FEDERAL LAW IN STATE SUPREME COURTS

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The growth of federal law during the middle and late twentieth century and the consequent increase of litigation are well-known phenomena of American legal life. Whenever Congress extends federal law into new fields or creates new federal rights or liabilities it sets the stage for more litigation. Supreme Court decisions giving fresh interpretations to constitutional and statutory provisions likewise stimulate judicial business. Many commentators have discussed the profound effects of this increase in litigation on all levels of the federal judiciary—the district courts, the courts of appeals, and the Supreme Court. However, little attention has been paid to the impact on state courts of this growth in federal law. Understanding more precisely the involvement of state courts with federal law is not merely a matter of academic interest; this involvement has important ramifications affecting the jurisdictional and structural relationships of federal and state courts.

Only one serious effort has been made to measure the role of federal law in state court adjudication. That study was completed in 1981 by the National Center for State Courts. Its key findings are summarized in the first part below. To supplement that study I have procured more recent data from other states, summarized in the second part. In the third section I identify some of the significant consequences for the American judiciary of increased federal law involvement in the work of state courts.

FEDERAL LAW IN FOUR STATE SUPREME COURTS: 1959 AND 1979

The National Center study focused on the Supreme Courts of four states: California, Connecticut, Illinois, and Virginia. The objective was to determine the extent to which federal law was involved in the decisions of those four courts in 1959, and then twenty years later in 1979.[1] Research was confined to the opinions of the

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1. *Comparison of Federal Legal Influences on State Supreme Court Decisions in 1959*

states' highest courts because that is where the federal law elements could most readily be identified. The authors assumed that the extent of federal law involvement in state supreme court decisions provides at least a rough measure of federal law involvement in all state court litigation. In any event, the impact of state court adjudication on the work of the United States Supreme Court is determined almost entirely by state supreme court decisions involving federal law and not by litigation in the lower state courts.

Federal law can be involved in state supreme court opinions in two ways: (1) the state supreme court can squarely decide a question of federal law, or (2) the court, when deciding a state law question, can look to federal law analogies or to persuasive reasoning in federal court opinions. The National Center study attempted to identify each of these kinds of federal law involvement in the opinions it surveyed. Without going into the details of that study, it suffices here to say that in the four state supreme courts federal law was involved in one way or another in 14% of the cases in 1959 and 42% of the cases in 1979.[2] This represents a three-fold growth in the extent of federal law involvement in state adjudication during that twenty-year period. However, the amount of such growth varied from one state to another and between civil and criminal cases within the same state.

Table 1, compiled from data in the National Center study, presents the key figures for each state. The figures in this table are the percentages of the courts' opinions involving federal law in relation to the total number of the courts' opinions in each category shown.

Perhaps the two most striking facts revealed by this table are these: (1) in both civil and criminal cases the supreme court in each state experienced a significant twenty-year growth in the amount of federal law with which it had to deal and (2) the increase of federal law in criminal cases was far greater than it was in civil cases. Indeed, in Connecticut only a small percentage of criminal cases lack federal elements. These statistics substantiate the widespread view that in many respects the state criminal process has become federalized as a result of the United States Supreme Court's decisions under the fourteenth amendment. It should be underscored that these figures reflect all degrees of federal law involvement in these

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and 1979, Legislation For The Improvement of The Judiciary: Hearing Before the Subcomm. on Courts of the Comm. on the Judiciary, U.S. Senate, 97th Cong., 2nd Sess. 293 (1982) (this study was funded by the Federal Justice Research Program administered by the former Office for Improvements in the Administration of Justice of the U.S. Department of Justice) [hereinafter cited as NCSC Study].

2. NCSC Study, *supra*, at 296.

TABLE 1
FEDERAL LAW IN STATE SUPREME COURTS,
1959 AND 1979

	Civil		Criminal		All Cases	
	1959	1979	1959	1979	1959	1979
California	16.2%	46.7%	28.8%	72.8%	20.1%	58.6%
Connecticut	7.2%	31.9%	31.2%	93.5%	10.3%	45.4%
Illinois	17.4%	24.7%	14.6%	70.5%	16.5%	37.4%
Virginia	3.4%	14.5%	17.6%	54.7%	5.3%	27.1%

state supreme court decisions; the percentage of opinions in which federal questions were squarely decided—and hence potentially reviewable by the Supreme Court—was smaller, although still significant.

SEVEN STATE SUPREME COURTS: 1983

To obtain similar data from other states, and to provide more recent information, I employed law students to survey the 1983 opinions of the supreme courts of seven states: Arizona, Colorado, Georgia, Minnesota, Mississippi, New Jersey, and Ohio.[3] These states are diverse geographically, in size, and in the nature of their populations and judicial business. All except Mississippi have intermediate appellate courts.

The results of my study, shown in Table 2, reveal substantial variation in the impact of federal law in the various states. The least involvement is in Minnesota with 28% and the greatest is in New Jersey with 69%. The National Center study showed a range in 1979 from 27.1% in Virginia to 58.6% in California.[4] The overall percentage in the four states surveyed in 1979 was 41%, whereas the overall percentage in the seven states surveyed in 1983 was 49%.

3. Each opinion was analyzed to determine whether the court actually decided a question of federal law or whether the court simply cited or referred to federal law in some fashion but without squarely deciding any federal question. It is not always clear, of course, whether a federal question is actually being decided, and there is sometimes room for differences of interpretation and judgment. Because of that circumstance and because these judgments were being made by law students, it is possible that the figures are not completely accurate. However, errors are not likely to affect significantly the overall statistical pattern.

4. The figures in this column were obtained through a combination of published reports and information provided to the author by the state court administrators.

TABLE 2
STATE SUPREME COURT OPINIONS INVOLVING FEDERAL LAW, 1983

State	Total Opinions[5]	Opinions Deciding Federal Questions	Opinions Citing Federal Law	Total Opinions Involving Federal Law	Opinions Not Involving Federal Law
Arizona	137	52 (38%)	34 (25%)	86 (63%)	51 (37%)
Colorado	221	68 (31%)	53 (24%)	121 (55%)	100 (45%)
Georgia	331	122 (37%)	21 (7%)	143 (44%)	188 (56%)
Minnesota	332	57 (17%)	38 (11%)	95 (28%)	237 (72%)
Mississippi	219	46 (22%)	66 (31%)	112 (52%)	107 (48%)
New Jersey	75	30 (40%)	22 (29%)	52 (69%)	23 (31%)
Ohio	252	28 (11%)	55 (22%)	83 (33%)	169 (67%)

Table 2 also shows that in 1983 in some states federal law was involved mainly by way of citation rather than by way of square decision. In Ohio, for example, federal questions were decided in only half as many cases as those in which federal law was merely cited. Mississippi also exhibited this pattern. In other states the cases in which federal law was decided outnumbered those in which it was merely cited. The most extreme illustration of this pattern was Georgia: 37% of its opinions decided federal questions, whereas federal law was merely cited in only 7%. That pattern suggests that some state courts look to federal law when required to do so in order to decide a federal question, but otherwise pay relatively little attention to it.

Perhaps the most striking fact overall shown by Table 2 is that four of these seven state supreme courts decided federal questions in nearly a third or more of all cases. The Ohio Supreme Court, in which only 11% of the opinions decided federal questions, appears to be unusual.

Table 3 takes the opinions in which federal questions were actually decided (the second column in Table 2) and classifies them into three categories: civil, criminal, and postconviction.

Realistically, the figures for criminal cases should be combined with those for post-conviction cases because the latter (although civil in theory) involve a review of criminal proceedings. Viewed that way, the data shown here confirm the widespread assumption that federal questions in state courts appear mainly in criminal

5. NCSC Study, *supra* note 1, at 296.

TABLE 3
STATE SUPREME COURT OPINIONS DECIDING FEDERAL QUESTIONS, 1983

State	Total	Civil	Criminal	Postconviction
Arizona	52	8 (15%)	44 (85%)	0 (0%)
Colorado	68	15 (22%)	45 (66%)	8 (12%)
Georgia	122	17 (14%)	90 (74%)	15 (12%)
Minnesota	57	24 (42%)	31 (54%)	2 (4%)
Mississippi	46	20 (43%)	21 (46%)	5 (11%)
New Jersey	30	15 (50%)	14 (47%)	1 (3%)
Ohio	28	14 (50%)	12 (43%)	2 (7%)

cases. New Jersey and Ohio are the only exceptions; in those two states federal law appears equally in civil and criminal litigation.

In compiling the data on federal questions actually decided, we identified the nature of each such question. Table 4, set out in an appendix, lists the federal questions by the constitutional provision or doctrine involved and by reference to the federal statute involved. Not surprisingly, constitutional questions far outnumbered statutory questions. As Table 4 shows, during 1983 these seven state supreme courts collectively decided a total of 535 federal constitutional law questions, but they decided only thirty-two issues under federal statutes. These federal statutory questions arose under twenty-seven different acts of Congress. It seems clear that no single federal legislative enactment depends heavily on state courts for its enforcement. However, state courts do form an important part of the judicial machinery for interpreting and applying the Federal Constitution.

RAMIFICATIONS

The National Center study showed a three-fold increase of federal law in state supreme court decisions between 1959 and 1979. The 1983 data set out above show that there has been no diminution since 1979 and that indeed the involvement of federal law in state supreme court opinions may be continuing to grow. In the seven states surveyed in 1983, federal law was involved in 49% of the cases and federal questions were actually decided in 28% of all of the opinions. What are the ramifications of this situation?

U.S. Supreme Court Docket

Consider first the docket of the United States Supreme Court.

Concern about the Court's workload in recent years has focused on the increasing difficulties encountered by the Justices in monitoring the work of the thirteen United States courts of appeals. What is often slighted in these discussions is the fact that the Supreme Court must also act as a court of last resort on federal questions for the fifty state court systems, the District of Columbia, and Puerto Rico. Statistics are not currently available to show the total number of decisions rendered annually by these fifty-two jurisdictions, but it is clear that the number runs high into the thousands. If the data derived from the seven states surveyed in 1983 present a reasonably accurate picture for the nation as a whole, more than a quarter of those opinions would involve decisions on questions of federal law, thereby opening the way for Supreme Court review. This means that a very substantial pool of potential Supreme Court business is being generated by the fifty-two non-federal court systems.

According to statistics supplied by the Office of the Clerk of the Supreme Court, during the 1981 Term 1,255 cases were brought to that Court from the fifty state systems, the District of Columbia, and Puerto Rico. During the 1983 Term there were 1,095 such cases.[6] These cases represent over a quarter of all filings in the Supreme Court for those terms. If federal law involvement continues to rise in state court business, these filings will increase. In any event, the substantial amount of state court adjudication of federal law must be taken into account in considering the Supreme Court's workload problem and related proposals for reforms.

Writing State Supreme Court Opinions

The Court's workload is affected by the manner in which state court opinions are written. This is because the way in which the state opinion employs federal law determines whether the state decision is reviewable by the United States Supreme Court. The classic rule is that a state court decision will be reviewable only if the state court actually decides a question of federal law and if that federal question is controlling in the case. Mere discussion and citation of federal law will not make the decision reviewable. This gives the state court judges a measure of control over the reviewability of their decisions. In some cases it is possible for the state judges to draft an opinion disposing of the case without resting the decision on federal law, even though the parties' arguments stressed federal issues.

6. These figures for the 1981 and 1983 Terms were supplied informally to the author by the Clerk of the Supreme Court.

The Supreme Court's decision in *Michigan v. Long*[7] has heightened the importance of careful attention to the drafting of opinions by state supreme court judges. Under that decision a state court case is reviewable by the Supreme Court if the state opinion discusses federal questions without making it crystal clear that the decision is being rested solely on a state law ground. With federal law now involved in so much state court litigation, the judges of the state supreme courts have more opportunity than ever before to craft their opinions in a way that will control their reviewability in the Supreme Court. In some cases the state judges may want their decisions to be reviewable; in others, they may not. Whatever their view on this matter, they are today being much more frequently confronted with the problem than in decades gone by, when federal law played a smaller part in state court work.

New Structures for Federal Appellate Review of State Decisions

Since the early 1970's efforts have been underway to devise means of overcoming the two difficulties besetting the federal judicial structure at the top: (1) the overload on the Supreme Court, which renders it difficult for the Justices to give adequate attention to the important questions with which they should deal, and (2) the inability of the federal appellate structure as a whole to deliver the number of decisions with nationwide binding effect necessary to maintain uniformity in the administration of federal law. If the volume of litigation continues to grow, as is likely, and the percentage of federal law questions in state court litigation remains high or increases, the business generated by these fifty-two jurisdictions will make it increasingly difficult for the Supreme Court alone to monitor the administration of federal law in those courts. Thus, in thinking about solutions for these problems, it would be well to bear specifically in mind the state court component of the Supreme Court's work and to think about restructuring the federal appellate system to provide a means for maintaining evenhandedness among these non-federal tribunals.

Among the various new devices that have been discussed in recent years, the idea of employing the U.S. courts of appeal to review state decisions on federal questions deserves renewed consideration in light of this study. This idea is as old as the republic. Hamilton noted the possibility in the 82nd *Federalist*:

> I perceive at present no impediment to the establishment of an appeal from the state

7. 463 U.S. 1032 (1983).

> courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union.

There are various ways in which state cases could be routed to the regional federal appellate courts. One is simply to vest jurisdiction in those courts to review all state decisions in which a controlling question of federal law has been decided. In other words, this would transfer the present Supreme Court jurisdiction over state decisions to the regional federal appellate courts. Supreme Court review would remain available through certiorari after the regional appellate court decision. This arrangement would, of course, increase the caseload for each of the twelve geographical federal circuits. However, the increase for each would not be unmanageable, although a few additional circuit judgeships might be necessary to deal with this added business. The main effect of this change would be to provide a more meaningful federal appellate review of state court decisions on federal law, thereby increasing the federal judiciary's capacity to maintain nationwide uniformity in the administration of federal law. Of course, discrepancies might arise, as they do now, among the twelve courts of appeals, but the Supreme Court, relieved of responsibility for reviewing fifty state courts (plus the District of Columbia and Puerto Rico), would be in a better position to monitor the federal appellate courts.

Another possibility would be to vest the regional appellate courts with jurisdiction to review state supreme court decisions in criminal cases only.[8] As the data from the two studies here show, federal law plays a much larger role, generally speaking, in criminal cases than it does in civil. In criminal cases the overall percentage involving federal law from the four states in 1979 was 72%; in the seven states in 1983 it was 59%. One might argue that uniformity is more important in the administration of criminal justice, particularly in the areas covered by constitutional rules, than in the miscellaneous assortment of civil litigation that involves federal law. In any event the criminal volume is greater, and there is thus a practical need for a greater federal appellate capacity. Again, the federal circuit decisions on these federal law questions would be reviewable on certiorari by the Supreme Court. This arrangement would leave

8. This idea is explained in Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273 (1983).

civil cases reviewable directly from the state supreme courts in the U.S. Supreme Court.

Whatever arrangements one may prefer, the point is that serious thought needs to be given to providing a greater federal appellate capacity to monitor the large and growing percentage of federal questions being dealt with by the fifty-two non-federal judicial systems of the nation.

Federal Funding for State Courts

Until well after the middle of the twentieth century the idea that the federal government should assist in funding the courts of the states would have been viewed as heretical, if not unconstitutional. However, beginning in the 1960's federal funds began to be channeled to the state courts as part of the "war on crime" that gripped the country at that time. Since then it has become generally accepted that it is appropriate for federal funding to be employed to improve the state judicial systems. With the creation by Congress of the State Justice Institute in 1984, such funding has now been institutionalized on a permanent basis.[9] The purpose of the Institute will be to provide several million dollars annually to improve the courts of the several states. One of the major reasons justifying such federal financial support is that the state courts, in addition to handling most of the nation's adjudication, perform a large role in the enforcement of federal law. Inasmuch as such a significant portion of state judicial manpower is devoted to federal purposes, it is not inappropriate that federal funding assist those judicial systems in developing more effective procedures and in bringing into service the most advanced technology.

Reallocation of Jurisdiction Over Federal Cases

One of the features of American federalism that makes our law confusing and litigation complicated and expensive is the coexistence of two judicial systems—one state and one federal. We have state trial courts and federal trial courts sitting side by side with concurrent jurisdiction over many cases. Much of the federal law involvement in state courts occurs in cases over which federal trial courts also have jurisdiction. Our legal system would be simplified if, in many of these situations, exclusive jurisdiction were vested in either a state trial court or a federal district court.

Whenever exclusive jurisdiction over federal cases is discussed,

9. State Justice Institute Act of 1984, Pub. L. No. 98-620, 98 Stat. 3336 (1984). The Institute did not begin functioning until its Board of Directors was appointed in 1986.

attention focuses mainly on the possibility of vesting such jurisdiction in the federal district courts. However, since state courts are already adjudicating a significant proportion of federal issues, perhaps they should be given even more federal law cases and jurisdiction should be exclusive. Truth-in-lending and FELA cases are two examples of fields where this might be done. A move in that direction would require an important policy decision by Congress. Such a choice may become increasingly attractive as the volume of litigation in the federal district courts continues to rise and as there is continuing pressure for even more federal judgeships. Transferring some of that jurisdiction to the state courts, where the judges are already heavily engaged in adjudicating federal law, may be an attractive option for Congress to consider, especially when it creates new federal statutory rights. The option may become even more attractive when one recalls that Congress is already channeling federal money to the state courts and will continue to do so indefinitely through the State Justice Institute. Vesting certain federal question cases exclusively in the state courts would, of course, justify even more federal funding for the state courts, but this would probably be cheaper than additional federal judgeships and personnel for the federal courts.

Support for exclusive state jurisdiction over some federal cases might come from those who perceive distinct disadvantages in an ever-expanding federal judiciary. There is a deeply held notion that the federal courts should remain relatively small and should be reserved for matters of special federal concern. Many of the federal law questions being adjudicated by state courts are not of that sort, and giving those courts exclusive jurisdiction would impair no major national interest. The more federal law business that the state courts take on, however, the greater will be the need for a revised federal appellate structure to prevent nonuniformity. If the federal appellate capacity is enlarged—for example, by authorizing the courts of appeals to review state judgments—"The state tribunals may then be left with a more entire charge of federal causes," as Hamilton put it in the 82nd *Federalist*. Thus, these concerns are all related: the volume of federal law in state court litigation, the exclusivity of such state court jurisdiction, the federal appellate structure, and the federal funding of state courts.

The two surveys described here are merely illustrative of the kinds of inventories that should be run annually on a more precise basis in all of the states. It is clear that federal law now plays an important, regular part in state court adjudication. We need to

measure that phenomenon more precisely in order to decide how best to arrange the totality of state-federal judicial business in the United States.

APPENDIX
TABLE 4
STATE SUPREME COURT OPINIONS - NATURE OF FEDERAL QUESTIONS DECIDED, 1983

Federal Question	AZ	CO	GA	MN	MS	NJ	OH
CONSTITUTIONAL (Total)	91	83	191	66	42	36	26
Burden of Proof/Sufficiency of Evidence	3	2	67	1	3	-	-
Civil Commitment	-	-	-	-	1	2	-
Commerce Clause	-	1	-	-	-	1	1
Confessions/*Miranda*	11	-	2	2	1	-	1
Confrontation Clause	6	2	2	-	-	1	3
Contract Clause	-	-	1	2	1	1	-
Death Sentences	16	-	7	-	3	-	-
Double Jeopardy	4	6	3	2	2	2	3
Effective Assistance of Counsel	5	-	8	1	2	-	-
Eighth Amendment/Sentencing	2	2	2	-	3	-	-
Eminent Domain	1	-	1	2	1	4	2
Ex Post Facto	2	-	1	1	1	-	-
Fair Trial	1	2	2	2	-	-	-
First Amendment	-	4	1	3	5	3	2
Full Faith & Credit	-	-	2	1	-	1	-
Grand Jury Proceedings	2	-	2	-	-	-	-
Guilty Pleas	-	3	2	-	1	-	-
Identification	2	2	4	7	-	1	-
Jury Impartiality	1	-	2	-	-	1	-
Misc. Due Process/Equal Protection	7	21	45	16	10	7	8
Overbreadth/Vagueness	1	11	4	1	-	1	2
Parole Revocation	-	-	-	-	-	-	2
Privileges & Immunities	-	-	-	1	-	1	-
Right to Counsel	5	3	11	3	-	2	1
Right to Jury	5	-	-	-	-	-	-
Search & Seizure	10	18	10	17	7	7	1
Self-Incrimination	7	5	8	3	-	1	-
Speedy Trial	-	-	3	1	-	-	-
Supremacy Clause	-	1	1	-	1	-	-
STATUTORY (Total)	4	2	5	5	10	2	4
Bank Holding Company Act	-	-	-	-	-	1	-
Bankruptcy Act	-	-	-	-	-	-	1
Civil Rights Act (42 U.S.C. § 1983)	-	-	1	1	-	-	-
Civil Rights Attys. Fees Award Act	-	1	-	-	-	-	-
Environmental Regs.	-	-	-	-	-	-	1
Equal Pay Act	1	-	-	-	-	-	-
Farm Credit Act	-	-	-	1	-	-	-
Federal Arbitration Act	-	-	2	-	-	-	-
Federal Credit Union Act	-	-	-	-	-	-	1
FELA	-	-	-	-	1	-	-
Federal Parole Commission & Reorganization Act	-	-	-	-	1	-	-
Fishery Conservation & Management Act	-	-	-	-	1	-	-
FRCP 26(b)	-	-	-	-	1	-	-
Garn. St. Germain Depository Inst. Act of							

TABLE 4 (CONTINUED)

Federal Question	AZ	CO	GA	MN	MS	NJ	OH
1982	1	-	-	1	-	-	-
Interstate Commerce Act	1	-	-	-	-	-	-
Jones Act	-	-	-	-	1	-	-
Judiciary & Judicial Procedure - Interest (28 U.S.C. § 1961)	-	-	-	-	1	-	-
Labor-Management Reporting Act	-	-	-	-	-	-	1
Omnibus Crime Control & Safe Streets Act	-	-	1	1	-	-	-
Rules of Decision Act	-	-	-	-	1	-	-
Sherman Act	1	-	-	-	-	1	-
Shipping & Vessels Regulation (46 U.S.C. § 262, 319, 911)	-	-	-	-	1	-	-
State Juris. over Indians	-	-	-	1	-	-	-
Truth-in-Lending Act	-	-	-	-	1	-	-
Urban Mass Transportation Act	-	-	1	-	-	-	-
Voting Rights Act	-	-	-	-	1	-	-
Water Rights Suits Act	-	1	-	-	-	-	-