THE FEDERAL COURTS: CRISIS AND REFORM. By Richard A. Posner.[1] Cambridge, Mass.: Harvard University Press. 1985. Pp. xi, 365. $25.00.

Maurice J. Holland[2]

As its title indicates, this is a book which asserts that the federal courts are in a state of crisis, undertakes to describe and analyze the nature of that crisis, and proposes a variety of remedies by which the author believes it might be alleviated. It is a work that deserves wide readership and thoughtful consideration simply because of its many intrinsic merits, and is likely to elicit special interest because Judge Posner has often been mentioned in the media as among the youngish, conservative, academically oriented jurists which the present administration has under consideration for future elevation to the Supreme Court. Should his nomination eventuate, no Supreme Court nominee since Felix Frankfurter[3] will have expressed himself so explicitly and forthrightly concerning the appropriate role and functioning of the federal judiciary as has Judge Posner in this volume. Although the principal thrust of this work is an institutional analysis of the explosive growth in the work load of the federal courts over the past two decades and what is argued to have been the inadequate, even deleterious responses, there is also extensive discussion of the author's judicial philosophy, including his theories of constitutional and statutory interpretation and his conception of the legislative function of federal courts as formulators of federal common law.

It has for some time been a commonplace assertion, both of judges and commentators, that the federal courts have experienced in recent decades a dramatic increase in the number of cases initiated and litigated at all levels, and that this increase has been met with a disproportionately meager augmentation of resources, primarily the number of judges, with which to cope with the onslaught of litigation.[4] Judge Posner's statistics break little new ground in

1. Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

2. Professor and Acting Dean, Indiana University School of Law, Bloomington.

3. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928), was in some respects a precursor of the present work, a lineage acknowledged by Judge Posner in his preface.

4. *See, e.g.*, Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Burger, *The State of the Federal Judiciary 1979*, 65 A.B.A. J. 358 (Mar. 1979); Ed-

this regard, though he does supply some interesting and informative refinements based on caseload data supplied by the Administrative Office of the United States Courts. Among these are tabulations and accompanying analyses of the number of cases fully tried as opposed to simply filed in the district courts in 1983 compared with the base year 1960 (21,047 compared with 10,003),[5] the increase over the same period in the average number of trial days of cases terminated in the district courts (3.1 compared with 2.2),[6] and the probably greater complexity of cases decided by the courts of appeals.[7] These and other interpolations from the gross data all suggest that focusing simply on the number of cases filed or terminated considerably understates the magnitude of the caseload crisis.

Where this book does break much new and valuable ground is in its analyses of the "supply side" in producing the current imbalance between the demand for, and supply of, the resources of the federal judiciary. In Judge Posner's base year, 1960, there were 322 article III judges, including the Justices of the Supreme Court. By 1983, the number of federal judges had more than doubled, to 657,[8] with, of course, no additions at the Supreme Court level. This was in response to an increase over the same period from 79,200 to 277,031 cases filed in the district courts,[9] from 3,765 to 29,580 cases filed in the courts of appeals,[10] and from 1,940 to 4,201 cases in which review was sought in the Supreme Court comparing 1960 with 1982.[11] The least dramatic increase occurred in Supreme Court decisions on the merits, increasing from 105 cases in 1960 to 196 cases in 1982,[12] but this does not reflect the enormously enhanced burden of screening cases for review within its discretionary jurisdiction.

---

wards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Harper, *The Breakdown in Federal Appeals*, 70 A.B.A. J. 56 (Feb. 1984); and Meador, *Federal Judiciary—Inflation, Malfunction, and Proposed Course of Action*, 1981 B.Y.U. L. REV. 617.

5. R. POSNER, *supra*, at 68.

6. *Id.*

7. *Id.* at 70-73. Judge Posner postulates that the increased proportion of appeals in which the trial court was reversed in his sample of cases from 1983, in contrast to the 1960 sample, and the greater number of appeals presenting multiple issues in the former year, equate with greater complexity and hence increased workload.

8. *Id.* at 27.

9. *Id.* at 61-64.

10. *Id.*

11. *Id.* at 74. Judge Posner used 1982 as the comparison year for the Supreme Court because complete data were not available to him. The comparable figure for 1983 was 4,155. 98 HARV. L. REV. 311 (1984).

12. POSNER, *supra*, at 75. The comparable figure for 1983 was 163. 98 HARV. L. REV. 314 (1984).

Judge Posner's thesis is that this rise in demand for federal judicial services, combined with the inadequate institutional response thereto, has resulted in a marked deterioration in the quality of those services for which the term "crisis" is not an overblown or hyperbolic description. Somewhat surprising to this reviewer is that the moderately greater time between initial filings and final dispositions, what Posner calls "the federal court queue," again comparing 1983 with 1960, ranks as the least adverse consequence. Thus, between 1960 and 1983, the average time between filing and disposition after trial in the district courts increased by only 1.2 months, between noticing appeals and disposition in the courts of appeals by only 2.8 months, and between filings in the district courts and dispositions in the courts of appeals by only 1.4 months.[13] But the principal method by which this exemplary timeliness of disposition has been maintained in the face of bloated dockets is, in Judge Posner's view, at the core of the crisis of deteriorating quality. In his words:

> The principal method of accommodating the caseload increase has been to expand the number of supporting personnel in the federal court. Not only do the hundreds of federal bankruptcy judges have more powers than their predecessors, the referees in bankruptcy, but the period since 1960 has seen the creation of a new and important federal judicial officer called a magistrate, of whom there are now almost 500 . . . operating as a kind of junior district judge. There has also been a big expansion in the number of law clerks, and the creation of a kind of floating law clerk called a staff attorney. Many district judges and court of appeals judges now also use "externs," who are law students working as junior law clerks in exchange for course credit from their law schools; this practice was unknown in 1960.[14]

Judge Posner does not contend that these ancillary personnel do not do their assigned tasks well. On the contrary, he gives them generally high marks for ability and industriousness. The problem is that they create a degree of distance between the judge, the ultimate decisionmaker, and the judicial product, primarily the opinion, that is inimical to high quality in the latter. "The federal courts increasingly resemble executive branch and independent agencies, where a few poorly paid senior officials preside over a bureaucracy . . . . [T]he specter of bureaucracy increasingly haunts the federal judiciary."[15]

Posner is most worried about the enlarged role as well as the number of law clerks which he believes has been brought about by the need to accommodate the vastly increased caseload.[16] Again,

13. POSNER, *supra*, at 96.

14. *Id.* at 97.

15. *Id.* at 39.

16. In 1960, each Supreme Court Justice had two law clerks; court of appeals and district judges one. In 1983, Supreme Court Justices were authorized four law clerks, although

the problem is not that the clerks are incompetent, or willful, or that they have been permitted to intrude upon the decisionmaking authority of their judges, but rather that the pressure of having to process an ever increasing number of cases has led to delegation to them of the tasks, not only of researching, but also of writing opinions. The judges have therefore tended to become merely editors of their opinions, and supervisors and coordinators of the work of their clerks, secretaries, and staff attorneys. He is concerned that, despite the best efforts of the judge-editors to whom they are responsible, opinions written by law clerks are likely to be markedly inferior to those personally authored by judges. In style, they tend to be "colorless and plethoric, and also heavily given to euphemism."[17] "Instead of using language to highlight the things being discussed, the standard [law clerk] style draws a veil over reality, making it harder to see exactly what the judge is doing."[18] Clerks are inclined to write opinions that are prolix, riddled with banalities, platitudinous, and burdened with excessive footnotes and citations. Worst of all, in Judge Posner's view, they lack candor and straightforwardness; hence their value as sources of authority for lawyers and other judges is greatly depreciated. "To write novels and to edit novels written by others are on different planes of creativity, and I think there is a similar difference in judicial creativity between writing one's own opinions and reviewing opinions written by one's law clerks."[19]

The parlous effects of the aggrandizement of the law clerks are not limited to depreciation in the quality of the work product of the federal courts. They also have the incidental but important consequence of reducing the job satisfaction and attractiveness of being a federal judge:

> It is a curious feature of the American legal system that a handful of famous judges should have made a contribution to the law so greatly disproportionate to their number. But it is true; and it would be sad to think there will never be another great American judge. Yet one wonders whether an editor can be a great judge. It is not just a failure of imagination . . . that makes me unable to visualize Oliver Wendell Holmes coordinating a team of law clerks and secretaries and polishing the drafts that the clerks submitted to him. The sense of style that is inseparable from the idea of a great judge in our tradition is unlikely to develop in a judge who does not do his own writing.[20]

At a time when the relative paltriness of federal judicial sala-

---

Justices Rehnquist and Stevens employ only three and two, respectively. Court of appeals judges are authorized three, and district judges two law clerks. *Id.* at 102-04.

17. *Id.* at 107.
18. *Id.* at 108.
19. *Id.* at 111.
20. *Id.*

ries is thought to be driving many of the best judges off the bench, and discouraging many of the best suited lawyers from accepting appointment, any deterioration in the intellectual and professional gratifications of the position is especially unfortunate.

An obvious solution to the crisis would be simply to appoint more federal judges. But Judge Posner believes that any substantial increase in the number of court of appeals judges could not be accomplished without risking the present generally very high quality which now prevails. For every one of the 648 lower court federal judges presently sitting, there might well be among the American bar four or five potential and theoretically available recruits whose appointment would not degrade in the slightest the aggregate quality of the federal judicial corps, leaving judicial inexperience out of account. (This is the reviewer's highly impressionistic guess, not Judge Posner's.) But a very large segment of this potential appointee pool is not realistically available, because of unwillingness to accept lower salaries or other working conditions of a federal judgeship, political or ideological incompatibility with an incumbent President, inability to meet the admittedly inconsistently applied special requirement of extensive trial experience for a favorable rating from the American Bar Association Standing Committee on the Judiciary,[21] or simply lack of interest in judicial work.

Even if these impediments could be surmounted to the point where a greater portion of professionally qualified lawyers could be tapped, Judge Posner does not believe that much of the solution to the crisis of the federal courts lies in the creation of additional judgeships. This is primarily because of the acutely pyramidal structure of the federal judiciary, and the practical obstacles in the way of increasing the capacity of the tribunal at the apex of the pyramid, the Supreme Court, by augmenting its membership or by any other feasible means. Any diminution in the opinionwriting burden per Justice that might be achieved by adding, say, two new Justices, would almost certainly be offset by the aggravated difficulties of forging majorities among a larger group of people. A somewhat similar objection can be raised against either increasing the number of judicial circuits, which would breed a larger number of intercircuit conflicts, or enlarging the number of judges assigned to

21. Judge Posner ventures an interesting explanation for the Committee's strong emphasis on trial experience, with which he disagrees. By requiring recent and substantial trial experience, particularly for district court appointments, the ABA can pronounce political hacks unqualified on the basis of an objective criterion, whose application is not subject to dispute like a subjective standard such as general legal ability. *Id.* at 30 n.9. The Committee has sensibly been willing to dispense with this requirement in cases where it has other assurance of professional qualification, as in the author's own instance.

the most heavily burdened circuits, which, by increasing the potential for intracircuit conflicts among panels, would heighten the need for cumbersome and time-consuming en banc hearings of cases. Judge Posner concedes that these difficulties have little application at the district court level, but it is at this level, he believes, that the crisis is least acute, primarily because district judges do not, for the most part, function collegially, and because they play a decidedly subordinate role in the lawmaking as opposed to law application and factfinding. In any event, the obstacle to the creation of any significant number of new district judgeships might well be of a different sort; that is, the pool of potential appointees as well fitted for the special and extraordinary demands of this position as the average of the existing corps of federal trial judges is possibly relatively much smaller than is the case with potential appointees to the courts of appeals.

If appointment of additional judges does not commend itself as a solution, what remedies does Judge Posner propose? In fact, he considers a broad array of them, some grouped under the heading of "palliatives," and others that he regards as more thoroughgoing and systemic. Among the former are: "raising the price of access to the federal courts; limiting or abolishing the diversity jurisdiction; moving toward a system of specialized federal appellate courts; reforming administrative review; and creating a kind of junior Supreme Court to assist the Supreme Court in assuring a reasonable uniformity of federal decisional law."[22]

Judge Posner concedes that some of the costs of litigation are rightfully subsidized by taxpayers to reflect the externalized benefits, primarily the clarification and elaboration of the law, to society at large, but thinks that the subsidy available to "users" of the federal courts has become excessive, to the point where many cases that should be handled in state courts are dysfunctionally attracted into the federal system. He therefore proposes that the fees for filing or removing civil cases involving nonindigent parties to federal court be substantially increased from the present basic fee of $60 to roughly $1,000.[23] He also favors broader use of the device of two-way shifting of attorneys' fees to deter fruitless litigation by overly optimistic plaintiffs or defendants.[24]

Judge Posner joins ranks with such well-known advocates of curtailing the beleaguered diversity jurisdiction as Chief Justice Warren Burger and Judges Henry Friendly and Clement Hayns-

22. *Id.* at 130-31.
23. *Id.* at 133.
24. *Id.* at 137-38.

worth. He points out that, even on the extremely doubtful assumption that the putative original rationale for this anomalous category of jurisdiction, the supposed bias of local juries against out-of-state litigants, retains any contemporary validity, it makes no sense to permit home-state plaintiffs to invoke it against out-of-state defendants.[25] He would have Congress disallow this, and overcomes his general skepticism about the utility of amount-in-controversy requirements to the point of urging that the present $10,000 amount be raised to at least $50,000, which would be just a bit more than an adjustment for inflation since 1958, when the former amount was set.

Judge Posner considers, but for the most part rejects, the idea of creating new federal appellate courts of nationwide jurisdiction and specialized subject-matter competency much beyond the recently created Court of Appeals for the Federal Circuit.[26] He does so out of concern that, if so much paramountcy in such areas as federal antitrust or criminal law were concentrated in a single court having a near monopoly of appellate authority in its assigned field, albeit subject to occasional review by the Supreme Court, the struggle to secure control of its composition would be exacerbated to an unwholesome degree. Another objection he sees is that this would deprive the Supreme Court of the benefit of review against the helpful background of multiple and diverse resolutions of emerging and difficult issues by the generalist courts of appeals.

Another "palliative" advanced by Judge Posner with greater enthusiasm is that the quality and thoroughness of appellate review within the federal administrative agencies be improved:

> With the appellate process within the agencies strengthened, the scope of federal [judicial] review of administrative decisions could be reduced. In the case of social security disability benefits, maybe it could be eliminated altogether; and certainly there would be no need for the two tiers of judicial review that we now have—review in the district court with a right of appeal to the court of appeals.[27]

Requiring, and providing the necessary resources for, well-reasoned opinions within the agency structure might well deter some of the appeals that are now taken to the courts from administrative adjudications. A more thoroughly developed record, including such an opinion, would in any event facilitate the work of the judges in cases that did reach them.

---

25. *Id.* at 146.

26. Created in 1983, this new court assumed the jurisdiction previously vested in the Court of Customs and Patent Appeals and the appellate division of the Court of Claims. *See* 28 U.S.C. § 1295.

27. POSNER, *supra*, at 161.

The proposal, which has been bruited around for more than a decade, to reduce the workload of the Supreme Court by creating a new federal court with nationwide jurisdiction and having the sole task of resolving conflicts among the circuits, has little appeal for Judge Posner. He is unpersuaded that the Supreme Court is in fact overburdened by cases presenting intercircuit conflicts, or that prompter or more pervasive resolution of such conflicts would be sound judicial policy.[28] If the courts of appeals are generating more conflicts among themselves than might be desirable, he proposes that they consider a self-imposed, and presumably informal, policy of deference whereby, if the first three circuits to consider a given issue agreed upon its resolution, then all courts of appeals before whom the same issue subsequently arose would follow suit. Judge Posner also sees problems with the most frequently proposed method of manning this "junior Supreme Court"—random selection of members from among sitting court of appeals judges, which would drain off resources from the very courts where the crisis is perceived by him as most pressing.

To this writer, the most interesting portion of *The Federal Courts* consists of those chapters wherein Judge Posner moves beyond procedural adjustments and matters of institutional design of the sort just summarized, his "palliatives," and turns to development of themes which penetrate to the core and substance of federal jurisdiction, and even to the nature of adjudication and the craft of appellate judging in the most fundamental terms. To the hasty reader, the author's excursions into the realms of legal process and applied jurisprudence may seem at first blush to be somewhat gratuitous interpolations which ill consort with the book's central preoccupation with matters of institutional structure. That reaction would be a mistake. For Judge Posner's unifying premise is that the judiciary's essential task of rendering judgment must be kept constantly in mind as one appraises malfunctions in the system.

Few would deny that the diversity jurisdiction of the federal courts should be substantially contracted. Posner goes further, arguing that the subject-matter jurisdiction of the inferior federal courts that is keyed to enforcement of rights and liabilities arising under federal substantive law has become considerably more extensive than warranted by any tenable concept deducible from the constitutional empowerment of Congress to establish and deploy such courts in complete or partial derogation of the residual general jurisdiction of state courts. His model for what he calls the "optimal

28. *Id.* at 163.

scope of federal jurisdiction"[29] is erected upon the postulate that not all cases arising under federal law should be assigned to the exclusive, or even the concurrent, jurisdiction of the inferior federal courts, but rather only that subcategory of such cases which call for the special measure of independence from political influences afforded federal judges by article III of the Constitution, an independence greater than that typically enjoyed by their state counterparts. Federal question cases falling outside this subcategory can, in his opinion, be prudently and more efficiently left to the general jurisdiction of state courts, subject of course to Supreme Court review.

> Since state court judges can be expected to be less independent of state political forces than federal judges when both are residents of a state adversely affected by federal regulation, a state court may be an unsympathetic tribunal in a case where a federal right has been created in order to correct an interstate externality.[30]

In other words, only when a federally created right or regulatory scheme is intended to require each state to bear some cost or burden (i.e., internalized) which, left to its own preferences or in the hands of its own judges, it might be tempted to cast off upon other states or the nation as a whole (i.e., externalize), is there a compelling case made out for jurisdiction in the lower federal courts. The concept of externalities is, of course, a fundamental element of economic cost-benefit analysis, and has its most obvious applications in contexts posing conflicts of palpably economic interests. Among the states an obvious example is the problem of regulating interstate pollution. State court judges, out of their supposed greater susceptibility to parochial influences, might be marginally more prone than federal judges to give an erroneously stringent or lenient interpretation and application of federal statutes addressed to this problem, depending upon whether they reside in a state which is the victim or the source of interstate pollution.

Judge Posner's examples of federal statutes regulating economic activity, but not substantially concerned with adjustment of interstate externalities, are the federal Truth-in-Lending statute, the odometer-tampering statute, and the federal securities acts as applied to small, local corporations. These have in common the characteristic that the benefits and costs of enforcement are both likely to fall within the same state, and are therefore unlikely to pose any temptation to externalize costs. Much the same is true of some federal question cases which are more compensatory than regulatory in

29. *Id.* at 175.
30. *Id.*

purpose, such as those brought under the Federal Employers Liability Act.

Posner expands the reach of his externalities model to include categories of federal jurisdiction which are not concerned with economic interests in the strict sense of the term. Thus, in the contexts of habeas corpus and civil rights claims, he analogizes claims or claimants invoking federal law likely to be unpopular or disfavored by local influences within a state to those which impose material costs or burdens with no offsetting benefits. For example, he does not believe that state judges are any less concerned than federal judges to avoid convictions of innocent criminal defendants, and so would restrict the scope of federal habeas corpus to claims that state courts have erroneously rejected a federal constitutional rule intended to deter police or prosecutorial misconduct in contrast to a rule intended to assure the reliability of guilty verdicts.[31] He reaches a similar conclusion with respect to such federal civil rights claims as asserted violations of the Age Discrimination Act and public employee claims of discharge in violation of due process, which he believes are not likely to be unsympathetically handled by state judges, because they are not locally unpopular.

The author concedes that, when all of these federal law claims have been sorted out and allocated or reallocated according to his broadly conceived externalities criterion, the attendant reduction in the federal courts' caseload would still be quite modest. He estimates it at twenty percent in the district courts and twenty-one percent in the courts of appeals.[32] But when this is combined with the significant contraction of the diversity jurisdiction he also advocates,[33] the total reduction is by no means inconsequential.

The overextension of the federal question jurisdiction has resulted, in Judge Posner's view, not only from its unnecessarily enlarged formal delineation, but also from an extravagant proliferation of the substantive claims to which this jurisdictional category applies, a proliferation derived from dubious interpretations of the Constitution and, to a lesser extent, Acts of Congress. He is in emphatic disagreement with the dominant, contemporary "noninterpretist" approach to constitutional interpretation, under whose auspices a plethora of recently discovered rights have been established. He is, however, no thoroughgoing "originalist," and is willing to countenance recognition of evolving constitutional norms

31. *Id.* at 186-87.

32. *Id.* at 189.

33. *Id.* at 146.

not traceable to the intent of the framers. Posner's constitutional philosophy is expressed in these paragraphs:

> The Civil War taught a lesson about the instrument the framers had drafted, . . . that they had made a mistake in putting the social institutions of the states almost completely beyond the reach of the federal judicial power. . . . The Civil War showed that there cannot be an American nation if the states are totally free to go their own way in the matter of social arrangements. Some minimum homogeneity of social institutions is necessary if people are to consider themselves American first and Georgians or New Yorkers second.
>
> . . . .
>
> . . . I shall assume that [the fourteenth amendment] was intended to give the Supreme Court broad discretion to invalidate state laws, and having made that assumption shall ask how the discretion should be guided. . . .
>
> The usual answer to the question of how to guide judicial discretion in interpreting open-ended constitutional provisions, including the due process clause, is summed up in the words "natural law."
>
> I offer in a speculative spirit the following alternative to natural law . . . a law that deprives a person of life, liberty, or property in violation of a fundamental social norm *held by most of the nation* denies due process. If Indiana adopted the Islamic code of punishment, or Florida authorized torture in police interrogation, or New Mexico decided to censor its newspapers, or California abolished the right to trial for crimes, these states would be violating the due process clause.
>
> Notice that I am using as my index of consensus state legislation. I am not suggesting that the content of the due process clause should change with the latest public opinion polls.
>
> Obviously my view is incompatible with the idea that the due process clause "incorporated" any provision of the Bill of Rights *in toto*. . . . The Bill of Rights was intended to weaken the federal government; apply the Bill of Rights to the states . . . and you weaken the states tremendously by handing over control of large areas of public policy to the federal judges, whose interpretations of the Bill of Rights are (short of constitutional amendment) conclusive of its meaning.
>
> . . . .
>
> . . . This anchor limits the subjective, ad hoc character of the concept; the judge is not free to set his personal views against the views embodied in the public policy of a majority of the states.
>
> It is a necessary condition of unconstitutionality under this approach that the challenged state practice be followed in only a minority of the states. But it is not a sufficient condition. The goal is not to stifle experimentation but to prevent deviations from the national consensus that are so extreme, so shocking, that they threaten national unity.[34]

It would be difficult to find a more constrained conception of due process than this. It is hard to imagine a Supreme Court guided by Judge Posner's standard exercising much meaningful control over the states. However well or ill considered are his examples of state laws violative of due process, it is entirely clear that he considers a posture of very nearly total deference to be the appropriate one. This is judicial restraint for those who like it neat, envisioning as it does a more limited role for federal courts in en-

34. *Id.* at 192-95 (footnotes omitted).

forcing constitutional norms against the states than all but the most literal minded of originalists. Of course this discussion relates only to the due process clause as a substantive limitation of state legislative power, and perhaps this stringent standard of judicial review is not intended by Judge Posner to apply *pari passu* to the equal protection clause or to constitutional limitations against the power of the federal government. This is not a book primarily about constitutional law, and he does not single out these matters for separate extended elaboration. To the extent that considerations peculiar to federalism inform this highly restrictive formulation, it is a fair inference that Judge Posner would vouchsafe a considerably more interventionist role to the federal courts vis-a-vis the federal government.

At another point in the book, Posner sums up his general theory of constitutional interpretation:

> I am speaking only of cases in which the meaning of the Constitution is unclear. I do not mean to place the minority at the mercy of the majority; that would deny the very concept of a constitutional right. . . . But if a court cannot honestly determine whether such a right exists then it should be denied; doubts should be resolved against the claimant. . . . [I]t is the counsel of prudence for courts to yield to the dominant power when to do so does not deny a clear constitutional right. When in doubt, the democratic principle, reinforced by concern for maintaining the courts' political capital, should lead the courts to interpret governmental powers broadly, and rights against government narrowly.[35]

What a wide world of disputation lies embedded in that short modifier "clear"! Few even of our most activist judges would avow disagreement with this formulation, however discrepant might be their practice. For Judge Posner, "clear" constitutional rights, at least against the states, are rights not to be deprived of life, liberty, or property other than in accord with practices well established in any respectable minority of the states. This standard would tilt judicial review toward the preservation of traditional, customary norms and practices, and make of it a conservative rather than a reformist force, retarding rather than fostering change on those few occasions when it is exerted at all. It harkens back to the venerable conception of due process articulated by Justice Cardozo in his famous opinion in *Palko v. Connecticut*,[36] and by such constitutional scholars as James Bradley Thayer[37] and Edward S. Corwin[38] in an earlier era. It is also more faithful to the logic of *Marbury v.*

35. *Id.* at 273-74.

36. 302 U.S. 319 (1937).

37. *See generally* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

38. *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

Madison,[39] with its emphasis upon reserving the power of invalidation only for cases of nearly literal repugnancy between the Constitution and the challenged statute, than is the dominant practice of recent decades.

Judge Posner believes that the crisis of the federal courts has been exacerbated by some shortcomings of modern judicial technique. One such shortcoming, the prevalence of unduly lengthy opinions, larded with unhelpful string citations and prolific footnotes, has already been mentioned.[40] Another is the proliferation of concurring opinions which add little but bulk to the federal reporters and grist for the mills of law clerks eager to display their learning in the best (or worst) law review style. He is also trenchantly critical of dissenting opinions which are principally concerned with impugning the intellectual integrity of the majority:

> To put it bluntly, many contemporary federal appellate opinions seem to be self-indulgent displays performed with little concern for . . . the audience . . . . A self-indulgent opinion is . . . much longer than it need be . . ., the author having made no effort to prune it of facts, procedural history, and citations that are unnecessary to an understanding of the decision. . . . [I]t is also irresponsible; it subordinates the judge's institutional obligations to his delight in self-expression, or more mundanely to his reluctance . . . to curb the self-expressive ardors of his law clerks.
>
> . . . There are opinions that, once the boilerplate of procedural details, supernumerary facts, and redundant or inapposite citations is stripped away, are actually too short; the analysis is missing.
>
> . . . .
>
> Another and increasingly common manifestation of excessive judicial self-assertion is the abuse—often shrill, sometimes nasty—of one's colleagues. Nothing is less helpful, less convincing, or less edifying to the professional readers of judicial opinions . . . than denunciations of a disagreeing colleague.[41]

Judge Posner does not essay any explanation of the root causes of what he describes as "a deficient spirit of institutional responsibility,"[42] beyond the multiplication of the law clerks, which he describes as a necessary, but not sufficient, condition of this indiscipline. (My own decidedly idiosyncratic explanation for most of our current ills, including judicial "logorrhea," is that it is due to the decline in the study of classical languages!)

Judge Posner also criticizes the failure, in so many cases, of the courts of appeals to write any generally published opinion at all, a direct and particularly lamentable consequence of the caseload explosion:

> The federal courts of appeals have adapted to the caseload explosion in part by

39. 5 U.S. (1 Cranch) 137 (1803).
40. *See supra* notes 18-20.
41. POSNER, *supra*, at 230-32 (footnotes omitted).
42. *Id.* at 241.

> reducing the quality of their output. This is an inevitable cost of the commitment to accommodate all increases in the demand for federal judicial services without raising the direct or indirect price of those services . . . . If the caseload continues to grow in the years ahead, the quality of the federal courts will continue to decline unless major changes are made in the system.[43]

Judge Posner makes a convincing point about another phenomenon that might in part fall under the heading of judicial technique, and which seems to this reviewer to bear even greater emphasis than he gives it. That is the strong attraction which multifaceted standards seems to hold for contemporary judges, in lieu of the more definite legal rules they have tended to displace. As he puts it:

> The choice between rule and standard has profound institutional implications. Because a rule is more definite, the adoption of a rule will increase legal certainty and thereby reduce the amount of litigation; it will also make each lawsuit simpler and shorter . . . . [G]enerally rules reduce and standards increase the amount as well as the length of litigation, and in a time of acute caseload pressures these consequences make rules attractive. Yet courts seem to shy away from declaring definite rules. They prefer to avoid definite decision by announcing a vague standard or, what amounts to the same thing, a multifactored test with equal weighting of each factor, leaving to the indefinite future the resolution of the uncertainties implicit in such an approach.[44]

The Federal Courts is a book that will alarm, even infuriate, some readers, partly because of the author's rigorously positivist theory of constitutional interpretation, and partly because many people react with suspicion verging on paranoia to any suggestion that the jurisdiction of federal courts be contracted or access to them made more difficult. However, much of what Judge Posner has here written is not linked to any sort of ideological commitment, but rather consists of cold-eyed, carefully considered analysis of the institutional and operational function of the federal courts. Few are likely to come away from reading this work unconvinced that these courts do in fact face a crisis, and that all indications are that the crisis will progress to a condition of near disablement unless some remedies are soon devised and urgently implemented. Many of the remedies Judge Posner proposes strike this reviewer as self-evidently sound and urgently called for. Others are clearly more problematic, but this surely does nothing to detract from the ongoing discussion, both within and without the profession, to which his book is a notable contribution.

---

43. *Id.* at 124.
44. *Id.* at 245.