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A Catalogue of Judicial Federalism in the United States

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Baker: A Catalogue of Judicial Federalism in the United States

A Catalogue of Judicial Federalism in the United States

Thomas E. Baker*

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I. INTRODUCTION

A catalogue is a familiar object from everyday life that displays items, usually with some brief description. This Article's approach will be similar. It will itemize and display various features of judicial federalism in the United States with some brief descriptions. Federalism may mean all things to all

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people.¹ Judicial federalism is the necessary accommodation required by our federal structure of state and national courts.

The purpose of this Conference is to apply the comparative method to judicial federalism in Australia, Canada, and the United States. Speaking for the United States, this effort is much needed and long overdue. A commentator recently proclaimed, “Few examples better illustrate the dire effects of closing one’s eyes to foreign models than the American law of jurisdiction, which presents a particularly cogent example of unenlightened parochialism.”²

The purpose of this Article is to shed some light on that parochial system. It will identify and describe the primary and formal interactions between the state and national judiciaries in the U.S. court system. Those who created the Constitution of the United States understood that state and national courts are two parts of “ONE WHOLE” system,³ and this paper sets out to describe how those two sets of courts “articulate[] as a system”⁴ today.

The Article’s organization and approach are straightforward. It will describe court structures and organization and principles of federalism. Then it will provide an overview of jurisdictions and procedures. Next it will catalogue the conflicts between the state and national judicial branches. In lieu of a conclusion, an assessment of current trends and the future of judicial federalism will be offered. This written version necessarily will be longer and more detailed than the accompanying oral presentation, as a brief is to an oral argument.⁵

II. COURT STRUCTURES AND ORGANIZATION

The study of judicial federalism in the United States begins with two 18th century events—ratification of Article III of the Constitution and passage of the Judiciary Act of 1789.⁶

1. See S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* 216 (1978) (tracing “where the federal idea stands after 2500 years,”).

2. Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 2 (1993).

3. THE FEDERALIST No. 82 at 379 (Alexander Hamilton) (Hallowell ed., 1842).

4. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 3 (1928).

5. This Article relies in large part on two handbooks on federal courts: ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* (2d ed. 1994), and CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* (5th ed. 1994). Candor, not immodesty, impels the citation of previous publications by the author on topics covered here. Finally, the footnotes are seasoned with a few citations to comparative treatments of the laws of Australia and Canada, without any claim of expertise or thoroughness in research: ZELMAN COWEN & LESLIE ZINES, *FEDERAL JURISDICTION IN AUSTRALIA* (2d ed. 1978), JAMES CRAWFORD, *AUSTRALIAN COURTS OF LAW* (1982), and GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* (2d ed. 1983).

6. WRIGHT, *supra* note 5, at 1.

Article III settled the debate on whether Congress should be given the power to create independent federal courts. However, the debate over Article III was protracted and intense. After an earlier draft had provided for a federal judicial branch, the delegates to the Constitutional Convention voted to strike the provision and make no mention of national courts other than the Supreme Court. The rationale was that the existing state courts were equal to the judicial tasks of the nation and all that was needed was to provide for appeals from the state courts to some supreme national court.⁷ Had that position prevailed U.S. constitutional history would have been far different, and this paper would end here because there would be little to say about judicial federalism. After great parliamentary wrangling, however, a compromise was reached, and the text was redrafted to read: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁸

The delegates' compromise was the subject of high and full controversy in the ratification debates. Federalist Papers 78 through 82 defended the idea of a separate and independent federal judiciary. Numerous amendments of Article III were proposed in the state ratifying conventions, and some of the provisions in the Bill of Rights owe their origin to that controversy.⁹ The Antifederalists were mistrustful of the proposed Constitution, and they feared all three heads of the federal leviathan.¹⁰ The Antifederalists especially opposed the power to create a new federal judiciary because they feared it would aggrandize power toward the central government and away from the state sovereign courts. They nearly prevailed and since then they have been proven right. The outcome of the ratification process was not certain, and the Federalists prevailed by the smallest of margins in several key states.¹¹ Thus, from the beginning, judicial federalism has been a theme in American constitutional history.

Upon ratification, one of the transcendent achievements of the first Congress under the new Constitution was the passage of the Judiciary Act of 1789.¹² That statute, although not without contemporary controversy,¹³ has been considered to be a "great law" that immediately invoked the power in Article III and thereby established "the tradition of a system of inferior federal courts."¹⁴ From the beginning, the most controversial jurisdictions and

7. *Id.* at 2.

8. U.S. CONST. art. III, § 1.

9. The Seventh Amendment is one such example.

10. "The Canadian approach was closer to the Antifederalist position." *FEDERALISM—THE LEGACY OF GEORGE MASON* 28 (Martin B. Cohen ed., 1988) [hereinafter *FEDERALISM*].

11. The Federalists won Massachusetts by a 187-168 vote; they won Virginia 89-79, and they won New York 30-27.

12. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

13. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

14. FRANKFURTER & LANDIS, *supra* note 4, at 4; *see also* *Wisconsin v. Pelican Ins. Co.*, 127

procedures have centered on the relationship between the federal courts and the state courts.¹⁵

The structure of the federal judiciary is that of a three-tiered pyramid. At the top is the Supreme Court of the United States, which is the only federal court created directly by the Constitution. The Supreme Court is the highest supervisory court within the federal judiciary, and it has appellate authority over the state courts in matters of federal law. It is comprised of nine Justices, who are appointed for life by the President with the advice and consent of the Senate. Each Justice is assigned to one of the courts of appeals for emergency matters, and the Chief Justice has additional administrative duties. The Supreme Court sits only en banc. Its annual Term begins on the first Monday of October and continues usually through the end of June. Its annual docket consists of more than 6000 cases. Most of the Court's jurisdiction is discretionary, and it exercises great care in selecting cases for plenary review. Therefore, most cases are disposed of without a decision on the merits, either through a brief order denying the petition for review or a dismissal of the appeal for want of a substantial question. Each Term the Court writes opinions in about one hundred-twenty cases, dealing with everything from great issues of federal constitutional law to important issues of federal administrative law. In the October 1992 Term, the Court handled 6,336 cases.¹⁶ The Court disposed of 6110 cases by denial or dismissal of appeals and petitions for review.¹⁷ The Court decided two hundred-twentysix cases on the merits.¹⁸ Of these two hundred-twentysix cases, the Court issued one hundred-nineteen full opinions (consisting of seventy-seven civil actions from inferior federal courts, eleven federal criminal cases, ten federal habeas corpus cases, four civil actions from state courts, nine state criminal cases, three cases in its original jurisdiction).¹⁹ The late Justice Robert H. Jackson once aptly described the high court's role as the last and unreviewable court: "We are not final because we are infallible, but we are infallible only because we are final."²⁰

U.S. 265, 297 (1888) (noting that the membership of the first Congress that framed the new federal judiciary included many framers of the Constitution).

15. See generally *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court could hear and decide appeals from the states' highest courts). For a comparative study of this subject, see RICHARD E. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL—STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES* (1969).

16. WRIGHT, *supra* note 5, at 15.

17. *Id.*

18. *Id.*

19. *Id.* The number of cases for the October 1993 Term exceeded 7700. Recess Order, 114 S.Ct. at CCCXXXIII (June 30, 1994).

20. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

On the level of intermediate federal courts, there are thirteen United States Courts of Appeals and the Court of Military Appeals.²¹ Twelve of the courts of appeals have jurisdiction over federal cases in certain geographical areas.²² The Federal Circuit has national jurisdiction²³ over specific types of cases that involve mostly patents, trademarks, international trade, and claims against the United States.²⁴ The number of judges appointed for each court of appeals varies from six to twenty-eight.²⁵ These courts decide appeals in panels of three that are subject to rare full-court rehearings. Most of the appeals to these courts are as of right.²⁶ There is a persistent problem with federal law conflicts among the circuits because the same provision in the U.S. Constitution or some federal statute may be interpreted differently by different courts of appeals. These conflicts persist until the Supreme Court resolves them.²⁷ The most pressing problem facing the courts of appeals is growth.²⁸ There has been a tremendous growth in filings and in judgeships over the last four decades. In 1950, there were 65 circuit judgeships, 2830 appeals were filed, and 2355 appeals were terminated (36 per authorized judgeship).²⁹ In 1990, however, there were 156 authorized circuit judgeships, 40,898 appeals were filed, and 38,520 appeals were terminated (245 per authorized judgeship).³⁰ There are those who worry that the courts of appeals today have become more like bureaucracies than courts.

The courts with original or trial jurisdiction in the federal judiciary are the U.S. district courts. Federal statutes divide the country and territories into ninety-four geographical districts that do not extend beyond state boundaries.³¹ Each state constitutes at least one district, and many states are divided into two, three, or four districts that sometimes are internally arranged into divisions for administrative purposes. There are six hundred-fortynine

21. "Undoubtedly, the most significant change in the structure of the federal courts during the past 200 years has involved the evolution of the courts of appeals." CHEMERINSKY, *supra* note 5, at 23; see also THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994).

22. 28 U.S.C. § 41 (1988).

23. *Id.*

24. See 28 U.S.C. § 1295 (1988).

25. See 28 U.S.C. § 44(a) (1988).

26. See Thomas E. Baker, *Toward a Unified Theory of the Jurisdiction of the United States Courts of Appeals*, 39 DEPAUL L. REV. 235, 240 (1990).

27. See Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-09 (1987).

28. See Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994).

29. BAKER, *supra* note 21, at 45.

30. *Id.*

31. See ADMINISTRATIVE OFFICE OF U.S. COURTS, *UNDERSTANDING THE FEDERAL COURTS* 10 (1992).

district judges, and each district has a chief judge who is designated on the basis of seniority and has additional administrative responsibilities.³² In the fiscal year ending June 1991, the district courts received 207,742 cases.³³ On the civil side, this included 19,340 civil rights actions, 37,309 personal injury or property damage actions, and 42,462 prisoner petitions.³⁴ There also were 47,035 criminal cases. Almost 70 percent of these cases were felonies, and they included 167 homicides, 957 federal tax frauds, 1577 robberies, 1182 forgeries/counterfeittings, and 12,400 drug offenses.³⁵ Two additional federal judicial officers serve at this entry level. The U.S. Magistrate Judges, who are appointed by the district judges, act as adjuncts of the district judge and handle miscellaneous matters as specified by statute.³⁶ The Bankruptcy Judges, who are appointed by the courts of appeals, preside over the various categories of individual and business reorganizations.³⁷

State court structures vary widely and only broad-brush generalizations are possible. All the states have some version of the federal pyramid-shaped structure, although the specific names of courts and their particular jurisdictions are highly state-specific.

Most state judges are elected although elections frequently are solely for retention and often are nonpartisan. Most state court structures have a bifurcated trial level, although law and equity have been merged. Courts of limited jurisdiction hear disputes on specified matters such as small monetary matters or minor criminal offenses. Courts of general jurisdiction serve as the *nisi prius* court for the more important civil and criminal cases. The courts of general jurisdiction usually are courts of record, their procedures are more formal, and they sometimes hear appeals from the courts of limited jurisdiction, commonly by a trial *de novo*.

A growing majority of states have intermediate appellate courts, often created to take caseload pressure off the highest courts. These courts hear appeals as of right from the trial courts, and they typically are organized geographically. They also usually have some reviewing authority of decisions issued by state administrative agencies.

Each state has a supreme court, although jurisdictional provisions vary considerably. In some states, the appeal to the highest state court is discretionary, but in others such an appeal is a matter of statutory entitlement.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. 28 U.S.C. §§ 631-39 (1988). There are 345 full-time and 124 part-time magistrate judges. ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 31, at 11.

37. 28 U.S.C. §§ 151-158 (1988). In the statistical year ending June 1991, 880,399 bankruptcy petitions were filed before the 291 bankruptcy judges. ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 31, at 10-11.

The state supreme courts are the great common law courts in the American judicial system. They have developed bodies of decisional law in torts and contracts, for example, that are comprehensive and highly sophisticated.

By comparison to the federal judiciary, the fifty state judiciaries, when considered collectively, defy statistical measure.³⁸ In 1992, there were nearly 28,000 trial judges presiding over approximately 16,500 trial courts (2516 courts of general jurisdiction; and 13,921 courts of limited jurisdiction). These figures represent continuing long-term trends and particular short-term increases in the states' criminal dockets. The same year there were 259,276 appeals filed; more than 60 percent were mandatory appeals to intermediate appellate courts and the rest were appeals to state courts of last resort. Indeed, since 1950, state appellate caseloads have doubled every ten years. Today, many state trial and appellate courts are experiencing great difficulty keeping up with these accelerating upward trends in caseload volume.

III. PRINCIPLES OF JUDICIAL FEDERALISM

The allocation of jurisdictional and lawmaking authority among the various judicial components within the federal system traditionally has given rise to significant tensions. These tensions occur in a number of different areas: relations between Article III federal courts and the other branches of the federal government, between state courts and the federal political branches, between federal courts and the state political branches, and—perhaps most significantly—between federal courts and their state counterparts.³⁹

Although this Article focuses on the most significant conflicts between federal courts and their state court counterparts, the reader needs to appreciate the complexity and subtlety of the surrounding constitutional and political context.⁴⁰

38. "Any attempt to assess the business of the nation's state courts must appreciate the enormity and complexity of bringing together information from 50 distinct and highly diverse court systems." STATE JUSTICE INSTITUTE, STATE COURT CASELOAD STATISTICS ANNUAL REPORT xi (1992); see generally Jeffrey A. Parness, *Comparative American Judicial Systems*, 24 U. RICH. L. REV. 171 (1990) (discussing the various state court systems).

39. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 1 (1980); see also Stephen Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, 17 FED. L. REV. 162 (1987); Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229.

40. "Australia and Canada also have systematic mechanisms for dealing with intergovernmental issues, but they are based more heavily upon executive negotiations." Robert B. Hawkins, Jr., *Federalism: The Contemporary Challenge*, in *FEDERALISM*, *supra* note 10, at 108; Alan J. Ward, *Responsible Government and Recent Constitutional Change in Australia and New Zealand*, 15 ADEL. L. REV. 165 (1993).

Issues of state court jurisdiction versus federal court jurisdiction are issues of power.⁴¹ Resolution of these issues involves constitutional principles, legislative authorization, and judicial fealty.

At the threshold, “[i]t is a principle of first importance that the federal courts are courts of limited jurisdiction.”⁴² This principle is based on the political theory of the U.S. Constitution that the federal government is one of limited and enumerated powers, although supreme in federal matters. In stark contrast, a state court is the court of a sovereign state that is possessed of a general police power to provide for the safety, health, morals, and general welfare of society. When a case is filed in state court, there is a kind of presumption that subject matter jurisdiction exists to hear and decide the matter and to afford appropriate relief. When a case is filed in federal court, however, the presumption is that the court lacks subject matter jurisdiction until it can be shown that the matter falls within the appropriate authorizations.⁴³

In effect, every decision by a federal court is a precedent in federal jurisdiction.⁴⁴ From the earliest days of the Republic, the judicial inquiry has always been two-dimensional.⁴⁵ The scope of the federal judicial power always is determined, first, by examining Article III of the Constitution and, second, by interpreting the particular enabling act of Congress.⁴⁶ Thus, this sense of limitations takes on controlling importance.⁴⁷ The party invoking “the judicial Power of the United States”⁴⁸ in federal court must allege facts to rebut affirmatively the presumption against subject matter jurisdiction.⁴⁹

41. CHEMERINSKY, *supra* note 5, at 31.

In fashioning the doctrines determining federal court jurisdiction, the Supreme Court repeatedly has focused on two major policy considerations. First, what is the proper role of the federal courts relative to the other branches of the federal government? Second, what is the proper role of the federal courts relative to the states and especially to the state courts? . . . Quite often, the disagreement between the majority and the dissent in specific cases is a dispute over the proper allocation of power within the federal government or between the federal and state courts. Without a doubt, every doctrine determining access to the federal courts reflects choices about separation of powers and/or federalism.

42. WRIGHT, *supra* note 5, at 27.

43. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973); *see* Lockerty v. Phillips, 319 U.S. 182 (1943).

44. “Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act.” *Edgar v. Mite Corp.*, 457 U.S. 624, 653 (1982) (Stevens, J., concurring in part and concurring in judgment).

45. “As preliminary to any investigation of the merits . . . this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.” *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.).

46. *See* *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); *James C. Hill & Thomas E. Baker, Dam Federal Jurisdiction!*, 32 *Emory L.J.* 3, 3-7 (1983).

47. *See* *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10-11 (1799).

48. U.S. CONST. art. III, § 1.

49. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181-82 (1936).

The party resisting jurisdiction and the court sua sponte may raise any jurisdictional question, even on appeal, even for the first time, in the Supreme Court.⁵⁰ This idea also allows the party invoking federal jurisdiction to challenge that jurisdiction after receiving an unsatisfactory result.⁵¹ Only a fundamental principle could command so much respect.

The constitutional principle of separation of powers is evident in the resolution of issues of federal court jurisdiction. From the third branch's perspective, a written Constitution interpreted by an independent judiciary⁵² is essentially how the Framers sought to "establish justice."⁵³ The necessary way to protect individual liberty was to divide government power and arrange the branches in a clockwork design of checks and balances.⁵⁴ Separation of powers is more than some "ringing phrase in American constitutional history."⁵⁵ It is given effect in numerous justiciability doctrines, such as standing, ripeness, mootness, political questions, advisory opinions, and the general contours of the Article III "case" or "controversy" requirement. Furthermore, the "Congressional power to define the jurisdiction of the federal courts within the limits of Article III represents an enormous influence by the legislature on the judiciary."⁵⁶ This writer's understanding of that legislative power is that "[t]he congressional dominion to expand and to contract federal court jurisdiction always has been correctly considered to be a plenary incident of the Article III power to 'from time to time ordain and establish' the 'inferior courts' of the United States."⁵⁷ Under a Constitution that eschews absolutes, a hypothetical limit must exist even to so nearly plenary a power,

50. *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Cameron v. Hodges*, 127 U.S. 322, 325 (1888).

51. See *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 n.17 (1951).

52. See generally, THOMAS E. BAKER, *THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY* 25-36 (1989) (discussing the evolution of an independent judiciary); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEG. STUD. 721 (1994) (comparing the United States' independent judiciary to Japan's nonindependent judiciary). The pragmatic explanation for the persistence of judicial independence in the federal government is found in the theory of repeated games designed into the nomination and confirmation process. Rational players in the executive and legislative branches have kept the federal courts independent because under the Constitution regular elections in the political branches are assured, and there is little likelihood for either major party to dominate both branches permanently. *Id.* at 722.

53. U.S. CONST. PMBL.; see also Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988).

54. See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting); Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719; Glen E. Thurow, *The Separated and Balanced Constitution*, 21 TEX. TECH L. REV. 2389 (1990).

55. DONALD L. DOERNBERG & C. KEITH WINGATE, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS* 8 (1994).

56. *Id.* at 11.

57. Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302 (1984) (quoting U.S. CONST. art. III, § 1).

but Congress is unlikely ever to exceed it.⁵⁸ At the same time, there are cases in which the subject matter requirement under some statute is satisfied, yet the court exercises a kind of self-restraint to decline to decide.⁵⁹ These too are occasions for considering separation of powers concerns.

Like separation of powers, the principle of federalism is not found in so many words in the text but nonetheless is an essential part of the Constitution's structure.⁶⁰ American constitutional history and traditions resound with debate over the proper understanding of federalism. It would not simply be "bad form" for a federal court to entertain a case outside its jurisdiction; it would be "an unconstitutional invasion of the powers reserved to the states."⁶¹

Only the most general lessons about the proper role of the federal courts can be learned from the teachings of history, tradition, legislative and judicial precedents, and constitutional law. A learned judge and scholar of the federal courts described those lessons in a most helpful way.⁶² The debate can be summarized in terms of a minimum model and a maximum model. The minimum model posits:

the best course is to put trust in the state courts, subject to appropriate federal appellate review, save for those heads of jurisdiction, by no means insignificant in case-generating power, where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts.⁶³

At the other extreme, the maximum model "would go to the full sweep of constitutional power" under Article III because "the federal courts provide a 'juster justice' than the state courts, [and] the more cases there [are] in the federal courts, the better."⁶⁴ These are the minimum and maximum

58. See generally Symposium, *Limiting Federal Court Jurisdiction: Can Congress Do It? Should Congress Do It?*, 65 JUDICATURE 177 (1981) (discussing issues raised by Congress' jurisdictional limiting proposals); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

59. Chief Justice Marshall was only half right:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

60. See Ralph A. Rossum, *A Means-Ends Approach to the Study of the Constitution and Constitutional Law*, 13 TEACHING POL. SCI. 36 (1985).

61. WRIGHT, *supra* note 5, at 27.

62. See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

63. *Id.* at 8.

64. *Id.* at 12.

extremes, and we can be confident that no one would take either extreme position once and for all. The legislative history of federal jurisdiction has steered a middle course, occasionally tacking toward but never reaching either extreme. Interestingly, and often equally frustratingly, there has never been one straight and direct approach. Two professors of federal jurisdiction recently described their own efforts to understand this phenomenon:

We began this article with the intent of constructing an ideal model of federal jurisdiction for Congress to use in allocating judicial resources. After further consideration we conclude that this is not a fruitful approach and, indeed, that the common assumption that there is an objectively "correct" model of federal jurisdiction misconceives the problem. There are objectively identifiable outer constitutional limits on federal jurisdiction—the limits established in Article III of the United States Constitution. But these are extremely permissive, and no one contends that federal jurisdiction should extend this far. Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress, essentially making the lower federal courts a resource to be used as Congress deems necessary.

The decisions Congress makes in this regard reflect important value choices and have significant political consequences. . . . History thus underscores that any model identifying the "proper" role of the federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension. Defining the role of the federal courts simply is not a scientific inquiry.⁶⁵

One last observation about judicial federalism is that the relationship between the state and national judicial branches is the only place on the contemporary constitutional scene where federalism still is taken seriously. In every other area of national life, the Supreme Court has abdicated its constitutional duty and has deferred to Congress at the expense of the states.⁶⁶ For Congress, the states have become what Alexander Hamilton hoped they would become. The trend to federalize more and more aspects of government, which gained momentum during the Depression and World War II, has continued apace. Through its legislative and administrative powers, the national government ineluctably draws power and influence over more and more aspects of daily life. For federal judges generally, the constitutional principle of federalism is dead, with the curious but nonetheless important exception of the relationship between federal and state courts.⁶⁷ Judicial

65. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 75-76 (footnotes omitted).

66. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Wickard v. Filburn*, 317 U.S. 111 (1942).

67. PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 96 (1970).

federalism thus narrowed and focused has become a fascinating kind of constitutional neurosis.⁶⁸ This condition would not be so interesting or so important if the state and federal judiciaries each were concerned only with its own laws. Each judicial branch, however, confronts questions that arise under the law created by the other sovereign—state courts decide questions of federal law and federal courts decide questions of state law—routinely and frequently. Having described how the national court system is structured and organized, the rest of this Article will consider the nuances of the jurisdictional provisions, how the judicial procedures are arranged to cope with the resulting conflicts-of-law problems, and the rules of decision for resolving such cross-sovereign complexities.

IV. JURISDICTIONS AND PROCEDURES

The potential for friction from inter-sovereign judicial interactions made possible by concurrent jurisdictions in such a complex court system has been lubricated by elaborate doctrines and procedures. The scope of this Article allows for only an overview of the following topics: diversity jurisdiction, federal question jurisdiction, supplemental jurisdiction, removal procedures, and Supreme Court appellate jurisdiction.

A. Diversity⁶⁹

Ever since the Judiciary Act of 1789, federal courts have been afforded original jurisdiction of diversity cases. The statute provides for jurisdiction over suits between citizens of different states or between a citizen of a state and an alien when the amount in controversy exceeds \$50,000.⁷⁰ When satisfied, this provision gives the plaintiff a choice of filing in federal court under Section 1332 or in a state court under the state jurisdictional provision encompassing the dispute. The jurisdiction is concurrent and not exclusive in the federal court. From the beginning, complete diversity, where the citizenship of every party plaintiff must be diverse from the citizenship of every party defendant, has been required under the statute.⁷¹ The district court, however, has the discretion to realign the parties according to their interests with the consequence of sometimes creating and sometimes destroying jurisdiction.⁷² There are two noteworthy exceptions to diversity jurisdiction.

68. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

69. For further research there are two major multi-volume treatises that will be cited here: 1 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶¶ 0.71-0.78 (2d ed. 1964) [hereinafter *MOORE'S FEDERAL PRACTICE*] and 13B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3601-30 (2d ed. 1984) [hereinafter *FEDERAL PRACTICE AND PROCEDURE*].

70. 28 U.S.C. § 1332 (1988).

71. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

72. See *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991);

Even when the statutory jurisdictional requisites are satisfied, federal courts will decline to decide domestic relations cases or cases involving the probate of estates.⁷³

The choice of law issue in diversity cases has frustrated the Supreme Court over the years, though an argument can be made that the Justices are themselves much to blame. Since 1789 the issue of statutory interpretation has been whether the decisions of state courts are binding on federal courts sitting in diversity cases.⁷⁴ The Supreme Court has changed its mind from “no,” to “maybe,” to “yes,” to “sometimes,” always amid swirling arguments over federalism.⁷⁵

Since 1938 federal courts have been “*erieantompkinated*.”⁷⁶ Before 1938 federal courts followed state procedural law and federal substantive law. In 1938, however, things were completely reversed. Federal courts were obliged to follow the substantive law of the forum state including state court common law, and national rules of procedure were promulgated for all federal actions.⁷⁷ The so-called *Erie* doctrine, which has developed over decades in several Supreme Court decisions, asks a series of questions to determine whether state or federal law applies in a diversity case.⁷⁸ First, is there a conflict between state and federal law? If not, apply both.⁷⁹ If so, go on. Second, is there a valid federal statute or federal rule of procedure on point? If so, apply the federal provision, even if there is a conflicting state law.⁸⁰ If not, go on. Third, is the application of state law likely to determine the outcome of the lawsuit? If not, then apply federal law.⁸¹ If so, then go on. Fourth, is there an overriding federal interest that justifies the application of

Bonell v. General Accident Fire & Life Assurance Corp., 167 F. Supp. 384 (N.D. Cal. 1958).

73. See *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992) (discussing domestic relations exception); *Byers v. McAuley*, 149 U.S. 608 (1893) (applying probate exception); see also Thomas E. Baker, *Thinking About Federal Jurisdiction—Of Serpents and Swallows*, 17 ST. MARY'S L. J. 239, 255-58 (1986).

74. 28 U.S.C. § 1652 (1988).

75. Thomas E. Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 167-68 (1985).

76. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946) (quoting Judge Learned Hand).

77. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 325-26 (1991).

78. Issues concerning the *Erie* doctrine will exist as long as there is diversity jurisdiction. There are simply too many conflicting values—such as the desire to have uniform federal procedural rules, but still follow state substantive law; and too many inherently difficult questions—such as the problem of having a federal court apply state law where none exists, for *Erie* issues ever to be completely resolved.

CHEMERINSKY, *supra* note 5, at 311 (footnote omitted).

79. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 (1980).

80. See *Burlington N.R.R. v. Woods*, 480 U.S. 1 (1987); *Hanna v. Plumer*, 380 U.S. 460 (1965). “[T]here are no cases declaring any of the Federal Rules to be invalid.” CHEMERINSKY, *supra* note 5, at 304.

81. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

federal law? If not, then apply state law. If so, then apply federal law.⁸² Finally, the judicial federalism goals of avoiding forum shopping and the inequitable administration of justice must be considered when answering each question.⁸³

If federal judges find that state law must be applied, they have to then determine what the state law is on the particular issue. A controlling state statute or a definitive common-law holding by the highest court of the state certainly is binding,⁸⁴ but at least some lower state court decisions might also be equally binding on federal courts sitting in a diversity case.⁸⁵ When faced with an uncertainty about state law, federal judges, like their state court counterparts, are obliged to rule as they believe the highest court of the state would rule on the matter.⁸⁶

Diversity actions also raise the separate question of determining which state's substantive law ought to be applied. A corollary to the rule that state law controls is that federal judges are obliged to apply the conflict-of-laws rule of the forum state to determine which state's substantive law applies.⁸⁷ This choice-of-law corollary requires a federal court to which a case is transferred to apply the conflict-of-laws rules of the federal court that transferred the case.⁸⁸ Adherence to this corollary can lead to flights of conceptual fancy. For example, a federal district judge in New York may be called on to determine what New York state court judges would think about what the Pennsylvania state court judges would hold as their state law, even though neither state's judges have considered the issue at all.⁸⁹

The debate over the advisability of diversity jurisdiction goes back to its beginning and shows no sign of abating.⁹⁰ During the 18th and early 19th centuries, this jurisdiction was one of the most important federal court functions. There was not much federal law at the time, and diversity cases helped to establish the federal courts as courts, while furthering the design of the Federalists to nationalize and enhance commerce among the states. During the 20th century the debate over the propriety and necessity of this jurisdiction

82. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

83. *See* CHEMERINSKY, *supra* note 5, at 302.

84. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

85. *See* *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-79 (1940).

86. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

87. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

88. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

89. *See* *Salve Regina College v. Russell*, 499 U.S. 225 (1991) (holding that the court of appeals must apply de novo standard of review to the district court's determination of state law); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (*per curiam*).

90. "Caveat lector! I am a notorious diversity abolitionist." Baker, *supra* note 75, at 164. The following discussion relies, without further attribution, on the FEDERAL COURTS STUDY COMMITTEE, REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES (Mar. 12, 1990), *reprinted in* I FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS, (July 1, 1990).

has waxed and waned. The antagonists generally have chosen sides so that the judges—federal and state—and academics favor abolition while the practicing lawyers favor retention. The bar has succeeded in persuading Congress to preserve diversity jurisdiction. However, the discernible, contemporary legislative trend has been to limit and reduce the scope of the jurisdiction. For example, Congress has raised the jurisdictional amount threshold⁹¹ and defined citizenship for corporations more broadly.⁹²

Over the last two decades, diversity cases have accounted for about 20 percent of the district courts' docket and about 10 percent of the courts of appeals' caseload. In time and motion studies, however, diversity cases have been found to be disproportionately more demanding of federal judicial resources from the standpoint of judges and juries.

The most straightforward argument against diversity jurisdiction is that the cumulative caseload figures disclose a discrete category of cases that have a relatively weak claim on federal judicial resources at a time when those resources are growing increasingly scarce. Administering this jurisdiction is unduly troublesome, and it inevitably encroaches on state sovereignty.⁹³ The advantage of having a tactical choice of fora, opponents maintain, has become simply too costly.

The traditional rationale on behalf of the diversity jurisdiction has been the avoidance of possible prejudice in state court in favor of in-staters and against out-of-staters. Other arguments for maintaining the diversity jurisdiction include: (1) providing a federal social service for dispute resolution; (2) adding to the judicial experience of federal judges; (3) improving the state and federal courts by formal interactions; (4) preventing a shift of cases to the already over-burdened state courts; and (5) preserving the statutory right of litigants to choose a federal forum because it is perceived to be superior to the state court choice.

One final point can be made with a high degree of confidence. This subset of issues within the larger debate over judicial federalism will not go away any time soon because diversity jurisdiction will continue to exist, in some form or another.

91. 28 U.S.C. § 1332 (1988); *see also* Baker, *supra* note 57.

92. *See generally*, WRIGHT, *supra* note 5, at 163-71 (discussing the citizenship of corporation); *cf.* Carden v. Arkoma Assocs., 494 U.S. 185 (1990) (finding that limited partners' citizenship has to be considered when determining a limited partnership's citizenship).

93. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

*B. Federal Questions*⁹⁴

Explaining the somewhat metaphysical meaning of the phrase “arising under,” found in Article III⁹⁵ and repeated in various special jurisdiction statutes as well as in the general federal question provision, Section 1331,⁹⁶ is beyond the author’s ken. This is not something for which to apologize, however, as the preeminent federal courts scholar of this generation has explained:

Though the meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, Frankfurter, and Brennan, and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been developed to determine which cases “arise under” the Constitution, laws, or treaties of the United States.⁹⁷

A brief summary, by way of background for the remainder of this Article, is offered here.

This jurisdiction might be identified as the “core of modern federal court jurisdiction.”⁹⁸ More than half of the cases brought in the district courts each year are federal question cases. Many of the justifications offered for this subject matter jurisdiction revolve around a mistrust of state courts, *i.e.*, state courts might misapply federal law due to a lack of familiarity or some misunderstanding or out of a lack of sympathy with federal policies.⁹⁹ The additional rationale frequently offered is the importance of uniformity in the national law, although it is not readily apparent that the Supreme Court can more efficiently supervise the ninety-four districts and thirteen circuits any better than it can supervise the fifty state supreme courts.

Federal question jurisdiction can be concurrent, so that either the federal court or the state court can decide the case.¹⁰⁰ Other federal jurisdiction statutes are exclusive, so that only a federal court can decide the case.¹⁰¹ The United States Code contains one general federal question jurisdiction

94. For further research, see 1 MOORE’S FEDERAL PRACTICE, *supra* note 69, ¶ 0.62; 13B FEDERAL PRACTICE AND PROCEDURE §§ 3562-66. John T. Cross, *The Constitutional Federal Question in the Lower Federal Courts of the United States and Canada*, 17 HASTINGS INT’L & COMP. L. REV. 143 (1993) (discussing the differences in the Canadian and American applications of federal question jurisdiction).

95. U.S. CONST. art. III, § 2.

96. 28 U.S.C. § 1331 (1988).

97. WRIGHT, *supra* note 5, at 101.

98. CHEMERINSKY, *supra* note 5, at 252.

99. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 168 (1969).

100. *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding that state courts have concurrent jurisdiction over civil suits under the federal anti-racketeering statute).

101. 28 U.S.C. §§ 1334, 1338 (1988) (granting federal courts exclusive jurisdiction in bankruptcy and patent cases respectively).

statute¹⁰² as well as numerous special federal question jurisdiction statutes.¹⁰³ In summarizing the power of state courts to decide federal issues the Supreme Court has stated that “[t]he general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.”¹⁰⁴

One can summarize the proper “arising under” analysis in three rules:¹⁰⁵ (1) the determination must be limited to the face of the plaintiff’s well-pleaded complaint;¹⁰⁶ (2) a case arises under federal law if it is based on a cause of action created by federal law;¹⁰⁷ and (3) a case arises under federal law, even if the plaintiff’s cause of action is based on state law, if a federal law that creates a cause of action is an essential component of the state law claim.¹⁰⁸ Each of these rules has a certain iceberg quality because there is more to the rule than is apparent on the surface.

The difficulty of determining whether a suit “arises under” federal law for purposes of federal court jurisdiction comes into play for purposes of judicial federalism in one of two ways. First, the analysis must be followed to determine whether a federal court of limited jurisdiction has power to decide the case. If the subject matter jurisdiction is concurrent, the state court also can hear and decide the same case under some relevant state jurisdictional statute, and the Supreme Court may review the federal question.¹⁰⁹ Second, if the case arises under an exclusive federal jurisdiction statute, the matter must be heard in federal court.¹¹⁰

102. 28 U.S.C. § 1331 (1988).

103. Illustrative examples from 28 U.S.C. (1988) include special provisions for admiralty (§ 1333), commerce (§ 1337), postal matters (§ 1339), civil rights (§ 1343), election disputes (§ 1344), actions against the United States (§ 1346), and federal bonds (§ 1352).

104. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981).

105. See CHEMERINSKY, *supra* note 5, at 263-74.

106. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

107. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

108. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Gully v. First Nat’l Bank*, 299 U.S. 109 (1936).

109. *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911); *Joy v. City of St. Louis*, 201 U.S. 332, 343 (1906).

110. See *supra* note 101. There is a *theory* of protective jurisdiction that posits a power in Congress to grant federal question jurisdiction under a statute that provides only for jurisdiction but does not provide for any substantive rule of decision. While the theory would have serious consequences for judicial federalism, it remains merely a matter of “magazine law” for law review commentators and not the courts. See *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 491-97 (1983).

C. Supplemental Jurisdiction

There is a federal statute that provides for supplemental jurisdiction in federal question cases and in diversity cases that carries with it marginal but nonetheless significant implications for judicial federalism.¹¹¹ The 1990 statute borrows heavily from earlier case law dealing with pendent and ancillary jurisdiction. The former term used to refer to claims that were joined in the plaintiff's complaint, and the latter term used to refer to additional claims that were joined after the complaint was filed. Basically, a federal court with subject matter jurisdiction over a portion of a dispute has the power to hear and decide the entire dispute.¹¹² The new statute provides that if the federal court has federal question jurisdiction over a claim then it can assert jurisdiction over other claims or claims against other parties, so long as all the claims are sufficiently related.¹¹³ The provision for supplemental jurisdiction in diversity suits is limited basically to other claims, not other parties.¹¹⁴ Determining whether to exercise supplemental jurisdiction over a state law claim is given over to the informed discretion of the district judge, although the statutory factors expressly invoke respect for state interests.¹¹⁵

D. Removal¹¹⁶

Resourceful defendants who want to "make a federal case out of it" can remove a lawsuit from state court to federal court under the applicable federal

111. 28 U.S.C. § 1367 (Supp. V 1993). For a discussion of Section 1367, see Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992); Thomas M. Mengler, et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991); Colloquy, *Perspectives on Supplemental Jurisdiction*, 41 EMORY L.J. 1 (1992).

112. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

113. 28 U.S.C. § 1367(a) (Supp. V 1993).

114. *Id.* § 1367(b).

115. A district court may decline to exercise its discretion to hear a state law claim if:

- (1) the claim raises a novel or complex issue of State law;
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
- (3) the district court has dismissed all claims over which it has original jurisdiction;
- or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (Supp. V 1993).

116. For further research, see 1A Moore's FEDERAL PRACTICE, *supra* note 69, ¶¶ 0.155-0.169 and 14A FEDERAL PRACTICE AND PROCEDURE §§ 3721-40. For a general outline of the Australian cross-vesting system, which is a related issue, see GARRIE J. MOLONEY & SUSAN MCMASTER, *CROSS-VESTING OF JURISDICTION: A REVIEW OF THE OPERATION OF THE NATIONAL SCHEME* (1992); Herbert A. Johnson, *Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction*, 19 MELB. U. L. REV. 45 (1993) and Keith Mason & James Crawford, *The Cross-vesting Scheme*, 62 AUSTL. L.J. 328 (1988).

statutes.¹¹⁷ Although removal jurisdiction is not expressly authorized in Article III, statutes have provided for this procedure since the Judiciary Act of 1789, and the constitutionality of this mechanism has long been assumed.¹¹⁸ Consequently, removal procedure is a creation of Congress. The removal statutes recognize, in effect, a statutory right in the defendant to have the opportunity to litigate in federal court. Only a state court defendant can remove a case.¹¹⁹ Also, the removal procedure authorizes only a transfer from state court to federal court; there is no provision to transfer a case properly before a federal court to a state court. This procedure shifts about 25,000 cases each year from the various state dockets to the federal district courts.¹²⁰ The possible reasons for a defendant to remove a case to federal court are as varied as the reasons a plaintiff might file the case in state court in the first place.¹²¹ A case that is improperly removed or that does not come within the federal court's subject matter jurisdiction, will be remanded to the state court for decision.¹²²

Unless a specific federal statute provides otherwise,¹²³ a case within the general federal question jurisdiction statute may be removed by the defendant.¹²⁴ Removal jurisdiction based on diversity jurisdiction is likewise coextensive with the original jurisdiction except that a defendant who is a citizen of the forum state may not remove solely on diversity grounds.¹²⁵ There is a subsection in the removal statute that echoes the same policies as the supplemental jurisdiction statute previously discussed.¹²⁶ This subsection, which is limited to claims based on a federal question, allows a defendant to remove an action from state court to federal court even though the plaintiff may have added other separate and independent claims that themselves are not within the statutes for federal jurisdiction. There also are obvious federalism

117. 28 U.S.C. §§ 1441-1452 (1988); Deborah J. Fritsche, *Removal: Making a Federal Case Out of It*, LITIG. Fall 1990, at 38.

118. See *Tennessee v. Davis*, 100 U.S. 257 (1879); *Railway Co. v. Whitton's Adm.*, 80 U.S. (13 Wall.) 270 (1871); 14A FEDERAL PRACTICE AND PROCEDURE § 3721, at 187. Removal procedure, however, is "fraught with arcane mysteries . . . [and] filled with technical pitfalls for the unwary." *Smith v. McDonnell Douglas Corp.*, 612 F. Supp. 364, 365 (N.D. Ill. 1985) (mem.).

119. 28 U.S.C. 1441(a) (1988); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

120. In 1992, 27,022 cases were removed to federal district courts. However, 187,720 civil actions were commenced in these courts. WRIGHT, *supra* note 5, at 224 n.6.

121. "The choice to remove is [a jurisdictional] isomer of the choice of the original forum." Baker, *supra* note 73, at 252; see also Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992).

122. 28 U.S.C. § 1447(c) (1988).

123. The removal statutes expressly prohibit removal, for example, of actions under state workers' compensation acts. 28 U.S.C. § 1445(c) (1988).

124. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

125. 28 U.S.C. § 1441(b) (1988).

126. 28 U.S.C. § 1441(c) (Supp. V 1993); see *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

and supremacy considerations behind the removal statute that provides for removal of cases by federal officers sued as defendants in state courts.¹²⁷ Finally, several additional statutes authorize the defendant to remove cases with important federal interests.¹²⁸

Despite the plaintiff's initial choice of a state forum, the removal procedure offers defendants a one-way avenue into federal court. If removal is improper because federal jurisdiction is lacking, then the matter must be remanded to the state court. A federal judge once explained why the statutory right to litigate in a federal forum is not absolute:

I am not impressed by the assertion that some valuable right which is given [a defendant] in the federal court will be taken away from him by trial in the state court. As I understand the jurisprudence of this state, it operates with an eye to justice, just the same as that of the federal court.¹²⁹

*E. Supreme Court Review*¹³⁰

Chief Justice Charles Evans Hughes once observed that the Supreme Court of the United States is “distinctly American in concept and function.”¹³¹ The Court wields the power of judicial review—the most original contribution of the United States to constitutionalism—within a complex system of separation of powers and federalism. Although one can easily list the Supreme Court's functions,¹³² one cannot easily judge how the court performs them. There have been recurring debates over how the Supreme Court should perform these functions and deal with its workload.¹³³

127. 28 U.S.C. § 1442 (1988).

128. *See, e.g.*, 28 U.S.C. §§ 1441(d) (civil action against a foreign state), 1442a (suit against a member of the armed services), 1443 (civil rights action) (1988).

129. *Pabst v. Roxana Petroleum Co.*, 30 F.2d 953, 954 (S.D. Tex. 1929).

130. *See generally* 1 MOORE'S FEDERAL PRACTICE ¶ 0.7[2]; 15A FEDERAL PRACTICE AND PROCEDURE § 3913.

131. SUPREME COURT HISTORICAL SOCIETY, THE SUPREME COURT OF THE UNITED STATES 3 (undated pamphlet).

132. The Court may be viewed as the authoritative interpreter of the Constitution, the judicial enforcer of the supremacy of federal law, the unifying reconciler of conflicting interpretations of federal law, and the highest exegete of federal laws. *See* CHEMERINSKY, *supra* note 5, at 570-71.

133. *See, e.g.*, SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986); Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472 (1989).

Traditionally, Canadian courts have limited themselves to judgments of fact, trying to avoid the kinds of judgments on law and jurisprudence that characterize the United States system. But the new clauses are changing all this. As the courts are asked to define, apply, and limit the Charter, they are essentially charged with deciding the meaning of fundamental rights as set out in general words of varying and uncertain content.

Edwin R. Black, *Drunk and Disorderly: Canadian Federalism Reels into Its Second Century*, in FEDERALISM, *supra* note 10, at 137.

The Constitution also explicitly authorizes the Supreme Court to hear disputes involving conflicts between states, conflicts between the United States and a state in its original jurisdiction; contemporary statutes set out the jurisdiction and procedures.¹³⁴ There are only a few cases on the Court's original docket each Term, and most of them deal with suits between two or more states over such issues as boundary disputes and water rights.¹³⁵

The Constitution does not explicitly authorize the Supreme Court to review decisions from the state courts.¹³⁶ A provision in the Judiciary Act of 1789 provided for review of state court judgments and figured in an early, celebrated showdown of judicial federalism. In 1816, the Supreme Court upheld this provision in no uncertain terms.¹³⁷ In doing so, the Court observed that while "judges of the state courts are, and always will be, of as much learning, integrity and wisdom, as those of the courts of the United States," the Constitution was based on an assumption that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."¹³⁸ Thus, the nature of the Constitution and the need for uniformity in matters of national law justified Supreme Court review of state courts. A few years later, the Supreme Court reaffirmed these principles when it reviewed a state criminal proceeding.¹³⁹ Therefore, one may conclude that, "[t]he constitutional authority for Supreme Court review of state court decisions is not open to serious question. Even the staunchest defenders of state courts recognize the need for Supreme Court review to ensure the supremacy of federal law and to provide uniform interpretations of the Constitution."¹⁴⁰ Another equally well settled proposition of judicial federalism is that state court decisions regarding state law are wholly unreviewable, unless there is some federal issue presented.¹⁴¹

Most reviews in the Supreme Court today are by a writ of certiorari and not by appeal so that the Justices have discretion to decide, in the first instance, whether to take a case and decide the merits.¹⁴² The Supreme Court is authorized to review "[f]inal judgments or decrees rendered by the

134. See ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* (7th ed. 1993).

135. See 17 *FEDERAL PRACTICE AND PROCEDURE*, *supra* note 69, § 4042.

136. Lower federal courts, of course, lack jurisdiction to engage in appellate review of state court determinations. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

137. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

138. *Id.* at 346-47.

139. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

140. CHEMERINSKY, *supra* note 5, at 575.

141. See *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

142. The Court's jurisdictional statutes were substantially revised in 1988. Robert L. Stern et. al., *Epitaph for Mandatory Jurisdiction*, A.B.A. J. Dec. 1, 1988, at 66; see also John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983) (discussing the rule of four).

highest court of a State in which a decision could be had.”¹⁴³ The requirement of a final judgment serves several related policies; it promotes judicial efficiency, encourages the expeditious resolution of disputes, and provides the Court with a better developed record for decision.¹⁴⁴ Most importantly, at least for present purposes, it promotes judicial federalism because the requirement of finality avoids the disruption of state proceedings.

Another important aspect of judicial federalism is represented in the complexity of the so-called independent and adequate state ground doctrine:

Simply stated, the Supreme Court will not hear a case if the decision of the state’s highest court is supported by a state law rationale that is independent of federal law and adequate to sustain the result. Phrased slightly differently, the Court must decline to hear the case if its reversal of the state court’s federal law ruling will not change the outcome of the case because the result is independently supported by the state court’s decision on state law grounds.¹⁴⁵

This doctrine is best understood as a prudential aspect of the Supreme Court’s exercise of its statutory jurisdiction. The criterion of independence requires that “the state [law] ground must not be intertwined with or dependent upon a federal question either explicitly or implicitly.”¹⁴⁶ The criterion of adequacy requires that “the state [law] ground must be bona fide, broad enough to sustain the judgment and to dispose of the case, and of sufficient significance to justify the Supreme Court’s declination to consider the federal issue.”¹⁴⁷ The state law ground can be procedural or substantive, and the doctrine applies in civil and in criminal cases. The Supreme Court will presume that there is not a state law ground unless the state court provides a clear statement to that effect.¹⁴⁸ The doctrine has been shaped by “the tension between the power of the Court to revise state court judgments on federal questions and the sovereign power of state courts over state law questions.”¹⁴⁹

F. A Postscript

The most recent, comprehensive assessment of judicial federalism in the United States provides an appropriate postscript to this account of jurisdictions

143. 28 U.S.C. § 1257 (1988); *see generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (recognizing four situations where there is sufficient finality for review); Thompson v. City of Louisville, 362 U.S. 199 (1960) (reviewing a decision of the city police court).

144. *See* CHEMERINSKY, *supra* note 5, at 594-95.

145. *Id.* at 614.

146. Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799, 801 (1985).

147. *Id.* at 802 (footnotes omitted).

148. *Michigan v. Long*, 463 U.S. 1032 (1983).

149. Baker, *supra* note 146, at 859.

and procedures. The 1990 Report of the Federal Courts Study Committee offered this mantra for the U.S. court system: "The general (not unvarying) principle of division should be that state courts resolve disputes over state law, and federal courts resolve disputes over federal law."¹⁵⁰ As we have seen, however, judicial federalism in the United States is not this simple.

V. CONFLICTS BETWEEN THE STATE AND NATIONAL JUDICIAL BRANCHES

Judicial federalism is required by the duality of our national court system where the federal judiciary exists alongside the state judiciaries. The organization and jurisdictions of the state and national courts guarantee points of friction. Although today we take it for granted, we should be reminded that the concept that two sovereigns could occupy the same territory and govern at the same time was an invention of 18th century political philosophy that was remarkable at the time. Although the Framers were uncertain that this division would work, they were certain that there would be conflicts. Thus, they designed mechanisms of government to deal with these inevitable conflicts.

A national court system made up of state and national courts is "comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference."¹⁵¹ The law of federal jurisdiction in the United States reflects this built-in duality. One set of statutes and case decisions glorifies the importance of the federal courts as the primary protectors of federal rights. A second set of statutes and case decisions emphasizes the same primary role for the state courts. These two sets of statutes and decisions are no more compatible than the underlying assumptions. This is the so-called "parity debate," and it is seemingly unending, although at different points one side or the other has enjoyed ascendancy in Congress or in the Supreme Court. Beliefs about the comparative competence of the state and federal judiciaries are basically unprovable. This is an empirical question that simply cannot be answered.¹⁵²

150. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 14 (Apr. 2, 1990). The report continued:

We do not base this principle on a love of symmetry, but on a theory of comparative advantage and on a desire that federal courts remain accessible in a practical as well as theoretical sense to federal claimants. It is no use having a technical legal right to sue in federal court, if the courts are too crowded to give timely, considered, and competent attention to one's claim.

Id. Later, the Committee amplified this attitude:

Not all of our proposals would shift business from federal to state courts, however, and none of our proposals carries any inference that the state courts are inferior to the federal courts and should thus be a repository for cases federal judges prefer not to decide. Rather, our goal is a *principled* allocation of jurisdiction. For that reason, some of our proposals would expand federal jurisdiction to cases that involve both federal and state law and for which the federal forum is more appropriate.

Id. at 35.

151. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981).

152. CHEMERINSKY, *supra* note 5, at 36. One problem with the parity debate is that the U.S.

Further complicating matters is the evolving intellectual history of federalism. There have been different versions of federalism over the last two centuries, but consider the different implications from just two examples. First, “dual federalism” posits that “the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way to intrude, even incidentally, upon the sphere of sovereignty reserved to the other.”¹⁵³ Second, “cooperative federalism” views “state and federal governments as complementary parts of a single governmental process [, and] [t]he two court systems are . . . but one system of justice to protect individual freedom from government excess.”¹⁵⁴ Often federalism rhetoric is used like red, white, and blue bunting to wrap up political ideas; parity arguments sometimes hide a simple preference for one set of judicial outcomes over another and the unstated expectation that the preferred outcomes are more likely in either the state or the federal courts.¹⁵⁵

What follows is the promised catalogue of judicial federalism, brief descriptions of the most important and recurring conflicts between the state and national judicial branches.¹⁵⁶

A. State Enforcement of Federal Law

Congress can give federal courts exclusive jurisdiction of matters within Article III. Unless Congress does so, state courts have concurrent power to

court system is composed of fiftyone separate, independent, and sovereign court systems each with its own judges and its own jurisdictional provisions enacted by its own legislature.

The problem with the parity debate partially stems from the difficulty in devising criteria by which federal and state courts are to be compared. Also, there are enormous obstacles with devising a way to compare court systems because of the difficulty of matching cases and meaningfully comparing decisions. And even if quality could be defined and even if it could be measured, at best the result would be a comparison of an aggregate of *all* state courts with *all* federal courts. As the term parity is used it refers to an overall comparison of the federal courts with the composite of all the state judiciaries. But the state courts differ from one another, just as the federal courts are not homogeneous. There is an enormous variance among the different states and many federal districts in their disposition toward protecting individual rights. Thus, an aggregate comparison is unlikely to be useful. Yet, impressions about parity doubtless will continue to influence federal courts' doctrines.

Id. at 36-37 (footnotes omitted) (emphasis in original); see also Symposium, *Federalism and Parity*, 71 B.U. L. REV. 593 (1991). “I decline to decide which I favor, federal judges or state judges. My problem is that I respect both groups.” Baker, *supra* note 146, at 827-28.

153. Baker, *supra* note 146, at 824 (quoting A. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 517 (6th ed. 1983)).

154. *Id.* at 826 (footnote omitted).

155. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

156. This organization and much of the content of this section is based on CHARLES T. MCCORMICK ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* (9th ed. 1992).

hear and decide cases based on federal law. As a general proposition, state courts that otherwise have jurisdiction may not decline to enforce federal laws because:

[f]ederal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.¹⁵⁷

One question is still open in this regard: “The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable in the state courts.”¹⁵⁸ But this is a professor’s point.

*B. Federal Injunctions Against State Court Proceedings*¹⁵⁹

There is a federal statute, first enacted in 1793, that prohibits a federal court from issuing a writ of injunction to stay the proceedings in a state court.¹⁶⁰ Over the long history of the statute, however, the measure has been reinterpreted so many times that its gloss of annotations is very distorting. The statute refers to exceptions to the general prohibition that are “expressly authorized” by any other statute, yet the Supreme Court has compiled a lengthy list of exceptions by implying authorizations from the legislative histories of statutes that have nothing else in common.¹⁶¹ A second exception is for *in rem* actions in which the federal court enjoins the state court to protect its jurisdiction over some property under federal custody.¹⁶² A third exception allows a federal court to enjoin a state court “to protect or effectuate its judgment,” to prevent relitigation that has gone to judgment in the federal court.¹⁶³ Thus, the exceptions have developed to near swallowing proportions.

157. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

158. WRIGHT, *supra* note 5, at 290; see Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984); Dennis L. Bailey, Comment, *State Court Jurisdiction Over Claims Arising Under Federal Law*, 7 U. DAYTON L. REV. 403 (1982).

159. For further research, see 1A MOORE’S FEDERAL PRACTICE ¶¶ 0.208-0.212; 17 FEDERAL PRACTICE AND PROCEDURE § 4221-26.

160. 28 U.S.C. § 2283 (1988).

161. See *Mitchum v. Foster*, 407 U.S. 225 (1972).

162. See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941).

163. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

*C. State Attempts to Limit Federal Jurisdiction*¹⁶⁴

State legislatures are impotent so far as federal court jurisdiction is concerned:

Article III of the Constitution and the Acts of Congress made pursuant thereto define the jurisdiction of the federal courts. State statutes are irrelevant in this connection. The states have not attempted to extend the jurisdiction of the federal courts. Their persistent attempts to limit federal jurisdiction have been almost uniformly unsuccessful.¹⁶⁵

State judiciaries are similarly incapacitated. They cannot enjoin proceedings in federal courts,¹⁶⁶ cannot enjoin individuals from bringing a federal suit in the future,¹⁶⁷ and cannot grant a writ of habeas corpus discharging a person held in federal custody.¹⁶⁸

*D. Federal Actions to Restrain State Officers*¹⁶⁹

This area of jurisdiction is incomprehensible without some historical background. In 1793, the Supreme Court decided what was one of its first controversial and widely unpopular cases. The Court held that the Constitution allowed a citizen of one state to sue another state in federal court, even though the defendant state had not consented to be sued.¹⁷⁰ State legislatures were outraged; one adopted a state statute declaring that anyone who attempted to enforce the Supreme Court's holding was "“hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy by being hanged.”"¹⁷¹ State legislatures were worried that federal suits would be brought to collect unpaid Revolutionary War debts, which would result in the financial ruin of the states. Within three weeks of the decision, Congress approved a constitutional amendment setting aside the holding, and the requisite number of state legislatures ratified the measure in less than a

164. For further research, see 17 *FEDERAL PRACTICE AND PROCEDURE*, *supra* note 69, § 4211.

165. *WRIGHT*, *supra* note 5, at 292-93.

166. *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

167. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (per curiam).

168. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

169. For further research, see 12 *MOORE'S FEDERAL PRACTICE*, *supra* note 69, ¶¶ 300.03 and 17 *FEDERAL PRACTICE AND PROCEDURE*, *supra* note 69, §§ 4231-32. See also CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

170. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

171. *CHEMERINSKY*, *supra* note 5, at 374 (quoting PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 804 (2d ed. 1989)).

year.¹⁷² The Eleventh Amendment states that: “[t]he 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.”¹⁷³ This measure nicely illustrates the evolving nature of constitutional jurisprudence in the United States. As one expert on the subject has noted: “Although the Eleventh Amendment is almost 200 years old, there still is no agreement as to what it means or what it prohibits.”¹⁷⁴ For example, despite the express language of the amendment, the Supreme Court has extended the immunity to suits brought against a state by its own citizens.¹⁷⁵

Here is an issue of federal jurisdiction that goes “to the very heart of a federal system and affect[s] the allocation of power between the United States and the several states.”¹⁷⁶ In 1908 the Supreme Court decided *Ex parte Young*.¹⁷⁷ It held that the Eleventh Amendment did not bar a suit against a state officer to enjoin enforcement of a state law that violated federal law. The fiction on which the holding is based pretends that the state officer is *not* the state for purposes of the Eleventh Amendment because the officer has no authority to violate federal law. However, the enforcement of state law *is* state action for purposes of the Fourteenth Amendment’s Due Process Clause.¹⁷⁸ On the facts of the case, state Attorney General Young’s enforcement of the state statute regulating railroad rates was state action under the Fourteenth Amendment but merely the individual wrong of Young for purposes of the Eleventh Amendment. At the time *Young* was decided, the fiction served as the basis for substantive due process challenges in federal court against state economic regulation. In more modern times, this fiction provided the basis for constitutional decisions over school desegregation and legislative reapportionment. Essentially, the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are violating the U.S. Constitution. Today, the fiction “seems indispensable to the establishment of constitutional government and the rule of law.”¹⁷⁹

Here is a sampling of some of the important decisions of the Supreme Court interpreting the Eleventh Amendment.¹⁸⁰ Consistent with the

172. U.S. CONST. amend. XI.

173. *Id.*

174. CHEMERINSKY, *supra* note 5, at 374.

175. *Hans v. Louisiana*, 134 U.S. 1 (1890).

176. WRIGHT, *supra* note 5, at 306.

177. 209 U.S. 123 (1908). It has been called “one of the three most important decisions the Supreme Court of the United States has ever handed down.” CHEMERINSKY, *supra* note 5, at 390 (quoting *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 564 (E.D. Ohio 1979)).

178. *See Home Tel. & Tel. v. Los Angeles*, 227 U.S. 278 (1913).

179. WRIGHT, *supra* note 5, at 312. It matters not that the Eleventh Amendment explicitly applies “to any suit in law or equity.” U.S. Const. amend. XI (emphasis added).

180. “The traditional rule can then be fairly simply stated. A litigant must normally exhaust state ‘legislative’ or ‘administrative’ remedies before challenging the state action in federal court. He or she need not normally exhaust state ‘judicial’ remedies.” Wright, *supra* note 5, at 313

understanding that the amendment bars suits in federal court against a state government by citizens from that state or another state, the Court has held that suits by Indian tribes against states also are barred,¹⁸¹ as are suits by foreign nations.¹⁸² The amendment, however, does not bar a suit brought against a state by the United States government¹⁸³ or by another state.¹⁸⁴ The measure applies only to federal courts and does not bar suits against a state brought in the courts of the defendant state or in some other state.¹⁸⁵ Most significantly, the amendment is understood to have no consequence for the Supreme Court's appellate jurisdiction.¹⁸⁶ It also does not bar suits against municipalities or political subdivisions of a state,¹⁸⁷ but relief against a county is barred when there is so much state involvement in the program being challenged that the suit is in effect against the state.¹⁸⁸

There are three ways around the Eleventh Amendment.¹⁸⁹ One is the suit against a state officer for federal injunctive relief as described in *Ex parte Young*,¹⁹⁰ and ancillary relief may be attached to the injunction.¹⁹¹ A second way is for the state to waive its immunity and consent to be sued in federal court.¹⁹² Such consent must be explicit or, under rare circumstances, can be constructive.¹⁹³ A third way is to bring suit against a state under some congressional statute that in effect abrogates the Eleventh Amendment. A statute, however, cannot trump a provision in the Constitution,¹⁹⁴ so in these situations there has to be something else going on. The "something else" is an invocation of another constitutional provision. By passing a federal statute pursuant to Section Five of the Fourteenth Amendment, which authorizes Congress to enforce the amendment "by appropriate legislation,"

(footnotes omitted).

181. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

182. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

183. *United States v. Texas*, 143 U.S. 621 (1892).

184. *Colorado v. New Mexico*, 459 U.S. 176 (1982).

185. *Nevada v. Hall*, 440 U.S. 410 (1979).

186. *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

187. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

188. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). "[T]he law concerning the immunity of state agencies, boards, and other entities from suit in federal courts is quite inconsistent." *CHEMERINSKY*, *supra* note 5, at 387.

189. *See CHEMERINSKY*, *supra* note 5, at 383.

190. 209 U.S. 123 (1908).

191. As a corollary to this fiction, there are complex rules for when monetary relief is permitted, which deserve mentioning. First, money damages paid out of the state officer's own pocket are allowed. Second, a federal court can grant injunctive relief against a state officer even though compliance with the injunction will cost the state a great deal of money in the future. Third, damages to compensate past injuries that will be paid out of the state's treasury are not permitted. Each of these rules has been elaborated over the course of numerous decisions with a great deal of detail and nuance. *See CHEMERINSKY*, *supra* note 5, at 394-401.

192. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

193. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

194. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Congress can authorize a suit against a state and abrogate the states' immunity when Congress' intent is clear from the legislative history.¹⁹⁵ Legislation enacted under one of Congress' other enumerated powers, such as the commerce power or the bankruptcy power, also may abrogate the states' immunity when Congress explicitly provides for that effect in the statute's text.¹⁹⁶ Even this brief a summary of the main contours of Eleventh Amendment lore provides some insight into its importance, complexity, and inconsistency.¹⁹⁷

*E. Three-Judge Federal Court*¹⁹⁸

This curiosity of judicial federalism has been virtually abolished, but deserves to be mentioned briefly for the sake of completeness and for historical background. Congress enacted statutes as part of the legislative reaction to *Ex Parte Young* under which a federal injunction against the enforcement of state statutes by state officers could be issued only by a federal court composed of three judges, at least one of whom was a judge of the court of appeals. Any injunction would be subject to a direct appeal in the Supreme Court. The federalism assumption was that such "a court of special dignity" would engender less sense of disrespect for the state legislature and the direct appeal would assure prompt and plenary review.¹⁹⁹

With the passage of time and changed attitudes toward federalism, the three-judge court came to be considered unduly burdensome. It expended substantial judicial resources, at trial and on appeal, and generated a great deal of satellite litigation over its procedures. Congress amended the statute in 1976 and nearly abolished these courts. Congress, however, did keep them for cases challenging the apportionment of congressional districts and state legislatures and in cases under the Civil Rights Act of 1964 and the Voting

195. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In two later decisions, the Court held that the principal federal civil rights statute, 42 U.S.C. § 1983 (1988), does not abrogate the states' immunity. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Quern v. Jordan*, 440 U.S. 332 (1979). The Court has also held that federal courts cannot hear pendent state law claims against the states. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

196. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

197. For a more detailed discussion of the Eleventh Amendment, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968); John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447 (1986); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

198. For further research, see 12 MOORE'S FEDERAL PRACTICE, *supra* note 69, ¶¶ 421.01-426.05 and 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4234-4235; also see Napoleon B. Williams, Jr., *The New Three-Judge Courts of Reapportionment and Continuing Problems of Three-Judge-Court Procedure*, 65 GEO. L.J. 971 (1977).

199. WRIGHT, *supra* note 5, at 315.

Rights Act of 1965.²⁰⁰ Since then, there has been only a small number of three-judge court cases triggered by each decennial census, the constitutional occasion for legislative redistricting.²⁰¹

*F. Statutory Restrictions on Enjoining State Officers*²⁰²

There are two federal statutes that otherwise restrict federal court injunctions against state officers. These Depression-era statutes have obvious implications for judicial federalism. Although their subject matters are narrow, they deal with important matters.

First, the Johnson Act of 1934 prohibits the district courts from enjoining an order of a state agency affecting public utility rates, where: (1) jurisdiction is based on diversity or a federal question arising under the Constitution; (2) the challenged rate order does not frustrate interstate commerce; (3) the rate order was preceded by a reasonable notice and hearing; and (4) there is an effective remedy in state court.²⁰³ Consequently, garden-variety litigation over utility rates is kept within the state courts.²⁰⁴ A second statute, the Tax Injunction Act of 1937, prohibits the district courts from enjoining the assessment or collection of any state tax if an effective remedy exists in state court.²⁰⁵ Again, the statute has the effect of assigning almost all litigation over state taxes to state courts.²⁰⁶

*G. Abstention Doctrines and Procedures*²⁰⁷

This phenomenon of federal jurisdiction appears rather peculiar upon first impression because it is rather peculiar. The judicially created doctrine called abstention refers to circumstances and procedures when federal courts should decline to exercise their jurisdiction. Some uncertainty exists whether there are several abstention doctrines or one doctrine with several different

200. 28 U.S.C. § 2284 (1988).

201. WRIGHT, *supra* note 5, at 317 n.15.

202. For further research, see 1A MOORE'S FEDERAL PRACTICE, *supra* note 69, ¶ 0.206 and 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4236-4237.

203. 28 U.S.C. § 1342 (1988).

204. Ben W. Heineman & J. Dean Vail, Jr., Note, *The Johnson Act—A Return to State Independence*, 30 ILL. L. REV. 215 (now the NW. U. L. REV.) (1935).

205. 28 U.S.C. § 1341 (1988).

206. See Daan Braveman, *Fair Assessment and Federal Jurisdiction in Civil Rights Cases*, 45 U. PITT. L. REV. 351 (1984); Robert F. Williams, *The Tax Injunction Act and Judicial Restraint: Property Tax Litigation in Federal Courts*, RUTGERS L.J. 653 (1981).

207. For further research, see CHERMERINSKY, *supra* note 5, at 685-714 & 757-78; 1A MOORE'S FEDERAL PRACTICE, *supra* note 69, ¶ 0.203 and 17A FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4241-4248.

applications.²⁰⁸ This account of the abstention doctrines will be drawn in constellations around the principal cases.

The oldest category of abstention was first invoked in 1941 in the *Pullman* case.²⁰⁹ The plaintiffs challenged the validity of an order of a state agency under the applicable state law and the Fourteenth Amendment. Because the state law issue was uncertain and would be controlling so as to obviate the federal constitutional issue, the Supreme Court unanimously ruled that the federal trial should be stayed to allow the parties to obtain a definitive answer to the state law issue from a state court. Such a stay would serve the interests of judicial federalism and perhaps avoid an unnecessary constitutional adjudication. *Pullman* abstention, however, may not be in order if there are compelling reasons for prompt federal adjudication or if the state court remedy is somehow inadequate.²¹⁰ The parties are required to file an action in state court, typically requesting a declaratory judgment on the issue of state law. In state court, the litigants are given a choice: they may litigate the state law issue and the federal constitutional claim or they may choose instead to litigate only the state law issue and reserve the right to return to federal court in the event that the state court's resolution of the state law issue does not obviate their federal claim.²¹¹ Alternatively, a litigant can wait for a state advisory opinion through the mechanics of certification of the state law issue to the highest court of the state, if there is provision for such certification in the state statutes.²¹²

In diversity cases, as discussed above, federal courts are obliged to apply the state law as the state judges would understand and apply it. There are some diversity situations in which a kind of abstention is obliged: if there is uncertain state law involving an important state interest that is closely identifiable with the state government's sovereign prerogative.²¹³ This category of abstention, sometimes called *Thibodaux* abstention, has not been further defined and exists of somewhat uncertain scope and vitality.²¹⁴

Burford abstention, which derives its name from a 1943 decision, encourages a federal court to defer to a state's administration of important state policy and to avoid unnecessary interference and disruption of the state's

208. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987).

209. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). For further discussion of *Pullman*, see Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

210. See *City of Houston v. Hill*, 482 U.S. 451 (1987).

211. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

212. See *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988).

213. See generally *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959) (refusing to abstain because state law was clear); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (abstaining because the case involved eminent domain and unclear state law).

214. See CHEMERINSKY, *supra* note 5, at 698-702 (discussing *Thibodaux* abstention).

governmental scheme.²¹⁵ Because this category of cases does not involve federal questions, the usual procedure is for the district court to dismiss the case outright, since any federal issue that develops can be reviewed by the Supreme Court. In *Burford* the state developed an elaborate state administrative agency scheme with judicial review in the state courts to regulate its important oil business. The federal court was obliged to dismiss the case because the state regulations were complex and very fact specific.²¹⁶

The fourth category of abstention, or *Colorado River* abstention, invokes considerations of “[w]ise judicial administration,” which presumably takes into account judicial federalism.²¹⁷ Unlike the other doctrines, this abstention doctrine developed first in the lower federal courts, as a means to avoid duplicative litigation in federal and state courts. Typically, there are pending state and federal proceedings involving the same parties and claims. Although federal courts usually allow federal actions to proceed, the courts may abstain after considering: (1) whether the state court has already acquired jurisdiction over some relevant property, (2) whether the federal forum is convenient for the parties, (3) whether piecemeal litigation will be avoided, (4) which court first obtained jurisdiction and which proceeding is further along, and (5) whether the state process adequately protects the federal rights at stake.²¹⁸ The federal judge’s discretion is limited to choosing between abstaining to avoid an otherwise wasteful race to judgment or affording the federal plaintiff the opportunity of a federal forum.

The Supreme Court has made it plain that “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.”²¹⁹ The various abstention doctrines, therefore, describe circumstances in which a federal court possessed of constitutional and statutory jurisdiction over the subject matter of a case nonetheless ought to “abstain”—by either staying or dismissing the federal proceeding—out of deference to the state courts.²²⁰

H. Federalism-Equity-Comity²²¹

The triptych phrase “federalism, equity and comity” forms the basis of a separate category of abstention different from the others as well as more

215. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

216. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-15 (1976).

217. *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

218. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15-16 (1983).

219. *Colorado River*, 424 U.S. at 813.

220. For arguments on the merits of abstention, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (opposing abstention) and David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985) (favoring abstention).

221. For further research, see 1A MOORE’S FEDERAL PRACTICE, *supra* note 69, ¶ 0.203[1.1] and 17A FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4251-55.

important. The *Younger* abstention doctrine, sometimes called the nonintervention doctrine and euphemistically referred to as “Our Federalism,” began to take shape in 1971.²²² The opinion for the Court waxed on about “Our Federalism” in the most nostalgic and heroic terms: “recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”²²³ The Court held that a federal court normally could not enjoin a pending state criminal prosecution, even though the federal plaintiff or state criminal defendant alleged that the prosecution violated the U.S. Constitution, except on a rare showing of bad faith or harassment or some other unusual and extraordinary circumstances. The principle of nonintervention has been extended to the following: prohibiting federal declaratory judgments when a state criminal prosecution is pending,²²⁴ prohibiting federal injunctions when important state administrative proceedings were pending,²²⁵ and prohibiting federal court interference with state executive agencies.²²⁶

The most noteworthy extension of the *Younger* doctrine is in federal cases when there is a civil suit pending in state court. The general rule of judicial federalism is that when there are parallel civil suits between private parties, one in state court and one in federal court, the suits proceed independently until one is reduced to a judgment and then that first judgment is argued to be *res judicata* in the second court. In a long line of incremental *Younger* doctrine holdings,²²⁷ the Supreme Court has nearly, but not quite, committed the federal judiciary to the proposition that a private civil lawsuit pending in state court always obliges the federal court to abstain.²²⁸ Some commentators believe that the Court’s repeated protests that it has not gone so far have grown quite faint.²²⁹

I. Preclusion Doctrine²³⁰

222. See, e.g., *Samuels v. Mackell*, 401 U.S. 66 (1971); *Younger v. Harris*, 401 U.S. 37 (1971).

223. *Younger*, 401 U.S. at 44.

224. *Samuels*, 401 U.S. at 66.

225. *Middlesex County Ethics Comm’n v. Garden State Bar Ass’n*, 457 U.S. 423 (1982).

226. *Rizzo v. Goode*, 423 U.S. 362 (1976).

227. See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987); *Moore v. Sims*, 442 U.S. 415 (1979); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

228. See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989).

229. See Thomas E. Baker, “*Our Federalism*” in *Pennzoil Co. v. Texaco, Inc. or How the Younger Doctrine Keeps Getting Older Not Better*, 9 REV. LITIG. 303, 337-44 (1990). As Justice Jackson once observed, “[t]he case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron’s reports, whispering ‘I will ne’er consent,’—consented.” *Everson v. Board of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

230. For further research, see 1B MOORE’S FEDERAL PRACTICE, *supra* note 69, ¶¶ 0.405-422; 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4301-4405.

Preclusion doctrine has to do with the various ways in which a judgment in one action will have some binding effect in a later action. Although preclusion doctrine seems to have lagged behind the rest of federal procedure in terms of sophistication and modernization, commentators and courts lately have shown signs of renewed interest in the subject. This has been, at least partly, the result of crowded dockets and a resultant attitude that litigants should be afforded only one opportunity to come to court. Allowing a litigant a second day in court has come to be perceived as a luxury that the courts can ill afford to subsidize.²³¹

The ancient proposition behind preclusion doctrine is that “a party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion.”²³² The “opportunity” to present a contention is greatly expanded with modern rules for joinder of claims, joinder of parties, and the liberal pleading rules. Consequently, the preclusion inquiry is far more complicated and amorphous.

Federal courts have always adhered to the principles of preclusion, although the terminology has been modernized. Claim preclusion, *res judicata* in the older terminology, dictates that “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”²³³ Issue preclusion, collateral estoppel in the older terminology, dictates that “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”²³⁴ These principles are far more complicated than these simply stated black-letter rules; their theory and practice are described in the *Restatement (Second) of Judgments* with numbing detail.²³⁵ But the emphasis of this Paper is on judicial federalism.

The preclusion doctrines “take on an added dimension because of the special problems that come from having two systems of courts, state and federal.”²³⁶ By Article IV, Section 1 of the Constitution²³⁷ and by a statute that has been on the books since 1790,²³⁸ federal courts are obliged to give the same full faith and credit to a state court judgment that the courts of that state would give the judgment. This policy is so strongly established that

231. WRIGHT, *supra* note 5, at 720-21.

232. *Id.* at 721 (quoting Geoffrey C. Hazard, Jr., *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1043 (1971)).

233. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

234. *Id.*

235. See RESTATEMENT (SECOND) OF JUDGMENTS (1982) (devoting 362 pages to the preclusive effects of judgments); see also James A. Martin, *The Restatement (Second) of Judgments: An Overview*, 66 CORNELL L. REV. 404 (1981); Elvin E. Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977).

236. WRIGHT, *supra* note 5, at 730; see also Symposium, *Preclusion in a Federal System*, 70 CORNELL L. REV. 599 (1985).

237. U.S. CONST. art. IV, § 1.

238. 28 U.S.C. § 1738 (1988).

it applies in federal civil rights cases,²³⁹ where one would have supposed that mistrust of state courts was an historical and legitimate justification for the jurisdiction. This rule has some rather convoluted applications. For example, the Supreme Court has held that a federal court must afford the same preclusive effect that would be afforded by other state courts to a prior state court's decision to reject a plea of preclusion based on a still more prior federal court judgment in another action.²⁴⁰

As for the effect that is to be given a federal judgment in state court, the black-letter answer is: "Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court."²⁴¹ Apparently, the effect of the Supremacy Clause is so powerful that "[t]he suggestion that state courts should be free to disregard the judgments of federal courts is so unthinkable that the rule rejecting any such suggestion has been stated in an unbroken line of cases that do not offer any clear judicial thought or explanation."²⁴² Consequently, the scope of the preclusion doctrines is determined by the federal courts as a matter of federal law.²⁴³ There is, however, some federalism play in the joints. For example, federal courts may conclude as a matter of federal law that there is no need for a uniform national rule on an issue of preclusion doctrine; thus, state court holdings that are substantive and not inconsistent with federal law are deemed persuasive authority.²⁴⁴

The topic of "jurisdiction to determine jurisdiction" is related. This is defined as "the power of a court to determine whether it has jurisdiction over the parties to and subject matter of a suit."²⁴⁵ The preclusion effect comes in some later collateral attack on the jurisdiction of the first court. This topic is not peculiar to federal courts, but the Supreme Court enjoys a position of leadership and influence and is responsible for the law of due process and full faith and credit. If a party appears before a court to contest its personal jurisdiction and argues the issue on direct appeal, a finding of jurisdiction will bind the party, who cannot later collaterally attack the court's judgment on that basis.²⁴⁶ A court's determination that it has subject matter jurisdiction is binding if the issue was actually litigated and expressly decided.²⁴⁷ This

239. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

240. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209 (1986).

241. RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982). The same rule applies, more obviously, to the effect of a federal judgment in a second federal action, under the principle of claim preclusion. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

242. WRIGHT, *supra* note 5, at 736.

243. Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

244. WRIGHT, *supra* note 5, at 738. This is a sophisticated part of the *Erie* doctrine.

245. *Id.* at 94.

246. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

247. *Durfee v. Duke*, 375 U.S. 106 (1963); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

determination is also binding if the party had a full and fair opportunity to present and litigate the issue.²⁴⁸

Pursuant to this power to determine jurisdiction, a court may enter orders to preserve the status quo such as a restraining order or an injunction. These orders are binding and enforceable against the parties even if the court lacks jurisdiction.²⁴⁹ The Supreme Court, in one remarkable application of these principles, upheld a state criminal contempt conviction against civil rights demonstrators who violated a state court injunction based on an unconstitutional city ordinance.²⁵⁰ The Court explained, “[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.”²⁵¹ Thus, a litigant who fails to bring a challenge on direct appeal and then violates such an order does so at considerable legal peril.²⁵² All these aspects of jurisdiction to determine jurisdiction apply across the federalism divide, whether the courts involved are federal or state or both.

*J. Habeas Corpus*²⁵³

Last considered, but certainly not least significant, is habeas corpus. Justice Holmes once observed, “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure.”²⁵⁴ Generally, a federal court can review a state court’s judgment only after the petitioner has exhausted all available state appeals. As was explained above, federal district courts lack the authority to hear appeals from the state courts. The federal habeas corpus jurisdiction, however, functions, as a practical matter, to change these general rules for state criminal cases, which profoundly affects judicial federalism.

By statute, a person convicted of a state crime and being held in state custody can collaterally attack the conviction in federal court in a civil suit by alleging that the state’s custody is “in violation of the Constitution or laws or

248. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

249. *See United States v. United Mine Workers*, 330 U.S. 258, 289-95 (1947).

250. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The city ordinance upon which the state court injunction was based was itself later held unconstitutional in a different case involving the same demonstration. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

251. *Walker*, 388 U.S. at 321.

252. *See United States v. Ryan*, 402 U.S. 530 (1971). For civil contempt, the rule is different: if the court is without jurisdiction, the compliance order need not be obeyed. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988).

253. For further research, see 7B MOORE’S FEDERAL PRACTICE, *supra* note 69, §§ 2241-2255 and 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 69, §§ 4261-4268.5. *See also* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Charles A. Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802 (1983); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

254. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

treaties of the United States.”²⁵⁵ A federal district court has jurisdiction to order the release of the state prisoner on that basis. As a matter of understatement, “[t]he power of a single federal judge to overturn a decision affirmed by an entire state court system is troubling to many.”²⁵⁶ For the most part, one’s actual guilt or innocence by itself does not enter this decision.²⁵⁷

Federal statutes²⁵⁸ and federal rules of procedure²⁵⁹ control this jurisdiction. Although a federal writ of habeas corpus can be issued by the Supreme Court, any individual justice, any individual circuit judge, or the district courts, the normal procedure is for the district court to consider the petition in the first instance.²⁶⁰ The named respondent is the custodian of the state prisoner, typically the warden, although the usual practice is for the state attorney general to represent the state’s interest. Petitioners generally are required to exhaust all state court remedies before bringing the federal proceeding.²⁶¹ Preclusion doctrine generally does not apply and a state prisoner can relitigate federal legal claims that were unsuccessful before the state courts.²⁶² State court findings of fact generally are binding in the federal proceeding.²⁶³ The recent trend in Supreme Court decisions is to construe narrowly the statutory jurisdiction and procedures. For example, an unsuccessful petitioner may not bring a subsequent petition without demonstrating “good cause” for not having raised the issue earlier and “prejudice” from not having the issue decided or actual innocence.²⁶⁴ Also, in an important recent decision, the Court held that habeas petitioners may only assert rights that existed and were articulated by the courts as of the time of their convictions.²⁶⁵

Federal habeas corpus in the modern era has become a dramatic and controversial aspect of judicial federalism. The Court recently has emphasized such related themes as the potential for friction between the state and federal courts, the societal costs in terms of judicial finality, and the efficiency in the

255. 28 U.S.C. § 2241(c)(3) (1988). A constitutional clause generally prohibits Congress from suspending the writ and preventing state courts from releasing individuals wrongfully imprisoned. U.S. CONST. art. I, § 9, cl. 2.

256. CHEMERINSKY, *supra* note 5, at 781.

257. *See* Herrera v. Collins, 113 S.Ct. 853 (1993); *see also* Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

258. 28 U.S.C. §§ 2241-2256 (1988). Section 2255 provides relief for federal prisoners. The individual states have their own separate version of state habeas corpus relief available to state, not federal, prisoners. *See generally* LARRY W. YACKLE, *POST-CONVICTION REMEDIES* 1-69 (1981) (discussing state remedies).

259. *See* Browder v. Director (Dep’t of Corrections of Illinois), 434 U.S. 257, 265 n.9 (1978).

260. 28 U.S.C. § 2241(a)-(b) (1988).

261. *Id.* § 2254(b) (1988).

262. *Brown v. Allen*, 344 U.S. 443 (1953). One major exception is that Fourth Amendment claims may not be relitigated. *Stone v. Powell*, 428 U.S. 465 (1976).

263. 28 U.S.C. § 2254(d) (1988); *Sumner v. Mata*, 449 U.S. 539 (1981).

264. *McCleskey v. Zant*, 499 U.S. 467 (1991).

265. *Teague v. Lane*, 489 U.S. 288 (1989).

criminal justice system.²⁶⁶ Federal courts likewise are burdened with the filings of state prisoners because of the constitutionalization of criminal procedure that virtually guarantees that multiple federal issues can be raised in every state criminal prosecution. It is worth noting that the federal jurisdiction has a certain “needle in the haystack” quality: “[C]omprehensive statistics are lacking, but those that are available indicate that the writ is granted in at most 4 percent of the cases in which it is sought, and in many of these cases it is possible for the state to retry the petitioner.”²⁶⁷

Because of the timing of stays of executions and the notoriety of the cases, federal habeas corpus proceedings in state death penalty convictions have become highly visible and divisive symbols of this intensified federalism debate, within the courts and in the nation.²⁶⁸ Federal habeas corpus proceedings in state capital cases have been afforded a great deal of attention lately. The perceived problem has been multiple petitions in a single case, often timed in the last few hours before a scheduled execution.²⁶⁹ Various reforms are being considered. They include: guaranteeing appointed counsel, prohibiting repetition of all issues presented to state courts, requiring that all issues be presented in a single petition, and imposing some statute of limitations.²⁷⁰ Two recent commissions have studied the issues of judicial federalism and justice involved and federal legislation can be confidently predicted although the form it will take is not yet clear.²⁷¹

VI. CURRENT TRENDS AND THE FUTURE OF JUDICIAL FEDERALISM

The 1969 Study of Judicial Federalism by the American Law Institute attempted a comprehensive statement based on “rational principle.”²⁷² In its

266. *Id.* at 309-10 (O'Connor, J., plurality opinion).

267. WRIGHT, *supra* note 5, at 366.

268. “Whatever a person may think of the death penalty, few dispute that the conduct of postconviction proceedings in capital cases demeans almost everyone—the lawyers, the judges, the defendants, the media, and the politicians and others who act as cheerleaders at the spectacle.” James E. Coleman, Jr., *Litigating at the Speed of Light: Postconviction Proceedings Under a Death Warrant*, LITIG. Summer 1990 at 14.

269. Victoria Slind-Flor, *All-Night Duel: Attorneys' Final Frenzy Over Harris*, NAT'L L.J., May 4, 1992, at 3. Compare Evan Cominher & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992) with Steven Harris Execution, 102 YALE L.J. 225 (1992).

270. CHEMERINSKY, *supra* note 5, at 795-96.

271. AMERICAN BAR ASSOCIATION SECTION ON CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES (1989); AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT AND PROPOSALS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (1989).

272. The objective of this Study is that cases be divided between the state and federal courts in a manner grounded on rational principle. Access to federal courts should not be frozen into a pattern set in 1789 or 1875, whether or not such pattern was right to meet the problems of its time, if it does not make sense in the light of conditions in the last half of the twentieth century. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 6 (1969).

1990 Report, the Federal Courts Study Committee, a congressionally created panel of interbranch experts sought “a *principled* allocation of jurisdiction” between the state and national judicial branches.²⁷³ Academics have persistently sought to develop a “grand unified theory” of judicial federalism.²⁷⁴ Although, a wholesale reassessment of the subject matter allocation of cases between state and federal courts is beyond the scope of this paper, one comprehensive factorial approach by a leading commentator deserves to be highlighted. An informed analysis of the two respective original jurisdictions should consider the following: (1) facilitating state-federal cross-pollination, (2) maintaining the autonomy of the two judicial sovereigns, (3) preserving some degree of litigants’ choice, (4) achieving litigation efficiency, (5) assuring fundamental fairness, (6) restraining the judicial branch within the judicial role, and (7) expecting an overall coherence and logical consistency of jurisdictional principles.²⁷⁵ This set of criteria is as good as any and better than most.

These fine-spun theories ignore a critical aspect of reality. Judicial federalism is not a static paradigm that decides competing claims for power between the state and national judicial branches. Rather, it is a compromise of competing power against a cluster of constitutional values. Judicial federalism is more like doing a painting than a sum.²⁷⁶ And it resembles some great unfinished masterpiece, truly a work in progress. Federalism was forged in a pragmatic compromise and has been tempered more by circumstances than by philosophy. Judicial federalism is about politics, and politics is about power. Arguments over principles of federalism have been at the heart of our nation’s most fundamental controversies.²⁷⁷

273. Not all of our proposals would shift business from federal to state courts, however, and none of our proposals carries any inference that the state courts are inferior to the federal courts and should thus be a repository for cases federal judges prefer not to decide. Rather, our goal is a *principled* allocation of jurisdiction.

FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (Apr. 2, 1990).

274. See Chemerinsky & Kramer, *supra* note 65.

275. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1772-85 (1992). What is conspicuously missing from this list is controlling docket growth, for the very good reason that it simply should not be considered in jurisdictional debates. It is a legitimate factor, however, in congressional decisionmaking to fashion new federal substantive rights. *Id.* at 1786.

276. “Life is painting a picture, not doing a sum.” Oliver Wendell Holmes, Jr., Address to the Fiftieth Anniversary of the Harvard Graduating Class of 1861 (June 28, 1911), in MARK D. HOWE, *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 160, 161 (1962).

277. See REPORT OF THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A FRAMEWORK FOR STUDYING THE CONTROVERSY CONCERNING THE FEDERAL COURTS AND FEDERALISM (1986); Robert C. Brighton, Jr., Note, *Separating Myth from Reality in Federalism Decisions: A Perspective on American Federalism—Past and Present*, 35 VAND. L. REV. 161 (1982).

The greatest alarm for judicial federalism is that it will recede like federalism generally has receded in the United States. The federalization of criminal law is one contemporary example.

By far, most criminal prosecutions take place in state court because one of the states' primary responsibilities is to promulgate and enforce substantive criminal law. The federal role is supposed to be limited to uniquely federal interests or policies that are otherwise beyond the states, but Congress seems willing to ignore this important aspect of judicial federalism. There are no federal common law crimes.²⁷⁸ Federal district courts are given exclusive federal question jurisdiction over all criminal offenses against the laws of the United States.²⁷⁹ The same conduct, a bank robbery for example, may be an offense against federal and state criminal laws, and Supreme Court double jeopardy holdings allow the same perpetrator to be convicted by both sovereigns.²⁸⁰

Many who work in the courts are concerned that judicial federalism and the federal courts will be among the casualties in the "war on drugs." The Chief Justice of the United States gave a speech last year in which he expressed concern that federal courts were being transformed into "national narcotics courts."²⁸¹ Consider some of the Chief Justice's statistics. Between 1980 and 1990, total criminal case filings increased 60 percent in the federal courts, and drug cases increased 290 percent. The criminal docket is about 15 percent of the district courts' caseload, but time studies disclose that criminal cases occupy approximately 48 percent of a federal trial judge's time (more than 80 percent in some districts). Drug cases not only increase a judge's workload,²⁸² but they take precedence and actually displace cases on the civil docket because of the federal Speedy Trial Act. Another part of the problem is the mandatory minimum sentences required under the Sentencing Reform Act of 1984.²⁸³ These have fueled the trend toward "federalizing" crimes. If the federal statutes are "tougher," then state and federal prosecutors exercise their discretion to funnel more and more of their drug cases into federal court.

Recently, there seems to be an accelerating congressional momentum to federalize more crimes.²⁸⁴ Recent proposals and opposition by the judiciary

278. *See* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

279. 18 U.S.C. § 3231 (1988); *see also* WRIGHT, *supra* note 5, at 124-26.

280. *Abbate v. United States*, 359 U.S. 187 (1959).

281. Chief Justice William H. Rehnquist, Remarks at the United States Sentencing Commission Symposium on "Drugs and Violence in America" (June 18, 1993).

282. 18 U.S.C. §§ 3161-3174 (1988).

283. *Id.* §§ 3551-3559; *see also* U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1994).

284. *See, e.g.*, Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384; Gun-Free School Zones Act of 1990, 18 U.S.C. §§ 921-922, 924 (Supp. V 1993); Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (Supp. V 1993); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403; Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (1988); False Identification Crime Control Act of 1982, Pub. L. No. 97-398, 96 Stat. 2009 (codified in pertinent part at 18 U.S.C. § 1738 (1988)); Parental Kidnapping Prevention Act

have been controversial—such as earlier proposals that would have made it a federal crime to use a firearm in the commission of any felony or a bill that would have made it a federal crime to physically harm a woman out of a gender animus.²⁸⁵

There have been few voices heard to argue in favor of preserving judicial federalism and respecting the traditional roles of the sovereign states over criminal law alongside the limited role of the federal courts.²⁸⁶ But this is politics, and this generation of politicians views the federal laws as public policy panacea and the federal courts as one of their services to their constituencies. Indeed, as this Article was being written, headlines around the country proclaimed a \$30 billion federal anticrime bill with something for everyone; more police, gun control, death penalties, new prisons, community programs, and more.²⁸⁷

Woodrow Wilson set out the challenge:

The question of the relation of the States to the federal government . . . cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, make it a new question.²⁸⁸

Would that our generation have a good answer and, having answered for ourselves, leave something left of the question for the generation that follows.

of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified in pertinent part at 28 U.S.C. § 1738A (1988)).

285. Naftali Bendavid, *How Much More Can Courts, Prisons Take? It's Tempting to Federalize Crimes, but Opponents are Gathering Momentum*, LEGAL TIMES, June 7, 1993, at 1. The second, but not the first, of these proposals was enacted in 1994. See *infra* note 287.

286. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994); WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, *ON THE FEDERALIZATION OF CIVIL AND CRIMINAL JUSTICE* (1994); James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *FORDHAM L. REV.* 1795 (1994).

287. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; H. Rep. No. 103-711, 103rd Cong., 2d Sess. (1994).

288. T. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 173 (1908). See also Michael E. Tigar, *2020 Vision: A Bifocal View*, 74 *JUDICATURE* 89 (1990).

