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COMMENTARY

NONIDEOLOGICAL JUDICIAL REFORM AND ITS LIMITS—THE REPORT OF THE FEDERAL COURTS STUDY COMMITTEE

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I. INTRODUCTION—IDEOLOGICAL AND NONIDEOLOGICAL APPROACHES TO JUDICIAL REFORM

In April of this year the Federal Courts Study Committee issued its final Report containing over one hundred proposals for change.¹ According to the accompanying press release, “[t]he study generating those proposals reflects the most comprehensive examination of the federal court system ever undertaken.”² It is certainly true that the Committee’s members are exceptionally well qualified to perform this task.³ Their own expertise was supplemented by staff work, input from public hearings,⁴ and extensive research from a battery of consultants and advisors.⁵ The Report is an important document. Many of the recommendations—such as the virtual abolition of diversity jurisdiction⁶ and the reallocation of most drug cases from federal to state courts⁷—would surely have an impact on the operation of the federal courts. Yet for all that, something is missing, at least to the academic reader. The Report is largely silent on what law school courses treat as the major issues of federal jurisdiction.

Particularly striking is the almost total lack of discussion of the myriad of Supreme Court decisions in the area and of the doctrines they develop.⁸


3. The Committee’s fifteen members include five federal judges, one state judge, members of Congress, practitioners, and a former Solicitor General of the United States.

4. See REPORT, supra note 1, at 32-33 (describing hearings and other sources of public input).

5. Id. at 199-201 (listing advisors and consultants).

6. Id. at 38-42.

7. Id. at 35-38.

8. The major exception is the recommendation that the rules concerning pendent parties be changed. See id. at 47-48. This would involve overruling Finley v. United States, 109 S. Ct. 2003 (1989).
Over the last twenty years (the period of the Burger and Rehnquist Courts) the Court has handed down an extraordinary number of rulings across the range of federal jurisdiction. To a considerable extent these cases are the law of federal jurisdiction, at least in those areas where there is controversy over its reach. Statutes and statutory interpretation play a secondary role.

A salient feature of these cases is the sharply ideological tone of the opinions produced by a deeply divided Court. Ostensibly technical questions—for example, the availability of pendent jurisdiction in federal court suits against state officials—become battlegrounds for contrasting visions of the role of the federal judiciary and the very structure of American government. Perhaps the Committee's apparent choice to steer away from so much of federal courts doctrine represents a more basic decision to engage in an exercise of nonideological, as opposed to ideological, judicial reform.

An ideological approach to federal judicial reform emphasizes basic systemic value issues such as balancing the need to vindicate national authority against claims of some form of state sovereignty and the constraints which separation of powers doctrines impose on the courts. It would produce proposals for change, or consolidation, in the role of the federal courts in such controverted areas as abstention, implied rights of action, and habeas corpus. Nonideological reform, by contrast, focuses on operational issues in the federal court system such as the existence of a caseload backlog, the proper role of the judge in managing cases, and the availability of alternatives to classic article III adjudication.

I do not contend that the line between the two approaches is always crystal clear. Those who want to see a diminution of federal authority vis-à-vis the states may invoke caseload concerns to reduce the role of the federal courts. Conversely, any proposal to lighten the federal courts' role by shifting a category of cases to the state courts may rest on a view of what cases have a higher claim to be in the federal judicial system. The Committee's proposal to eliminate most of the diversity jurisdiction is an example of how the two approaches can seem to mingle. It is certainly a means of reducing the federal courts' caseload, thus making the system

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10. Congress, of course, possesses the power to establish the lower federal courts and prescribe their jurisdiction. U.S. Const. art. I, § 8; art. III, § 1. In applying the basic jurisdictional statutes such as 28 U.S.C. § 1331 the Court often purports to be engaging in statutory construction, but the broad scope of the jurisdictional statutes permits a substantial amount of judicial discretion on questions of jurisdictional policy. The Court has admitted that its "construction" may run counter to Congress' intent. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9 n.8 (1983).


13. For example, using 1988 statistics, the Committee estimates that abolishing diversity
work more quickly and efficiently for those who are in it. At the same time it can be viewed as doubly ideological in that it reduces a form of federal intrusion on state sovereignty (deciding state law cases) and furthers the goal of a role for the federal courts that emphasizes the value of national supremacy. Still, diversity does not present any of the difficult ideological questions which have triggered most of the Court’s major federalism jurisdictional decisions: when and to what extent should the federal courts act to supervise state governmental actions, especially when state judicial relief is available, and when and to what extent should federal courts act to review the manner in which state courts have enforced federal rights, especially against state officials? A brief examination of these cases, as well as cases and issues involving separation of powers, will give a better sense of the issues with which the Committee might have dealt.

II. Federal Courts Doctrine and the Committee Report—A Missing Ingredient?

The current corpus of federal courts doctrines is based substantially on decisions by the Burger and Rehnquist Courts. The major thrust of these cases is to restrict access to the federal courts. The Court is actively managing the judicial system; it can even be viewed as engaging in its own brand of judicial reform. This endeavor may be motivated in part by concerns for the federal courts’ caseload, and in part by a theory of adjudication which limits any litigant’s “bites at the apple.” Underlying these concerns, however, are more fundamental notions of federalism and separation of powers. The result is not just doctrine in some abstract sense of the word. The doctrines determine who can get into federal court and who cannot.

A good example is the Court’s jurisdictional federalism cases. Many persons claim the protection of federal rights against their state governments. Although the eleventh amendment does not even seem to deal with federal question suits against a state in federal court by one of its own citizens, the Court has utilized the amendment to erect a formidable set of barriers in the way of such litigants. Damage suits are prohibited where the state jurisdiction would reduce the courts of appeals’ caseload by almost ten percent. Report, supra note 1, at 39, 41.

14. Id. at 14.
15. See id. at 15.
17. See Levit, supra note 9, at 321-22.
18. Id. at 322, 326-27.
19. For example, this theory may manifest itself in cases applying the concept of res judicata strictly, and in cases restricting the availability of habeas corpus as a means of re litigating issues already decided in state trials.
is the real party in interest,\textsuperscript{21} although equitable relief may be available.\textsuperscript{22} The recent cases also deal with eleventh amendment limits on declaratory relief\textsuperscript{23} and pendent jurisdiction.\textsuperscript{24}

The Report contains no recommendations concerning these crucial issues and appears not to discuss the eleventh amendment at all. One might justify this omission on the ground that the eleventh amendment’s bars on federal jurisdiction are a constitutional issue and that addressing constitutional rules was beyond the Committee’s mandate.\textsuperscript{25} A striking aspect of the eleventh amendment cases, however, is the large role which they assign to Congress in permitting citizens to sue their states in federal court.\textsuperscript{26} The Committee might have considered whether Congress should pass some form of statute authorizing these suits.\textsuperscript{27} The Committee might also have addressed how Congress should respond to the Court’s rules of statutory construction for eleventh amendment issues.\textsuperscript{28}

Litigants with federal grievances against state (and local)\textsuperscript{29} governments are liable to run into \textit{Younger} abstention. This doctrine applies if the litigant is a party to pending state proceedings which raise the federal issue and in which there is an important state interest, usually manifested through the presence of the state, or an official, as a party.\textsuperscript{30} \textit{Younger} is only one of several abstention doctrines, but it is probably the most significant in terms of its impact on litigants,\textsuperscript{31} and is the form of abstention that is most clearly a creature of the Burger-Rehnquist Court. Congressional power to act here is even clearer than in the eleventh amendment area. The abstention cases represent a form of judge-made federal common law. The Report’s treatment of the issue is as follows: “[w]e recommend for further study, but take no

\begin{itemize}
\item \textsuperscript{22} Id. at 670-71.
\item \textsuperscript{23} Green v. Mansour, 474 U.S. 46 (1985).
\item \textsuperscript{25} The authorizing statute directs the Committee, among other duties, to “recommend revisions to be made to laws of the United States as the Committee . . . deems advisable.” REPORT, supra note 1, at 191, citing Federal Courts Study Act § 105(2), Pub. L. No. 100-702, 102 Stat. 4642 (1988). There is no comparable specific charge concerning constitutional issues, although the Committee is to “make such other recommendations and conclusions it deems advisable.” Id.
\item \textsuperscript{26} \textit{E.g.}, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (holding Congress may authorize suits against states in federal court to enforce legislation enacted under the commerce power).
\item \textsuperscript{27} \textit{See} Brown, Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court, 71 VA. L. REV. 343, 394-401 (1985) (discussing alternative approaches).
\item \textsuperscript{28} \textit{See, e.g.,} Dellmuth v. Muth, 109 S. Ct. 2397, 2403 (1989) (Brennan, J., dissenting) (discussing and criticizing strictness of Court’s rules).
\item \textsuperscript{29} The eleventh amendment is not applicable to suits against local governments and their officials. The \textit{Younger} cases, however, do not seem to apply any distinction based on whether the official works for a state or local government. \textit{See, e.g.,} Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying \textit{Younger} doctrine to federal action against county officials).
\item \textsuperscript{30} \textit{See generally} C. WRIGHT, LAW OF FEDERAL COURTS 320-30 (4th ed. 1983).
\item \textsuperscript{31} Levit, supra note 9, at 336.
\end{itemize}
position on, proposals concerning the Anti-Injunction Act, abstention, and removal..." The Report notes that "[t]houghtful proposals" on abstention can be found in Part III of the Report. The status of Part III is something of a mystery, however. It consists of several thousand pages of studies, research, correspondence, etc. It was released some months after the full Report with cautionary notices that "[i]n no event should the enclosed materials be construed as having been adopted by the Committee." Part III does indeed contain an excellent discussion of Younger and other forms of abstention. The analysis includes a proposal that Younger be retained, but curtailed so as not to preclude damage suits. The Committee did not adopt this proposal, however, and placing it in Part III may be the equivalent of placing it in limbo.

Federalism concerns have also played an important role in the current Court's decisions on federal habeas corpus for state prisoners. As with the eleventh amendment and Younger abstention, habeas corpus cases present the question of the proper role of the federal courts in supervising state governmental processes. In this instance the processes are those of the state courts themselves. Not surprisingly, the current Court has shown great reluctance to do this and has cut back on the availability and scope of habeas corpus relief. The Committee opted once again not to join the debate. The Report states that the matter is "of central concern to the nation and its courts," and notes that federal habeas corpus cases have grown substantially in volume. However, the Committee chose to make no recommendation on the ground that Congress was considering revisions of habeas corpus procedures in death penalty cases and that proposals on other aspects of the issue "are in various stages of development." Again, the reader is referred to Part III, which contains an excellent analysis of the matter.

32. Report, supra note 1, at 48.
33. Id.
34. Federal Courts Study Committee, Working Papers and Subcommittee Reports (July 1, 1990) [hereinafter Working Papers]. The disclaimer is contained on the first page of each of the two volumes of Part III. The Report of the Subcommittee on Administration, Management and Structure contains an additional disclaimer that "[t]he working papers herein are not a part of the recommendations of the Federal Courts Study Committee. They may, in some cases be contrary to the final determinations of the Committee. They are reproduced solely as background material." Id.
36. E.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (limiting federal habeas corpus review in cases which rest on an independent and adequate state ground).
37. Report, supra note 1, at 51.
38. Id.
39. Id.
Interestingly enough, the Committee’s Draft Report did address habeas corpus, although not in great detail. The decision to avoid it in the final version may reflect a general desire to stay out of controversial issues, at least where the Court has generated the controversy. But the jurisdictional federalism cases are not just controversial. They are “of central concern to the nation and its courts.” The would-be federal plaintiffs or petitioners in such cases are strong candidates for a federal forum. This is particularly so if one applies the Committee’s apparent philosophy of favoring federal adjudication for “the protection of individual liberty against actions of the political branches of government.” The Court feels that in these cases considerations of comity and federalism are of an even higher order, while strong dissents emphasize the role of the federal courts in protecting federal rights. This sounds like the Committee’s approach, but one cannot know.

Separate from the merits of the federalism decisions is the related question of whether the Court has the authority to fashion such doctrines. In the abstention context, a powerful argument has been advanced that the Court in so doing is thwarting choices Congress has already made in basic jurisdictional and remedial statutes. The argument may have implications beyond abstention. If the Court’s development of jurisdictional rules is in fact a problem, apart from the content of those rules, the Federal Courts Study Committee would seem an ideal vehicle to put the matter before Congress so that it can respond. There are those, including this author, who insist that the Court’s abstention decisions do not represent a misuse of authority. Under this view, the development of federal court jurisdiction is an ongoing process in which Congress and the Court engage in a periodic dialogue. But if one takes this view, an occasion like the Report seems an ideal vehicle to inform Congress of what its partner in the dialogue has been doing and what the effects of these developments are on the federal courts. This would be the case even if the Committee had reviewed and reached agreement on all of the decisions that Congress might address.

I have dealt with the federalism jurisdictional cases at some length because they present the issue of ideological judicial reform in sharp focus. Doctrines promulgated by the Supreme Court keep cases out of the federal courts based on conclusions about the bearing of federalism values on federal jurisdiction. Congress has power in the area and might want to

41. REPORT, supra note 1, at 8.
44. The Court’s habeas corpus decisions may present questions of whether it has gone beyond the bounds of the authorizing statute. See M. REDISH, FEDERAL COURTS 943 (2d ed. 1989).
reform jurisdiction in a more inclusive direction. Let us consider briefly a group of recent cases in which jurisdiction is restricted in the name of another basic value: separation of powers.

The best known cases in the group are those in which the Court has refused to "imply" a private right to sue in federal court from a statute whose remedial scheme does not contain the judicial remedy which the plaintiff seeks. The clear tendency of the cases is against implication, but some go in the other direction. The Court's doctrinal approach is far from clear, reflecting a continuing division over whether it is ever proper to infer a private right from a statute not containing one. The matter is of intense importance to the federal claimant because, unlike in the federalism cases, the claimant's ability to get the alternative of state judicial enforcement of the federal right is not free from doubt. The extent of implied rights of action also affects the federal courts' caseload.

In 1979 then-Justice Rehnquist announced that "the ball is now in Congress' court." The Committee apparently agrees. The Report recommends creation of an Office of Judicial Impact Assessment which would advise on matters such as "the effect of proposed legislation on the judicial branch." The assessment would include "spotlighting drafting defects that might breed unnecessary litigation, such as . . . uncertainty as to whether a private right of action was intended." As a supplement the Report recommends that Congress "consider a 'checklist' for legislative staff to use in reviewing proposed legislation for technical problems." Items to be reviewed include "whether a private cause of action is contemplated."

Adopting these recommendations would have a major impact: the virtual end of the implied right doctrine. Until now the doctrine has shown remarkable resiliency in the face of repeated assaults by conservative justices. The Report may represent a tacit acceptance of the conservative

50. For example, in his influential dissent in Cannon, Justice Powell argued for virtual elimination of the implied private right doctrine. Id. at 730 (Powell, J., dissenting).
51. The Court's decision in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986), leaves the issue open. However, as the dissenters in that case pointed out, a conclusion that Congress did not provide a private right of action might be viewed as preemption of state enforcement of the federal right.
53. REPORT, supra note 1, at 89. There is some ambiguity on whether the Office would advise Congress directly or indirectly through the Judicial Conference. Id.
54. Id. at 90.
55. Id. at 91.
56. Id.
57. For example, in Thompson v. Thompson, 484 U.S. 174 (1988), Justice Marshall for the Court refused to reduce the implied right doctrine to a "virtual dead letter." Id. at 179. Justice Scalia, on the other hand, advocated "the categorical position that federal private rights of action will not be implied." Id. at 191 (Scalia, J., concurring).
position, but it is somewhat surprising that the Committee chose to resolve a major controverted issue of federal jurisdiction without discussing it.

As long as the Committee was going to deal with rights of action implied from federal statutes, what about the issue of implying damages remedies from the Constitution? Under the so called Bivens doctrine\(^5\) the Court has asserted the judiciary's power to grant such remedies against federal officials even though no statute authorizes them\(^5\). In recent years, however, the trend has been to deny judicial damages relief against the federal official if Congress has addressed the underlying subject matter and provided some form of relief.\(^6\) The cases seem to treat the issue as one primarily of statutory construction.\(^6\) As long as this approach is taken, would it not make sense to follow the Report's implied right approach and develop a means of informing Congress of the problem when it is considering statutes that might be read to preclude Bivens remedies even though the latter problem does not arise as frequently?

There is one final group of cases in which the Court has fashioned important doctrines and which the Committee Report addresses only partially: those applying the basic jurisdictional statutes and establishing the contours of what lawsuits and what configurations of parties can be brought in the federal district courts. The Court has long played an important role in this area. The best known example is the extensive judicial gloss on the statute conferring jurisdiction over cases "arising under" the Constitution, laws, and treaties of the United States.\(^6\) The Court's approach has wavered, but frequently has been restrictive.\(^6\) The Court has applied the "well-pleaded complaint rule" with a vengeance.\(^6\) It has also held that a case did not arise under federal law, even though the state complaint was based on the standard of conduct in a federal statute, because that statute did not provide for a private right of action.\(^6\) It is obvious that the well-pleaded complaint rule gets in the way of a lot of cases that most people would feel ought to be in federal court. A thoughtful section of Part III addresses these issues tangentially in the context of removal and proposes modific-
tions in current doctrine. The Report itself does not deal with any of them.

The Report does, however, speak out with some firmness in a closely related area where the Court has also taken a restrictive approach: jurisdiction over "pendent parties." The concept of pendent claim jurisdiction is well accepted. A federal court with jurisdiction over one of the plaintiff's claims against the defendant may resolve other claims, not normally within its power, if the claims arise out of a "common nucleus of operative fact." The situation is more complicated if resolution of the underlying controversy would seem to require the addition of parties over whom the court would not normally have jurisdiction. Recently, in Finley v. United States, the Supreme Court cast doubt on the validity of any pendent party jurisdiction, at least where it is the plaintiff who seeks to use the device.

The Report calls on Congress to confirm the validity of pendent party jurisdiction. The background papers in Part III make it clear that this would involve overruling Finley. The Report emphasizes the unfairness to the plaintiff of not allowing him to bring in the party against whom he has a closely related claim, but over whom the federal court has no jurisdiction. He must either bring two suits, abandon one claim, or bring the entire case in state court, and then only if it has jurisdiction over the federal claim. This range of choices is undesirable, including the third which amounts to "delegating the determination of federal issues to the state courts."

There is an important policy debate here. The Court's decisions do seem grudging, but they are motivated by a desire to preserve the limited nature of federal jurisdiction and a concern for the interests of "pendented" defendants who could not otherwise be brought into federal court on this matter by this plaintiff. On the other side is the powerful concern that is at the core of the doctrine of pendent jurisdiction: maximizing the ability of federal courts to deal with matters that are properly before them and preserving the attractiveness of the federal forum for federal claimants. Drawing a line between pendent claims and pendent parties may be arbitrary. Indeed, the Court's hostility toward the latter form of jurisdiction

66. Working Papers, supra note 34, Volume 1, at 516-31. This analysis includes a recommendation for broadening removal to include federal counterclaims. The Subcommittee recognizes that this would increase the federal courts' caseload, but finds this concern outweighed by "the general interest in preserving a federal forum for federal claims." Id. at 531.

67. Report, supra note 1, at 47.
70. Report, supra note 1, at 47.
71. Working Papers, supra note 34, Volume 1, at 547.
72. Report, supra note 1, at 47.
73. Id.
75. The Court in Finley seems to recognize this when it describes the cases on the need for statutory authority as "not display[ing] an entirely consistent approach." Finley v. United States, 109 S. Ct. 2003, 2010 (1989).
may cast doubt on the validity of the former. In any event, the Committee considered the issue and, over the dissent of three members, took a firm stand.

This action raises a basic question: why here and not elsewhere? Is it conceivable that the Committee surveyed the entire range of Supreme Court decisions on federal jurisdiction and related matters and found only one area—pendent parties—where Congress should step in to overturn the result? Even if this were somehow the case there is a closely related area that may call for the same treatment: pendent state law claims against state officials who are defendants in federal court suits based on federal law. Under current eleventh amendment doctrine such suits are permissible as long as the plaintiff seeks prospective relief rather than monetary compensation from the state treasury based on past conduct. In *Pennhurst State School and Hospital v. Halderman,* however, the Court ruled that the eleventh amendment overrode generally applicable principles of pendent claim jurisdiction and barred state law claims against the same defendants. The decision presents a would-be plaintiff with the same set of choices that the Committee found undesirable in the pendent party context: bifurcating claims, foregoing a claim, or bringing the entire suit in state court. Congress probably has power to overrule *Pennhurst.* The Committee might well have addressed the issue, given its view that "supplemental forms of jurisdiction, which may be exercised in the discretion of the federal courts, enable them to take full advantage of the rules on claim and party joinder to deal economically—in single rather than multiple litigation—with matters arising from the same transaction or occurrence."

It is of course true that a case like *Pennhurst* presents questions of federal jurisdiction in a sharply ideological context. At issue is whether a federal forum is necessary to protect federal rights against state governments and their officials. The result of the Court's federalism decisions is to send a large number of these cases into the court system of the very state whose conduct (or that of officials who act under color of its law) is under scrutiny. The Court has been sharply divided over how to approach these cases. Two ideological views compete for primacy. Federalist premises emphasize respect for states as sovereign entities and the role of their courts as enforcers of federal law. Nationalist premises focus on the post-Civil War amendments' transformation of federalism, which took the form of national rights against states and reliance on national institutions, especially the federal courts, to protect those rights. Perhaps the Committee produced

76. WORKING PAPERS, supra note 34, Volume 1, at 555-56.  
79. See Brown, supra note 27, at 351-53.  
80. See id. at 379-82, 394-401.  
81. REPORT, supra note 1, at 47.  
82. See Fallon, supra note 12, at 1151-57.  
83. See id. at 1158-64.
a document dealing with nonideological judicial reform because it simply wanted to stay out of this whole debate.

When one is dealing with federal court questions, however, ideology has a way of turning up. It is difficult to prescribe federal jurisdiction without a developed notion of the proper role of the federal courts. And it is difficult to develop this notion without addressing basic value questions such as the allocation of power among governmental entities in a federal system. What is surprising about the Report, given what it does not address, is the extent to which it engages in the process just described.

The Report states that its goal is "a principled allocation of jurisdiction," and that the Committee's "overriding concern . . . is promoting the most rational possible allocation of jurisdiction between state and federal courts." What drives this search is a belief that the "central task" of the federal courts is "protecting federal rights and interests." Protecting them against the states certainly is part of this task as shown by the previously quoted passage that "federal judicial intervention" is clearly necessary in situations that "involve the protection of individual liberty against actions of the political branches of government."

Much of this sounds ideological, and every bit as nationalistic as a ringing dissent by Justice Brennan. He would wholeheartedly endorse the Committee's statement that "the primary responsibility of the federal courts for resolving questions concerning federal rights [should not] be curtailed, notwithstanding the availability of state courts." The Report fails, however, to consider where these premises might lead. Should federal jurisdiction over federal cases be exclusive, for example? The Report comes close to suggesting this as an ideal, although any attempt to realize it would run up against pervasive notions of concurrent jurisdiction and the manifold problems of mixed federal and state law cases. Moreover, as long as we have concurrent jurisdiction, to say that a case somehow belongs in federal court only begins to answer the hard questions that arise when it also belongs in state court. Younger abstention cases, for example, are difficult because each system has highly plausible arguments for being the one to hear the dispute. The Court's ideological choices raise many questions; the Report avoids them.

III. THE JUSTIFICATIONS FOR A NONIDEOLOGICAL APPROACH TO JUDICIAL REFORM

This comment's focus on what is not in the Report is not meant to obscure the breadth and significance of what it does contain in its analysis

84. REPORT, supra note 1, at 35 (emphasis in original).
85. Id. at 44.
86. Id. at 15.
87. Id. at 8.
88. Id. at 7.
89. See id. at 14. ("The general (not unvarying) principle of division should be that state courts resolve disputes over state law, and federal courts resolve disputes over federal law.")
and more than one hundred recommendations. Besides eliminating almost all of the diversity jurisdiction and shifting most drug cases to state courts they include the following: the repeal of mandatory minimum sentence provisions and a review of the Sentencing Guidelines;\(^{90}\) a new article I Court of Disability Claims for disability claims under the Social Security Act;\(^ {91}\) a broadened requirement of exhaustion of state remedies in prisoner civil rights suits;\(^ {92}\) broadened statutory authorization for alternative dispute resolution procedures in civil litigation;\(^ {93}\) and an experimental proposal to deal with intercircuit conflicts by having the Supreme Court direct cases to a circuit court that has not yet ruled on the issue for an en banc resolution which will settle the issue.\(^ {94}\) These and other proposals reflect a lot of thought and effort, and make an important contribution to any discussion of how to change the federal court system. The nagging question that remains, however, is why the Committee stopped where it did. Why, having gone so deeply into questions of federal jurisdiction, did the Committee shy away from the ideological dimensions of the subject and from the Supreme Court's decisions and doctrines that reflect them?

A dispositive answer would be that the Committee was not authorized to get into such matters. Examination of the statutory mandate shows, however, that it was quite broad. The Committee's purposes include examining "problems and issues currently facing the courts of the United States,"\(^ {95}\) and developing a long range plan for the federal judiciary, including assessment of "the types of disputes resolved by the Federal Courts."\(^ {96}\) It is true that the Committee was directed to report to a number of entities, including Congress, but not including the Court.\(^ {97}\) The Committee might have concluded that an extensive discussion of the pros and cons of twenty years of Supreme Court decisions was beyond its sphere. Congress, however, has extensive power to overturn these decisions and probably ought to be informed of them as part of any examination of "problems and issues currently facing the courts of the United States." Moreover, in the area of pendent jurisdiction the Committee did examine what the Court has done and recommended overruling it.

A more pragmatic explanation is that the Committee would have felt politically awkward about engaging in a review of Supreme Court cases. The Chief Justice of the Supreme Court appointed its members, and several

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90. Id. at 133.
91. Id. at 55-59.
92. Id. at 48-51.
93. Id. at 82-86.
94. Id. at 125-29.
96. REPORT, supra note 1, at 189.
97. Id. The Report is, however, to be transmitted to the Chief Justice of the United States. The summary table of recommendations includes a category of "Recommendations to the Courts." Id. at 172-83.
FEDERAL COURTS STUDY COMMITTEE

of them, including the Chairman, are lower federal court judges. It is unrealistic to expect such a body to seem to sit in judgment of the High Court. The Committee showed little reluctance, however, about questioning the work of the United States Sentencing Commission, an important governmental body (including federal judges) that Justice Scalia has called a "junior varsity Congress." And, again, the pendent party materials show that the Committee was willing to evaluate the work of the Supreme Court itself.

It seems implausible that the pendent party cases are the only ones about which one can disagree. Perhaps the Committee limited itself to pendent parties because that is one of the few areas where it could evaluate the Court's doctrine without becoming involved in an ideological dispute. A case such as Finley v. United States can be seen as not resting on controversial views of federalism and separation of powers. To call for its overruling is to engage in nonideological judicial reform, while to call for overruling Younger v. Harris would be to plunge into an ideological battle. Assuming that this view of pendent parties is correct—a matter not free from doubt—the Committee may be sending an implicit message that it is time to move beyond the ideological conflicts over federal jurisdiction that dominated the 1970s and 1980s. The Report might be seen as an effort to develop what Professor Fallon has called "mediating conclusions and doctrines" that avoid the extremes of both federalist and nationalist rhetoric while recognizing the values in each approach. If this is so, the Report indeed is an important step forward, but one would expect an explicit discussion of the issue. Even if one takes this approach, moreover, it will not make the decisions of the Burger-Rehnquist Court go away. They stand, until an authoritative body—Congress or the Court—changes them. Perhaps this is acceptable to the Committee, but one would expect some discussion of how to reconcile this result with the Report's emphasis on protecting federal rights in federal court.

There is another possible explanation for the Committee's nontreatment of ideological issues, one which will make federal courts teachers uncomfortable. The Committee may have felt that the issues that dominate the federal courts classroom are largely irrelevant to a study of problems in the federal courtroom. In other words, we have a classic example of the division

98. See id. at 135-40.
102. The Court has been sharply divided over the seemingly technical issue of pendent parties. The dissenters have accused the majority of imparting "a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen." Finley v. United States, 109 S. Ct. 2003, 2021 (1989) (Brennan, J., dissenting), quoting Aldinger v. Howard, 427 U.S. 1, 36 (1976) (Brennan, J., dissenting).
103. Fallon, supra note 12, at 1231.
between academia and the bar, in which those who practice "in the real world" view academics' concerns as far removed from it. Perhaps the Committee's choice of approach reflects the view of practitioners that, for example, the availability of alternative dispute resolution is of far greater importance to them and their clients than an incisive analysis of the eleventh amendment's bearing on pendent jurisdiction.

In this respect it is worth noting that Judge Richard Posner is a member of the Committee and Chairman of its Subcommittee on The Federal Courts and Their Relation to the States. Posner's 1985 book, "The Federal Courts—Crisis and Reform," had a clear impact on the work of the entire Committee. Posner's book cast substantial doubt on the utility of doctrinal analysis to the task of evaluating current problems in the federal courts. This he saw as an institutional issue, and "the training and experience of doctrinal analysts limit the contribution they can make to the solution of what are, after all, largely economic, political, and managerial problems."

In my view the Supreme Court's federal jurisdiction cases are important both as a matter of doctrine and because of their impact on the federal courts. Consider the eleventh amendment. Academics cannot seem to get enough of it, while Judge Posner in his book dismisses it with a wave of the hand. The amendment, as currently interpreted by the Court, is a major obstacle to people with grievances against state governments. The fact that the Court deals so frequently with eleventh amendment issues suggests that many of these people want to bring their grievances to a federal court. Although it is virtually impossible to quantify how many cases are not brought in federal court, common sense suggests that other federal courts doctrines lead to this result. Without Younger abstention, for example, a wide range of current state defendants could well be federal plaintiffs.

When Judge Posner's book came out, Professor Redish criticized it on grounds similar to those which I have advanced in criticizing the Committee Report. According to Redish, Posner "fail[ed] to consider in detail the validity of numerous Supreme Court decisions which have the effect of reducing dockets." Redish felt that an analysis of the doctrinal decisions would expose their inadequacies and lead to more federal court jurisdic-

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105. E.g., Report, supra note 1, at 6-7 (discussing why simply adding judges will not resolve caseload crisis).
107. Id. at 325.
110. During the 1988 term the Court decided four eleventh amendment cases, and used eleventh amendment analysis in deciding a fifth.
Supporters of the decisions will disagree, but neither side of this argument supports omitting them from a comprehensive study of the federal courts.

Redish's observations about the book may, however, provide a clue as to why the Report is silent on doctrinal issues. Perhaps the Committee felt that it is not yet time to reach them. Consideration of doctrinal issues was not so much rejected as postponed until a later date when attention can be focused on issues that might add to the jurisdiction of the federal courts. The fundamental premise of the Report is that the federal courts face a caseload crisis. Thus the focus of virtually all of the Report's jurisdictional recommendations is on getting cases out of those courts. Alleviating the caseload crisis, then, is not the Committee's only goal, but an essential first step toward that "most rational allocation of jurisdiction between state and federal courts" that it seeks.

The Report points in this direction in its initial treatment of the curtailment of diversity jurisdiction. Getting rid of diversity will, it is contended, "free up the time of the federal courts to concentrate on their central task, that of protecting federal rights and interests. It will make it possible to consider ways of making the federal courts more effective protectors of federal rights." The Report lists the Anti-Injunction Act, removal, and abstention as possible areas for such future consideration, as well as pendent party jurisdiction on which it does make a current recommendation. Of course, the undertaking need not be limited to these subjects. Even the same Committee, given its view of the "central task" of federal courts, would feel pulled towards considering all doctrines which keep federal right holders out of federal courts.

One puzzling aspect of this scenario is why the Committee ties consideration of expansion of federal rights cases so closely to the curtailment of diversity jurisdiction. This can be done, the reader is told, "in a post-diversity era in which federal courts are not preoccupied with the enforcement of rights under state law." Why not do it now? Diversity jurisdiction may never be changed. If the federal rights cases are, indeed, a higher priority for federal court jurisdiction, those who want to bring them should not have to wait until some elusive day that might not come. The caseload problem can be reduced by other measures that the Committee recommends, even if diversity remains untouched. Also, it is not clear why diversity cases so "preoccupy" federal judges with state law issues that they cannot

112. Id. at 1392.
113. Report, supra note 1, at 6-9; see also infra notes 120-30 and accompanying text (examining premise that federal court system faces a caseload crisis).
114. Report, supra note 1, at 44.
115. Id. at 15.
116. Id.
117. Id.
118. Id.
119. Id. at 27-28.
"concentrate" on federal issues. The point probably is one of volume rather than intellectual energy. Whatever is wrong with the federal courts, federal rightholders might prefer to join the queue and take their chances. What is keeping many of them out is not diversity but a set of restrictive judge-made doctrines. Perhaps it makes sense to defer consideration of them until the caseload problem is dealt with, but the Report is hardly convincing on this point. Indeed, one cannot say with any certainty why the ideological jurisdictional issues are absent from the Report. The answers may lie in the justifications I have suggested here; they may be elsewhere.

IV. THE REPORT'S MAJOR PROPOSALS AFFECTING FEDERAL COURT CASELOAD AND THEIR MAJOR PREMISE.

This comment's focus on what is not in the Report is not meant to downplay the importance of what it does contain. The Committee puts forward a large number of thoughtful proposals aimed at improving the operation of the federal judicial system as a means of resolving disputes and reducing the caseload of the federal courts. The major specific proposals are aimed at alleviating crowded federal dockets; indeed, caseload concerns are the driving force behind much of the Report's call for reform. Thus one's general approach to what the Report does discuss is likely to be heavily influenced by one's perception of whether there is a caseload crisis in the federal courts.

Given the centrality of this premise to the whole undertaking, the Report is a bit ambivalent. It refers to the "current crisis"\(^\text{120}\) to the "impending crisis"\(^\text{121}\) and to the crisis that is "at last upon us."\(^\text{122}\) A fair reading would seem to be that the system is very close to its limits and that unless significant action is taken it will no longer be able to process cases in an acceptable manner. This is particularly true at the appellate level where simply adding more judges can harm the goals of consistency and collegiality.\(^\text{123}\)

Trying to establish that there is a caseload crisis in the federal courts is not an easy task. Part of the problem is that, according to one observer, "[n]o comprehensive study exists which considers all of the necessary variables to adequately measure and evaluate the workload of the federal courts."\(^\text{124}\) Another part of the problem is that the claim has been made before. It is, for example, the major premise of Judge Posner's book. Writing in 1985 he argued that the statistics of great caseload growth demonstrated the existence of a crisis,\(^\text{125}\) although his language was at times

\(^{120}\) Id. at 3.
\(^{121}\) Id. at 4.
\(^{122}\) Id. at 6.
\(^{123}\) Id. at 7.
\(^{124}\) Levit, supra note 9, at 324.
\(^{125}\) The subtitle of the book is "Crisis and Reform." Part II, which contains the greatest use of statistical information is titled "The Crisis." R. Posner, supra note 104, at 59.
also ambivalent. Reviewers of the book differed over whether Posner had proved his point. Posner was by no means the first federal judge to cry wolf about the caseload problem.

To some extent the Committee's arguments for the existence of a crisis today weaken Posner's claim of five years earlier. The Report identifies two of the major causes of the crisis as the dramatic increase in federal drug prosecution, and the impact of the Federal Sentencing Guidelines. Neither of these factors was present in 1985. If they are the key to the current crisis that could mean that there was not a crisis in 1985. On the other hand, they may have made a bad situation worse.

Apart from discussing these two recent developments the Report does not offer much new on the crisis issue. The statistics show that there are a lot of cases, but the existence of a crisis has to be taken somewhat on faith. Perhaps it is enough that there is a serious problem; still, support for many of the Report's proposals will depend substantially on the degree of acceptance of the premise of a caseload crisis.

A good example is the set of recommendations concerning diversity jurisdiction. The Committee proposes as follows: "Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens. At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction." The fall-back changes include raising the jurisdictional amount to $75,000, prohibiting calculation of noneconomic harm and attorneys fees in that amount, prohibiting plaintiffs from invoking diversity jurisdiction in their home states, and deeming corporations to be citizens of every state in which they are licensed to do business. Either way the change would take a lot of cases out of federal court.

The proposal has substantial merit. Most diversity cases probably do not belong in federal court. The notion that state courts cannot be trusted to handle state law claims against noncitizens seems out of date. On the other hand, Judge Posner himself has demonstrated that economic analysis may support some diversity jurisdiction. Perhaps the federal courts are better equipped to handle complex matters involving interpleader and class

126. Compare id. at vii (system "on the verge of being radically changed for the worse" under pressure of caseload growth) with id. at 261 (adoption of his proposals would go "some way toward solving the federal courts' caseload crisis.").
129. REPORT, supra note 1, at 35.
130. Id. at 135-39.
131. Id. at 38.
132. Id. at 42.
133. Id. at 40.
134. R. POSNER, supra note 104, at 176.
actions. Moreover, trying to curtail diversity involves a major political
deficit. Whether this is due to the merits of the jurisdiction or to the fact
that "the bar likes forum shopping" is hard to determine. The point is
that paying anything more than lip service to the Committee on this point
involves investment of substantial political resources.

Another politically difficult recommendation comes in the area of the
so-called war against drugs. "Federal prosecuting authorities should limit
federal prosecutions to charges that cannot or should not be prosecuted in
state courts and should forge federal-state partnerships to coordinate pros-
ecution efforts. Congress should direct additional funds to the states to help
them to assume their proper share of the responsibilities for the war on
drugs, including drug crime adjudication." While curtailing diversity
jurisdiction is an old chestnut, this is a new issue. The Report shows that
criminal filings have increased substantially—over fifty percent since 1980—and
that they are growing faster than civil filings. This is an important
development. Writing in 1985 Judge Posner had treated the statistics as
showing that civil cases were the main area of growth. The Committee
argues persuasively that drug cases are the key to this side of the problem.
"Drug cases now account for 44 percent of the federal criminal trials, and
almost all of these are jury trials. Roughly 50 percent of federal criminal
appeals are drug cases." Because of the requirements that the Speedy
Trial Act imposes on federal criminal cases, the Committee foresees a real
danger that the civil side of the docket will grind to a halt. The question
of which judicial system should assume primary responsibility for adjudi-
cation of drug cases also implicates the broader federalism issue of where
responsibility for law enforcement properly lies.

These are important observations about an emerging issue. Precisely
because the Committee has no stake in any particular side of the drug issue,
its warnings about the impact on the federal courts are likely to get the
serious hearing they deserve. Yet as the following excerpt from two dis-
senting Committee members' statement shows, there are powerful policy
and political arguments that cut the other way: "our society is looking to
its law enforcement agencies to be vigorous in bringing to justice those who
are violating our drug laws, because the future of our nation is at stake....
The role of the federal courts is crucial to drug law enforcement, for without
their authority federal law enforcement loses its nationwide subpoena power,
its electronic surveillance authority, its contempt and immunity powers, and
its forfeiture authority to name a few." The dissenters argued for more

135. See generally Kastenmeier & Remington, Court Reform and Access to Justice: A
Legislative Perspective, 16 Harv. J. Leg. 301 (1979).
136. Id. at 313.
137. REPORT, supra note 1, at 35.
138. Id. at 36.
139. R. PosnER, supra note 104, at 64.
140. REPORT, supra note 1, at 36.
141. Id.
142. Id. at 38.
federal judges. Perhaps we are dealing with a problem whose radically new dimensions will sort themselves out over time. In any event, few enough politicians will want to appear soft on drugs in the name of alleviating the federal caseload problem. That makes all the more important a convincing demonstration that the caseload problem exists.

The third major recommendation to deal with the caseload crisis is imposition of a broadened requirement of exhaustion of state administrative remedies on state prisoners who file civil rights suits. Currently a federal statute spells out when state administrative schemes are sufficiently comprehensive that prisoners must exhaust them. The Committee views this approach as too rigid, and also criticizes the Justice Department's administration of the current exhaustion requirement. Giving states greater latitude while preserving federal oversight through court review (or approval by the Attorney General) probably makes sense, unless one is a strong advocate of the standards in the existing statute. On the surface the number of cases affected is high. State prisoner filings constituted eleven percent of all civil filings in 1989. It is likely, however, that most of these receive generally summary treatment. Even so, the recommendation would have some impact, but one wonders why the Committee limited itself to civil rights suits by prisoners. Many federal suits under section 1983 of title 42 might be foreclosed if the plaintiff were required to exhaust available state administrative remedies. Indeed, the major Supreme Court case dealing with the exhaustion issue was based largely on analysis of the prisoner statute that the Committee seeks to amend. There is a major federalism matter lurking here. Again a desire to avoid ideological issues seems to be at work. Perhaps the Committee did not want the caseload reduction push to be viewed as an anti-civil rights movement.

The Committee put forth a number of proposals of somewhat lesser significance that would reduce the number of cases filed in the district courts or the courts of appeals, or both. These include the following: restructuring tax litigation by mandating that virtually all cases be brought in the Tax Court and appeals taken to a new article III Appellate Division of that Court; restructuring social security disability claim litigation by creating a new article I Court of Disability Claims; implementing a

143. Id. at 48-49.
145. REPORT, supra note 1, at 49.
146. Id.
147. See id.
148. Id.
150. Patsy was not a prisoner case. However, the Court declined to impose a generalized requirement of exhaustion in section 1983 cases largely because Congress had imposed such a requirement in the prisoner context. Patsy, 457 U.S. at 510.
151. REPORT, supra note 1, at 69.
152. Id. at 55.
program of voluntary arbitration by the Equal Employment Opportunity Commission of employment discrimination cases;\textsuperscript{153} repealing the Federal Employers Liability Act and shifting the cases into state workers compensation systems;\textsuperscript{154} requiring greater use of non-article III judge in bankruptcy appeals;\textsuperscript{155} and creating a federal claims procedure.\textsuperscript{156}

These proposals raise a number of interesting issues, particularly the interrelated questions of the use of article I versus article III courts\textsuperscript{157} and the value of specialized versus generalized adjudication.\textsuperscript{158} In conjunction with the major proposals discussed above they would bring about substantial change in the workload of the federal courts, both in terms of type and number of cases. The proposals rest to some degree on notions of what cases ought to be in federal court, but they do not raise the difficult ideological questions of recent Supreme Court decisions. The Committee estimates that adoption of its proposals would reduce the courts of appeals caseload by 16.6 percent and that of the district courts by 37.2 percent.\textsuperscript{159} These figures appear not to include any reduction in drug cases. Perhaps the Report is indeed, as speculated above,\textsuperscript{160} only a first step toward developing greater federal court capacity for cases that are now not brought there.\textsuperscript{161}

V. OPERATIONAL PROPOSALS AND THE NEED FOR FURTHER STUDY.

There are a number of recommendations in the Report that are aimed not so much at reducing the federal courts' caseload as at affecting how individual cases are dealt with in those courts.\textsuperscript{162} These recommendations are dealt with here only briefly because they do not, generally, raise ideological questions about the role of federal courts and they do not, generally, require a response to recent Supreme Court decisions.

The most controversial of these proposals involves an apparent disagreement between the Committee and the United States Sentencing Commission. The Commission has promulgated Guidelines which are the major determinant of sentences in federal criminal cases. Views about the Guide-
lines differ, to put it mildly. The committee sided with the critics, finding "a pervasive concern that the Commission's guidelines are producing fundamental and deleterious changes in the way federal courts process criminal cases and federal judges use their time." 163 Three members went further and stated that "guideline sentencing is contributing significantly to a criminal caseload crisis which threatens to paralyze the district courts." 164 The Committee, however, stepped back from its draft recommendation of amendment of the Federal Sentencing Act. 165 The final recommendation is that, because of the serious criticisms that have been made, Congress and others "give serious and close attention to the sentencing guidelines promulgated by the United States Sentencing Commission, with a view to a careful and in-depth re-evaluation by Congress of federal sentencing policy and, in particular, the sentencing guidelines." 166

The problems cited include the inflexibility of the Guidelines 167 and the large amount of judges' time required to comply with them. 168 The Committee was particularly concerned with their impact on plea bargaining. The Committee cites disagreement over whether they permit it. 169 Calling for statutory amendment seems premature. Any problem might well be cured at the administrative level, for example. The Report does not examine alternatives to statutory amendment. Perhaps this is an area where study makes sense.

Most of the Committee's focus in the operational area is on civil litigation. The general approach that emerges is encouragement of nontraditional approaches, at least as supplements or alternatives. For example, the Report is strongly supportive of "case management" by federal district judges. 170 This technique involves "the early involvement and active role [of judges] in the management of litigation." 171 The Committee endorses "measures such as status conferences; targets for completion of various pretrial stages; and close supervision of discovery, including prompt decisions on discovery issues by one judicial officer primarily responsible for discovery matters in the case." 172 The view seems to be that this is not only a way to keep up the momentum in complex cases, but also an appropriate use of judicial resources in general.

The Committee is also positive about a greater utilization of nonjudicial resources in deciding cases. It supports the general approach known as alternative dispute resolution, and recommends that Congress "broaden
statutory authorization for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives."\textsuperscript{173} The Committee also takes a favorable stance on the use of magistrates in civil cases within the courts,\textsuperscript{174} although it does not want them to achieve the status of "an autonomous class of judicial officers."\textsuperscript{175}

One possible critique of the Committee's treatment of operational issues is that it took too much refuge in calls for further study. For example, on the controversial issue of sanctions under Federal Rule 11,\textsuperscript{176} the Report cited the disagreement over the matter as a reason for not taking a stand.\textsuperscript{177} Frequently the Committee recommended study when it felt that it lacked the resources or the time to do the job.\textsuperscript{178} I do not feel that this tendency weakens the Report substantially. Even these portions of the Report serve to flag important issues. And on a wide range of important, controverted operational issues the Committee's stance is clear.

VI. Conclusion—Guns and Butter?

Looked at in perspective the Report is an impressive document, especially considering its relative brevity at less than two hundred pages. The Committee deals with what I have called operational issues in an informative way. Its proposals to reduce the federal courts' caseload could have a substantial impact. Yet the high quality of the analysis which is there makes one wish that the Committee had turned its considerable abilities to ideological issues concerning the federal courts, as well as the nonideological ones. Why not, as an economist might say, produce guns and butter? Whether the reason is one of those suggested above or some other, the Committee did not do this. Ignoring these issues will not make them go away. The Court's decisions stand; and it continues to hand down new ones.\textsuperscript{179} At the moment the only dialogue is between the Court and the law review writers. Perhaps Congress will step in, but this is likely to happen in the context of a specific issue, such as habeas corpus, rather than as part of an overall look at the federal courts. Thus, I view the Report, for all of its positive features, as an opportunity missed. Injecting a good deal more federal courts law into the Report of the Federal Courts Study Committee would have strengthened the document and made the entire exercise more meaningful.

\textsuperscript{173} Id. at 83.
\textsuperscript{174} Id. at 80-81.
\textsuperscript{175} Id. at 79.
\textsuperscript{176} Id. at 103.
\textsuperscript{177} Id. at 104.
\textsuperscript{178} Id. at 13.
\textsuperscript{179} In the 1988 term, for example, the Court handed down a significant Younger decision, New Orleans Public Service, Inc. v. Council of City of New Orleans, 109 S. Ct. 2506 (1989) and a number of eleventh amendment decisions, e.g., Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989). The issue of habeas corpus continues to generate important cases, e.g., Teague v. Lane, 489 U.S. 288 (1989).