prosecutorial and investigatory officials of state and federal courts. *See, e.g.*, *Elkins v. United States*, 364 U.S. 206, 221-22 (1960) (citing the need to foster cooperation between state and federal law enforcement as a ground for adopting the exclusionary rule in federal courts); *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992) (reinstating a federal indictment based on investigation primarily conducted by state authorities).

89. Mark Gladstone & Robert J. Ostrow, *Sacramento Trial Likely in Unabomber Case*, L.A. TIMES, June 13, 1996, at A3.

90. *See* Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AMER. ACAD. POL. & SOC. SCI. 85 (1996). The desirability of conceptualizing the state and federal prosecutions as distinct rests in part on views toward allegedly criminal behavior, the meaning of the due process and double jeopardy clauses, and the utility of multiple or overlapping prosecutions. Compare the majority and dissenting opinions in *Bartkus v. Illinois*, 359 U.S. 121 (1959), discussing whether the Illinois prosecution subsequent to an acquittal in federal district court for bank robbery was proper.

91. FED. R. CIV. P. 4(f) (1963 amendments) (providing that those litigants “brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served . . . at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial”). According to Wright and Miller, the 1963 amendments “recognize[d] the increased incidence of multiparty litigation in the federal courts and the need to compromise territorial boundaries in order to facilitate the handling of these cases.” 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1127, at 332 (2d ed. 1987).

The import of the 1963 amendment providing the “bulge” has been differently described. Benjamin Kaplan, then reporter for the Advisory Committee that drafted the rule, called the amendment “modest,” analogized it to interpleader in that both enable federal judges to hear “entire controversies,” and argued both its constitutionality and propriety; Kaplan also noted that the rule responded to instances when states could not constitutionally reach the “entire controversy.” Benjamin Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-63 (I)*, 77 HARV. L. REV. 601, 629-34 (1964). In contrast, Allan Vestal termed the change “monumental” because it represented a move from the “traditional limited reach of the federal courts” and represented the “broad historical trend toward the supremacy of the federal government.” Allan D. Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. REV. 1053, 1053, 1077 (1963).

In 1993, the relevant provision was moved to FED. R. CIV. P. 4(k)(1)(B) and the language changed somewhat (providing for service of parties joined under either Rules 14 or 19 and “served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues”). As the 1993 Advisory Note explained: “In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned” and also noted that some “metropolitan areas span[] more than one state.” The 1993 amendments also provide for nationwide service of process in federal question cases. *See* FED. R. CIV. P. 4(k)(1)(D).

FED. R. CIV. P. 45, which provides for service of subpoenas, has an analogous provision, permitting such service “at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection.” That federal courts could reach outside their own territory has been a longstanding proposition of federal law; under a 1793 provision, a federal court could subpoena witnesses not within the district but within “one hundred miles from the place of holding” the hearing. *See* 1 Stat. 333, 335, ch. 22, § 6 (1793).

## Federalism's Options

are blurring. When federal and state judges sit together, when federal and state prosecutors designate each other as their agents, they deconstruct the reality of discrete and independent court systems.<sup>92</sup>

### III. FEDERALISM AND PHYSICALITY: THE CHANGING RELEVANCE OF TERRITORIAL BOUNDARIES

Thus far, many stories about "Our Federalism"<sup>93</sup> have emerged: that it has longstanding features that reiterate themselves over the centuries,<sup>94</sup> that it is the subject of invention and radical reformation<sup>95</sup> or of evolution and quiet alteration born of periodic reassessments, that it reflects a good deal of consensus,<sup>96</sup> that it has little current substantive content and is really about managing a large country,<sup>97</sup> and that it is soon to be eclipsed by international activity.<sup>98</sup>

One might tell a story that the states have disappeared in the sense that they no longer exist as vital centers of power and governance, but that commentators are so accustomed to assuming states' presence that their demise cannot be perceived. Alternatively, one might suggest that states have remarkable vitality and stamina, given their endurance in the face of determined efforts at nationalization.<sup>99</sup> One might argue for states' authority based on legal claims

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92. Justice O'Connor has used the metaphor of a "marriage" to describe the state-federal relationship, which she characterized as a system of "dialogue and dependence." Sandra Day O'Connor, Keynote Speaker, *Middle Atlantic Conference*, 162 F.R.D. 180, 182 (1994) ("Each partner must depend on the other to uphold its solemn obligations with respect to federal rights; each partner must have appropriate respect and regard for the other; and each partner must listen to and appreciate the views the other brings to bear on the issues they must, by the necessity of their marriage, address in common."). Whether that image conveys a blurring of boundaries (that I stress here) depends upon one's concept of marriage.

93. While the phrase was used some forty times before, Justice Black was the first to put it in quotes and capitalize it. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (that opinion was also the first authored by him in which the phrase was used). For commentary on the claims of tradition made by that decision, see Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1117-21 (1977).

94. Scheiber, *supra* note 7, at 227-33.

95. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 569 (1995) (calling for conception of Founders as "pioneers of an ongoing tradition of revolutionary reform"); Frankfurter & Landis, *Compact Clause*, *supra* note 32.

96. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 77 (developing "minimal model" of federal jurisdiction, based in part on "areas of agreement [that] turn out to be surprisingly large").

97. Rubin & Feeley, *supra* note 37 (arguing that Supreme Court doctrinal claims for federalism are in fact arguments about decentralization of decisionmaking, that little evidence supports claim that federalism diffuses power or that it supports, engenders, or reflects communities of affinity).

98. Friedman, *supra* note 43, at 1472 (predicting that globalization will further erode state authority); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1644-55 (1994) ("globalization of the economy is surely more important in determining what happens in the lives of residents of the United States than the intricacies of federalism doctrine").

99. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 747-58 (1989) (maintaining that vitality of federal Indian tribes and of some forms of state governance suggest possibility of federalism continuing to enable divergent norm development and authority); see also Eskridge & Ferejohn, *supra* note 39, at 1357-61 (disputing conventional view that centralization is inexorable force and calling for mechanism to maintain "robust federalism," in which

to their formal status as political units recognized in the Constitution,<sup>100</sup> or because of the ubiquity of the drive toward devolution.<sup>101</sup> One might make claims for state governance based on their capacities as “laboratories” generative of new rights or of educational and participatory opportunities,<sup>102</sup> as enablers of affiliations to governments born from proximity,<sup>103</sup> as useful or limited competitors,<sup>104</sup> as autonomous centers of governance that provide at least some choice of if not a vast diversity of rules,<sup>105</sup> or as co-conversationalists in norm development.<sup>106</sup> One might argue instead for duality itself, based on the view that two governments protect individual liberty more than does one.<sup>107</sup> Alternatively, one might perceive the state courts as “wrongdoers” often in need of federal superintendence.<sup>108</sup>

With the exception of the commentators who claim that states are functionally defunct, most versions of federalism do not focus on the declining saliency of physical domain or on the need to reconceptualize United States legal federalism in light of coordinated actions among its participants. In the context of the courts (and probably in other institutions of government as well), the plausibility of bounded state and federal governance is declining, as is the

state boundaries have political content); Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1208-09 (1994) (arguing that while Supreme Court’s deference to state interests could be understood as “little more than a strategy to exploit the state courts, conscripting them to a national agenda,” federalism should be “untamed,” so that state courts can have important “normative role . . . in the discourse concerning the meaning of rights”).

100. Briffault, *supra* note 59, at 1344. Briffault maintains that most of the arguments made on behalf of federalism’s utility are arguments about the advantages of *local* governance and that such localism does not depend on the existence of states but could be provided instead by municipalities.

101. See generally Schuck, *supra* note 27.

102. Amar, *Five Views*, *supra* note 59, at 1233-36, 1240-46. Amar distinguishes between two views of federalism, one that posits the states as laboratories for experimentation in an empirical sense and for education and citizen participation, and a second—related—claim that states serve to safeguard rights and to provide additional protection for citizens. This second view is tied to both the writings of Herbert Wechsler and to Justice William Brennan, while Justices Frankfurter and O’Connor are associated with the first. See also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380-88 (articulating conception of states as tools to guard against national tyranny).

103. GRODZINS, *supra* note 34, at 383-84. Grodzins also distinguishes this claim from one based on participation in government, in part by noting low voting rates in local elections. *Id.* at 198.

104. Amar, *Five Views*, *supra* note 59, at 1236-40 (discussing both horizontal and vertical competition, among states and against federal government); Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1437-42 (1992) (arguing for “substantial expansion of the role of federal law” because of failures in state competition in certain areas).

105. Merritt, *supra* note 59, at 1573-75 (suggesting that state autonomy serves as check on federal government powers, diversifies participants in government, and offers some programmatic alternatives).

106. Various formulations on redundancy and duplication as virtues and inefficiencies are provided in ELAZAR, *supra* note 36, at 30-32; Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) [hereinafter Cover, *The Uses of Jurisdictional Redundancy*].

107. Amar, *Five Views*, *supra* note 59, at 1248. But see Briffault, *supra* note 59, at 1323 (questioning bases from which to assume that such duality of governance creates more freedom).

108. LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 44 (1994).

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explanatory power of the physical boundaries to justify courts' exercises of jurisdiction.<sup>109</sup> As I have described above, participants within—judges, lawyers, legislators, businesses, and residents—are chafing against such boundaries.<sup>110</sup>

The doctrine is ambivalent, and the data are mixed. Some fifty years ago, the Supreme Court uncoupled the link between the authority of a court to exercise jurisdiction over a person and that person's physical presence within that court's territorial jurisdiction.<sup>111</sup> Until about 1950, a literal physical nexus to the person (sometimes in the fictive form that the person had designated a state official to act as that person's "agent" to receive process within the boundaries of the state) was the *sine qua non* of jurisdictional power. A government within the United States could not, absent consent, invoke its power over a person without this material, embodied relationship. The distance from that conception is marked by a 1996 proposed amendment to the Federal Rules of Civil Procedure to permit the taking of testimony "in open court" by "contemporaneous transmission from a different location."<sup>112</sup>

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109. The decline of territory as a meaningful source of shared history poses problems not only for legal jurisdictional theory but also for the nation-state. As Guehenno puts it: "The territorial foundation of political modernity, as we have thought of it for centuries, is under attack today from new forms of economic modernity. 'Territory' (spatial proximity) is of dwindling importance, now that not only agriculture but industry, too, represents a decreasing part of economic activity." GUEHENNO, *supra* note 64, at 7-8.

110. I question not the longevity of state boundaries but their normative implications. Hence, I part company with Briffault who argues that even "the modern tendency to define rights nationally, high levels of interstate mobility, the emergence of new-non-state-based interests" will not undermine the centrality of states, and relying in part on the "territorial integrity" of states, that very few boundary changes have occurred. Briffault, *supra* note 59, at 1346, 1336-38. That states have fixed boundaries does not make such boundaries determinative of how judicial systems should operate. Furthermore, as Kramer explains, *supra* note 36, at 1522-46, key contemporary elements of state power stem from the role of national media in an era of weak national political parties, the relationships among national and state-elected officials, and federal laws relying on states for administrative purposes. See also Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1591-97 (1994) (discussing how even "local" problems such as noise and waste disposal can be inefficiently and inefficaciously decentralized).

111. See *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The facts of both cases reflect economic changes, dependent on development of means of transportation and of commercial exchanges flowing easily interstate. In *Mullane*, the issue was the ability of New York banks both to pool investors' accounts and to settle them in group-wide proceedings; the Supreme Court authorized the state court to exercise jurisdiction over non-residents whose funds were at issue. See *Mullane*, 339 U.S. at 311-13 (refusing to adopt then-current jurisdictional characterizations of actions "in rem" or "in personam" but insisting instead on jurisdictional authority of New York court over absentees—as long as the representative had notice and absentees were also noticed). In *International Shoe*, the State of Washington wanted to impose its unemployment tax on a St. Louis, Missouri corporation that did business in Washington by means of sales representatives and sample merchandise (including a single shoe out of a pair); the Court upheld jurisdiction by relying on the defendant's systemic and ongoing relationships with the state. See 326 U.S. at 313, 318-20.

112. FED. R. CIV. PRO. 43(a), 64 USLW 4277 (Apr. 30, 1996) (to become effective Dec. 1, 1996, absent contrary congressional action). The permission for such testimony is limited, requiring a court's decision "for good cause shown in compelling circumstances and upon appropriate safeguards." The Advisory Committee Note however states that "[g]ood cause and compelling circumstances may be established with relative ease if all parties agree . . . ." *Id.*

But despite that move in the 1950s away from physicality to a “relational” theory of jurisdictional power over people in civil litigation, territoriality remains a vital part of contemporary jurisdictional law. In 1990, the United States Supreme Court concluded that, when a person is served within the boundaries of a state, jurisdictional authority is proper, no matter the relationship between that person and the state.<sup>113</sup> Federal admiralty and maritime jurisdiction are similarly connected to place.<sup>114</sup> Forum-selection clauses are generally enforceable.<sup>115</sup> Further, on the criminal side, physical presence remains the touchstone; the absent defendant cannot generally be tried.<sup>116</sup> And the related point is that physical authority alone can permit trial; not only does the ability to compel extradition serve the requirement of physical presence but jurisdiction by kidnap is also permitted under Supreme Court constitutional interpretation.<sup>117</sup>

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113. *Burnham v. Superior Court*, 495 U.S. 604 (1990). It is not happenstance that Justice Scalia, a consistent member of the majorities that have struck Congressional statutes over states for violating federalism’s boundaries is also the author of *Burnham*. See generally *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559-699 (1991), including Lea Brilmayer, *Introduction: Three Perennial Themes of the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 561-64 (discussing “borders versus distance”); Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569 (discussing role of historical practices and expressing concern about nationwide service of process because of the relationship between choice of law and jurisdiction rules).

114. Location is not the exclusive basis but a factor to be considered. See *City of Chicago v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1048 (1995) (Souter, J., for the majority) (determining that admiralty jurisdiction under 28 U.S.C. § 1331(1) involving tort claims “must satisfy conditions both of location and of connection with maritime activity”); compare the opinion by Justice Thomas, joined by Justice Scalia, arguing that the jurisdictional inquiry should be limited to the “simple question whether the tort occurred on a vessel on the navigable waters.” *Id.* at 1056; see also *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249 (1972) (concerning plane that falls into Lake Erie not within admiralty jurisdiction because “wrong” did not “bear a significant relationship to traditional maritime activity”).

The reach of federal civil law beyond the United States and its relationship to international or transnational laws of human rights is discussed in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. pending sub nom. Karadzic v. Kadic*, No. 95-1599.

115. *Shute v. Carnival Cruise Lines*, 499 U.S. 585 (1991). Such clauses suggest both the relevance of place and the potential burdens that distance can impose. Whether telecommunications can cushion such costs depends in part on the respective resources of the litigants. See generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992).

116. Linked to the Sixth Amendment’s confrontation clause and right to defend guarantees as well as to due process concerns, Rule 43 of the Federal Rules of Criminal Procedure requires that a non-corporate felony defendant be present at arraignment and at every stage of the proceedings, subject to waiver. See *Crosby v. United States*, 113 S. Ct. 748 (1993) (absconding prior to the beginning of trial precludes trial under the Rule). If a defendant absconds during trial, it may continue, and if a defendant leaves the country while an appeal is pending, an appellate court may dismiss that appeal. *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993). The “fugitive disentitlement doctrine,” however, has its limits; a criminal defendant’s absence cannot be used to dismiss that defendant’s civil suit challenging forfeiture of property. See *Degen v. United States*, 116 S. Ct. 1777 (1996). In short, the need in criminal law for the body of the defendant is not matched on the civil side.

117. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (abduction of criminal defendant, even from countries with which the United States has extradition treaties, does not prevent that defendant’s trial). The court in *Alvarez-Machain* relied on what has become termed the “Ker-Frisbie” doctrine. *Ker v. Illinois*, 119 U.S. 436 (1886) (State of Illinois had defendant abducted from Peru);

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Moreover, while I provided above some information about large scale aggregates with their multitude of far-flung parties, a good deal of litigation in the United States remains bipolar, and according to Professors Kevin Clermont and Theodore Eisenberg, the place at which disputes are resolved has a surprisingly large effect on the outcome. In their study of almost three million federal cases terminated between fiscal years 1979 and 1991, they found that when a motion for transfer was granted and a plaintiff's choice of venue was trumped by a judge (typically responding to a defendant's motion), the overall rate of plaintiff victories dropped from about 58 percent to just under 30 percent.<sup>118</sup> Moreover, despite assumptions of United States courts' inhospitality to "foreigners" (here defined as non-United States litigants), Clermont and Eisenberg found that foreign plaintiffs and defendants have higher success rates than do domestic litigants and that out of state litigants also do better than "locals."<sup>119</sup>

In short, territoriality and physicality—material connections in water, air, and land—are centerpieces of jurisdictional authority, theory, and practice.<sup>120</sup> To this day, active federal judges are generally required to reside within the circuit or district in which they sit,<sup>121</sup> and federal district lines are drawn in relationship to state boundaries. But we who think about courts will need to reassess assumptions—both of structure and of process—heretofore deeply rooted in the physical relationship of human beings on a specific piece of soil and a particular courthouse.

At the outset, I mentioned a consent decree that bound litigants in

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Frisbie v. Collins, 342 U.S. 519 (1952) (Michigan officials kidnapping defendant from Chicago).

118. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1512 (1995). They note that motions to transfer, while affecting a small percentage of the federal docket, are rising slowly. *Id.* at 1526-27. That trend may reflect a growing number of litigants being sued at distances from their preferred forum.

119. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1136, 1142 (1996). Their explanation is of greater selectivity by non-local litigants, resulting in their selective pursuit of meritorious or stronger cases.

120. See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 54 (1989) ("government coercion is mediated by reference to *land*"); see also Friedman, *supra* note 43, at 1442-53 (predicting that globalization will require reconsidering domestic federalism, including the forms of regulating business and industry).

121. See 28 U.S.C. § 44(c) (1994) (except for the D.C. Circuit, each circuit judge "shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service"); 28 U.S.C. § 134(b) (1994) (except again for the District of Columbia, each district judge "shall reside in the district . . . for which he is appointed"). These provisions stem from the First Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73. Once holding a life-tenured judgeship, that individual may be temporarily reassigned to sit elsewhere. 28 U.S.C. §§ 291 (circuit judges), 292 (district judges) (1994). While some senior judges have moved under those provisions, they are not yet used freely to alter the idea of landlocked judges; for example, when one recently elevated federal appellate judge requested permission to change his residency from New Jersey to California and to telecommute, that request was rejected. See David Stout, *Judge Barred from Moving his Chambers to California*, N.Y. TIMES, Apr. 25, 1996, at B6; Neil MacFarquhar, *Federal Judge to Resign, Citing Political Attacks*, N.Y. TIMES, June 5, 1996, at B4.

Tennessee, Alabama, and California.<sup>122</sup> Above I detailed practices in which judges either merged jurisdictions or coordinated proceedings across jurisdictional lines.<sup>123</sup> In this symposium, Senator Joseph Biden described his experience as a child growing up in Delaware but greeted by airborne soot from plants in Pennsylvania.<sup>124</sup> Discussing federalism in the context of health care debates, Professor Grogan noted that it was not clear how state autonomy was advanced when states contract for the provision of care to only a few national health care providers, nor why one would characterize that activity as “state”-based.<sup>125</sup> Professor Swire analyzed what is known (evocatively) as “not in my back yard” (NIMBY),<sup>126</sup> but the issue is what constitutes one’s “back yard.” Take the dispute about expansion of airports in the Chicago area;<sup>127</sup> the municipalities around both O’Hare and Midway Airports debate those airports’ expansion. At one level (literally, that of the neighboring houses and streets), the issue is well understood as “local.” But it also affects all who commute across country as well as the shipment of goods and parcels.

This problem of how to site an issue, be it jurisdictional or substantive, is reflected in choice of law doctrine. Choice of law is an area of law in which, like jurisdiction, reliance on a physical nexus—the place of the event—solves fewer problems when participants in the event(s) are disbursed throughout a range of venues and injuries occur across not only physical boundaries but also through electronic transmissions. Take a major pronouncement in the 1980s in the field of choice of law, *Allstate v. Hague*.<sup>128</sup> The Supreme Court had little instructive to say when faced with a question about the constitutionality of the application of Minnesota law (which required the “stacking” of coverage clauses in auto policies protecting against uninsured drivers) to insurance policies issued (aptly) by “Allstate” to a resident of Wisconsin who drove daily to work in Minnesota. Allstate argued for the application of Wisconsin’s law (which would have required it to pay the \$15,000 for uninsured motorist coverage once, rather than stacking the three policies and requiring payment of \$45,000). The Court only issued the reminder that states that lack any contact with a dispute cannot impose their laws.<sup>129</sup> Relying on longstanding

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122. See *supra* note 15.

123. See *supra* Part II.

124. Sen. Joseph Biden, Jr., Keynote Address delivered at Yale Law and Policy Review/Yale Journal on Regulation, Symposium: Constructing a New Federalism (Mar. 1-2, 1996).

125. Grogan, *supra* note 11, at 358. Similar questions are raised about other commentators’ discussions of problems of a “locality,” see, e.g., Butler & Macey, *supra* note 3, at 43, and when, in the interaction between a multistate corporation and a piece of land, the characterization “local” should attach.

126. Swire, *supra* note 3, at 105 (discussing “classic” NIMBY as occurring when “neighbors are geographically close to each other and easy to identify”).

127. See Isabel Wilkerson, *Airport Battle Grows in Chicago*, N.Y. TIMES, Jan. 9, 1991, at A10.

128. 449 U.S. 302 (1981).

129. 449 U.S. at 312-13 (“for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts,

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conceptions, the Court assigned the plaintiff a single place of residence (Wisconsin) and then asked a series of questions about the "contacts" between the plaintiff, the defendant, the cause of action, and the State of Minnesota. Yet, as Justice Brennan explained for the Court, Minnesota was specially situated in the life of the plaintiff; it was a "very important contact" to be a "member of Minnesota's work force."<sup>130</sup>

The economically-inclined among us might consider this example as raising problems for Allstate about how to price insurance across the country, whether varying state rules on stacking of insurance policies represented competition for business or other interests, and whether states that had or had not adopted such rules imposed "externalities" on other states. Implicit in both the doctrinal and economic approach are the assumptions that physical boundaries are salient and that each participant is assigned a single residence for which one posits either "contacts" to other sites (in doctrinal terms) or "internalizing" or "externalizing" the costs (in economic terms).

But why not use this example to question the reliance on boundaries, the conception of a singular relationship between individuals and states, and the assumption that the competitors in the "race" are individual states? If a person works in one state and sleeps in another, it is not fully coherent to imbue one state with the significance of "residence" and the other as having a "contact" but not a "relationship" to that individual. (Depending on one's line of work, one may spend more waking hours where one works than where one "lives"). I do not know the number of persons who have a driver's license from one state, vote in another, and own land in a third; the Census Bureau tells us that, as of 1990, about 4 million worked in a state other than their residence.<sup>131</sup> To use Peter Schuck's example, given that a person can "enjoy many of the economic and cultural advantages of New York while living in South Dakota,"<sup>132</sup> it is not clear what legal meaning to attach to the fact that one is sleeping in South Dakota. Moreover, to return to the Clermont and Eisenberg data, to find that the geographic identities of parties or the places of litigation affect outcomes in the federal courts undermines the theory of federal

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creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"). The Court held that the contacts here with Minnesota sufficed for its law to be applied.

130. 449 U.S. at 313-314. Hinting at the need to shift rules, Justice Brennan also discussed how states have "police power responsibilities toward the nonresident employee that are analogous, if somewhat less profound, than toward residents" and described Mr. Hague as "a longstanding member of Minnesota's work force." *Id.* at 314, 318.

131. 1990 Census of Population: Journey to Work and Migration Statistics Branch; Population Division, U.S. Bureau of the Census, STF3C. (that 4 million represents 3.5 percent of workers over the age of 16; in 1980, 3.1 percent of such persons worked outside their state of residence). [expand]

132. Schuck, *supra* note 27, at 18. Schuck then proceeds to analyze the idea of the population "distribut[ing] itself among communities according to its differing preferences concerning the mix of taxes and services offered by those communities." *Id.* I think, rather, that some segments of the population should be understood as living simultaneously in more than one community.

courts as neutral fora *per se* and raises the question of whether venue ought to influence adjudicative decisions.<sup>133</sup>

As the placement of people and businesses tells us less and less, doctrine, legal rules, and economic theories will need to shift.<sup>134</sup> Whatever the headaches of how to count people for purposes of the census created by such changing conceptions of the United States,<sup>135</sup> people, like corporations, will need to be understood as participating as residents and citizens of different types in several states and be accorded a range of legal statuses to reflect degrees of relatedness.<sup>136</sup>

From a history in which courts were not licensed to commence their proceedings without the body of the defendant to the demise of the fictive appointment of an agent for service of process, from requirements of lawyers' "appearances" to permission to file by fax, courts are slowly moving away from physical presence. Today it is telephone conferences in lieu of court appearances.<sup>137</sup> Tomorrow it will be video teleconferencing and the internet. Today, claimants and lawyers from across the country in the Silicone Breast Implant Litigation can address questions to the claims facility in Texas and receive information about the litigation via a computer,<sup>138</sup> and LEXIS-NEXIS has developed a "complex litigation automated docket system" (CLAD) by which documents can be filed electronically and decisions posted.<sup>139</sup> Given cyberspace<sup>140</sup> and globalization, the coherence of physicality as the basis of

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133. See Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 425 (1992) (arguing that geography is "arbitrary, extraneous, and distorting factor" whose effects on "the fair and orderly administration of the laws" should be limited).

134. My e-mail recently informed me that a "Virtual Magistrate" had been established for the Internet as a part of a "Voluntary Dispute Resolution for Network Conflicts," a project, supported by the National Center for Automated Information Research, to provide "neutral arbitrators" (trained in law and in computer networks) to serve to respond to disputes that will "inevitably" arise. (Notice posted April 11, 1996, my thanks to my colleague Matt Spitzer for forwarding it to me).

135. See, e.g., *Wisconsin v. City of New York*, 116 S. Ct. 1091 (1996) (rejecting challenge to methodology of 1990 Census).

136. Jurisdictional rules on corporations may be instructive. Corporations have two "citizenships" for purposes of diversity, that of their place of incorporation and that of their principle place of business, 28 U.S.C. § 1332 (c)(1) (1993); under rules that required service of process on agents within the state, corporations were deemed by the act of doing business to have appointed the Secretary of State as such an agent.

137. FED. R. CIV. P. 16(b) (providing for pretrial conferences in person or "by . . . telephone, mail, or other suitable means").

138. The Plaintiffs' Liaison Counsel created a Breast Implant Bulletin Board System, enabling access by modem to obtain information, including finding posted notices about the progress of the litigation and dates of hearings; in addition, the Claims Facility has also established a Bulletin Board for claimants. Telephone interview with Richard Rosenthal, Plaintiffs' Liaison Counsel (July 6, 1995).

139. Telephone interview with Richard Klein of LEXIS-NEXIS (June 14, 1995) (describing systems used by Delaware Superior Court for its asbestos litigation and in multi-party insurance case; as well as by Fulton County Court System, Georgia; Southern District of New York's Bankruptcy Court in bankruptcy proceeding; and in Eastern District of Ohio for product liability action).

140. The nonphysicality and intangibility of cyberspace was of central import to the recent finding of the unconstitutionality of regulations aimed at curbing "indecent" speech on the internet. See ACLU

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jurisdiction diminishes, with variation depending on the context.<sup>141</sup>

### IV. THE DIFFICULTIES OF INCORPORATING PRESENT ALTERATIONS, THE ATTRactions OF "TRADITIONS," AND THEIR LIMITS

So often have traditions been rehearsed—of discrete and territorially-bounded roles for the state and federal system, of a three-tiered federal pyramid (constructed, by the way, only a hundred years ago),<sup>142</sup> of only life-tenured federal judges, of bipolar litigation, of trials as central—that descriptions persist despite changing realities. What accounts for the distance between description and practice? Using claims about past jurisdictional lines or longstanding descriptions of federal courts<sup>143</sup> as the basic assumptions of current parameters appears to offer both security and presumptions of legitimacy—so appealing in a world patently insecure and filled with exercises of power lacking in constraint. Moreover, invocation of historical practices as a basis for contemporary decision making is not without its attractions—as a means of attempting to draw principles from practice and to avoid imposition

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v. Reno, 1996 WL 311865 (E.D. Pa. June 11, 1996). Each of the three judges writing as a part of the three judge court stressed the unique character of the medium; Judge Dalzell described it as providing "a never-ending worldwide conversation." *Id.* at \*64.

141. As Lawrence Friedman so nicely put it: "Borders are no longer as significant as they once were. From the *economic* standpoint at least, they are hardly impenetrable frontiers, but rather flimsy and insubstantial curtains of gauze, through which goods, ideas, and people flow rather easily." Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 90 (1996).

142. The original structure of 1789 provided that Supreme Court justices joined district judges in sitting as appellate courts; no right of appeal attached in all instances. The creation of a separate intermediate appellate court between trial courts and the Supreme Court and of a right of appellate review occurred by a series of enactments from 1891 to 1925. *See* Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826 (establishing circuit courts of appeal and appointing additional circuit judges but continuing the *nisi prius* jurisdiction of those courts); Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 (abolishing circuit courts and transferring their jurisdiction to the district courts); Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (Judges Bill) (requiring the use of intermediate appellate judges and establishing generally discretionary review at the Supreme Court level). *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 103-45 (1928).

143. Much of the contemporary commentary about the federal courts falls within the tradition of Henry Hart and Herbert Wechsler, who wrote the landmark text in 1953. *See* HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953). Several editions have been issued, but not until the last few years have questions emerged about its basic structure. *See* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (analyzing elements of approach, including its focus on appropriate allocations of power and institutional responsibilities); Richard H. Fallon Jr., *Comparing Federal Courts "Paradigms,"* 12 CONST. COMMENTARY 3, 3 (1995) (discussing Hart and Wechsler's approach as "reigning Federal Courts 'paradigm'"); Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENTARY 557 (1994-95) (arguing that approach is no longer generative and should be replaced); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994) (arguing that reconception was required); *see also* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURT AND THE FEDERAL SYSTEM* (3d ed.) and discussing its influence and assumptions).

of normative judgments not anchored in shared assumptions.<sup>144</sup>

Reliance on historical practices as guides to United States' legal federalism's future is problematic, however, in part because the practices are themselves varied and complex, and in part because some of the practices stem from contexts now eclipsed by profound changes that structure daily lives. Take again the example of the federal courts. As noted above, the Judicial Conference of the United States argues for a presumption against expansion of federal civil jurisdiction; the commentary attempts to link that policy preference to longstanding allocations of state and federal court authority.<sup>145</sup> But the practices over the past two centuries are multifaceted and varied, and different retellings of federal jurisdictional history can stress an array of its iterations, permitting a range of normative claims to be couched in historical practices but varying significantly.

For example, Richard Fallon argues that two competing conceptions of the federal judicial role lie within United States Supreme Court doctrine. He terms one a "nationalist model" and another a "federalist model," and then details the claims made on behalf of both and the historically relevant moments to which each turned.<sup>146</sup> For the federalists, the founding of the nation is key; the states are the backdrop court system, and the federal courts are part of the extra court system, to be employed only in the exceptional moment.<sup>147</sup> For the nationalists, the Civil War, the Fourteenth Amendment, the New Deal, and the 1960s Civil Rights movement revised the story and shifted the focus; the stress is on federal courts' involvement.<sup>148</sup> From these differing visions, one could create two kinds of presumptions, one about presumptive reliance on state courts and the other about a presumptive welcome to the federal courts.

Turning from such a jurisprudential overview to specific areas of law, the criminal arena is currently of concern to many federal judges, who decry what

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144. The reliance on history as a normative justification is not only attractive to nations; it is also constitutive of them. As Guehenno describes, "A nation has no other definition but historical. It is a locus of a common history, of common misfortunes, and of common triumphs." GUEHENNO, *supra* note 64, at 4. Arguing that territorial boundaries of nations are also central to their identities and that those boundaries have little coherence given economic and technological changes, he then concludes that the era of "nations" is coming to a close.

145. *See supra* note 8.

146. Fallon, *The Ideologies of Federal Courts Law*, *supra* note 59, at 1150-64.

147. *Id.* at 1151-57 (states as equally "competent" and absent contrary evidence, federal judges should respect state court abilities).

148. *Id.* at 1158-64 (discussing "special role" for federal judiciary and ready access); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing states as wrongdoers in need of federal oversight); YACKLE, *supra* note 108, at 34-44 (arguing that the federal courts are "far better forums for the vindication of rights than are the state courts"); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994) (providing historical case study of events in southern parts of United States in 1950s and 1960s and arguing that jurisdictional rules are deeply embedded in particular disputes).

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some have described as the “federalization” of criminal law.<sup>149</sup> But federal criminal law has long been an eclectic and sweeping amalgam, overlapping state jurisdiction in a variety of areas. As Professor Rory Little has summarized it, by 1790 federal criminal jurisdiction reached bribery, false statements, “murder, maiming, theft, fraud, and even receiving stolen property.”<sup>150</sup> Scanning the last two centuries, Professor John Jeffries and Judge John Gleeson conclude that, even before the 1994 crime bill, “federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loansharking, most illegal gambling operations, most briberies, and every drug deal, no matter how small . . . .”<sup>151</sup>

Similar examples can be found in other parts of the federal docket. During the late eighteenth and early nineteenth centuries, land speculation and holding were “national,” “federal” issues of great import to the creation of a central government.<sup>152</sup> In the late nineteenth and early twentieth centuries, labor-management relations moved into national focus and onto the federal courts’ agenda.<sup>153</sup> Kidnapping for ransom became a national concern in 1932 in the wake of the abduction of a child of Charles Lindbergh.<sup>154</sup> The era of federal

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149. See William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6-7; see generally Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995).

150. Little, *supra* note 10, at 1063; see also *id.* at 1034 (arguing that it is mythic to perceive of the “federalization of crime [as] a new phenomenon”); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 833 (1994) (describing congressional creation of federal crimes beyond the “explicit constitutional authority” and arguing that the First Congress believed itself authorized to create federal criminal law “necessary and proper to the exercise of some other explicit federal power”) (footnote omitted). In contrast to Little, Professor Kathleen F. Brickey argues that the “federalization of American criminal law is a twentieth century phenomenon.” Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135, 1137-41 (1995).

151. John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095-97 (1995) (footnotes omitted). For a snapshot a half century earlier, see L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 LAW & CONTEMP. PROBS. 64, 64 (1948) (discussing “[n]ational criminal jurisdiction, [ranging from] treason to hunting offenses, occupying approximately one quarter of the federal judges’ time”) (footnote omitted).

152. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22 (1948) (stating that there were twenty-five Supreme Court cases, many brought by virtue of diversity jurisdiction, about “interests in public lands between 1790 and 1815”; the “Supreme Court aided virtually every land speculator who came before it from 1790 to 1815”) (footnote omitted). On “congressional instrumentalism” when deciding the boundaries of federal court subject matter jurisdiction in the early years, see WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 52 (1995) (“[T]he drafters of the Judiciary Act viewed the federal courts as a tool to effect specific substantive results.”).

153. Ray Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROBS. 114 (1948).

154. Horace L. Bomar, Jr., *The Lindbergh Law*, 1 LAW & CONTEMP. PROBS. 435, 435-36 (1934) (stating that in 1931, while a survey of 501 chiefs of police found that 279 kidnappings occurred in 1931, only 69 convictions were reported; proposals for federal jurisdiction over inter-state kidnappings had been made but none were enacted until after that “atrocious deed”). For discussion of both the federalization of car theft in 1919 and the subsequent “de facto defederalization” by prosecutorial decisions not to bring such cases, see Little, *supra* note 10, at 1068-69 (discussing how between 1922-

prohibition of alcohol resulted in a federal prison population in the early 1940s in which about half of the inmates were incarcerated for "liquor law violations."<sup>155</sup> Also during the twentieth century, both the New Deal and the 1960s Civil Rights movement prompted Congress to define a myriad of issues, some relating to economic wherewithal and some to civil liberties, as "federal."<sup>156</sup> In the past few years, a battle has been fought about whether violence against women is a national issue to which federal judicial attention ought to be paid,<sup>157</sup> and about the scope of federal court criminal jurisdiction.<sup>158</sup> From these varying uses of the federal courts over the past two centuries, Jamie Gorelick and Harry Litman object to the very effort of identifying "fixed spheres of federal and state activity" and conclude that a principle limiting federal court criminal jurisdiction "cannot be squared with the historical development of the federal courts' jurisdiction."<sup>159</sup>

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33, an average of 1,466 auto theft prosecutions were brought, but by 1991 such filings were less than 205 per year).

In the 1930s, bank robbery also first became a federal crime. See Act of May 18, 1934, ch. 304, 48 Stat. 783. According to the Justice Department, impetus for the bill came from difficulties contending with organized gangsters "sufficiently powerful and well equipped to defy local police, and to flee beyond the borders of the State before adequate forces can be organized." See H.R. REP. NO. 1461, 73d Cong., 2d Sess., at 2 (1933) (Statement of Attorney General); see also *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 LAW & CONTEMP. PROBS. 445, 448 (1934) ("Since only federal forces are free to conduct their operations without regard for state lines, the federal government is in a strategic position to combat such activities."). See Brickey, *supra* note 150, at 1144 (by legislation such as this, local problems became national ones).

155. James V. Bennett, *Excerpts from Report on Federal Youthful Offenders*, tbl. A, reprinted in REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 41, App. I (1942). In terms of the focus of federal criminal enforcement during that era, see Schwartz, *supra* note 2, at 64 (stating that of 31,114 criminal cases instituted in 1947, 3244, or more than 10 percent, were filed under the National Motor Vehicle Theft Act; the two largest categories prosecuted were "fraud and other theft" which represented 7082 cases or almost 23 percent, and immigration which represented 7029 cases, also about 23 percent).

156. Fallon, *The Ideologies of Federal Courts Law*, *supra* note 59, at 1158-64; see also Little, *supra* note 10, at 1059 (discussing how what might be termed "ordinary" street crime is sometimes perceived to have federal dimensions because of the relationship between those assaults and racial hostility).

157. In 1994, Congress answered in the affirmative, enacting the Violence Against Women Act. The Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1796 (codified at 42 U.S.C.A. § 13981 (West Supp. 1995)). For the four years during which the proposal was pending, federal judicial voices and many lawyers voiced opposition. See Cahn, *supra* note 42, at 1108-11, nn.188-93 and accompanying text (1994) (reviewing exchanges among federal and state judges and Senator Biden, one of the legislative sponsors). In 1993, the Judicial Conference of the United States changed its position. It no longer opposed the legislation, but took no position on the creation of a new cause of action and supported the provisions for studies of gender bias, also provided in the legislation. See Judicial Conference Resolution on Violence Against Women (Mar. 1993), reprinted in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (June 14, 1993); see also *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THIRD BRANCH 1, 3 (1992) (discussing Judicial Conference's then opposition to some portions of the bill that would "involve the federal courts in a whole host of domestic relations disputes").

158. Little, *supra* note 10, at 1034-70; *United States v. Lopez*, 115 S. Ct. 1624 (1995) (dividing 5-4 on whether possession of gun "substantially affects interstate commerce").

159. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 969 (1995).

## Federalism's Options

That history is messy or multi-faceted does not require rejection of historical practices *per se* but rather self-conscious work at exploring how and why one selects a particular set of practices as exemplary. But other difficulties also counsel skepticism about drawing sustaining guidance from traditional practices in this particular context. A good deal of discussion of the jurisdictional boundaries of the federal courts depends on the invocation of these categories as if they had clear content, as if "state" as compared to "federal" courts were sufficiently distinct that one could hold the two next to each other and readily mark the differences.<sup>160</sup>

But given the long history of concurrence of jurisdictional authority, state and federal courts overlap and resemble each other in several dimensions, including caseload, judiciaries, and modes of decisionmaking. The federal docket is an eclectic mix, not limited only to disputes readily recognized as "federal."<sup>161</sup> Much of federal jurisdiction is concurrent with that of the state courts and has been since the inception of the country. While federal courts have more life tenured judges than other judiciaries, federal courts are no longer populated exclusively by life-tenured judges.<sup>162</sup> The modes of decision making within federal courts are also not unique. The amalgam of management, settlement, and adjudication, of published and unpublished decisions, is shared by state and federal judiciaries. While federal jurisdictional boundaries have been and are more limited than that of state courts, limited mandates themselves do not delineate federal courts from other adjudicatory institutions; federal agencies also function as courts of limited jurisdiction.

The one remaining distinguishing feature is that federal courts today are richer, in material and symbolic terms, than their counterparts. This relative richness comes in several forms, such as judicial salaries, the ratio of judges to cases, the quality of courtroom space and its comfort, the public resources

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160. As the final report of the Long Range plan put it, the "starting point in articulating a sound judicial system is identifying the *essentials* of federal court jurisdiction." LONG RANGE PLAN, *supra* note 8, at 23 (emphasis added). In contrast, an analysis of federal criminal law, by considering convictions and incarcerations by type of crime, concludes that while the federal and state case loads look different, categories of federal criminal work are a "series of clusters of diverse case types," reflecting "federal special interests," but that what "the special interest may be" does not appear from the data. "If there is a general theory of federal criminal jurisdiction in the statistics on prosecution and imprisonment, it is not visible to the naked eye." Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 542 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 19-20 (1996).

161. One example is the exchange between Justice Scalia and Marc Galanter about the federal docket. Justice Scalia argued that, in 1960 (when he had gone to law school), the docket of the federal courts was populated by important cases, with a touch of the "routine." Address by Justice Antonin Scalia to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, LA (Feb. 15, 1987), *reprinted in* 34 FED. B. NEWS & J. 252 (1987). Galanter reviewed the docket of those "good old days," and demonstrated that a good many "routine" cases were on the docket then as now (but may well not have been the subject of law school discussions). Marc Galanter, *The Life and Times of the Big Six: Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 921-28.

162. See Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) (discussing valuation of tasks of different federal trial judges).

spent, the status of the lawyers and litigants who appear in the courts, and the status accorded to those who hold the position of federal judge.<sup>163</sup> But, as some federal judges are quick to point out, these features of federal court may also be vulnerable.<sup>164</sup> More poignantly, this mark of distinction rests on the existence of other, less fortunate judiciaries.

That state and federal courts overlap to a large extent is not surprising when one remembers that courts' dockets reflect the overlapping work of the state and federal governments. As is illustrated by the debates among Supreme Court justices about the meaning and reach of the Tenth Amendment, in which discussion has focused on whether particular kinds of activities should be understood as belonging to a state and beyond congressional legislative authority,<sup>165</sup> a search for the "essential attributes" of a sovereignty is unavailing.

The construction of roads and the provision of social welfare were once deemed "private" activities, superintended by neither the state nor federal governments,<sup>166</sup> while educational facilities were often supported by public and private resources.<sup>167</sup> Technological changes alter the relevance of geographical boundaries, and with that, the role of territories's government.<sup>168</sup> Social mobility makes the idea of family law as local law implausible; interstate support orders are of course needed for collection of debts,<sup>169</sup>

163. See Resnik, *History, Jurisdiction, and the Federal Courts*, *supra* note 60, at 249-54.

164. LONG RANGE PLAN, *supra* note 8, at 5-20.

165. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating Fair Labor Standards Act's application to localities); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* and upholding congressional authority to regulate wages of transit workers of a locality); *New York v. United States*, 505 U.S. 144 (1992) (holding that while Congress can create incentives for states to share in problems of nuclear waste disposal, federal government cannot compel states to accept nuclear waste).

166. See, e.g., *Garcia*, 469 U.S. at 539-47. Justice Blackmun described the difficulty of distinguishing "governmental" versus "proprietary" functions and rejected the possibility that a "workable standard for 'traditional governmental functions'" could be developed; he also discussed the limited utility of historical tests. The bases for this decision are illuminated by Tushnet, *supra* note 98, at 1626-34 (explaining that Justice Blackmun had initially voted in conference in *Garcia* to overrule Congress but that, upon attempting to draft that opinion for a then-majority, he became persuaded that he could "find no principled way" to do so).

167. See NEWTON EDWARDS & HERMAN G. RICHEY, *THE SCHOOL IN THE AMERICAN SOCIAL ORDER* 211 (1963) (claiming that at Founding, "no one could have foreseen that education would come to be regarded as one of the essential functions of government"; arguing that rise of interest in public education was linked to concern about need for educated populace to enable republican institutions to function); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925* (1987) (arguing that history of public and private involvement demonstrates that states could subsidize non-public secular educational institutions).

168. *New York v. United States*, 505 U.S. 144, 150-51 (1992), provides a good example; both nuclear waste and its ready transport, as well as its extraterritorial risks, are artifacts of the twentieth century. See also Merritt, *supra* note 59, at 1564-66 (discussing limitations of theory of federalism based on territory).

169. See the Child Support Recovery Act (CSRA) of 1992, 18 U.S.C. § 228, enacted in 1992, the constitutionality of which is now being debated (post *Lopez*) in the lower courts. See, e.g., *United States v. Schroeder*, 912 F. Supp. 1240 (D. Ariz. 1995) (finding Act unconstitutional); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) (upholding Act).

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and many issues of family life intersect with current national laws on bankruptcy, immigration, and benefits.<sup>170</sup> Mark Tushnet makes a further point: that many government functions are not themselves performed by governments but are contracted out to private entities.<sup>171</sup> Morton Grodzins fights the dichotomization itself and argues that the role of governance has long been shared by federal, state, and local authorities, as well as by public and private actors.<sup>172</sup> In short, while a good deal of this Symposium's discussions are in the context of state or federal, public or private, centralization or devolution, it is important to remember that some "ands" might be useful—state and federal, public and private, centralized and state-run.<sup>173</sup> As Felix Frankfurter (a complex speaker on federalism) and James Landis argued seventy years ago, "[o]ur regions are realities. Political thinking must respond to these realities."<sup>174</sup>

Divergent claims are made about today's "realities." Edward Rubin and Malcolm Feeley argue that the country has evolved from a federation of semi-sovereigns into a national government that relies on the states as mechanisms of decentralization; in their view, federalism *per se* has little to commend it.<sup>175</sup> Professor Daniel Meador suggests a unified court system.<sup>176</sup> In contrast, Larry Kramer believes that the states are vital law makers, affecting the lives of most citizens more than does the federal government.<sup>177</sup> Two decades ago, Robert Cover and Alexander Aleinikoff spoke of the values of a dialectical federalism, of the ongoing dialogue between state and federal systems, of the normative utility of maintaining distinctive systems, and of the

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170. Resnik, "Naturally" Without Gender, *supra* note 42, at 1621-30 (describing "federal laws of the family"); some federalist systems, including Canada and Australia, locate some family matters in their national court systems. See P.E. Joske, AUSTRALIAN FEDERAL GOVERNMENT 203-04 (1967); Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 108 (Winter 1992).

171. Tushnet, *supra* note 98, at 1639.

172. GRODZINS, *supra* note 34, at 5-24 (including foreign affairs as an example, and also noting that while the Constitution bars certain federal officials from simultaneously holding office in other branches of the federal government, no such constitutional bar operates to preclude dual office holding between state and federal governments). Note that Scheiber disagrees, arguing that Grodzins' claim is "spurious and insupportable" but that, given the era in which the claim was advanced (during President Johnson's term), the appeal of the historical continuity of Johnson's "partnership" themes with earlier eras lent persuasive power to Grodzins' theory. See Scheiber, *supra* note 7, at 265-90.

173. Mashaw makes a similar point in the context of the debate about categorical entitlements and block grants. See Mashaw & Calsyn, *supra* note 4, at 298-99.

174. Frankfurter & Landis, *Compact Clause*, *supra* note 32, at 729 (in context of responding to "shibboleths 'States-Rights' and 'National Supremacy'").

175. Rubin & Feeley, *supra* note 37, at 908-09.

176. Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 777-82 (1995) (considering advantages of unified state and federal court system and trends that underlie movement in that direction).

177. Kramer, *supra* note 36, at 1504 ("by comparison with other developed nations, it's striking how much authority in this country is still exercised by state law"); see also Eskridge & Ferejohn, *supra* note 39, at 1358-59 (arguing that federalism has problem "of credibility" if it does not seek to maintain "robust" role for state governance).

means by which to do so.<sup>178</sup> These divergent images capture different moments of political promise and despair, at times focused on the immense power of the national project, and other times appreciating the vitality and durability of forms of governance that, without guns or great resources, continue to have social and political force.

Much of the identity of either a state or a federal government is gained from distinguishing itself from the "other." The dichotomy may serve therefore in rhetorical political debates, but it misses the many "others," the variety of combinations, be they intermediate organizations, regionalism within states, networks of states, or informal as well as rule-based collaborations. Again using the context of the federal courts, the narrative of the twentieth century federal judicial system that I prefer to tell is one of invention, some quiet and some exuberant, some elegant and some jury-rigged. Take magistrate judges, who accrued power slowly over a period of thirty years, not even gaining the title "judge" until 1990.<sup>179</sup> The emergence of the fourth tier of federal judges (magistrate and bankruptcy judges) need not be relegated to an embarrassed footnote but rather seen as an innovative mechanism almost to double the size of the federal trial bench during decades when a variety of political obstacles made infeasible the expansion of the life-tenured apparatus. Consider also the growth of agency adjudication, with its trumpeted beginnings (the New Dealers praised this cadre of what today we call bureaucrats and hoped that their regulatory efforts would benefit the country), its more quiet expansion during the 1950s and 1960s, its siege of criticism resulting in the "due process revolution," during which procedural obligations were imposed on agency adjudication and by which agencies came all the more to resemble courts.<sup>180</sup>

The more recent developments, of judicial federalism, large-scale litigation, and fluid borders, could in turn prompt yet another round of innovations, aspiring to create additional judicial services with stature and wealth. Whether it might be "national courts" to deal with the many instances in contemporary litigation that involve disputes not fairly described as either federal or state,<sup>181</sup> or something else, *interstate* problems need not necessarily be understood as federal problems nor remitted to a single state.<sup>182</sup> Collabora-

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178. Cover & Aleinikoff, *supra* note 106, at 1045-52; 1064-68 (overlapping jurisdiction also useful to enact tensions in governance and ambivalence about norms); Cover, *The Uses of Jurisdictional Redundancy*, *supra* note 106.

179. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990), codified at 28 U.S.C. § 631 note (1994) (change of name of United States magistrate to "United States Magistrate Judge").

180. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring hearing prior to termination of welfare benefits).

181. In addition to the aggregate tort litigation, discussed above, ordinary diversity litigation and certain crimes could also fall within such a court's jurisdiction.

182. In many respects, the suggestion of an interstate court reflects calls from earlier eras on the need for interstate regulatory coordination. See, e.g., Frankfurter & Landis, *Compact Clause*, *supra* note

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tive, noncategorical federalism captures some of the emerging methods of legal practice that cut across state and federal jurisdiction. Just as states exist in part by constitutional inscription but also because of the habit of invoking them as relevant sources of governance,<sup>183</sup> so might we build on practices of co-venturing across states to enable additional effective means of providing new opportunities for multiple voices, exchange, and coordination.<sup>184</sup>

To do so, law, empirical inquiries, and theorizing about both will have to shift.<sup>185</sup> For example, doctrines that privilege activities of states above those of regions would need to be reconsidered,<sup>186</sup> as will the question of how to

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32, at 717 (explaining state compacts relating to natural resources: "The regional characteristic of electric power, as a social and engineering fact, must find a counterpart in the effort of law to deal with it. No single State in isolation can wholly deal with the problem. . . . Co-ordinated regulation among groups of States, in harmony with the Federal administration, . . . must be the objective"). These comments are also related to what David Shapiro calls "intermediate federalism," which he describes as responding to the functional utility of regional responses and in which the federal role is that of "facilitator." DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 135-37 (1995). The difference between the Frankfurter & Landis conception and current ones is in part also an artifact of technology. For them, regionalization was central. Today, groups of states (such as California and states on the East Coast) combine for certain purposes, not necessarily prompted by geographical proximity.

183. See generally PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 105-36 (John B. Thompson ed. & Gino Raymond & Matthew Adamson trans., 1991); see also Briffault, *supra* note 59, at 1346-47 (discussing how "complex of values . . . gives the states a certain importance in the popular consciousness that reinforce their political position").

184. Such interaction would be responsive to Susan Rose-Ackerman's point, that even within a given area such as environmental regulation, some issues are better dealt with at differing levels of governance and the choice should not be cast as either local or national regulation. See Rose-Ackerman, *supra* note 110.

185. As Frankfurter and Landis put it: "The challenge of the situation is to make legal accommodations of these practical impingements." See Frankfurter & Landis, *Compact Clause*, *supra* note 32, at 687 (the referent was to then-spreading phenomenon of federalism and the existence of two "lawmaking agencies, State and Nation").

186. Not only do the terms of *Lopez*, *Seminole Tribe of Florida*, and *New York* need to be revisited, (see, e.g., Gordon, *supra* note 7, at 222, but doctrines such as sovereign immunity need also be addressed. I agree with Vicki Jackson that sovereign immunity should be understood as an abstention doctrine. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *YALE L.J.* 1, 7 (1988). The question is whether, to the extent such deference should be accorded, it should flow equally towards state-created compact entities and unitary states.

The current rule, developed before the expansion of the Eleventh Amendment in *Seminole Indian Tribe*, is that because "[b]istate entities occupy a significantly different position in our federal system than do the States themselves . . . [and] address 'interests and problems that do not coincide nicely either with the national boundaries or with State lines,'" *Hess v. Port Authority Trans-Hudson Corp.* (PATH), 115 S. Ct. 394, 400 (1994), and are the product of Congress as well as the consenting states, suit against them in federal court does not pose any incursion of state sovereign authority and "the federal tribunal cannot be regarded as alien in this cooperative, trigovernmental arrangement." See *Hess*, 115 S. Ct. at 401; *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). My point here is not to argue for expansion of the Eleventh Amendment but to ask about how, doctrinally, to provide stature for such "trigovernmental arrangements" to reflect that their operation is as critical to the operation of the country as is action located in a single state and that, like states, such compacts implicate governmental concerns of "solvency and dignity." *Hess*, 115 S. Ct. at 406. Note that raising such concerns does not necessarily result in insulation of compact entities from suits such as the injured-railroad worker's Federal Employers' Liability Act (FELA) claim at issue in *Hess*, an alternative is to reconceive of the Eleventh Amendment as not insulating states from such litigation as well, developing different conceptions of the role of federal courts, or creating alternative *fora* for the litigation of such cases.

conceptualize individuals, as residents and citizens of single states, as members of regions for certain purposes, or as members of more than one state.<sup>187</sup> With a focus on interstate mutual activities, a series of questions arise: do interstate compacts provide sufficient mechanisms to insure accountability or fiscal rationality? Do these compacts reflect and/or implement democratic processes?<sup>188</sup> What effect do current legal doctrines—that every compact sanctioned by Congress can be subject to federal court interpretation because they present “federal questions”—have on the political power of states?<sup>189</sup> Those concerned about “races to the bottom” will need to interrogate their own models of competition to consider how joint ventures and participants in compacts fit, to decide which entities might be termed competitors; they will need to include within their analytic search for optimal levels of regulation the role of such compacts. Also at issue will be whether legal and political interpretations of congressional oversight of such agreements serve as useful monitoring systems or build in troublesome distortions.<sup>190</sup> For those concerned about social programs such as income subsidies, inquiries will need to be framed about the mobility of lower income echelons and whether regional responses are appropriate. The very idea of what is “close to citizens”<sup>191</sup> will need to change. Further, how parts of the country relate to each other varies; “[w]hat constitutes a ‘section’ at one time, then, may not constitute one at a later time as a result of discoveries, developments, or change of some

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187. Implicated, of course, are constitutionally-based voting rules.

188. See Mashaw & Calsyn, *supra* note 4, at 298-99, raising such concerns in the context of block grants and categorical entitlement programs. Part of the question will have to be how these political units work in comparison to other state, local, and national structures. See DOIG, *supra* note 46, at 4-12; 166-250 (analyzing metropolitan transportation systems and regional politics in the New York, New Jersey region in the 1950s and 1960s). Professor Barry Friedman, who commented at the symposium, also raised concerns about accountability.

Similarly, the example I provided of large-scale aggregate litigation, in which state and federal judges and litigants create *ad hoc* entities, have prompted concern about the degree to which they ensure adequate representation of the interests determined. See, e.g., Barry Meier, *Infected Hemophiliacs and Tainted Lawsuits*, N.Y. TIMES, June 11, 1996, at C1 (some “activist” litigant members of the class argued that lawyers had not adequately represented them, negotiated directly with defendants, and then some form of agreement was forged among lawyers and clients); *Symposium, Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (many essays criticizing the agreements in such cases); see also Resnik, Curtis, & Hensler, *Individuals Within the Aggregate*, *supra* note 71.

189. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981).

190. Echoing, in late twentieth century terms what were concerns decades ago. See, e.g., THURSBY, *supra* note 32, at 5-10 (discussing arguments, framed in the mid-1930s, about when regional compacts would result in “sectionalism” and relaying commentary about how compacts are supposed to fulfill interests that would not be well-served by either national or state based political action, with congressional oversight to ensure that neither other regions nor the nation suffer from such agreements).

191. The European Community’s term. See *supra* note 31. Both Marquardt and Guehenno share a sense that the nation in Europe is a political unit that is (in Guehenno’s words, *supra* note 64, at 12-13) “too remote to manage the problems of our daily life” and “too constrained to confront the global problems that affect us.” Guehenno further argues that “classical federalism” is no solution, for it too is tied to territorial arrangements now obsolete. *Id.* at 16.

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kind.”<sup>192</sup> Similarly, what might be conceptualized as “threaten[ing] federal supremacy”<sup>193</sup> will need to be reevaluated.

In short, discussants of federalism less pressed by politics will have to fight the rhetorical pressures of national and states' rights in search of new alternatives, and equally important, in quest of already extant options.

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192. THURSBY, *supra* note 32, at 7 (using as example that Tennessee Valley Authority distributed electricity beyond that valley).

193. A term within United States law. *See* *United Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978).

