The Role of the State Supreme Court in the Adjudication of Federal Questions

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During the past five years hundreds of articles and speeches have been published concerning the United States Supreme Court. An analysis of these would show a rough division into four categories:

(1) Those articles and speeches which praise or deplore particular decisions of the Supreme Court with the author dealing with the merits of a particular controversy.

(2) Papers which approve or disapprove of particular decisions of the Supreme Court in terms of the decisions relation to distribution of power between state and nation.

(3) Papers which attack or defend the Supreme Court with the approving or disapproving generalization drawn, all too frequently, from one particular instance.

(4) Papers which try to describe the role of the Supreme Court in constitutional controversy and then try to induce the reader to appreciate the tasks and difficulties of decision.

I hope that my talk today fits somewhere in the fourth category of understanding and sympathy but with, I also hope, a peculiar twist, an appreciation of the role of the State Supreme Court in the adjudication of federal questions. Much of that which follows is elementary but it bears repeating.

The state judicial systems are in a unique position in our federal system. Historically and actually today the state court and the state legal system serves as the initial agency of government settlement of most problems of private behavior. Federally law has never operated fully in these matters. In general federal law does two things: (1) It sometimes displaces state law and takes over the task of governing private activity. Wherever the negative implications of the commerce clause of the constitution prohibits state regulation and where the interstate commerce act of congress supersedes state law are illustrations. (2) (and most often) federal law assumes and accepts the basic responsibility of the states and seeks only to regulate the exercise of state authority, usually by saying "do not" and rarely by command of action.

The ex post facto clause and the 14th amendment are illustrations.

Thus the state judge is supreme in those areas where, for various reasons, there is no applicable federal law. This supremacy may be emphasized by recalling that even if a question of state law gets into the federal court system in such a way that the United States Supreme Court must decide the question, the state supreme court is free to ignore the decision of the Supreme Court. We may also recall that a state court decision is reviewable by the Supreme Court only as to matters of federal law.

The unique position of the state judge is further emphasized when we recall that as to many matters of federal law, Congress has chosen to use the state courts as federal instruments to enforce federal law. But whether federal law is injected into the state judicial system because Congress has seen fit to leave such matters there, or is injected into the state system by way of defense to some state created right, the Supremacy Clause of the Constitution controls the state court action. That clause would seem to mean this: If a state court undertakes to adjudicate a controversy, the state court must do so in accordance with whatever federal law is applicable. We need not consider here whether state courts can be compelled to adjudicate a matter. We may note however that in post conviction claims reviewed by the Supreme Court, the Court has frequently spoken of the obligation of the states to provide a court procedure to test and raise certain federal claims. Even so this obligation has been enforced to date only by the sanction of habeas corpus.

Before proceeding further certain premises from which I proceed should be made clear. Most of these are no longer debatable:

(1) Not since the first decades of the 19th century has it been seriously argued that the Supreme Court may not review a state court decision. I assume therefore that the Supreme Court may review a decision of a state court to determine whether the state court applied applicable federal law.
(2) It is essential to the maintenance of the federal union that there be some review of state action by some agency other than the national legislature and we agree that in our system it is and should be the Supreme Court.

(3) There are particular clauses of the constitution such as the full faith and credit clause, the import-export clause and the Fourteenth Amendment which have been held to be self-executing for too long a period of time to re-open this issue. Thus these clauses are enforceable by courts without further action by Congress.

(4) Judges do make law instead of finding it and implicit in Chief Justice Marshall’s famous statement that it is a "Constitution which we are interpreting" is almost an obligation on the courts to keep the constitution a living document.

(5) The values of federalism over a completely national system are so self-evident that they need not be re-argued. I like as a relevant statement of these values, the remark of Professor Wechsler in celebrating the federal system a few years ago. "The enduring values of federalism," he said, "call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without sacrifice of their diversities and the creative energy to which diversity gives rise."

Although the subject matter of this session of the Conference is entitled "Federal-State Relations" I take it we are not discussing the whole of this complex subject but only to the extent this topic is within the special competence of judges, particularly state court judges. There is no doubt that the position of the states in our system has deteriorated. For our purposes this is a fact, the consequences of which must control state court judges however hateful this fact is to many of us. Some of the causes of this decline may be of interest to the state judiciary in order that we may properly distribute the blame for the decline of the states and also in order that we may understand some of the current attitudes, found even in the Supreme Court, toward the states.

Some causes of the decline of the state, such as the need to maintain safety against behavior of our international neighbors should lead us to conclude that neither judge, legislator or executive in either the federal or state system can be blamed for the decline of the state.

Another cause of the decline of the states cannot be made the responsibility of any federal official, particularly a judge of the United States Supreme Court. This cause is the unwillingness of the states to deal with problems which have been traditionally theirs. Unwillingness is too weak a word—eagerness that the federal government take over the job is more apt. Illustrative is the subject of the substantive criminal law. A subject more fit for state action could hardly be found. In recent years Congress has been asked, however, to create a growing list of federal crimes. In the beginning it was a federal crime to interfere with federal officials and federally operated institutions. Thus it is a federal crime to rob a post office. But then Congress made it a crime to rob a private institution such as a bank incorporated by act of Congress and finally Congress has been asked (and it has) to make it a crime to rob a state created bank if that bank has paid money into some federal fund such as the Federal Deposit Insurance Corporation. This principle, if there be one, of making a federal crime if the victim gets some favor from or contributes some money to the national government has not yet been fully exploited. Think of the business state law enforcement officers could turn over to J. Edgar Hoover if it became a federal crime to murder or rob a person who receives federal funds or who pays federal income taxes.

As state court judges you are not to blame for these state initiated requests that the federal government assume power. Neither is the Supreme Court to blame. It is also obvious that neither judiciary can do much about this decline of the states. The relevance of this kind of decline of state government to our problem lies perhaps in the attitude of mind which this assumption of power by the federal government encourages. As state court judges you have become concerned with the question when does federal law supersede state law. A paraphrase of a remark of Chief Justice Hughes concerning dissenting opinions might be apt here:

"we ought not to expect among supreme court judges much greater respect for state power on the difficult question of federal supersede which comes before the Supreme Court than we find among the representatives of the states such as Congressmen, Attorneys General, Prosecuting Attorneys and Chiefs of Police on the lesser issues of historic police regulation."

From the above recital of a few causes of the decline of state power we can make this generalization: Many of the factors leading to the increased exercise of power by the federal government are attributable not at all to the Supreme Court. A corollary of this statement is the fact that much of the problem is not solvable by the judiciary, either federal or state.

This statement that the solution of many of the federal-state problems is not in the hands of the judiciary should make us look at an area where the Supreme Court has expanded state power. It is well-
known that in most areas of governance of private activity, the Constitution does not block out responsibility for governance between state and nation. But we should not forget that at one time not so long ago, the Supreme Court held there were situations in which the mere existence of federal power deprived the states of competence to act. Since the constitutional revolution of the mid-thirties the Supreme Court has made it very clear that there are very few such situations left. Thus if we compare 1928 with 1958 the Supreme Court has made a substantial increase in the power of the states. There are wide areas of governance of private activity where state law operates by virtue of the non-exercise by Congress of its power to regulate private conduct.

The root of the current controversy concerning state or federal governance of private activity is Congress. Since Congress has discretion not to act, it has discretion to act for a limited purpose. When the federal government undertakes to regulate or govern private activity, there is inevitably a question whether such assumption of responsibility by Congress displaces the state law which formerly governed the private activity. This is a question which the Court must resolve. But Congress is the final tribunal of review in this area. A decision by the Supreme Court that state law has been displaced is really no final bar to state governance of the activity. If the political representatives of the states, in Congress assembled, think a decision wrong it can be changed. Whether any particular state law should be superseded by an act of Congress is not a matter of judicial concern. For the judiciary the only question is the test which the Supreme Court adices should be used to determine whether state law has been displaced.

The area of federal-state relations which produces the most stresses and strains in the judicial systems is the area where federal law controls the exercise of admitted state authority. Although the Constitution appears to give Congress considerable power to control the exercise of state authority by legislation it has not been fit to use this power extensively. Thus it is the Constitution as interpreted by the Supreme Court rather than statutory law which is the federal law applicable. One very substantial group of federal controls on state exercise of its admitted authority are the constitutional prohibitions designed to protect the private individual from state action thought to be abusive. The states may govern the private conduct but they must do so according to federal standards. The ex post facto clause, extradition clause, the bills of attainder clause and the Fourteenth Amendment are leading examples of this type of control. Here the federal law functions as a policeman of the decencies of civilized government. Since so much of this policing concerns the procedures in a particular case, part of the irritations arise from the fact that federal questions concerning the procedure cannot be known until final decision.

In the balance of this paper I will concern myself with what you as state court judges can do in the judicial system in preserving state power over private conduct against a claim that federal law has displaced it or against a claim that the state method of regulation has infringed on federal standards. Your oath of office under your state constitution and the Supremacy Clause under the Federal Constitution require you to heed the Supreme Court in these matters.

It seems to me that the crux of the proper approach for the state judiciary lies in emphasizing the values of federalism which I quoted earlier—the value of experimentation and diversity among the states. You may recall that this justification for federalism was advanced in the days of Mr. Justice Brandeis as a reason why the Supreme Court should allow state legislatures to regulate economic enterprise as they chose to. The enduring value of federalism is not, however, the fact of diversity or lack of uniformity but it is the privilege to choose to be different. The legislative process requires that choice to be made when legislation is enacted. Choice, as you know, is not made in the same way in a judicial decision. The common law tradition of continuity through precedent and custom influence a decision which must be made. I read the recent Supreme Court opinions in this general area to do two things: The Court is still receptive to this argument of diversity; but it is requiring the state supreme courts to give careful consideration of every old rule to demonstrate that choice was conscious.

Professor Allen’s monograph for this conference on state criminal procedure and federalism points out that one really significant fact derivable from a survey of Supreme Court cases involving criminal procedure is the number of specific instances in which the states were allowed to keep or adopt a procedure which deviates from a federal norm. One additional fact is the number of times the Supreme Court, even after it has indicated a federal norm, has allowed a state to have a diverse rule where the state judiciary has done its job well.

You are of course aware of this in many areas of federal law. In passing upon a city’s refusal to permit the members of a religious sect to speak in a public place, I doubt that many of you would uphold the city’s power by a decision which recites only Justice Holmes aphorism of 1895 that because the city owns its parks it has a proprietor’s right of exclusion. You would, I am confident, look to the facts of the
particular refusal, consider the reasons the city authorities have for refusal and you would balance legitimate interests of the city against the interests of free speech. You know, I think, that if you did this well and still upheld the city's refusal your chances of being sustained are extremely high. Take another Holmes aphorism of current interest. In considering the oaths and investigations of government employees for subversive or disloyal indications. I doubt that many of you would find a complete vindication of state power in Holmes' remark that while there is a constitutional right to talk politics there is none to be a policeman. If you balanced individual rights against legitimate state concern, you would be sustained. The lesson of the Supreme Court cases seems to be this: old slogans and aphorisms cannot serve as a substitute for judgment by you. If you consciously make that judgment, respect for the federal system will tend to induce the court to support you.

This, it seems to me, is the lesson of Konigsberg v. State Bar of California 353 U. S. 252 (1957) on the one hand and Beilan v. Board of Education 357 U. S. 399 (1958) on the other. In the former case, it appears to me, the Supreme Court of California relied on tradition—admission to the bar is in the uncontrolled discretion of the state procedure for admission. It did not consider the case other than routine. The Supreme Court was thus able without hindrance from any opinion or clearly articulated state reasons for failure to admit Konigsburg, to read the record as it desired and to find the alleged reason for non-admission to be illegal inferences from refusal to answer. In the Beilan case on the other hand, the Supreme Court of Pennsylvania noted that the record showed no inferences were drawn from refusal to answer and it concluded that the reason for discharge of the teacher was refusal to answer relevant questions. The Pennsylvania Supreme Court forced the United States Supreme Court to ask itself only one question: can a state if it wishes refuse employment to a person who refuses to answer a relevant question. Bar Admission cases before and after Konigsburg indicate that if the state supreme court explains why it regards refusal to answer as important and makes clear the legitimate state interest, the Supreme Court will respect the state's desire to be different.

The history of post conviction claims in Illinois also indicates an approach for the state judiciary. In a fair procedure case, the Supreme Court cases indicate that there are several requisites before the merits are reached: (1) an adequate state procedure for the claimant to make his claim; (2) a full and serious and thoughtful consideration of the claim; (3) a careful statement of the facts as the state court sees them. Here the important thing for the State Supreme Court is to convey to Washington an idea of the state's sufficiency to maintain orderly procedure and to control its government. If this is indicated, the chance of Supreme Court reversal in any particular case is reduced.

When we depart from those aspects of federal law which protect the individual against the methods chosen by the state and turn to the question whether federal governance has displaced state governance I am less confident of any approach being successful. It seems to me that a true adherence to the federal system requires the burden of persuasion to be placed on those asserting federal supersede. On the other hand we can live under a reverse presumption without too much damage to the federal system. The recent Supreme Court decisions have destroyed the presumption of earlier days but I do not see that they have substituted the opposite. It would seem to me to be incumbent on the state judiciary now to show the large number of state interests and ends which are served by the state law to strengthen an inference that it was inconceivable that Congress intended to displace the state law. Even after Nelson the court indicated that the states have such a major interest in subversion that they can continue to have subversion laws. Mistakes in this area are less serious than in the other area under discussion because they are completely changeable by specific legislation. Indeed it is possible to establish by legislation a rule of construction.

An examination of recent federal regulatory legislation would seem to indicate that in spite of the furor about this problem consciousness of it has not yet reached the level of the legislative draftsman. Since legislative action is possible the question arises whether the organized state bench can do something in this area? It would seem to me to be beyond the province of the state bench to report and recommend on two aspects of the general problem: (1) whether there should be federal regulation of the private conduct; and (2) Assuming there should be whether federal law should or should not displace state law. The most a committee of judges could do would, it seems to me, be to inform Congress of legislation or rules which might be affected by the federal law. In a more general way a Committee of State court judges could perhaps draft one or more model clauses concerning displacement which Congress would be urged to use in new legislation. This would be analogous to the traditional repealer and separability clauses found in most legislation.

My discussion today has not tried to deal with the problem of federal-state relations but rather I have
tried to look at the problem through the eyes of a judge. Most cases (all cases of displacement) do not really impose a final bar to state action. In all such cases I have suggested that the solution of any particular problem is for another side of our federal system—the federal officials who are elected by the states. From the judiciary’s point of view we should not lose sight of the premise that the federal system cannot be maintained in any form without a supreme court empowered to determine when federal law does govern a situation. Within that framework, the state judiciary can strengthen the federal system and its valuable chance of diversity by the judiciary first deciding whether their state needs diversity and explaining why to the Supreme Court. True it is that there is a minimum of uniformity which our constitutional framework imposes on each of the states. Beyond that, imaginative and creative state law making on your part will most likely give you the values of independence and diversity.