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## Judicial federalism in the United States: structure, jurisdiction and operation

### *Federalismo judicial nos Estados Unidos: estrutura, jurisdição e funcionamento*

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“To provide against Discord between national & State Jurisdictions, to render them auxiliary instead of hostile to each other; and so to connect both as to leave sufficiently independent, and yet sufficiently combined, was and will be arduous.”<sup>1</sup>

John Jay

First chief justice of the U.S. Supreme Court

#### Resumo

O presente artigo tem o objetivo de analisar o federalismo no Poder Judiciário dos Estados Unidos. Para isso, realiza uma comparação entre as competências e a autonomia das cortes estaduais e federais, concluindo que o modelo adotado no Judiciário é muito parecido com aquele seguido no âmbito executivo e legislativo. Analisa, ainda, o fenômeno da federalização no âmbito mais específico do Direito Penal, afirmando que, nessa seara, os réus têm direito a recorrer às cortes federais sempre que algum dano que lhe for causado com fundamento em norma estadual, violando uma norma federal. Por fim, conclui que, apesar de alguns problemas

#### Abstract

The present article aims to analyze the judicial federalism in the United States. To do so, it compares the jurisdiction and the autonomy of the federal and states courts, concluding that the model adopted in the Judiciary is similar to that followed by the Executive and Legislative branches. Furthermore, it analyzes the federalization of Criminal Law, affirming that, in this field, the defendants have the right to appeal to federal courts every time that some damage has been caused to them based on a state law, violating a federal law. By the end, it concludes that, despite the existence of some endemic and periodical problems, the American system of judicial federalism has largely

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<sup>1</sup> MARCUS, Maeva (Ed.). *The Documentary History of the Supreme Court of the United States, 1790-1800*. vol. 2. New York: Columbia University Press, 1988. p. 27-28.

endêmicos e periódicos, o sistema americano de federalismo judicial obteve considerável sucesso na promoção de uniformidade nacional e diversidade subnacional na administração da justiça.

**Palavras-chave:** federalismo judicial; Poder Judiciário; Cortes estaduais e federais; Direito Penal; Estados Unidos.

*succeeded in promoting national uniformity and subnational diversity in the administration of justice.*

**Keywords:** *judicial federalism; Judicial branch; federal and states courts; Criminal Law; United States.*

## CONTENTS

**1.** Constitutional Foundations of America's Judicial Federalism; **2.** The Federal Judicial Power and Federal Jurisdiction; **2.1.** The Federal Judicial Power; **2.2.** Federal Jurisdiction; **3.** The State Judicial Power and Judicial Federalism; **3.1.** The Division of Authority; **3.2.** State Judicial Power; **3.3.** The New Judicial Federalism; **4.** The Federal Courts; **4.1.** Development; **4.2.** Current Structure; **5.** State Courts; **5.1.** Structure; **5.2.** Development and Reform; **6.** Relationships between State and Federal Courts; **6.1.** The "Federalization" of Criminal Law; **6.2.** Habeas Corpus; **6.3.** Certification; **6.4.** Cooperative Arrangements; **7.** Emerging and Endemic Issues Affecting State and Federal Courts; **7.1.** Judicial Independence and Accountability; **7.2.** Judicial Branch Autonomy; **8.** Conclusion; **9.** References.

## 1. CONSTITUTIONAL FOUNDATIONS OF AMERICA'S JUDICIAL FEDERALISM

To choose federalism is to choose complexity in government. Having multiplied the number of governments, a federal democracy must provide for the allocation of power and responsibility among them, and it must devise mechanisms and procedures for resolving disagreements and settling boundary conflicts. Whereas the component units of all federal systems exercise legislative and executive power, many federations — for example, Austria, Canada, and India — have not instituted complete sets of courts at both the federal and component-unit levels. The United States, in contrast, has fifty-one court systems, fifty state and one federal, each with the full panoply of trial and appellate courts. The federal government determines the structure and operation of the federal courts, and each of the fifty states determines the structure and operation of its own courts. Federal law primarily determines the division of authority between these court systems.

Under British rule, the thirteen American colonies operated their own systems of courts, and the states continued to do so after independence. The federal Constitution presupposes the continued existence and operation of state courts: Article IV requires that "full faith and credit... be given in each State to the ...judicial Proceedings of every other State," thus regulating horizontal judicial federalism, and Article VI mandates that "the Judges in every State shall be bound" to recognize the supremacy of federal law, thus regulating vertical judicial federalism.<sup>2</sup>

<sup>2</sup> U.S. Constitution, Art. IV, sec. 1, and Art. VI, sec. 2.

Beyond that, the Constitution itself created only a single federal court, the United States Supreme Court. It vested the Supreme Court with a very limited original jurisdiction and an appellate jurisdiction that encompasses all cases under the federal judicial power, “with such Exceptions, and under such Regulations as Congress shall make.”<sup>3</sup> Congress was authorized to create additional federal courts and to invest them with portions of the federal judicial power, an invitation that it immediately accepted in the Judiciary Act of 1789. However, the Constitution did not mandate that the federal judicial power be exercised only by the federal courts, and in fact the Judiciary Act granted only a limited jurisdiction to the federal courts, with cases outside that jurisdiction (but within the federal judicial power) being resolved by state courts. Despite the expansion of the jurisdiction of the federal courts over time, even today federal courts do not comprehensively or exclusively exercise the federal judicial power.

Furthermore, the federal judicial power granted in Article III encompasses only a small proportion of all legal disputes. The absence of a comprehensive judicial power vested in the federal courts necessitates that there be state courts to resolve those disputes that fall outside of the federal judicial power. Cases that are exclusively matters for state courts include cases arising from the violation of state criminal statutes (more than ninety-five percent of criminal prosecutions occur in state courts) and suits between citizens of the same state when only state law is implicated. The decision not to grant a comprehensive judicial power to the federal government is consistent with the overall constitutional design, which established a federal government of limited, delegated powers rather than one with plenary powers. The Tenth Amendment confirmed that this was the aim, emphasizing that “[t]he powers not delegated to the United States by the Constitution” were “reserved to the States respectively, or to the people.”

Although the U.S. Constitution contemplated that each state would have its own court system, it did not prescribe the structure and operation of state courts, aside from the broad general strictures that the federal government was to guarantee to each state a “republican form of government”<sup>4</sup> and, with the adoption of the Fourteenth Amendment, that no state shall “deprive any person of life, liberty, or property, without the due process of law.”<sup>5</sup> The former provision, the so-called Guarantee Clause, has never been used as a basis for intervening against state courts, although some opponents of judicial elections have speculated that they impinge on the rule of law and thus are incompatible with republican government.<sup>6</sup> This is at best a dubious proposition. The Due Process Clause has been used by the U.S. Supreme Court to strike down

<sup>3</sup> U.S. Constitution, Art. III, sec. 2, para. 2.

<sup>4</sup> U.S. Constitution, Art. IV, sec. 4.

<sup>5</sup> U.S. Constitution, Fourteenth Amendment, sec. 1.

<sup>6</sup> FROHNMEYER, David B.; LINDE, Hans A. State Court Responsibility for Maintaining ‘Republican Government’: An Amicus Curiae Brief. *Willamette Law Review*, Salem, vol. 39, n. 1, oct./dec. 2003, p. 1487-1505.

numerous rulings by state courts, but its impact has extended only to overturning judicial decisions.<sup>7</sup> It has not led to federal legislation affecting the structure or operation of state courts. Rather, the design and operation of state court systems continues to be determined by state statutes and state constitutions.

## 2. THE FEDERAL JUDICIAL POWER AND FEDERAL JURISDICTION

### 2.1. The Federal Judicial Power

Whether a particular case falls within the federal judicial power conferred by Article III of the Constitution is determined by who the parties to the case are (e.g., “Cases affecting Ambassadors, other public Ministers, and Consuls”) and/or by the subject matter of the case (e.g. “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority”). The specific grants of federal judicial power point to four basic purposes the federal judiciary is meant to serve. First, federal courts serve to vindicate the authority of the federal government. To that end, they are empowered to hear cases arising under the laws of the United States, cases arising under the U.S. Constitution, and cases in which the federal government is a party. Second, federal courts ensure the exclusive control of the federal government over foreign affairs. For that purpose, they are given the power to hear admiralty and maritime cases, cases arising under treaties, cases involving ambassadors, or other representatives of foreign countries, and cases between states (or the citizens thereof) and foreign nations, citizens, or subjects. Third, federal courts umpire interstate disputes, hearing controversies between two or more states and controversies between a state and a citizen of another state. Finally, federal courts protect out-of-state litigants from the possible bias of state tribunals, hearing cases involving citizens of different states (the federal courts’ “diversity-of-citizenship” jurisdiction).

Limitations on the federal judicial power derive both from the separation of powers and from federalism. With regard to the former, Article III’s restriction of the federal courts to “cases or controversies” is crucial. This justiciability limitation, rooted in the common-law understanding of courts as forums for dispute resolution, means that federal courts can only address issues when they are presented in the form of a real conflict of legal interests or rights between contending parties. To bring a case in federal court, a party must have standing to sue, that is, he or she must “allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be

<sup>7</sup> The Due Process Clause of the Fourteenth Amendment became the basis by which the U.S. Supreme Court has applied the protections of the Bill of Rights against state violations. See ROSSUM, Ralph A.; TARR, G. Alan. **American Constitutional Law: Volume II - The Bill of Rights and Subsequent Amendments.** 9<sup>th</sup> ed. Boulder: Westview Press, 2013. p. 54-59.

redressed by the requested relief.”<sup>8</sup> The requirement of a *personal* injury largely excludes taxpayer suits or suits by individuals as private attorneys general seeking to vindicate constitutional values.<sup>9</sup> Federal courts also cannot address “political questions,” understood as cases that would “involve inappropriate interference in the business of the other branches of government.”<sup>10</sup> Among the issues understood as political questions are those that the Constitution has committed to other branches for resolution, such as impeachment, and those for which there are no “judicially discoverable or manageable [legal] standards” or which require “an initial policy determination of a kind clearly for nonjudicial discretion,” such as most issues in foreign affairs.<sup>11</sup> Finally, the case or controversy requirement precludes federal courts from addressing hypothetical issues, rendering advisory opinions, or ruling on the constitutionality of proposed legislation before its enactment.

A further limit on the federal judicial power flows from the federal character of the system of government created by the Constitution and from the states’ status as constituent units of that system. According to the U.S. Supreme Court, the federal judicial power does not extend to suits against states without their consent, because the states enjoy sovereign immunity. Therefore, even in the exercise of its constitutionally granted powers, Congress cannot invade the sovereign immunity of states by authorizing suits against them in federal or state courts. In a series of cases dating from the mid-1990s, the Supreme Court has strictly limited the power of Congress to abrogate the sovereign immunity of states, striking down several federal statutes that did so. In the first of these cases, *Seminole Tribe of Florida v. Florida* (1996), Chief Justice Rehnquist relied primarily on the Eleventh Amendment as the constitutional basis for invalidating a congressional effort to abrogate sovereign immunity.<sup>12</sup> In subsequent cases the Court held that the states’ immunity from suit “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution” and is “confirm[ed] by the Tenth Amendment.”<sup>13</sup> Whatever the constitutional basis, the result is that the

<sup>8</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>9</sup> The notion that federal courts are prohibited from hearing cases involving “generalized grievances” is elaborated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). On the restriction on taxpayer suits, see *Frothingham v. Mellon*, 262 U.S. 447 (1923) and *Flast v. Cohen*, 392 U.S. 83 (1968). For a general overview, see ROSSUM, Ralph A.; TARR, G. Alan. **American Constitutional Law: Volume I – The Structure of Government**. 9<sup>th</sup> ed. Boulder: Westview Press, 2013. Chapter 3.

<sup>10</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

<sup>11</sup> See *Nixon v. United States*, 506 U.S. 224 (1993), and *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>12</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Eleventh Amendment, adopted in 1798, reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

<sup>13</sup> *Alden v. Maine*, 527 U.S. 706, 713 (1999). Cases following the Court’s lead in *Alden* include: *Kimmel v. Board of Regents*, 528 U.S. 62 (2000); *Trustees of the University of Alabama v. Carrett*, 531 U.S. 356 (2001); and *Federal Maritime Commission v. South Carolina State Port Authority*, 535 U.S. 743 (2002).

states' sovereign immunity operates as a check on the exercise of the federal judicial power.

## 2.2. Federal Jurisdiction

The Constitution defines the original jurisdiction of the U.S. Supreme Court, i.e., the range of cases that it hears as a court of first instance, and Congress can neither add to nor subtract from the original jurisdiction conferred by the Constitution. An attempt by Congress to add to the Court's original jurisdiction became the basis for the Supreme Court's initial invalidation of a congressional statute in the celebrated case of *Marbury v. Madison*.<sup>14</sup> Beyond that, the Constitution leaves it to Congress to define the jurisdiction of the various federal courts, that is, what portion of the federal judicial power each will exercise. Congress has assigned criminal cases arising under federal statutes exclusively to federal courts. It has also made federal jurisdiction exclusive with regard to certain issues that demand national uniformity, such as patents, copyrights, and suits against the federal government. But it has allowed state trial courts to exercise concurrent jurisdiction with federal district (trial) courts in most civil cases arising under the federal judicial power.<sup>15</sup> Thus, with only a few exceptions, civil cases that could be filed in federal court can be initiated in state courts as well. Even when the party initiating the case chooses state court, if the case was one that could have been brought in federal court, the defendant may "remove" the case to federal court. This enables lawyers to choose to contest a case in the court in which they believe they have the best chance of winning. Also, throughout the nation's history Congress has limited the jurisdiction of federal courts. In "diversity of citizenship" cases, for example, the Constitution permits federal courts to be assigned all cases involving a suit by a citizen of one state against the citizen of another state, Congress restricts federal courts to cases in which at least \$75,000 is at stake.

Although federal jurisdiction might seem a technical concern, it has generated intense, if episodic, political conflict for more than two centuries.<sup>16</sup> After the adoption of the Judiciary Act of 1789, during the nation's first century, conflicts over federal jurisdiction centered largely on questions of federalism. Nationalists in Congress sought to enlarge federal jurisdiction, while champions of states' rights attempted to maintain the prerogatives of state courts, assuming that those courts would adopt a more localistic perspective. The first major expansion of federal jurisdiction occurred after the Civil

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<sup>14</sup> *Marbury v. Madison*, 1 Cranch 137 (1803).

<sup>15</sup> Note the use of the word "allow": because Congress does not assign jurisdiction to state courts; state courts hear all cases not assigned to the federal courts exclusively.

<sup>16</sup> See REDISH, Martin H. **Federal Jurisdiction: Tensions in the Allocation of Judicial Power**. Indianapolis: Michie, 1980.



War (1861-1865). Congress suspected, with good reason, that state courts in the South would be unwilling to vindicate the rights of newly freed slaves; so to ensure that those rights were protected, it expanded the jurisdiction of the federal courts. The Habeas Corpus Act of 1867 enabled all persons in custody “in violation of the constitution, or of any treaty or law of the United States” to seek redress in federal court. This in effect authorized federal courts to oversee state courts in criminal cases to ensure that defendants were not imprisoned in violation of federal law. The Judiciary Act of 1875 conferred on the federal courts jurisdiction in all cases involving questions of federal law and in all diversity cases where more than \$500 was at stake. This grant of jurisdiction over “federal question” cases ensured that all those who believed their federal rights had been infringed could get a hearing before a federal judge. Since the adoption of this Act, the growth in the business of the federal courts has been due largely to new congressional legislation, which has created new “federal questions.” For example, the adoption of the Volstead Act in 1920 to enforce Prohibition more than doubled the criminal prosecutions in federal courts, and the enactment of civil rights statutes in the 1960s dramatically increased racial discrimination cases in federal courts.

Since the late nineteenth century, changes in federal jurisdiction have reflected either congressional dissatisfaction with judicial decisions or a concern to relieve the caseload pressures on the federal courts. An example of the former is a statute enacted in 1914 that empowered the U.S. Supreme Court to review all state rulings that relied on federal law. (Previously the court could only review state court rulings *upholding* state statutes against federal constitutional challenges.) Congress’s action was a response to *Ives v. South Buffalo Railway* (1911), in which New York’s Supreme Court had ruled that the state’s workmen’s compensation act (the first in the nation) violated the federal Constitution.<sup>17</sup> Because most members of Congress favored such legislation and believed it to be constitutional, they wanted the Supreme Court to be able to overturn excessive constraints placed on state legislatures by state courts.

In recent decades, political conservatives in Congress have responded to controversial federal court decisions by proposing legislation to restrict the power of those courts to rule on particular issues. During the 1970s and 1980s, conservatives introduced bills that would have prohibited lower federal courts from ruling on abortion, school prayer, and busing of students to achieve racial integrations in public schools. None of these bills was adopted. Following the election of Republican majorities in both houses of Congress in 1994, however, less drastic restrictions on federal jurisdiction were approved. In 1995, Congress enacted the Prison Litigation Reform Act, which reduced the discretion of federal courts in supervising prisons and requiring the early release of prisoners, and the Effective Death Penalty Act, which limited the power of

<sup>17</sup> *Ives v. South Buffalo Railway*, 201 N.Y. 271 (1911).



federal courts to consider successive habeas corpus petitions filed by inmates awaiting execution.

Some commentators, including former Chief Justice Rehnquist, have proposed further reducing the caseloads of federal courts by eliminating their diversity-of-citizenship jurisdiction. Proponents of this change insist that state courts today treat residents and non-residents even handedly, and so the original justification for the diversity jurisdiction (avoiding possible bias against non-residents in state courts) no longer exists. Shifting diversity cases to state courts would significantly reduce federal caseloads, as diversity-of-citizenship cases account for more than twenty percent of all civil cases filed in federal district courts. However, the American Bar Association and various trial lawyers' organizations have opposed this change, maintaining that federal courts do a better job than do state courts in dispensing justice. This dispute sparked a lively exchange in legal publications debating the "parity" of federal courts and state courts.<sup>18</sup>

Whatever the merits of the competing arguments, those seeking to maintain diversity jurisdiction have thus far blocked its elimination.

### 3. THE STATE JUDICIAL POWER AND JUDICIAL FEDERALISM

#### 3.1. The Division of Authority

Three legal principles govern the relations between federal and state courts in their exposition and interpretation of federal and state law. The first principle is the supremacy of federal law. Under the Supremacy Clause of the U.S. Constitution, all inconsistencies between federal and state law are to be resolved in favor of the federal law, as long as the federal government is acting within the sphere of its authority. Thus, the federal Constitution, federal statutes, and federal administrative regulations all supersede state enactments, including state constitutions. A second principle is the authority of each system of courts to expound its own body of law. State courts must not only give precedence to federal law over state law, they must also interpret the federal law in line with current rulings of the U.S. Supreme Court. Conversely, in interpreting the law of a state, federal courts are bound to accept as authoritative the interpretation of that law propounded by the highest court of that state. A third principle is the so-called autonomy principle: when a case raises issues of both federal and state law, the U.S. Supreme Court will not review a ruling grounded in state law unless the ruling is inconsistent with federal law. Thus, when a state ruling rests on "adequate and independent state grounds," it is immune from review by the U.S. Supreme Court.

<sup>18</sup> See, for example, NEUBORNE, Burt. *The Myth of Parity*. *Harvard Law Review*, New Haven, vol. 90, n. 6, apr. 1977, p. 1105-1131; and BATOR, Paul. *The State Courts and Federal Constitutional Litigation*, *William & Mary Law Review*, Williamsburg, vol. 22, n. 4, ago./oct. 1981, p. 605-638.

### 3.2. State Judicial Power

Because all residual powers under the federal Constitution lie with the states, the state judicial power extends to all cases that do not fall within the exclusive jurisdiction of the federal courts. This encompasses most legal disputes. Moreover, in determining what constitutes a “case” appropriate for judicial resolution, the states are not bound by the justiciability limitations imposed on federal courts by Article III of the federal Constitution. Rather, state constitutions and state statutes determine what sorts of claims can be litigated in state courts. Thus, whereas federal law imposes strict standing-to-sue requirements, many states have been far more liberal in awarding standing, with most permitting taxpayers’ suits to challenge state or municipal government action. Similarly, whereas federal courts cannot issue advisory opinions, seven state constitutions expressly impose on their supreme courts a duty to render such opinions, usually upon request by the legislature or the executive. In two other states, courts have upheld statutes permitting advisory opinions even in the absence of constitutional authorization, and in North Carolina the power to issue advisory opinions has been established by judicial decision.<sup>19</sup>

Justice William Brennan, who served on the New Jersey Supreme Court before his elevation to the U.S. Supreme Court, once observed that “the composite work of the courts in the fifty states probably has greater significance [than that of the U.S. Supreme Court] in measuring how well America attains the ideal of equal justice for all.”<sup>20</sup> In part this reflects the sheer volume of cases that American state courts decide annually. But in addition, the decisions that state courts render tend to have a more direct and immediate impact on the daily lives of ordinary citizens than do most rulings of federal courts. More than ninety-five percent of criminal cases are state cases, arising under state criminal laws. Family matters (divorce, child custody, and adoption) and landlord-tenant relations are regulated by state law and addressed by state courts. So, too, are traffic violations, creditor-debtor disputes, most personal injury suits, and most commercial transactions. Such issues not only arise in state courts but also are settled by them. Although some state judicial decisions are subject to review by the federal courts, most fall outside the federal judicial power—that is, they resolve disputes under state law between citizens of the same state. Even when the U.S. Supreme Court might in theory review state rulings, the sheer number of state cases means that only a minuscule percentage receive federal judicial scrutiny, so state courts render the final determinative decision in almost all the cases they consider.

<sup>19</sup> Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota provide for advisory opinions by constitutional mandate, Alabama and Delaware by statute, and North Carolina by court decision.

<sup>20</sup> BRENNAN JR, William J. State Supreme Court Judges *versus* United States Supreme Court Justice: A Change in Function and Perspective. **University of Florida Law Review**, Gainesville, vol. 19, 1996. p. 236.

### 3.3. The New Judicial Federalism

The most significant recent development involving the exercise of state judicial power was the emergence in the early 1970s of the new judicial federalism, that is, state courts relying on state bills of rights to provide greater protection than was available under the federal Bill of Rights.<sup>21</sup> The development of the new judicial federalism originated in response to changes in personnel on the U.S. Supreme Court, best symbolized by the appointment in 1969 of Warren Burger to succeed Earl Warren as chief justice. These personnel changes alarmed civil-liberties advocates, who expected that the reconstituted Supreme Court would erode the gains they had made during the Warren Court era, particularly with regards to the rights of defendants in criminal cases. As it turned out, these fears were largely exaggerated, but they led civil-liberties groups to look for alternative means to safeguard rights, a search that led them eventually to embrace state bills of rights.

The decision to rely on state courts and state bills of rights was rather surprising. State bills of rights protect many of the same set of fundamental rights—the freedoms of speech and of the press, religious liberty, and protections for defendants—found in the federal Bill of Rights. Moreover, historically state courts had not been aggressive in enforcing those guarantees, which was one of the reasons that civil-liberties groups in the past had sought to pursue their claims in federal courts. Nevertheless, several factors made these state bills of rights attractive to rights advocates in the early 1970s. First of all, state judges interpreting state bills of rights are not obliged to conform their interpretations to the rulings of federal courts interpreting analogous federal provisions. Even when the language is identical or nearly identical, state judges are interpreting a unique document, with a unique history, and this uniqueness may justify a different interpretation. Moreover, even if the federal courts have interpreted an identical constitutional provision in a nearly identical case, as a matter of law the federal ruling is not binding—states are the ultimate interpreters of their own constitutions, and they may simply disagree. They need not assume that the federal interpretation is the best legal interpretation. In addition, under the legal doctrine of “adequate and independent state grounds,” rulings based solely on state law are not subject to federal scrutiny.<sup>22</sup> This means that expansive state rulings, if based on the rights guarantees in state constitutions, are insulated from review and reversal by the Supreme Court. Thus, the shift to state bills of rights represented a tactical maneuver by groups

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<sup>21</sup> On the development of the new judicial federalism and its impact, see TARR, G. Alan. *The New Judicial Federalism in Perspective*. *Notre Dame Law Review*, Notre Dame, vol. 72, n. 4, may 1997, p. 1097-1118.

<sup>22</sup> Key cases developing the notion of “independent and adequate state grounds” include *Herb v. Pitcairn*, 324 U.S. 117 (1945), and *Michigan v. Long*, 463 U.S. 1032 (1983).

eager to evade what they perceived as a less hospitable federal constitutional law. From 1950 to 1969, in only ten cases did state judges rely on state guarantees of rights to afford greater protection than was available under the federal Constitution. But since then they have done so in more than 1200 cases.

The new judicial federalism may have begun as an attempt to circumvent conservative decisions of the Supreme Court, but over time its character has changed. Initially, the new judicial federalism was confined to a few pioneering courts, but by now reliance on state bills of rights had become standard practice in all state courts. Initially, the agenda of the new judicial federalism was determined in reaction to or in anticipation of rulings by the U.S. Supreme Court on issues such as the rights of defendants and the financing of public education, but that too has changed. State courts continue to address such issues, but they likewise confront new issues that have been addressed rarely or not at all by the Supreme Court. For example, the supreme courts in a number of states have considered state constitutional challenges to changes in tort law, and several also addressed issues involving the rights of gays and lesbians. State constitutional law is thus increasingly becoming an independent body of law rather than a body of law defined by its relation to federal constitutional law. This is reflected in the highly sophisticated literature on the distinctive problems of state constitutional interpretation that has developed in recent years.<sup>23</sup>

From a theoretical perspective, under the American system of rights protection, the federal government provides the base, the constitutional minimum, ensuring the protection of fundamental rights, while state protections build upon that base, providing whatever additional protections the citizens of the state deem appropriate. From an institutional perspective, the logic is slightly different. The initial responsibility for protecting rights often rests with the states, both their political branches and their courts. Federal intervention usually occurs as a result of litigation, when the states have failed to meet their responsibilities. This offers substantial opportunity for state courts to develop independently their own bodies of civil-liberties law, and they have authored pioneering rulings involving the death penalty, the rights of defendants, the financing of public education, the rights of gays and lesbians, and several other matters.<sup>24</sup>

<sup>23</sup> See WILLIAMS, Robert F. The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents. **Oklahoma City University Law Review**, Oklahoma, vol. 27, mar./may 2002, p. 189-229.

<sup>24</sup> For an overview of state civil-liberties rulings under the new judicial federalism, see FRIESEN, Jennifer. **State Constitutional Law: Litigating Individual Rights, Claims and Defenses**. 4<sup>th</sup> ed. Charlottesville: LexisNexis, 2006.

## 4. THE FEDERAL COURTS

### 4.1. Development

Congressional statutes have defined and then redefined the federal court system.<sup>25</sup> The Judiciary Act of 1789 established a Supreme Court of six justices and provided for two sets of federal trial courts, the thirteen district courts and the three circuit courts. A district court was established in each state, staffed by a single district judge, exercising a limited jurisdiction involving such matters as revenue, admiralty, and minor crimes. The other trial courts, the circuit courts, were likewise geographically based. They initially had no judges of their own, but operated in multi-judge panels consisting of the district judge for the district and one or both of the Supreme Court justices who “rode circuit” (literally traveled from place to place) to hear cases. Beginning in the early nineteenth century, Congress multiplied the number of districts, creating new districts as new states were admitted to the union and dividing existing states into more than one district. In dividing states into multiple districts, Congress did not act on the basis of a general plan but rather proceeded in piecemeal fashion, state by state, typically responding to the urgings of local groups that were eager to have courts that were more convenient geographically.

After the Civil War the expansion of federal jurisdiction, the increase in the number of judicial districts and circuits, and growth in the caseloads of the federal courts all caused the U.S. Supreme Court—at that point the only federal appellate court—to be inundated with appeals. Litigants as a result had to wait as long as three years to have their cases heard. To alleviate this backlog, Congress in 1891 created Circuit Courts of Appeals to hear appeals from the District Courts and Circuit Courts. In 1911 Congress eliminated the Circuit Courts, vesting the original jurisdiction of those courts in the District Courts, thus finalized the three-tiered structure of the federal court system that exists today.

In addition to the courts already described, Congress has since 1855 created a number of specialized federal courts. In some instances these courts were designed to relieve Congress from deciding individually large numbers of similar claims, thus freeing Congress to devote its attention to legislation. This was the rationale for the creation in 1855 of the Court of Claims (now the U.S. Court of Federal Claims) to hear suits against the federal government for monetary damages—e.g., claims for tax refunds and for compensation for federal takings of private property for public use. In other instances specialized courts were created because it was important to ensure a uniform

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<sup>25</sup> Our account of the development of the federal judicial system relies on FALLON, Richard. **Hart and Wechsler's The Federal Courts in the Federal System**. 4<sup>th</sup> ed. Westbury: Foundation Press, 1996; and REDISH, Martin H. **Federal Jurisdiction: Tensions in the Allocation of Judicial Power**. Indianapolis: Michie, 1980.

to ensure uniform resolution of issues arising under federal statutes of national application. Thus the U.S. Customs Court, located in New York City, hears cases arising out of civil rulings by U.S. customs collectors involving the amount of customs duties, the value of imported goods, and the exclusion of merchandise from the country. Specialized courts may also be created, sometimes merely temporarily, to address problems arising from a particular emergency. Thus the Alien Terrorist Removal Court was established in the wake of the bombing of the federal office building in Oklahoma City in 1996, in order to streamline the deportation of criminal aliens after they had served their prison sentences. Finally, some specialized courts have been established to deal with highly sensitive matters—for example, the Foreign Intelligence Surveillance Court (1978) oversees the issuance of warrants to use electronic eavesdropping to acquire “foreign” intelligence within the United States.

## 4.2. Current Structure

Congress has established ninety-four district courts, staffed by 663 judges (as of October, 2015), serving the fifty states, the District of Columbia, and territories (e.g., the Virgin Islands) governed by the United States. Every state has at least one district court, and no district extends beyond the borders of a single state. Larger or more populous states are divided into more than one district, with three states—California, New York, and Texas—each having four district courts. Every district court has at least two judges: the number of judges assigned to a district court depends on its caseload, and that varies considerably from district to district. District courts exercise no discretion over what cases they hear. Any litigant who satisfies the jurisdictional requirements and follows proper legal procedures can initiate a case in federal district court. However, a federal district court cannot address a legal issue unless a litigant brings it before the court in a bona fide case. Thus, the business of the district courts is determined solely by the litigant demand. Over the past few decades, the filings in federal district courts have risen sharply: from 87,421 cases in 1960 to 390,525 cases in 2014.<sup>26</sup> Civil filings have increased during these decades, but the more substantial increase has been in federal criminal cases. The increase in criminal cases reflects both the rising number of drug cases now prosecuted in federal courts and congressional enactment of legislation creating new federal crimes. Only about 15 percent of district court rulings get appealed, so federal district courts render the final decision in most federal court cases.

Congress has established thirteen federal courts of appeals, staffed by 179 judges, that serve as the first-level appellate courts of the federal judicial system. In more than ninety-five percent of the cases they hear, courts of appeals meet in three-judge

<sup>26</sup> Federal Court Caseload Statistics, at <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014>.

panels, deciding cases by majority vote; but federal statutes also permit courts of appeals at their discretion to hear cases *en banc*, with the entire membership of the court deciding a case. More than three-quarters of the cases decided by courts of appeals come on appeal from the district courts, with the remainder coming from federal administrative agencies or from specialized courts, such as the Tax Court. Twelve of the thirteen courts of appeals are organized regionally. Eleven have “circuits” made up of three or more states and/or territories—for example, the First Circuit includes Maine, Massachusetts, New Hampshire, and the Virgin Islands, and the Seventh Circuit includes Illinois, Indiana, and Wisconsin. One court of appeals, the Court of Appeals for the District of Columbia, reviews large numbers of appeals from federal administrative agencies and serves as a sort of state supreme court for the District of Columbia. The thirteenth court of appeals, the Court of Appeals for the Federal Circuit, was created in 1982 by combining the jurisdictions of the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims into a single court.

The boundaries of most regional circuits were established long ago, and as population shifts have occurred, some courts of appeals have experienced disproportionate increases in their caseloads. In 1981 Congress responded to caseload pressures by splitting the old Fifth Circuit into a new Fifth Circuit (serving Texas, Louisiana, and Mississippi) and a new Eleventh Circuit (serving Alabama, Georgia, and Florida). Generally, however, Congress’s response to burgeoning caseloads has been to add judges to overburdened circuits, and as a result the number of judges varies considerably among the courts of appeals. The First Circuit has the fewest appeals court judges (6), while the Ninth Circuit has the most (26).

Atop the federal judicial hierarchy sits the Supreme Court of the United States. Its nine justices receive more than 7,000 petitions for review each year, primarily from federal courts of appeals and state supreme courts, and in recent years the justices have decided fewer than 80 cases annually.<sup>27</sup> Over the course of the twentieth century, Congress gradually expanded the justices’ control over their agenda, so that today they exercise virtually complete discretion in determining which appeals to hear and which to reject. The legal or political importance of the issue, the lower courts’ rulings on the issue, the parties to the case, and the justices’ own legal views all factor into the decision to grant or deny certiorari.

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<sup>27</sup> This of course means that a very large proportion of decisions by federal courts of appeals and by state supreme courts are not reviewed by the Supreme Court. When the Supreme Court does not review a ruling by a court of appeals or state supreme court, then that ruling is the final and determinative ruling in the case.



## 5. STATE COURTS

### 5.1. Structure

State court systems typically involve a hierarchy of courts. Atop the state court system is the state supreme court. Forty-eight states vest ultimate appellate authority in a single court, usually designated as the Supreme Court (although Maryland and New York call their highest court the Court of Appeals and Maine and Massachusetts designate it the Supreme Judicial Court). Oklahoma and Texas have each established both a Court of Criminal Appeals, which is the court of last resort in criminal cases, and a Supreme Court, which has final responsibility for appeals in civil cases. The state supreme court is responsible for the development of state law, and its decisions serve as authoritative precedent within the state court system. Its jurisdiction is defined by the state constitution, by state statutes, or by both. Usually, a state supreme court does not enjoy the broad discretion over the cases it hears that the U.S. Supreme Court does. The mandatory appellate jurisdiction of the Washington Supreme Court, for example, includes certain criminal, administrative agency, juvenile, and lawyer-discipline cases. Not surprisingly, given their more extensive mandatory jurisdiction, most state supreme courts decide more cases per year than does the United States Supreme Court.

Forty states have also created intermediate courts of appeals — that is, first-level appellate courts below the state supreme court. These courts focus on error correction. They review the rulings of state trial courts to ensure that the judges did not make errors in procedure or in the interpretation of the law that would warrant reversal of their decisions, and — like the federal courts of appeals — these courts exercise no discretion over the appeals that they hear. If an appeal is properly filed, they must review the lower court's decision. Decisions of an intermediate court of appeals typically can be appealed to the state supreme court, though state law may allow the supreme court some discretion over what cases it chooses to review. In practice, intermediate courts of appeals render the final decision in most cases that come before them.

Intermediate courts of appeals were initially established in populous state to alleviate case load pressures on state supreme courts, but now most states have also created intermediate courts of appeals. There is wide variation in the structure and operation of these courts. Some sparsely populated states — for example, Alaska — have a single court that hears all appeals *en banc*. Other states, such as California and Louisiana, have followed the model of the federal courts of appeals, with several courts serving various regions of the state. These courts typically meet in three-judge panels, just like the federal courts of appeals. In contrast, Alabama and Tennessee have created separate courts for appeals in criminal cases and in civil cases.

Four states—Illinois, Iowa, Minnesota, and South Dakota—have a single set or original jurisdiction (trial) courts. Forty-six states, however, operate two sets of trial courts: courts of limited jurisdiction and courts of general jurisdiction. Courts of limited jurisdiction go under a variety of names: municipal court, county court, district court, justice of the peace court, and so on. They handle less serious criminal cases and civil cases involving relatively small sums of money. For example, North Carolina's trial courts of limited jurisdiction, known as district courts, decide civil cases involving less than \$10,000, domestic relations cases, and criminal cases involving juvenile offenders or misdemeanors. In contrast, courts of general jurisdiction handle more important civil cases and serious criminal cases. In several states they may also hear appeals, often with a new trial (called a trial *de novo*) from courts of limited jurisdiction. (A new trial is necessary because limited jurisdiction courts do not keep a verbatim record of proceedings.)

Despite some basic uniformities, what is most striking about state court systems is their bewildering organizational diversity. No two state court systems are exactly the same. Perhaps the most important variation is found in the organization of state trial courts. Although forty-six states divide original jurisdiction between courts of limited jurisdiction and courts of general jurisdiction, most further subdivide it on the basis of geography, subject matter, or both. Distinctive courts reflect the history or economy of the state. Thus, Maryland has a separate Orphan's Court; Colorado has a Water Court; and New York has ten separate sets of trial courts, including special civil and criminal courts for New York City.

## 5.2. Development and Reform

Historical factors largely account for the organizational complexity found in state court systems. In creating their court systems, most states designed them to serve a relatively sparse and predominantly rural citizenry. Over time, urbanization, population growth, and the developing complexity of the law produced new demands for court services. In some states constitutional amendments were adopted to modernize the court system, but often these amendments were outpaced by subsequent development, requiring periodic changes. In other states the legislatures responded not by overhauling the existing court structure but by creating additional trial courts to satisfy the demands for accessible court services. Thus, in contrast with the federal court system, whose structure has remained relatively stable for the most part, many state court systems have exhibited a continuing pattern of demand and response. Typically, the new state trial courts that were created were added with little consideration of their impact on the overall coherence of the state judicial system, reflecting no underlying organizational principle.

During the twentieth century, reformers introduced important changes in state court systems. A nationwide reform campaign, spearheaded by the American Judicature Society and the American Bar Association, focused on streamlining state court systems. According to these groups the complexities of state court systems — in particular, the myriad specialized trial courts with their overlapping jurisdictions — interfered with the efficient and uniform administration of justice. Litigants often did not know in which court to file suits, and varying procedural requirements from court to court meant that cases were too often dismissed on procedural grounds, without consideration of their merits. To remedy these problems, the reformers proposed a consolidation of state trial courts and a clearer definition of the jurisdictional boundaries among them. In the decades following World War II, the reformers' campaign for trial court consolidation enjoyed considerable success. Once structural changes were introduced in a few states, such as New Jersey, other states followed their lead and modernized their courts.

Another structural reform, adopted in response to increases in the number of appeals filed in state courts, has been the establishment of intermediate courts of appeals. By itself, this structural change had little effect on the caseload problems of state supreme courts. Appeals tended to increase following the establishment of intermediate appellate courts, and with appeals from those courts to the state supreme court, filings in the supreme court soon approximated earlier levels.<sup>28</sup> However, when the creation of intermediate appellate courts was combined with limitations on the right of a second appeal, it substantially reduced the caseloads of state supreme courts.<sup>29</sup> Equally important was the effect that this reform had on the types of cases coming before state supreme courts and on the role that those courts began to play in their states. By diverting routine cases away from state supreme courts, intermediate appellate courts allowed state supreme courts to devote more attention to cases that raised important policy questions and to assume a position of leadership in the legal development of their states.

## 6. RELATIONSHIPS BETWEEN STATE AND FEDERAL COURTS

### 6.1. The “Federalization” of Criminal Law

In its unamended form, the United States Constitution expressly authorized Congress to make criminal only treason, offenses committed on federal property,

<sup>28</sup> FLANGO, Victor Eugene; BLAIR, Nora F. Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court? *Judicature*, Durham, vol. 64, aug. 1980, p. 74-84.

<sup>29</sup> For examples, see GROOT, Roger D. The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience. *Wake Forest Law Review*, Winston-Salem, vol. 7, 1971, p. 546-572.

counterfeiting, offenses against the “Law of Nations,” piracy, and “Felonies committed on the high Seas.”<sup>30</sup> However, as Chief Justice John Marshall recognized in *McCulloch v. Maryland*, the grants of other powers to Congress, coupled with the Necessary and Proper Clause, permit Congress to impose penal sanctions to further the exercise of those powers.<sup>31</sup> For example, the power to establish post offices carries with it the power to outlaw mail fraud or theft of the mail, and the power to regulate commerce includes the power to punish those who violate congressional regulations of commerce. Nevertheless, until the Civil War there were relatively few federal crimes, and those largely consisted of offenses against the United States, its officers and property, and the territory that it ruled directly. The prosecutions of crimes was generally understood as the responsibility of (and province of) state government, and there was virtually no overlap between federal and state crimes.<sup>32</sup>

After the Civil War, Congress enacted criminal laws to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments, which guaranteed (among other things) the rights of the newly freed slaves. From 1870-1970, Congress occasionally adopted criminal legislation to regulate and protect interstate commercial activity, which was expanding. With the advent of the automobile, which increased the mobility of criminals, enabling them to cross state lines in order to evade state and local law enforcement, Congress expanded the federal role, targeting bank robbery, car theft, and kidnapping, as well as various forms of organized crime. Nevertheless, Congress largely left ordinary law enforcement in the hands of the states.

This has changed in recent decades: more than half of all the federal criminal laws enacted since the Civil War have been enacted since 1970. Much of the recent federalization of criminal law has been a political response to highly publicized crimes. For example, within a week after the 1999 massacre of students at Columbine High School in Colorado, federal legislation was proposed making it a felony for adults to recklessly or knowingly allow children to possess weapons later used to injure or kill a person. Within weeks after a Maryland woman was brutally murdered during a car-jacking, Congress made car-jacking a federal crime. In both these instances—and in many others as well—Congress was enacting criminal statutes addressing conduct that had no distinctive federal dimension and that was already outlawed by state law.

From the perspective of judicial federalism, the enactment of such duplicative federal legislation raises several concerns. First the federalization of criminal law

<sup>30</sup> U.S. Constitution, Art. I, sec. 8.

<sup>31</sup> *McCulloch v. Maryland*, 4 Wheat. 316 (1819); U.S. Constitution, Article I, sec. 8, para. 18.

<sup>32</sup> This section’s analysis of the federalization of criminal prosecutions relies primarily on MARONEY, Thomas J. Fifty Years of Federalization of Criminal Law: Sounding the Alarm or ‘Crying Wolf?’ *Syracuse Law Review*, Syracuse, vol. 50, 2000, p. 1317-1378; and EHRLICH, Susan A. The Increasing Federalization of Crime. *Arizona State Law Journal*, Tempe, vol. 32, sep./nov. 2000, p. 825-842.

impinges on the historical role of state courts in adjudicating criminal matters. Second, the requirement that federal courts address a potentially large volume of run-of-the-mill criminal cases could prove a drain on federal resources, diverting the federal courts from their unique mission of adjudicating important national issues. Third, the existence of federal and state statutes, with different penalties for the same offense, promotes unequal justice, in that defendants committing the same act may receive different sentences depending on whether they are tried in federal or state court, and it gives undue discretion to prosecutors in deciding in which forum to prosecute cases.<sup>33</sup>

Some constitutional scholars claim that much of this federal criminal legislation exceeds the powers granted to Congress by the Constitution, and this view has enjoyed some support on the U.S. Supreme Court. In *United States v. Lopez* (1995), a five-member Court majority struck down the federal Gun-Free School Zones Act; in *United States v. Morrison* (2000) the same majority invalidated the federal Violence Against Women Act; and in *Jones v. United States* (2000) the Court held that a federal arson statute, if applied to arson of an owner-occupied residence not used for any commercial purpose, would exceed Congress's power under the Commerce Clause.<sup>34</sup> Nevertheless, it seems unlikely that the Court will be an effective barrier against the federalization of criminal law, given the political incentives for federalization and the ability of Congress to frame much of its criminal law as necessary and proper to carrying out its power to regulate commerce among the several states.

## 6.2. Habeas Corpus

Habeas corpus was originally a common law writ designed to test the legality of confinement. A writ of habeas corpus is a court order commanding an official, whether state or federal, who holds a prisoner in custody to demonstrate to the court the legal justification for the restraint of personal liberty. This venerable legal protection, termed by Chief Justice Salmon Chase "the best and only sufficient defense of personal freedom," was granted constitutional recognition even before the adoption of the Bill of Rights.<sup>35</sup> Article I, section 9 of the federal Constitution mandates that the "privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Because the Constitution did not require the creation of lower federal courts that could issue the writ, this provision may initially have been designed to safeguard

<sup>33</sup> See CLYMER, Steven D. Unequal Justice: The Federalization of Criminal Law. *Southern California Law Review*, Los Angeles, vol. 70, mar. 1997, p. 643-739.

<sup>34</sup> *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000).

<sup>35</sup> *Ex Parte Yergler*, 8 Wall. 85, 95 (1868).

habeas corpus in state courts against infringement by the federal government. Prior to the Civil War, some state courts in “free” states issue writs of habeas corpus releasing persons convicted in federal court of violating the Fugitive Slave Act. However, the Supreme Court in *Ableman v. Booth* (1859) ruled that state courts lacked the power to release persons imprisoned following conviction in federal court.<sup>36</sup> More recently, tensions over habeas corpus have resulted from its use in federal courts to challenge convictions in state courts under state criminal laws, as habeas corpus provides the only circumstance in which state court judgments can be reviewed by lower federal courts.

State courts readily concede that they are obliged to uphold federal constitutional requirements in criminal cases. This responsibility has assumed greater importance since the 1940’s, when the Supreme Court began to expand the range of procedural requirements on state courts through the “selective incorporation” of various guarantees of the federal Bill of Rights, making them equally applicable in state prosecutions.<sup>37</sup> State courts likewise acknowledge that their rulings on matters of federal constitutional law are subject to appellate review by the U.S. Supreme Court. Of course, given the number of state supreme court rulings and the limited capacity of the Supreme Court, this is quite a limited oversight mechanism. In its 2014 term, for example, the Supreme Court heard only five appeals from state courts in criminal cases. What has created resentment on the part of state courts is the possibility that a single federal district court judge may review the determination of a multi-member state supreme court and overturn the conviction upheld on appeal by the state’s highest court.

In practice, the overturning of state convictions on habeas corpus review happens relatively infrequently—one study documented that federal courts granted less than one percent of habeas petitions filed by state prisoners.<sup>38</sup> Moreover, both Congress and the Supreme Court have undertaken to reduce tensions between state and federal courts. Congress has mandated that a state prisoner must exhaust his remedies in state court (appeals, state habeas corpus, or other post-conviction remedies) thereby allowing state courts an opportunity to correct their own errors, before federal habeas corpus can be issued. Finally, at least some legal commentators have argued that the relation between federal and state courts in habeas corpus should be viewed not as one of domination but rather one of dialogue, in which the possession of authority does not

<sup>36</sup> *Ableman v. Booth*, 21 How. 506 (1859).

<sup>37</sup> See ROSSUM, Ralph A.; TARR, G. Alan. **American Constitutional Law: Volume II - The Bill of Rights and Subsequent Amendments**. 9<sup>th</sup> ed. Boulder: Westview Press, 2013. Chapter 7.

<sup>38</sup> FLANGO, Victor E; MCKENNA, Patricia. Federal Habeas Corpus Review of State Court Convictions. **California Western Law Review**, Riverside, vol. 31, n. 2, mar./may 1995, p. 237-275.

preclude a willingness to listen and learn and in which the duty of obedience does not eliminate all say over how the authority will be exercised.<sup>39</sup>

### 6.3. Certification

Although appellate review serves to ensure that state courts faithfully apply federal law, there is no analogous procedure for ensuring that federal courts properly interpret state law in the cases coming before them. In 1967 Florida pioneered a remedy for this situation, authorizing its supreme court to rule on questions of state law certified to it by either the United State Supreme Court or federal courts of appeals. By 1982 twenty-three other states had followed Florida's lead by permitting certification questions of state law to their respective supreme courts, and in 1983 the American Bar Association adopted a resolution urging that all states adopt certification procedures.<sup>40</sup> However, despite its potential benefits, certification has not been widely employed. According to Guido Calabresi, formerly a distinguished professor at Yale University and later a member of the United States Court of Appeals for the Second Circuit, the reason is simple: "Federal judges don't like to certify, because we think we know, better than the states, what state law ought to be."<sup>41</sup> Whatever the reasons—and Calabresi argues for a major expansion in the use of certification—in its absence state supreme courts have no means for reviewing federal courts' interpretation of state law. On the other hand, they are not bound by federal interpretations of state law that they deem erroneous, and by their rulings in subsequent cases they can see to correct those errors and guide future federal court interpretations.

### 6.4. Cooperative Arrangements

In Federalist No. 82, Alexander Hamilton observed that "the nation and state [court] systems are to be regarded as 'one whole'." Part of the success of American judicial federalism stems from efforts designed to make Hamilton's observation a reality, to facilitate cooperation between the federal and state judiciaries and to develop practical mechanisms for promoting the more effective administration of justice. The need to promote a harmonious, cooperative relationship between the federal and state judiciaries was highlighted by Chief Justice Warren Burger in 1970 in his state of the judiciary address to the American Bar Association. Since then, new institutions have

<sup>39</sup> See COVER, Robert M.; ALEINIKOFF, T. Alexander. Dialectical Federalism: Habeas Corpus and the Court. *Yale Law Journal*, New Haven, vol. 86, may 1997, p. 1035-1102.

<sup>40</sup> On the perceived success of certification, see SERON, Caroll. *Certifying Questions of State Law: Experience of Federal Judges*. Washington DC: Federal Judicial Center, 1983.

<sup>41</sup> CALABRESI, Guido. Federal and State Courts: Restoring a Workable Balance. *New York University Law Review*, New York, vol. 78, n. 4, oct. 2003, p. 1293-1308.



been established, numerous studies have been undertaken, and new channels of communication have been opened with the aim of fostering cooperation and upgrading court operations.

The creation of the National Center for State Courts (NCSC) in 1971 and the State Justice Institute (SJI) in 1984 have probably had the greatest effect on the quality of justice in state courts and on coordination and cooperation between state and federal courts. The NCSC was the brainchild of Chief Justice Burger, who saw a need for major improvement in many state court systems. The NCSC, which receives a substantial part of its funding from grants from the federal government, serves as a clearinghouse for information on best practices pioneered in various court systems. In addition, it develops standards to guide state courts, such as its Trial Court Performance Standards, and undertakes studies focusing on common problems, such as court backlogs and the need to introduce technology to improve productivity in court administration. The NCSC also provides expert assistance on request to court systems. Finally, in conjunction with its counterpart federal institution, the Federal Judicial Center (FJC), it encourages cooperation between court systems.

The State Justice Institute was established by federal law as a mechanism for awarding project grants designed to improve the quality of justice in state courts, for facilitating better communication and coordination between state and federal courts, and for fostering innovative solutions to problems faced by all courts. Although SJI is fully funded by the federal government, by statute its eleven-member Board of Directors, appointment by the President and confirmed by the Senate, must include at least six state judges, thereby ensuring the SJI remains responsive to state concerns. Since becoming operational in 1987, the SJI has awarded more than \$130 million in grants in support of more than 1000 projects.

Several other innovative steps have been taken in recent years to foster cooperation between state and federal courts. State-federal judicial councils were created in most states that meet annually to discuss areas of mutual concern. In 1992, a national conference was convened on state-federal judicial relations, and the following year the Federal Judicial Center and the National Center for State Courts began publishing the *State Federal Judicial Observer*, a newsletter devoted to state-federal judicial relations and activities. Building on that momentum, in 1997 the FJC and NCSC jointly published a *Manual for Cooperation Between State and Federal Courts* that addresses such vital matters as calendar conflicts, joint discovery plans, certification of questions of state law, and sharing courtroom facilities.

## 7. EMERGING AND ENDEMIC ISSUES AFFECTING STATE AND FEDERAL COURTS

Federal and state courts face some common problems in their relationships with the other branches of government and with the public. A system of judicial federalism permits different court systems to adopt their own solutions to these problems. This section identifies some important instances of this aspect of judicial federalism.

### 7.1. Judicial Independence and Accountability

Judicial independence refers to the capacity of judges to render decisions according to law without undue external influence or threat of retribution for their decisions.<sup>42</sup> Thus judicial independence is perceived as crucial for judicial impartiality—if judges are to behave impartially, they must be free from pressures to behave otherwise. In the United States, however, this concern for judicial impartiality is in tension with another deeply held American value: the accountability of governmental officials, that is, the notion that in a democratic society citizens should select those who wield power and hold them accountable for its exercise. In the federal courts, the emphasis has been on safeguarding judicial independence. Although the emphasis varies among state court systems, in general they have been more willing to introduce mechanisms for judicial accountability, even at some risk to judicial independence.

The federal Constitution establishes specific guarantees for the independence of federal judges. Article III grants federal judges tenure during “good behavior,” so even though the selection process for federal judges has grown increasingly partisan and contentious in recent decades, federal judges—once appointed by the President and confirmed by the Senate—in practice serve until retirement. In only seven instances have federal judges been impeached and removed from office, and these cases have all involved instances of personal wrongdoing (e.g. bribery, perjury) rather than retribution for unpopular decisions.<sup>43</sup> Article III also protects judicial independence by prohibiting the reduction of judges’ salaries during their term in office. Thus, during the Great Depression of the 1930’s, when Congress cut the pay of all other federal officials, the Constitution prevented a similar reduction for federal judges.<sup>44</sup>

State judges enjoy less judicial independence. Most state constitutions safeguard judges from punitive salary reductions (although some permit salary reductions for judges if they are part of an across-the-board reduction for all state officials).

<sup>42</sup> See TARR, G. Alan. **Without Fear or Favor: Judicial Independence and Judicial Accountability in the States.** Stanford: Stanford University Press, 2012.

<sup>43</sup> VOLCANSEK, Mary L. **Judicial Impeachment: None Called for Justice.** Urbana: University of Illinois Press, 1993.

<sup>44</sup> U.S. Constitution, Art. III, sec. 1.

With regard to selection and tenure, however, the states tend to emphasize judicial accountability to the populace, even at some risk to judicial independence. In only three states—Connecticut, Massachusetts, and New Hampshire—do judges hold office during good behavior. Terms of office vary from state to state and also vary among courts within a single state, with trial court judges likely to serve shorter terms than appellate judges do. More than half the states prescribe terms of eight years or fewer for their supreme court justices. However, no state imposes term limits on state judges, and therefore incumbent judges are eligible to run for reelection, although many states do impose a retirement age (usually seventy).

The states employ a variety of means for selecting and retaining judges. In four states the governor appoints all appellate judges and in three states all trial judges as well, subject to confirmation by the state senate. This selection system mirrors federal judicial selection, except that judges do not serve during good behavior. In New Jersey, for example, judges serve an initial term of seven years and, if reappointed and reconfirmed, serve until the retirement age of seventy. In Virginia the legislature elects state judges, a system that has tended to favor the judicial candidacies of former legislators. Nineteen states elect some or all of their judges in non-partisan elections. Candidates run for election without party labels, and usually the two top candidates in a non-partisan primary election qualify for a runoff in the general election. Eleven states elect some or all of their judges in partisan elections, in which political parties nominate candidates for judicial office, and prospective judges run with party labels in the general election. Finally, twenty-three states employ a “merit selection” system, in which the governor appoints judges from a list of candidates proposed by a judicial nominating commission typically composed of lawyers selected by the state bar association and non-lawyers appointed by the governor. Even judges selected by this last procedure must periodically run for reelection in retention elections, in which voters decide whether the judge should remain in office—the ballot reads: Should Judge X be retained in office? Altogether, eighty-nine percent of state appellate judges stand for election, whether in partisan elections, nonpartisan elections, or retention elections.

Whatever one’s view on the desirability of electing judges, the fact that each state remains free to strike its own balance between judicial independence and judicial accountability, rather than having to follow the federal lead on this matter, illustrates the operation of judicial federalism in the United States.

## 7.2. Judicial Branch Autonomy

The system of separation of powers at both the federal and state levels means that each branch will be dependent on the other branches to some extent. Because, as Alexander Hamilton observed in *Federalist #78*, the judiciary has “neither the sword nor the

purse," it must rely on the assistance of the legislative and executive branches in carrying out its responsibilities. Lacking the "purse," it must look to the legislature for the funding it needs; lacking the "sword," it must depend on the executive to enforce its mandates. However, the separation of powers also implies that each branch of government, federal or state, has a realm in which it operates autonomously. This realm of autonomy extends to a branch's internal operations—each branch is master in its own house. Thus, just as the Legislature sets its own rules for the transaction of its business, so too the Judiciary should set the rules for the transaction of its business. That, at any rate, is the argument for the control of the Judiciary over rules of practice and procedure.

The situation is complicated at the federal level, however, by two factors. First, the Constitution gives Congress a general authority over the courts. It authorizes Congress to make "Regulations" governing the appellate jurisdiction of the Supreme Court and to "make all Laws, which shall be necessary and proper for carrying into Execution... all other Powers vested by this Constitution in the Government of the United States, or in any Department [including the Judicial Department] or Officer thereof."<sup>45</sup> Second, Congress retains the power to enact substantive law, and the line between substance and procedure may be unclear.

In practice, rather than enacting legislation stipulating the rules of procedure that govern proceedings in federal court, Congress has delegated rule-making power to the courts themselves. The Rules Enabling Act of 1934 authorized the Supreme Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts... and courts of appeals."<sup>46</sup> The Supreme Court has in turn delegated initial responsibility for drafting proposed rules to an Advisory Committee (composed of judges, practicing lawyers, and legal academics appointed by the Chief Justice). After the Advisory Committee's drafts are reviewed, those changes approved by the Supreme Court are submitted to Congress. Congress has the power to reject, accept, or amend the Court's proposals during a seven-month "layover" period. However, should Congress not act on the rules promulgated by the Court during that period, they automatically take effect.

At the state level the constitutional allocation of power for rule-making varies from state to state. Some state constitutions expressly vest the power to establish procedural rules in the Supreme Court. Others expressly vest the power in the Legislature. Still others vest the power in the Supreme court but authorize the Legislature to overturn rules promulgated by the Supreme Court. Finally, some state constitutions are silent on the matter, leaving it to be worked out through implications from the separation of powers or the plenary scope of state legislative authority.

<sup>45</sup> U.S. Constitution, Art. III, sec. 2, para. 3, and Art. I, sec. 8, para. 18.

<sup>46</sup> 28 U.S.C. sec. 2072.

Federal constitutional law plays a significant role in this area. The federal Bill of Rights imposes a number of requirements on the operation of federal courts, particularly with regard to criminal prosecutions. It guarantees defendants a right to a speedy and public trial before a jury of their peers. It grants them a right to notice of the charges against them, a right to counsel, a right to confront witnesses against them, a right to call witnesses on their behalf, and a right against self-incrimination. The Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law and secures to all the equal protection of the laws. In enforcing these guarantees, the United States Supreme Court has selectively incorporated almost all criminal procedural guarantees of the federal Bill of Rights and has applied them equally to the states as to the federal government. For example, *Gideon v. Wainwright* required states to furnish counsel to indigent defendants in criminal cases; *Mapp v. Ohio* ruled that illegally obtained evidence could not be used in state prosecutions; and *Pointer v. Texas* held that state prosecutors could not submit a transcript of a witness's testimony in lieu of his appearance in state court, as that deprived the defendant to confront and cross-examine the witness.<sup>47</sup> However, states remain free, as a matter of state law, to afford additional procedural protections for defendants beyond those mandated by the federal Constitution.

## 8. CONCLUSION

A preeminent federalism scholar, Daniel Elazar, has observed that federalism involves both self-rule and shared rule, and the American system of judicial federalism clearly illustrates this.<sup>48</sup> Under the American system of judicial federalism, both the federal government and state governments have instituted their own court systems. To a considerable extent, these sets of courts operate independently of each other. The federal government determines the structure of the federal court system, whereas each state defines the structure of its own court system. The federal Constitution defines the federal judicial power, and the Constitution and congressional statutes together allocate jurisdiction among the various federal courts. All judicial power not granted to the federal government resides in the states, and state constitutions and state law assign that power as they see fit among state courts. The federal Constitution defines the mode of selection, tenure, and compensation for federal judges, while state law does the same for state judges. Whereas the federal Constitution emphasizes judicial independence, state law seeks to balance independence and accountability, with

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<sup>47</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>48</sup> For an elaboration of his extraordinarily influential views, see ELAZAR, Daniel J. **Exploring Federalism**. Tuscaloosa: University of Alabama Press, 1987.

various states striking the balance quite differently. Federal appropriations finance federal courts, while state and local appropriations finance state courts. Finally, each set of courts makes the final and determinative ruling in most cases that come before it. In particular, more than ninety percent of cases originating in state courts involves matters outside the federal judicial power, and thus the rulings in those cases are not susceptible to federal court review.

However, when state court cases involve matters of federal law, state courts are obliged to give precedence to federal law over state law, when they are in conflict, and to interpret the federal law in conformity with authoritative rulings of the United States Supreme Court. State court rulings on federal law are subject to appellate review by the United States Supreme Court. Moreover, state prisoners can petition federal district courts for a writ of habeas corpus, alleging that the state has violated their rights under federal law. Thus, when important national interests are implicated, mechanisms exist for promoting national legal uniformity. Thus, despite endemic problems and periodic concerns, it is reasonable to conclude that the American system of judicial federalism has largely succeeded in promoting both necessary national uniformity and subnational diversity in the administration of justice.

## 9. REFERENCES

BATOR, Paul. The State Courts and Federal Constitutional Litigation, **William & Mary Law Review**, Williamsburg, vol. 22, n. 4, ago./oct. 1981, p. 605-638.

BRENNAN JR, William J. State Supreme Court Judges *versus* United States Supreme Court Justice: A Change in Function and Perspective. **University of Florida Law Review**, Gainesville, vol. 19, 1996.

CALABRESI, Guido. Federal and State Courts: Restoring a Workable Balance. **New York University Law Review**, New York, vol. 78, n. 4, oct. 2003, p. 1293-1308.

CARBERRY, Charles M. The State Advisory Opinion in Perspective. **Fordham Law Review**, New York, vol. 44, n. 1, 1975, p. 81-113.

CLYMER, Steven D. Unequal Justice: The Federalization of Criminal Law. **Southern California Law Review**, Los Angeles, vol. 70, mar. 1997, p. 643-739.

COVER, Robert M.; ALEINIKOFF, T. Alexander. Dialectical Federalism: Habeas Corpus and the Court. **Yale Law Journal**, New Haven, vol. 86, may 1997, p. 1035-1102.

EHRlich, Susan A. The Increasing Federalization of Crime. **Arizona State Law Journal**, Tempe, vol. 32, sep./nov. 2000, p. 825-842.

ELAZAR, Daniel J. **Exploring Federalism**. Tuscaloosa: University of Alabama Press, 1987.

FALLON, Richard. **Hart and Wechsler's The Federal Courts in the Federal System**. 4<sup>th</sup> ed. Westbury: Foundation Press, 1996.

FLANGO, Victor E; MCKENNA, Patricia. Federal Habeas Corpus Review of State Court Convictions. **California Western Law Review**, Riverside, vol. 31, n. 2, mar./may 1995, p. 237-275.

FLANGO, Victor Eugene; BLAIR, Nora F. Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court? **Judicature**, Durham, vol. 64, aug. 1980, p. 74-84.

FRIESEN, Jennifer. **State Constitutional Law: Litigating Individual Rights, Claims and Defenses**. 4<sup>th</sup> ed. Charlottesville: LexisNexis, 2006.

FROHNMEYER, David B.; LINDE, Hans A. State Court Responsibility for Maintaining 'Republican Government': An Amicus Curiae Brief. **Willamette Law Review**, Salem, vol. 39, n. 1, oct./dec. 2003, p. 1487-1505.

GROOT, Roger D. The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience. **Wake Forest Law Review**, Winston-Salem, vol. 7, 1971, p. 546-572.

MARCUS, Maeva (Ed.). **The Documentary History of the Supreme Court of the United States, 1790-1800**. vol. 2. New York: Columbia University Press, 1988.

MARONEY, Thomas J. Fifty Years of Federalization of Criminal Law: Sounding the Alarm or 'Crying Wolf'. **Syracuse Law Review**, Syracuse, vol. 50, 2000, p. 1317-1378.

NEUBORNE, Burt. The Myth of Parity. **Harvard Law Review**, New Haven, vol. 90, n. 6, apr. 1977, p. 1105-1131.

REDISH, Martin H. **Federal Jurisdiction: Tensions in the Allocation of Judicial Power**. Indianapolis: Michie, 1980.

ROSSUM, Ralph A.; TARR, G. Alan. **American Constitutional Law: Volume II - The Bill of Rights and Subsequent Amendments**. 9<sup>th</sup> ed. Boulder: Westview Press, 2013.

ROSSUM, Ralph A.; TARR, G. Alan. **American Constitutional Law: Volume I - The Structure of Government**. 9<sup>th</sup> ed. Boulder: Westview Press, 2013. Chapter 3.

SERON, Caroll. **Certifying Questions of State Law: Experience of Federal Judges**. Washington DC: Federal Judicial Center, 1983.

TARR, G. Alan. The New Judicial Federalism in Perspective. **Notre Dame Law Review**, Notre Dame, vol. 72, n. 4, may 1997, p. 1097-1118.

TARR, G. Alan. **Without Fear or Favor: Judicial Independence and Judicial Accountability in the States**. Stanford: Stanford University Press, 2012.

WILLIAMS, Robert F. The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents. **Oklahoma City University Law Review**, Oklahoma, vol. 27, mar./may 2002, p. 189-229.