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The Distribution of Judicial Power between National and State Courts

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From time to time during the past fifteen years, I have appeared before gentlemen of your ilk in vain attempts to persuade you that you should act in accordance with the best interests of my clients. My singular lack of success has not discouraged me from continuing to try to show you the light of truth and justice. And so I appear before you this morning once again in the role of an advocate. For I am asking you to give consideration to — and then to take action on — the question of the appropriate distribution of power between the national and state courts.

The first point I wish to make is that the question of distribution of judicial power between the national and state governments is almost entirely in the hands of the national legislature. With the single exception of the Supreme Court's original jurisdiction, the Constitution of the United States does not make any provision for a division of function between the two judicial systems. There was some debate at the Constitutional Convention on the question whether there should be any federal courts at all, other than the Supreme Court. But that question was left to Congress for resolution, and, although Mr. Justice Story once announced the view that all of the judicial powers specified in Article III of the Constitution must be vested in federal courts,1 and some professors are still of that view,2 Story's notion has long since been rejected both by Congress and by the courts. In the very first judiciary act,3 the act which authorized the creation of the federal courts, only a small portion of the Article III powers was vested in them. Moreover, not only does Congress have power to say what business shall be assigned to the federal courts. It may also decide that the state courts are to be charged with the effectuation of federal law.4 Indeed the general rule has developed that unless Congress specifically confines jurisdiction to the federal courts, that jurisdiction is to be exercised by the state courts as well.5

A Matter of State Concern

My second proposition is that the state judiciaries have a direct interest in the con-
tent of the federal judiciary acts, even where the acts do not purport to assign jurisdiction to state courts. A single example will suffice to make this point. Just a few weeks ago, the president of the United States signed into law a bill which increased the minimal monetary amount required to invoke jurisdiction in the federal district courts from a sum exceeding $3,000 to a sum exceeding $10,000, both with regard to diversity of citizenship and federal question cases. That law also provides that in measuring diversity of citizenship a corporation shall be deemed to be a citizen of the state in which it maintains its principal place of business as well as of the place of its incorporation. The law also prohibits removal from state to federal courts of workmen’s compensation cases. The bill was sponsored by the Judicial Conference of the United States in order to relieve the federal courts of a portion of their workload. It was an intermediate step toward the possible elimination of diversity jurisdiction in its entirety. If, as suggested, this act will relieve the federal courts of as much as 12¹⁄₂% of their diversity business, the effect on the state courts will be to increase their burden by some 3,000 cases per year. And the heaviest increase will take place in those metropolitan areas of the country where the state courts are already floundering under a burden which they cannot now effectively carry. Should the Judicial Conference later recommend and Congress enact legislation eliminating diversity jurisdiction in its entirety, there will be an increase in the business of the state courts by at least 23,000 cases per year. This is a graphic but not a unique example of the fact that one cannot properly consider the problems of federal court jurisdiction in isolation from the effect that changes in that jurisdiction will have on the state judicial systems. Yet I venture to say there was no representation before the Judiciary Committees of Congress by anyone who suggested that the states too had a vital interest in the legislation.

Lest this statement mislead you as to my own thinking on this subject, let me say that I am heartily in favor of the abolition of the diversity jurisdiction. But I do not believe that this major shift of business from the federal to the state courts should take place without a complete reallocation of the country’s judicial business. This reallocation requires a careful study of the proper assignment of judicial power within the nation. And my thesis for today is that such a study should be undertaken not only by those whose interest is solely that of the federal judicial system, but rather by a group which can also represent the interests of the state judiciaries. In short, I suggest that it is this Conference of Chief Justices—working with the Judicial Conference of the United States, if possible—which should undertake to prepare a revision of the Judicial Code of the United States signed into law a bill which increased the minimal monetary amount required to invoke jurisdiction in the federal district courts from a sum in excess of $3,000 to a sum exceeding $10,000, both with regard to diversity of citizenship and federal question cases. That law also provides that in measuring diversity of citizenship a corporation shall be deemed to be a citizen of the state in which it maintains its principal place of business as well as of the place of its incorporation. The law also prohibits removal from state to federal courts of workmen’s compensation cases. The bill was sponsored by the Judicial Conference of the United States in order to relieve the federal courts of a portion of their workload. It was an intermediate step toward the possible elimination of diversity jurisdiction in its entirety. If, as suggested, this act will relieve the federal courts of as much as 12¹⁄₂% of their diversity business, the effect on the state courts will be to increase their burden by some 3,000 cases per year. And the heaviest increase will take place in those metropolitan areas of the country where the state courts are already floundering under a burden which they cannot now effectively carry. Should the Judicial Conference later recommend and Congress enact legislation eliminating diversity jurisdiction in its entirety, there will be an increase in the business of the state courts by at least 23,000 cases per year. This is a graphic but not a unique example of the fact that one cannot properly consider the problems of federal court jurisdiction in isolation from the effect that changes in that jurisdiction will have on the state judicial systems. Yet I venture to say there was no representation before the Judiciary Committees of Congress by anyone who suggested that the states too had a vital interest in the legislation.

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States for presentation to Congress. I can assure you that such an undertaking could have the assistance of major law schools of the country and I expect that the American and state bar associations could also be called upon for aid if that were thought necessary or desirable.

But let me return, if I may, to the point of my digression.

**Reconsideration Long Overdue**

My third point is that reconsideration of the distribution of judicial power between states and nation is both necessary and long overdue.

We have it on high authority that:

"It is proper to inquire into the appropriateness of the existing distribution of judicial power, just as the substance of law is revised from time to time in response to new needs. Whatever survives such an inquiry can only help to strengthen the judicial system... The happy relations of states to nations—our abiding political problem—is in no small measure dependent upon the wisdom with which the scope and limits of the federal courts are determined."

Indeed, it was thirty years ago when Professor Frankfurter, as he then was, noted that there had not been a comprehensive revision of the federal judicial code since 1875. What was true in 1928 remains true in 1958: The distribution of function between the two sets of judiciaries remains controlled by the concepts of eighty-odd years ago. And as Mr. Justice Frankfurter wrote:

"A division of judicial labor among different courts, particularly between a dual system of federal and state courts, is especially subject to the shifting needs of time and circumstance. That the wisdom of 1875 is the exact measure of wisdom for today is most unlikely."

In 1875, the national government was truly a government of limited functions. Interstate commerce was a narrow area, just beginning to burgeon; foreign relations were a comparatively minor aspect of governmental affairs; the income tax was not so pervasive a feature of our lives; federal criminal regulation was minimal; national welfare legislation was practically unknown. And distance between federal courts had not yet evaporated in the face of the auto and the plane. Whether we like it or not the shift in the exercise of substantive governmental power from the states to the nation has been a vast one. And the time has come to adapt the judicial systems to the realities of 1958.

I do not mean to suggest that there have been no changes in the judicial code since 1875, for there certainly have. But that code has developed like Topsy—it has just growed—with the result that there is in it today no rhyme and an inadequacy of reason.

Having pointed out that the problem of allocation of judicial power between the states and the nation is a legislative one, that the states have a vital interest in this legislative allocation, and that a reconsideration of the division has long been overdue, I should like to call your attention to several—four to be exact—of the many problems which would be presented by such a reconsideration.

**Diversity and Federal Question**

I have already made reference to the diversity of citizenship jurisdiction of the federal courts. It amounts to approximately 33 per cent of the business of those courts. And yet since 1938 when Mr. Justice Brandeis announced the opinion for the Court in *Erie R. R. v. Tompkins,* the federal courts in these cases have been vainly trying to simulate state courts presented with the same questions. As the Supreme Court said in *Guaranty Trust v. York,* in diversity cases the federal courts are to behave as though they were part of the state court.

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13. Id. at 503.
14. 326, 304 U. S. 64 (1938).
system. This raises the question whether there is any reason for making available to litigants this simulated version of a state court when the real thing is available to them “across the street”. My own opinion, as I have already stated, is that little, if any, reason exists today for the continuance of diversity jurisdiction. Certainly the question ought to be examined and, I repeat, examined not only by the Judicial Conference of the United States but also by some group with a real interest in the state judicial systems.

A second major question calling for study, it seems to me, is whether the federal question jurisdiction should remain in the state courts. There are no statistics available to show how much of the state court business is concerned with cases in which the plaintiffs are relying on federally created rights as a basis for their claims. But you know even better than I that those cases add up to a very substantial number. Are there adequate reasons for leaving these cases for resolution by the state courts?

Two reasons which have been advanced are weighty. As Professor Wechsler has told us:

"This method has the virtue of preserving for final resolution by state agencies any issues in the case that turn upon state law; the more numerous or weightier such state ingredients, the more important it may be to have them first determined by state courts. Initial state adjudication also tends, however, to give the states the final voice on many federal questions, for review by the Supreme Court, even when the parties can afford it, can never function on a quantitative basis."16

Another suggestion is, to me, no longer persuasive. Mr. Justice Frankfurter to the contrary notwithstanding, I do not believe that it is any longer possible that “the federal courts should be given only such powers as are appropriate to a national judiciary under a federal system, so limited as to be capable of disposition by a relatively small number of distinguished judges.”17 The state courts ought not to be the dumping ground for litigation on the pretext of maintaining an elite federal judiciary, since time has demonstrated that whatever “elite” quality the federal judiciary once attained has long since been dissipated. I do not mean to foreclose the question, however, but only to ask for its re-examination—by you.

Certification of Questions

No matter how these major issues are resolved there remains a third major problem involving the whole area of cooperation between the two systems, a problem which has never been adequately canvassed. However the federal question and diversity jurisdictions are allocated there will always be cases arising within one system which will call for the application of rules of law developed by the other. And often those rules will be difficult to ascertain. Some method of certification of questions from one system to the other, such as is authorized by a Florida statute,18 is certainly worth consideration before its feasibility is rejected out of hand. Certainly the existent methods of dealing with this problem have proved both difficult and inefficient.19

The fourth example which I should like to mention is the one which is the most exacerbating in the whole area of federal-state judicial relations: The power of a court in one system to enjoin parties from

16. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 218 (1948). Evidence of the truth of Professor Wechsler’s statement about the numerical insignificance of Supreme Court review of state cases may be garnered from the annual surveys of the business of the United States Supreme Court in the Harvard Law Review.
19. See, e.g., the litigation culminating in Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951), which was in the courts for almost a decade shuttling back and forth between the two judicial systems.
proceeding with litigation in the other. As you know, the Judicial Code now provides that:

“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly provided by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

The very real question presented by this language is whether the exceptions eat up the rule. In 1941, the Supreme Court, in Toucey v. New York Life Ins. Co.,21 construed very narrowly the powers of the federal courts to enjoin proceedings in the state courts. But the 1948 codification specifically rejected the Toucey rational22 and, in effect, reopened the whole question. I will venture that this action, too, was taken without any representations having been made to Congress on behalf of the state judicial systems. Here again, I submit, is an area which warrants careful consideration by your organization.

The problems suggested here are but some of the details which are regulated by the Judicial Code of the United States. As we have been told, problems such as these “do not yield to settlement by formula. Nor are they moral issues to be tested by abiding truths. . . . We are here in the domain of administrative effectiveness and procedural adaptations,—matters not of principle but of wise expediency.”23 And I submit that the wisdom and experience of the state judiciaries should be lent to their solution.

Federal Appellate Jurisdiction

I have spoken of some of the issues which must be the concern of those engaged in determining the proper allocation of judicial power between state and nation. I wish now to speak for a moment about one subject which should not be the object of such concern: I mean the scope of the appellate jurisdiction of the Supreme Court. I speak of this in part because of the recent furor raised in Congress over this subject.

I start with an assumption in which, I believe, you will readily indulge me. That is that the Supreme Court has erred, seriously and frequently, in its decisions of recent terms. But I would remind you that this is no novelty with reference to that Court or any court. To me there are proper and improper means for correcting the Supreme Court's errors, but a vindictive limitation of the Court's appellate jurisdiction would be a grosser error than any which the Court has committed. Insofar as it is within the competence of Congress to rewrite the law which the Court has “erroneously” interpreted, such revision is a proper way to correct judicial error. This was done, it will be recalled, after the Court held insurance to be a business subject to the antitrust laws;24 it was done again after the Court held that the off-shore oil lands were within federal rather than state control.25 Insofar as the “error” was an error of constitutional construction rather than one within the legislative domain, there are still other means of correction. Constitutional amendment is available and has been used to correct judicial error, as was the case with the Income Tax Amendment.26 Education of the people and the Court to the error of its ways is still another corrective and we have seen this work as on the question whether the federal government had power to prohibit the shipment of articles manufactured by child labor in interstate commerce.27 But to toy with the idea

27. See Hammer v. Dagenhart, 247 U. S. 251 (1918); United States v. Darby, 312 U. S. 100 (1941).
of cutting down the Court's appellate jurisdiction—especially in constitutional matters—is to toy with the destruction of that organ of our governmental system which has permitted the United States to survive as a federation.

It was Mr. Justice Holmes who long ago said that "the Union would be imperilled" if the Court was deprived of its power to declare "the laws of the several states" invalid.\(^{28}\) It was Harlan Fiske Stone, then Attorney General of the United States who said:

"The most enlightened thinkers of the day urge upon the world the submission of international controversies and the interpretation of treaties to a permanent judicial tribunal, as a substitute for the arbitration of arms. It would be a strange anomaly if at this day the settlement of differences between our two systems of government should be withdrawn from the Supreme Court and either left unsettled or settled according to arbitrary determination of the agencies of the respective governments."\(^{29}\)

But I really want to quote to you the words of one who is perhaps closer to your own thought on this subject. Senator Butler of Maryland, sponsoring an amendment to the Constitution of the United States, had this to say only four years ago:

"The final section which would remove from Congress the power to impair in constitutional cases, the appellate jurisdiction of the Supreme Court, finds its principal justification in the fact that Congress can now withdraw jurisdiction as was done in the cases of Ex parte McCordale, the 1869 habeas corpus case with which I am sure you are all familiar, and as was attempted in Ex parte Yerger, an 1868 case which prompted Congress to introduce a bill prohibiting the Supreme Court from considering any case which involved the validity of the Reconstruction Acts and another prohibiting judicial review of any acts of Congress. To the extent that appellate jurisdiction on constitutional questions is taken away from the Supreme Court, decisions of State and lower federal courts on such constitutional questions will have a finality and stature which they do not now and never were intended to possess under our judicial system..."

"To me that is a serious matter. It can happen again. We may not foresee the circumstances under which it may happen, but I do not believe we should place the American people under that hazard. We should guarantee to them, by their Constitution, protection of their basic right to be heard by the Supreme Court of the United States in all cases arising under the Constitution, and we should do what we can to preserve our system of checks and balances. Both of these ends would be served by this section of the joint resolution."\(^{29}\)

I should hope that you would indorse these sentiments of Senator Butler.

In conclusion, I want to say this in support of my plea that you undertake to study the federal judicial code and make suggestions to Congress for the proper distribution of judicial power. The centralization of governmental power in this country has come about primarily for three reasons. The first is the necessity for central power resulting from the increased interdependence of the people within this nation and within the world community. The second is the unwarranted usurpation of power by the federal authorities in many areas. The third is the unwillingness of the states to shoulder the responsibilities which are properly theirs.\(^{31}\) If the existent distribution of judicial power is unfortunate in many respects, it is due in part to the failure of the state judiciaries to make their voices heard on the subject of the allocation. The responsibility is yours and I hope that you will exercise it.

\(^{28}\) Holmes, Collected Legal Papers 296 (1920).
\(^{29}\) Stone, Law and Its Administration 138 (1924).
\(^{30}\) Hearings before Subcommittee No. 4 of the Committee of the Judiciary of the House of Representatives on the Composition and Jurisdiction of the Supreme Court, 83d Cong. 2d Sess. (June 23, 1954).