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Interjurisdictional Enforcement of Rights in a Post-Erie World

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INTERJURISDICTIONAL ENFORCEMENT OF RIGHTS IN A POST-*ERIE* WORLD

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The United States may have emerged as the first modern federation,[1] but federalism has since been widely copied elsewhere.[2] Federalism is no longer a political structure that is unique to the United States. An aspect of federalism in the United States that remains distinctive, however, is the existence of a fully developed dual court system. A national judiciary composed of trial and appellate courts co-exists with state judiciaries, which also have trial and appellate benches. Judges in the national courts are chosen by national bodies in accordance with national rules, and judges in state courts are chosen in each state in accordance with the state's rules. The existence of such parallel judicial structures is unusual among federalist nations. Most federalist systems rely on a single set of lower courts, commonly identified with the subnational units, to apply both national and subnational law.[3]

In view of the existence of parallel state and federal judicial tracks, the allocation of issues between state and federal courts becomes an important concern. The different structural features of state and federal courts in the United States magnifies the importance of the choice. Among other characteristics, the electoral

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1. RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 2 (2d ed. 1999) ("While the United States, which adopted a federal constitution in 1787, is often regarded as the first modern federation, the history of federalism is much older."); *cf.* United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (describing federalism as "the unique contribution of the Framers to political science and political theory").

2. *See* WATTS, *supra* note 1, at 3.

3. *See* Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 955 (2000).

accountability of most state, but not federal, judges may lead the state and federal courts to develop different perspectives on issues, particularly those relating to hotly contested matters of public policy.[4]

The existence of a dual court system creates the possibility of allocating cases based on the law at issue. Federal questions could be sent to federal court and state questions to state court, though of course cases raising both kinds of issues would pose allocational difficulties. Instead, in the United States, the jurisdictions of the state and federal courts overlap extensively. Issues of state law commonly arise in and are adjudicated by federal courts; issues of federal law commonly arise in and are adjudicated by state courts. Such intersystemic adjudication, by which I mean the interpretation by a court operating within one political system of laws of another political system, is pervasive.

This Article seeks to situate intersystemic adjudication within the larger framework of federalism in the United States. Federalism today is characterized by a sharing of state and federal power, rather than by a rigid division between state and federal authority. Dual federalism, the idea that the states and the national government each enjoy independent and largely autonomous spheres of authority, has given way to other visions of federalism that contemplate a greater sharing of power.[5] Elsewhere, I have developed the concept of "polyphonic federalism" to describe the appropriate understanding of federalism in the contemporary United States.[6] Polyphonic federalism understands the state and federal governments to be sources of power that are distinctive, but not mutually exclusive. State and federal governments serve as

4. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1453-54 (1999) (discussing studies assessing influence of electoral politics on state courts); *see also* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1491-94 (2005).

5. For a classic discussion of the decline of dual federalism, see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). Professor Redish has also described the sharing of state and federal authority. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 26-29 (1995); Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

6. *See* Schapiro, *supra* note 4.

alternative mechanisms for accomplishing ends that legitimately lie within the prerogative of either system.

Although conceptions of federalism have changed over time, the basic goals of federalism have remained stable. One of the key purposes of federalism is to offer enhanced protection for individual rights.[7] This Article contends that intersystemic adjudication provides a way for state and federal courts to work together to safeguard important liberties.

Many scholars of federal jurisdiction treat intersystemic adjudication as a necessary evil. The verbal formulas vary somewhat, but these scholars express a preference for the courts of a particular legal system interpreting the law of that jurisdiction.[8] Contrary to that general critical backdrop, this Article offers a limited defense of intersystemic adjudication. Specifically, I make two primary arguments in support of intersystemic adjudication. First, I contend that intersystemic adjudication sometimes proves beneficial to the enforcement of rights. Second, I defend intersystemic adjudication as a legitimate exercise of judicial power in our constitutional system. In particular, I confront the claim that intersystemic adjudication violates key principles established by the Supreme Court's seminal decision in *Erie Railroad v. Tompkins*.[9] Both sets of arguments rely on a distinction between law and its judicial interpretation. Critics of intersystemic adjudication often appear to adopt the view that the law is only what the court says it is. Building on criticisms of that conception developed in the context of federal constitutional interpretation, this Article resists the

7. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 35-36 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402-05; Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380-89.

8. *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236 (2004) ("One is likely to find little disagreement with the proposition that ceteris paribus it is better for a sovereign's own courts to resolve novel or unsettled questions regarding that sovereign's laws."); *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607 (1981) (citing to Charles Alan Wright's statement that "federal courts should adjudicate issues of federal law; state courts should adjudicate issues of state law"); Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) ("I start with the principle that the federal courts are the primary experts on National Law just as the State courts are the final expositors of the laws of their respective jurisdictions.").

9. 304 U.S. 64 (1938).

conflation of law and its judicial interpretation. By insisting on this distinction, I defend the benefits and the legitimacy of courts interpreting the law of a different political system in appropriate circumstances.

To provide an understanding of the framework in which intersystemic adjudication operates, Part I sketches the key characteristics of federalism in the United States. This Part focuses on the move from dual federalism to a more interactive conception of federalism, as well as on the increasing agreement on fundamental values throughout the United States. Part II examines the dual judicial system of the United States and the resulting prominent role for intersystemic adjudication. Part III outlines the important distinction between law and its judicial interpretation. Drawing on these accounts of federalism and interpretation, Part IV explores the benefits of intersystemic adjudication and assesses the potential disadvantages. Part V turns to a defense of the legitimacy of intersystemic adjudication. This Part acknowledges tension between intersystemic adjudication and the spirit, if not the holding, of *Erie*. I argue, however, that *Erie* is best understood as unleashing state and federal governmental power so as to protect individuals. *Erie* heralds the development of cooperative judicial federalism; it does not represent the last gasps of dual federalism. This interpretation of *Erie* fully accords with the exercise of intersystemic adjudication. The Article concludes with some more general thoughts about the role of intersystemic adjudication as a second-best tool for enforcing rights in a system characterized by imperfection.

I. FEDERALISM AS POLYPHONY

To understand the role of intersystemic adjudication in protecting rights, it is necessary to situate the practice within the scheme of federalism in the United States. The interaction of state and federal governments constitutes a core element of contemporary federalism. Intersystemic adjudication is an application of that interactive model to the characteristic issues of judicial federalism in the United States.

A. From Dual Federalism to Cooperative Federalism to Interactive Federalism

Federalism in the United States is entering a third phase.[10] Dual federalism provided the dominant conception of federal-state interaction into the twentieth century. In this model, sometimes termed dual sovereignty, the states and the national government exercised authority over distinct and mutually exclusive realms.[11] Federal power began where state authority ended, and the U.S. Supreme Court enforced a firm border between the two.

The First and Second World Wars, along with the Great Depression, transformed federalism. Driven by the perceived need for concerted action to address a variety of national problems, the federal government expanded its authority over social and economic matters.[12] After initial resistance,[13] the U.S. Supreme Court eventually blessed the enlarged view of federal power.[14] Scholars dubbed the succeeding era a time of "cooperative federalism" in which the states and the federal government worked together to solve problems. State and federal authority no longer strictly corresponded to particular areas of regulatory activity. The states and the national government served as partners without rigid lines of demarcation. In the paradigmatic instance of cooperative federalism, the federal government would design regulatory goals,

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10. *See* John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 150 (1990) (discussing progression from dual to cooperative federalism and the need for a new vision of federalism).

11. *See* Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1526-27 (2002).

12. For discussions of the historical evolution of federalism, see *id.* at 1637; Corwin, *supra* note 5; Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 679-81 (1980).

13. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding the Bituminous Coal Conservation Act of 1935 unconstitutional); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional).

14. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress had the power to regulate wheat grown for home consumption under the Agricultural Adjustment Act of 1938); United States v. Darby, 312 U.S. 100 (1941) (holding that the Fair Labor Standards Act of 1938 was a permissible exercise of power under the Commerce Clause); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the National Labor Relations Act was a proper exercise of Congress's power to regulate interstate commerce).

and the states would implement regulations in accordance with the overall federal plan.[15]

Some have declared the end of the era of cooperative federalism.[16] Others have merely called for its demise.[17] Commentators have expressed concern that cooperative federalism lacks the competitive dynamic that can stand as an important feature of federalism.[18] Along these lines, scholars have emphasized the importance of meaningful decentralized decision making, rather than simple implementation of centrally decreed plans.[19]

The complete nature of the successor to cooperative federalism is not entirely clear, but the general characteristics can be discerned. No one forecasts a return to dual federalism. The new phase of federalism, though, will place more emphasis than cooperative federalism on competition and even confrontation among the states and between the states and the national government. The common principle of the somewhat divergent understandings of contemporary federalism is that the goals of federalism are best achieved not through the quixotic attempt to separate state and federal spheres, but through embracing the interaction of state and federal governments. Intersystemic adjudication can play a vital role in implementing this conception of interactive federalism.

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15. For discussions of the general characteristics of cooperative federalism, see Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 190 (1998); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1697-1703 (2001) (discussing the critical features of cooperative federalism); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS: J. FEDERALISM 15, 18 (2001) (setting out postulates for general definitions of cooperative federalism).

16. *See* Kincaid, *supra* note 10, at 150; John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 920 (1995) (defining the era of cooperative federalism as roughly 1933-1968).

17. *See* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000) (arguing that cooperative federalism is a "rotten idea" and emphasizing the need to curtail cooperative programs).

18. *See id.* at 559-62.

19. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314-26 (1998).

B. Federalism of Shared Values

Another important component of contemporary federalism stems from the relative homogeneity of values in the United States today. Dual federalism accepted the possibility that states might reach radically different conclusions about fundamental social issues. Dual federalism addressed this potential by erecting barriers between state and federal domains, and then protecting each state from interference with its policy choices. Polyphonic federalism corresponds to a more cohesive understanding about fundamental values, an assumption of basic consensus on the outlines of human rights. Variations among regions, as well as within states, undoubtedly exist. People in the United States, nevertheless, agree on a shared core of values.

Greater communication and travel has reduced cultural distinctiveness.[20] Like The GAP and Starbucks, an appreciation of basic human rights seems ubiquitous. The second half of the twentieth century witnessed the effort to declare universal human rights throughout the world.[21] If the world can profess acceptance of certain core principles, it seems likely that the people in the United States share a similar consensus. Further, the U.S. Supreme Court has established a uniform floor of rights that each state must protect within its borders. Each state has its own constitution with its own understanding of fundamental rights. The specific contours of the rights may differ among states, and state and federal constitutions may enshrine somewhat different formulations. Nevertheless, the rulings of the U.S. Supreme Court on issues of fundamental rights have been extremely influential in the development of state constitutional standards, and state constitu-

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20. *See, e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 68 (1996) (citing transportation and communication as factors making the United States a single country); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1557-58 (1994) (discussing factors leading to strong national identity).

21. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Part I, at 71, U.N. Doc. A/810 (1948); *see also* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995/1996) (discussing the broad influence of the Universal Declaration in domestic law).

tional decisions have figured in the rulings of the U.S. Supreme Court.[22]

This state-federal dialogue reflects a general convergence of views on fundamental principles of individual rights. Given that broad consensus, federalism is best understood as ensuring the existence of dual modes of realizing largely shared goals. The means may be state or federal; the ends are not.

II. INTERSYSTEMIC ADJUDICATION IN THE UNITED STATES

The dual judicial system of the United States makes intersystemic adjudication a significant feature of legal interpretation. A comparative perspective provides a valuable starting point. Federalism has become a common form of political organization in the world.[23] The United States, however, is quite unusual in maintaining a fully developed dual court system.[24] Much more common is a single set of lower courts, generally identified with the subnational units, which hear cases raising issues of national or subnational law. Australia, Canada, and Germany, for example, generally follow this alternative model.[25]

A. Dual and Unitary Systems of Judicial Federalism

The U.S. Constitution did not mandate a dual court system,[26] but Congress quickly implemented the authority to create lower federal

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22. *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1037-43 (2003) (discussing the influence of state court decisions on the rulings of the U.S. Supreme Court).

23. *See* FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL AND AUTONOMY ARRANGEMENTS xi-xv (Daniel J. Elazar et al. eds., 2d ed. 1994) (asserting that more than fifty countries rely on federal principles to some extent and that more than eighty percent of the world's population lives in countries utilizing some kind of federal arrangement); WATTS, *supra* note 1, at 4 (noting that there are currently "24 federations containing about two billion people or 40 percent of the world population").

24. *See* Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 765 (1995); Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329, 336 n.14 (1996); Watts, *supra* note 3, at 955-56.

25. *See* Meador, *supra* note 24, at 765 (discussing Germany); WATTS, *supra* note 1, at 3 (describing Australia and Canada).

26. *See* U.S. CONST. art. III, § 1.

courts.[27] Members of Congress apparently felt it prudent to establish trial courts to further the purposes of the grants of federal jurisdiction in Article III, including uniformity in admiralty law, the enforcement of federal law and the collection of federal revenue, and the provision of more impartial tribunals for disputes between different states and their citizens.[28] Ensuring the enforcement of national law represents an important concern in federal systems, generally. Rather than setting up a dual court system, other countries have addressed this problem by alternate methods, such as establishing some specialized federal courts, exercising control over the selection of provincial judges, or providing a right of appeal to a federal court.[29]

In light of the widespread current concern with ensuring the implementation of national law, it is instructive to recall that in 1789, Congress granted the lower federal courts jurisdiction over the enforcement of revenue laws and federal criminal laws, but not generally over all cases arising under federal law.[30] An embrace of intersystemic adjudication thus dates from the birth of federal courts. Citizens from different states could bring their state-law

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27. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.2 (4th ed. 2003); WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 15 (Wythe Holt & L.H. LaRue eds., 1990) ("Congress did choose to establish inferior courts, and by this choice it set the course for the national judicial system that has prevailed to this day; but the Congress could have chosen otherwise.").

28. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS §§ 1, 23 (6th ed. 2002); Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 687 (1995). For discussions of the origin of diversity jurisdiction, in particular, see RITZ, *supra* note 27, at 66; Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 132 (1993); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-97 (1928); Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1453-66; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 NOTRE DAME L. REV. 447, 506-08 (1994).

29. *See* K.C. WHEARE, FEDERAL GOVERNMENT 66-68 (4th ed. 1964); Richard C. Risk, *The Puzzle of Jurisdiction*, 46 S.C. L. REV. 703, 711-15 (1995); *see also* Herbert A. Johnson, Note, *A Brief History of Canadian Federal Court Jurisdiction*, 46 S.C. L. REV. 761, 761 (1995).

30. *See* Bourguignon, *supra* note 28, at 694 (characterizing the failure to grant jurisdiction over all cases arising under federal law as a "glaring omission").

disputes into federal court, and disputes involving issues of federal law would commonly begin in lower state courts.

The distinction between the dual judicial system of the United States and the more unitary judicial systems of other federalist nations becomes even more stark when viewed from the top of the judicial pyramid. The U.S. Supreme Court stands as the ultimate interpreter of federal law, reviewing issues of federal law that arise in lower federal courts or in state courts.[31] In exercising its appellate authority over state courts, however, the U.S. Supreme Court does not generally review questions of state law.[32] The highest court of each state renders the authoritative interpretation of that state's law.

Although the U.S. Supreme Court's treatment of state-law issues arising in state courts has been fairly consistent, the treatment of state-law issues arising in federal court has been a focus of substantial controversy. A fair summary would be that federal courts long have understood state courts to be the authoritative interpreters of state law. The main historical debate has focused on what qualified as state law. State constitutions, state statutes, and state laws governing local matters, such as property disputes, generally fell safely within the category of state law.[33] The highest state court served as the definitive interpreter of these matters, and federal courts were bound to follow these precedents. *Swift v. Tyson*[34] held that other matters of nonfederal law, especially in commercial areas, would be treated as a kind of general common

31. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342-43 (1816).

32. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

33. *See* Green v. Lessee of Neal, 31 U.S. (6 Pet.) 289 (1832). The U.S. Supreme Court sometimes did assert independent interpretive authority even in these areas. *See* Township of Pine Grove v. Talcott, 86 U.S. 666, 677 (1873) (refusing to follow the Michigan Supreme Court's ruling that a statute authorizing the issuance of bonds was unconstitutional); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863) (refusing to follow highest state court's most recent construction of its constitution); RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 73-75 (1977) (noting examples of federal courts engaging in independent interpretation in statutory cases); Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1281-82 (2000) (noting same); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 118-22 (1998) (noting same).

34. 41 U.S. (16 Pet.) 1 (1842).

law rather than as a species of local law. State courts did not serve as the definitive interpreters of this general, nonfederal law, and federal courts could reach an independent construction of these matters.[35]

In *Erie Railroad Co. v. Tompkins*,[36] the U.S. Supreme Court ended this trifurcated regime of federal law, general law, and state law. All nonfederal law became state law, subject to authoritative construction by the highest state court.[37] In matters of state law, then, the U.S. Supreme Court is not supreme. Interpretive supremacy rests with the highest court of each state.[38]

In Australia and Canada, by contrast, a federal high court serves as the ultimate interpreter of both national and subnational law.[39] Commentators credit the existence of a single final interpreter with creating a greater sense of the unity of the law.[40] Statutory law differs among the states and territories, but the federal high court serves as a unifying force. The absence of parallel court systems

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35. *See* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 15-16 (1981).

36. 304 U.S. 64 (1938).

37. *Id.* at 65-66.

38. The highest court in each state is the highest judicial authority on interpretation. In the federal context, a lively scholarly debate focuses on the extent to which the courts, as opposed to other branches of government, should be understood to be the authoritative interpreters of the Constitution. *See, e.g.*, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Interpretation*]; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000).

39. *See* AUSTL. CONST. ch. III, § 73 ("The High Court shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences ... of any other federal court ... or of any other court of any State...."); W.M.C. Gummow, *Full Faith and Credit in Three Federations*, 46 S.C. L. REV. 979, 989 (1995) (discussing Australian law); Herbert A. Johnson, *Introduction*, 46 S.C. L. REV. 641, 645 (1995) (providing commentary on the unitary nature of both Australian and Canadian law); Brian R. Opeskin, *Federal Jurisdiction in Australian Courts: Policies and Prospects*, 46 S.C. L. REV. 765, 771 & n.28 (1995) (reviewing Australian law and noting similarities to Canadian law); Risk, *supra* note 29, at 714 (discussing Canada's jurisdictional unity).

40. *See* Johnson, *supra* note 39, at 645 ("The presence of one High Court or Supreme Court empowered to review the decisions of federal and state courts would suggest that Australia and Canada are inclined toward a unitary common law."); L.J. Priestley, *A Federal Common Law in Australia?*, 46 S.C. L. REV. 1043, 1065-73 (1995) (discussing the theory of a unified common law in Australia).

decreases the possibility of interpretive divergence between state and federal tribunals,[41] and the single high court structure diminishes the variations in the law among the various states.

B. Allocating Issues Between Parallel Court Systems

Unlike these other models, the system of judicial federalism in the United States involves parallel state and federal interpretive tracks, and no single court exercises interpretive authority over both. This arrangement enhances the importance of the choice of forum, and the existence of extensive areas of overlapping jurisdiction makes forum choice common. The state and federal paths lead to different destinations. Eventually, the authoritative interpreter—either the U.S. Supreme Court or the highest court in the state—will resolve contested issues, and that determination will enjoy binding authority in both systems. That definitive resolution, however, may be a long time coming. Doctrines must be utilized to determine in which of the independent, available tracks the case will proceed.

For the most part, subject matter jurisdiction is a matter of legislative right, not judicial grace. A federal court cannot refuse to hear a properly filed state-law diversity case, nor may a state court close its doors to a federal question. Congress exercises its discretion in deciding how much of the constitutionally defined federal judicial power it will confer on the lower federal courts and how much concurrent jurisdiction will be permitted to the state courts. Once that decision is made, courts exercise their statutorily granted jurisdiction. Congress, not the courts, owns the key to the federal courthouse. To a large extent, Congress has lent those keys to the litigants. When state and federal courts enjoy concurrent jurisdiction, either litigant generally may opt for the federal forum. The

41. Australia experimented with a system of "cross-vesting" jurisdiction, allowing federal and state courts to exercise broad concurrent jurisdiction, thus increasing the chance that a single court could exercise jurisdiction over all parts of a dispute. *See* GARRIE J. MOLONEY & SUSAN MCMASTER, CROSS-VESTING OF JURISDICTION: A REVIEW OF THE OPERATION OF THE NATIONAL SCHEME (1992); *see also* Peter Nygh, *Choice-of-Law Rules and Forum Shopping in Australia*, 46 S.C. L. REV. 899, 905-06 (1995) (discussing reasons for the cross-vesting scheme). The cross-vesting scheme was subsequently held unconstitutional. *See* Dung Lam, Case Note, Wakim, 22 SYDNEY L. REV. 155, 155-56 (2000).

plaintiff may file in state or federal court, and the defendant may exercise the right to remove a case from state court to federal court.[42] Judges must accept the cases properly brought before them.

Within the broad scope of federal jurisdiction, though, doctrines exist to allow federal courts to have some say over the allocation of state and federal issues. Particularly intricate questions arise when a single case involves state and federal elements. The resolution of a state-law question may serve as a necessary prerequisite to a federal claim. A plaintiff, for example, may assert that a state statute violates the federal Constitution. A federal court would have to decide the meaning of the challenged enactment before it could assess its constitutionality. Alternatively, a state-law claim for recovery might come within the supplemental jurisdiction of the federal court.[43] Under the current supplemental jurisdiction statute, as well as under prior judicially crafted rules, a plaintiff filing a federal claim in federal court may include any state-law claims that arise from the same transaction or occurrence as the federal claim.[44] Supplemental jurisdiction allows for the efficient packaging of related claims, and it helps to preserve the availability of a federal forum for a federal claim. In the absence of supplemental jurisdiction, a plaintiff would face the choice of filing the state and federal claims together in state court or of splitting the claims between state and federal court. The claim-splitting alternative could be costly and could occasion preclusion obstacles if parallel issues were adjudicated in the two proceedings. Supplemental jurisdiction allows a federal forum for the federal claim without the hazards of parallel litigation.[45]

III. THE DISTINCTION BETWEEN LAW AND ITS JUDICIAL INTERPRETATION

In the remainder of this Article, I argue that intersystemic adjudication may be beneficial and that it is legitimate. With regard

42. *See* 28 U.S.C. § 1441 (2000).

43. *See* 28 U.S.C. § 1367 (2000).

44. *Id.*

45. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 69-70 (3d ed. 1999) (discussing the purposes of supplemental jurisdiction).

to both contentions, the distinction between the law and its judicial interpretation plays an important role. That distinction amplifies the advantages and reduces the disadvantages of intersystemic adjudication. The distinction also undergirds the legitimacy of the enterprise of intersystemic adjudication. This Part outlines the distinction between law and its interpretation that will figure prominently in the Parts that follow.

The literature on constitutional interpretation outside the courts is large and growing. The main thrust of this scholarship, which has focused on the federal Constitution, is that one need not understand courts to be the exclusive interpreters of the federal Constitution. Other governmental officials interpret the Constitution as well.[46] A great deal of what the President does is to interpret the Constitution. This facet of the executive power keeps the Office of Legal Counsel busy. A great deal of what Congress should do is to interpret the Constitution. In the federal constitutional context, the main debate is about supremacy. Should the U.S. Supreme Court be supreme in the interpretation of the federal Constitution?[47] This debate recognizes a distinction between the Constitution and its judicial interpretation. The Constitution is more than what the courts say it is.

In the state court/federal court context, supremacy is not at issue. With regard to state law, the state high court is supreme, at least with respect to federal courts. Nevertheless, the basic point remains that the law is more than what a court says it is. This point remains valid, too, whether the relevant law is a state constitution or state common law. State courts may have a greater generative role with respect to common law than with respect to

46. All state and federal officials take an oath to uphold the Constitution, which seems to imply some duty in addition to obeying a judicial order in a particular case. *See* U.S. CONST. art. VI, cl. 3. For a discussion of each branch's duty to interpret the Constitution, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385 (1994): David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993).

47. *See, e.g.*, Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994) (arguing that "each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions").

constitutional or statutory law. That potential distinction, though, makes no difference.

In this post-Realist age, few deny that courts make law in a variety of settings. Nevertheless, whether one views a court as making the law or as interpreting the law, a difference remains between the view that courts make or interpret law and the view that the law is only what the courts say it is. Attacks on intersystemic adjudication often conflate these two propositions. To recognize a role for courts in making or interpreting law is not to endow them with the exclusive authority to do so. To say that state courts are authorized to make or interpret the law does not necessarily mean that other bodies, such as federal courts, are not so authorized. Recognizing the role of state courts in interpreting or making law does not undermine the legitimacy of intersystemic adjudication.

One can rephrase this argument as an argument about the possibility of error. The appreciation of error constitutes an important component of the argument for the benefits of intersystemic adjudication. Does it make sense to say that a court, including the highest judicial authority, may err in its interpretation of the law? Once one recognizes the distinction between law and its judicial interpretation, it follows that courts may make mistakes in their interpretation of the law. Even courts authorized to give the definitive construction to a law may err in that construction. If courts may err, then various strategies may be appropriate to address the potential errors. One strategy is to create a role for additional interpreters. For example, if state courts are not infallible in their interpretation of state law, a role may exist for federal courts to contribute to the interpretation of state law. In this way, intersystemic adjudication responds to the possibility of error in interpretation.

IV. THE VALUES AND COUNTER-VALUES OF INTERSYSTEMIC ADJUDICATION

This Part explores the potential advantages and disadvantages of intersystemic adjudication. To illustrate the principles involved, this Part focuses on federal court interpretation of state constitu-

tions. I have chosen this example for several reasons. The analysis here builds on an earlier doctrinal study.[48] Further, federal court interpretation of state law presents the most contested instance of intersystemic adjudication, and federal court interpretation of state constitutions introduces yet another level of controversy. Federal courts understand state constitutions to enjoy an especially intimate connection to the state.[49] Federal interpretation of the state charters thus may appear as the height of federal intrusion. To defend intersystemic adjudication in this context is to confront the most serious arguments against the interpretive practice.

A. Doctrinal Background of Dual Constitutional Claims

For cases raising claims under both the state and federal constitutions, the current jurisdictional rules give no clear guidance. Due to concerns for separation of powers and federalism, cases raising dual constitutional challenges implicate a complex thicket of doctrines. These doctrines reflect varying attempts to harmonize the following three, sometimes conflicting, principles: (1) courts should avoid federal constitutional rulings when possible (the "avoidance" principle);[50] (2) state courts should be the primary interpreters of state law (the "local interpretation" principle); and (3) no barriers should impair the availability of a federal forum for federal claims (the "open door" principle). Complying with any two of the principles does not pose much of a problem. Following all three proves much more difficult.

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48. *See* Schapiro, *supra* note 4.

49. *See* Van Harken v. City of Chicago, 103 F.3d 1346, 1354 (7th Cir. 1997) (Posner, C.J.) (citing constitutional character of state-law claim as supporting the decision to decline supplemental jurisdiction); *see also* Chicago Title Ins. Co. v. Vill. of Bolingbrook, No. 97 C 7055, 1999 WL 259952 (N.D. Ill. Apr. 6, 1999) (following *Van Harken*); Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 846 n.1 (D. Wyo. 1994) ("It is hard to imagine issues that are more within the province of the state courts than issues requiring interpretation of the state's own constitution.").

50. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994); *see also* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW (2001) (examining critically a variety of judicial techniques to avoid controversial issues).

Consider the first two principles. To honor the avoidance principle, federal courts should base their rulings on the state claim, not the federal constitutional issue. In accordance with the local interpretation principle, federal courts should not themselves adjudicate the state issue, but should instead seek the guidance of state courts. The doctrine of *Pullman* abstention allows the federal court to achieve these goals.[51] *Pullman* abstention comes into play when novel or unsettled questions of state law arise in a federal constitutional case. In these circumstances, the federal court can require the claimant to file a suit in state court to seek clarification of state law. The federal suit remains in abeyance while the claimant proceeds with the state court litigation. After the state-law issue is clarified, the claimant can return to federal court for adjudication of any federal issues that remain. State certification statutes provide a speedier alternative to abstention. These provisions allow federal courts to refer state-law issues directly to state courts for resolution, rather than forcing the claimant to initiate an independent lawsuit.[52]

Although *Pullman* abstention vindicates the avoidance and local interpretation principles, the open door principle does not fare as well. Routing dual constitutional challenges through state court delays the adjudication of the federal claim and thereby burdens access to the federal forum. Certification, when available, ameliorates but does not wholly obviate the problem of delay. The delay entailed in abstention or certification provides a powerful incentive for the plaintiff to submit state and federal claims to the state court for resolution.

Alternatively, under the doctrine developed in *Siler v. Louisville & Nashville R.R. Co.*,[53] federal courts could first adjudicate the supplemental state-law claims so as to avoid reaching, if possible, the federal constitutional issue.[54] If the state-law ground disposes of the case, then the court has succeeded in resolving the dispute

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51. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

52. For discussions of the operation of *Pullman* abstention and certification, see CHEMERINSKY, *supra* note 27, at §§ 12.2 - 12.3; Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1681-90 (2003).

53. 213 U.S. 175 (1909).

54. *Id.* at 191-92.

without the potential rigidity of federal constitutional adjudication. This procedure also avoids burdening access to the federal forum. The plaintiffs might or might not prevail on the state claim, but, if unsuccessful on the state claim, they could expect a simultaneous ruling on the federal claim, thereby avoiding the delays of certification or abstention. This approach complies with the avoidance and open door principles, but at the cost of violating the local interpretation principle because the federal court will adjudicate the state claim.

Finally, the federal court could rule first on the federal constitutional claim. If that claim fails, the court could turn to the state claim, or it could even refuse to decide the state-law issue. Under the supplemental jurisdiction statute, as well as under previous case law, a court retains some discretion to dismiss supplemental claims. In its current statutory version, § 1367(c) lists potential grounds for dismissal, including that "the claim raises a novel or complex issue of State law."[55] If the federal claim raised a federal constitutional issue, dismissing the supplemental state claims would necessitate deciding, rather than avoiding, the federal constitutional issue. Beginning with the adjudication of the federal constitutional claim neither imposes a barrier to the federal forum nor transgresses the local interpretation principle. What suffers is the canon of avoiding federal constitutional adjudication.

The three principles evade easy harmonization. If one cannot satisfy all three, the question is which principles should take priority. With regard to the specific kind of state constitutional provisions on which this Article focuses—provisions that mirror the federal Constitution, but have not been interpreted to duplicate the federal version—current doctrine offers no definitive guidance.[56]

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55. 28 U.S.C. § 1367(c)(1) (2000). As I have discussed elsewhere, this ground appears to overlap with the bases for *Pullman* abstention. *See* Schapiro, *supra* note 4, at 1419.

56. With regard to other kinds of state constitutional provisions, such as lockstep provisions or provisions addressing state-specific topics, the practice is clear and correct. If the state clause has been construed to have the same meaning as its federal counterpart, then essentially only a question of federal law presents itself, and the federal court should decide the federal question. That issue will be dispositive. Avoidance of the federal constitutional issue is impossible. Purporting to rest only on state grounds would be disingenuous and potentially confusing. Abstention would delay federal adjudication by unnecessarily diverting the federal claim through state court and would be pointless because the state court could not avoid the federal question. In such cases, the federal court cannot

B. Protecting Individual Rights Through Intersystemic Adjudication

Having reviewed the doctrinal landscape, I turn to an evaluation of intersystemic adjudication. The local interpretation principle counsels against intersystemic adjudication. The following Section takes issue with that principle. This Section examines intersystemic adjudication by focusing on three overlapping values—plurality, dialogue, and redundancy—and on the corresponding set of counter-values that intersystemic adjudication may hinder—uniformity, finality, and hierarchical accountability. My argument is not that federal courts always should adjudicate state constitutional claims within their jurisdiction, but that federal courts sometimes should do so, rather than adopt the avoidance techniques discussed above.

1. Plurality/Uniformity

State guarantees of individual rights may be subject to several interpretations. Federal court adjudication of state constitutional claims allows for additional exploration of those meanings. The federal court never will provide the definitive interpretation of the state provision. The federal court interpretation may be helpful, however, in contributing to the discussion of the best way to realize the underlying constitutional value. Federal judges can contribute to a plurality of legal meaning, which provides a rich background for the investigation of fundamental rights.

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avoid the federal constitutional issue. The federal court then is free to decide the federal constitutional issue. *See* Schapiro, *supra* note 4, at 1428-29.

On the other hand, if the provision is a clause of uniquely local interest, the federal courts will have little expertise or ability to contribute. In *Reetz v. Bozanich*, 397 U.S. 82 (1970), for example, the plaintiffs alleged that new Alaskan fishing regulations violated their rights under the Equal Protection Clause of the Fourteenth Amendment and under the fishery provisions of the Alaska Constitution. *See Reetz*, 397 U.S. at 84 ("'Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.'" (quoting ALASKA CONST. art. VIII, § 3)); *id.* ("'No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.'" (quoting ALASKA CONST. art. VIII, § 15)). Noting that the state constitutional provisions had never been interpreted by Alaska courts, the U.S. Supreme Court held that the federal courts should await guidance from the state courts on the proper construction of those clauses. *Id.* at 87.

Federal judges are rooted in a different institutional context than state judges. They are chosen by different means and enjoy tenure on different terms than state judges.[57] Federal judges are thus able to offer a perspective that differs from that of state judges. A useful dialogue may ensue between state and federal judges over the proper interpretation of a fundamental right. Immersion in state constitutional debates also may prove useful to federal judges in interpreting the federal Constitution.[58] Examining state precedent may enrich a court's understanding of the sources and meaning of fundamental rights that exist in both state and federal documents.[59] State and federal courts can engage in a valuable dialogue over the meaning of state and federal constitutional guarantees.[60]

Plurality does come at a cost. Uniformity in interpretation also serves as an important value.[61] When a federal court interprets the state constitution, it creates the possibility of multiple meanings. The state constitution will have an interpretation in the federal system and may have a different interpretation in the state system until the state supreme court resolves the conflict. This plurality could be unsettling and confusing. Parties may win or lose depending on the forum hearing the case. This kind of disparate result is the price of pluralism. Is the game worth the candle? Justice Sandra Day O'Connor commented on the similar problem that arises from diverse interpretations of federal law. She stated:

> While uniformity is a necessary and desirable goal, its immediate achievement is not always possible. Nor is immediate action necessarily desirable. Part of the beauty of our federalism is the diversity of viewpoint it brings to bear on legal problems. State court judges may have a different approach to a problem than

57. Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 647 (1985).

58. *See* Gardner, *supra* note 22, at 1037-38.

59. *See id.* at 1037-43.

60. *See* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1181 (1999) (discussing "cooperative federalism in which both state and federal judges participate in a mutual endeavor to interpret and apply federal law").

61. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 849-54 (1994) (examining the value of uniform interpretation of law).

> might a federal judge.... Under our system, the 50 state supreme courts, 13 United States Circuit Courts of Appeals, and countless trial and intermediate appellate courts may bring diverse experiences to bear on questions that, because of the Supremacy Clause, they must answer in common.
>
> When those courts encounter an unresolved question of federal law, their differing perspectives may lead them to different conclusions. The resulting divergence provides a valuable moment in the law—a moment of dialogue among different jurists in which they may share their views on a common issue. There can be no doubt that the dialogue is a profitable one or that the Court on which I sit listens to the voices in the debate. Indeed, it is not all that infrequent that the Supreme Court will, despite the existence of a conflict on an issue of federal law, decline to review a case so that other voices may be heard on the subject before the issue is resolved once and for all. The benefits of dialogue can, for at least a limited time, outweigh the immediate need for uniformity.[62]

In recognizing the benefit of interpretive plurality, I assume that state and federal constitutional rights share important features. When a state constitution and the federal Constitution both talk about due process or equality, those meanings might be distinct; that is a premise of allowing the state provision to be interpreted independently of the federal.[63] The meanings, however, are not incommensurable. The state and federal charters invoke shared values. The contours of the specific rights may vary, but the ideals the provisions embody are sufficiently similar for federal and state courts to engage in a profitable dialogue. The dual federalist premise of separating areas of state and federal regulation might suggest a critical divide over fundamental values. Dual federalism protected states from federal intrusion into such areas. In that framework, perhaps the states and the national government had little to share about safeguarding important liberties. The more one recognizes a move from dual federalism to cooperative or interactive

62. Sandra Day O'Connor, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173, 181-82 (1994).

63. For a discussion of the debate over interpreting the state constitution independently of the federal Constitution, see Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 441-44 (1998).

federalism, however, the more likely it is that such dialogue will be helpful.

2. Dialogue/Finality

A related paired opposition that Justice O'Connor's comments invoke is that of finality and dialogue. Finality is a significant legal value.[64] The law has an important settlement function. Sometimes it is more important that a matter be settled than that it be settled right. A federal court's interpretation of a state constitution will never carry that guarantee of final resolution. The same issue might arise in a different case in state court, and the federal court's interpretation of the state constitution will have no binding effect.

The flip side of lack of finality is the possibility of dialogue. What makes conversation possible is the absence of a final authority. The federal courts and the lower state courts can express their divergent opinions on state constitutions. They can listen to each other and learn from each other. The state supreme court can learn from the dialogue until it decides to end the discussion by rendering an authoritative interpretation. The perils of finality are reflected in part in the doctrine of seeking to avoid federal constitutional adjudication. It is well established that courts will not rely on federal constitutional grounds if other grounds are available.[65]

It is useful in this regard to remember that the power of the state high court to give a definitive opinion does not mean that that court will necessarily give the best interpretation. Sometimes finality is more important than correctness, but that possibility recognizes the distinction between the last word and the best word. Justice Jackson's famous caution in *Brown v. Allen*[66] seems apt here: "We are not final because we are infallible, but we are infallible only because we are final."[67] Justice Jackson referred to the U.S. Supreme Court, but the observation applies more generally to ultimate interpreters, be they a state or federal high court. When the necessarily fallible state high court does give the last word, it can benefit from other views on the topic.

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64. *See, e.g.*, Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 38.

65. *See supra* note 50 and accompanying text.

66. 344 U.S. 443 (1953).

67. *Id.* at 540 (Jackson, J., concurring in result).

3. Redundancy/Hierarchical Accountability

To place the same opposition in a kind of organizational perspective, when federal courts interpret state law, hierarchical accountability always will be absent. On the organizational chart of the interpretation of state law, the state's highest court sits at the top. Its authority is ultimate. Federal courts stand outside this chain of command, in the sense that no appeal lies from their decisions to the ultimate interpreters. Once the state supreme court speaks, the federal court must listen. With regard to the decision in the particular case at issue, however, the state court will never speak. State courts cannot review a federal court's interpretation of state law. From an organizational perspective, this arrangement frustrates authoritative interpretation.

The federal courts might incorrectly construe the state charter. Correction of such an error may take some time and provides no relief to the parties in the first litigation. It is worth contemplating the possibility of error. Of course, the problem of error is pervasive. The state court may misinterpret the state's constitution just as the federal court may misinterpret it. The comparison of these problems raises difficult questions. One concern is the qualitative characteristic of the error. It could be argued that for reasons of federalism, the federal court's misinterpretation of the state constitution might be an error of a categorically greater magnitude than the same misinterpretation by the state court. My scratching the paint on my neighbor's car may be more serious than my putting a big dent in my own. This kind of categorical concern, however, presupposes the illegitimacy of federal courts' interpreting state law. The very question to be answered is whether a misinterpretation by a federal court constitutes a dent in someone else's vehicle or whether the vehicle belongs to the federal courts as well. Inherent in the process of interpretation is the possibility of error. If the enterprise of federal court interpretation of state constitutions is legitimate, a subject I address below, then errors are no greater threat here than in other forms of interpretation.

Is a federal court more likely than a state court to misinterpret the state constitution? Again, it is important to distinguish between deviation from what the state high court might eventually hold and incorrect interpretation. The more one understands federalism to

protect distinctive state enclaves, the more federal court interpretation of state constitutions appears problematic. How can a federal court really understand the spirit of the state community? If one rejects this kind of romantic nationalist view of the state, and thinks of a state constitution as more about achieving widely shared values, then the risk of error diminishes. Perhaps a state court would have greater familiarity with state law principles and would therefore be less prone to error than the federal court. The federal court, however, operates under no categorical disability, and the federal court's familiarity with constitutional adjudication might compensate for its potential unfamiliarity with some aspects of state law.

This organizational structure, moreover, enables a different organizational virtue, that of redundancy.[68] The existence of parallel, non-intersecting lines of authority means that a blockage or error in one will not affect the other. If one path for realizing state constitutional rights does not work, an alternative path exists. If for some reason the lower state courts do not properly recognize a state constitutional right, resort may be had to the federal courts. This kind of redundancy is one of the chief results of the system of judicial federalism that exists in the United States.

The different institutional structures of the state and federal courts may enhance the value of redundancy. State and federal courts differ in many ways.[69] Extensive debates have focused on whether this organizational variation hinders state courts in the enforcement of fundamental rights.[70] Evidence appears to support the conclusion that electoral pressures render state courts less sympathetic to specific kinds of individual rights claims.[71] Other

68. For discussions of the role of federalism in providing redundancy, see DANIEL J. ELAZAR, EXPLORING FEDERALISM 30 (1987); Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1234 (1997); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS: J. FEDERALISM 173 (1973).

69. *See* Hazard, *supra* note 57, at 647 (listing institutional differences between state and federal courts and suggesting that such differences are "synergistically, systematically, and ubiquitously 'outcome determinative'").

70. *See* Schapiro, *supra* note 4, at 1452 & n.194.

71. *See id.* at 1453-54 (discussing studies assessing the influence of electoral politics on state courts); *see also* Solimine, *supra* note 4.

scholars argue that state courts may be more receptive to certain kinds of arguments about individual rights.[72] From the perspective of redundancy, the key issue is that federal and state courts differ. Redundancy allows parties to enjoy the potential benefits of both.[73]

V. LEGITIMACY OF INTERSYSTEMIC ADJUDICATION

So far, this Article has explained some of the practical benefits of intersystemic adjudication in general, and of federal courts interpreting state constitutions in particular. In addressing these topics, though, it is necessary to confront the argument that intersystemic adjudication runs counter to central organizing principles of our constitutional system. Another way to pose this objection is to say that the foregoing account details some of the strategic advantages that a federal forum may bring to certain parties, but that underlying postulates of the constitutional system in the United States undermine the legitimacy of these arguments.

A. Challenges: Spirit of Erie

The decision of the U.S. Supreme Court in *Erie*[74] has served as a focus of scholarly resistance to intersystemic adjudication. *Erie* directly rejected one form of intersystemic adjudication that had arisen: federal courts independently interpreting state common law.[75] More generally, commentators have found *Erie* to embody three principles that individually and in combination could be understood to oppose intersystemic adjudication. These principles are positivism, realism, and federalism.[76]

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72. *See, e.g.*, William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 622 (1999) ("[I]f federal courts enjoy an institutional advantage with regard to civil liberties issues, perhaps state courts have some institutional advantages in safeguarding group rights when equality claims are involved.").

73. *See* Chemerinsky, *supra* note 68, at 1234.

74. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

75. *Id.*

76. The relative significance of positivism, realism, and federalism for the *Erie* decision remains a subject of dispute. *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1479-84 (1997) (discussing *Erie*'s connection with positivism); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 708 (1995) (asserting that federalism, not realism or positivism, constituted the principal basis for *Erie*); Jack Goldsmith & Steven Walt, Erie *and*

On one level, *Erie* held that in cases in which federal law did not supply a rule of decision, federal courts were bound to apply the common law as it would be applied by state courts.[77] After *Erie*, federal courts could no longer apply general common law in preference to the common law of the particular state.[78] The holding of *Erie* and its overruling of *Swift v. Tyson*,[79] however, do not directly relate to the federal court interpretation of state constitutions. In all of the discussions of the role of federal courts in interpreting state constitutions, no one doubts that federal courts must follow the rulings of the highest court of the state. The state high court definitively interprets state law, including the state constitution, and the federal courts are bound to follow that construction. Indeed, even before *Erie*, federal courts were theoretically required to follow state court interpretations of positive enactments, such as state constitutions.[80] Only with regard to state common law did federal courts enjoy the prerogative of independent interpretation.[81] In practice, federal courts sometimes did not defer to state court interpretations of the state constitution, but no one suggests a return to such infamous cases as *Gelpcke v. City of Dubuque*.[82]

What stands in the way of intersystemic adjudication is not *Erie*, but the larger jurisprudential commitments that *Erie* is understood to embody. Critics of intersystemic adjudication rely in particular on certain versions of legal positivism and legal realism that *Erie* arguably presupposes. The positivist theme is that all law must have a foundation in some identifiable authority.[83] *Erie* identified as a central flaw in the pre-existing *Swift* system the existence of

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the Irrelevance of Legal Positivism, 84 VA. L. REV. 673 (1998) (examining critically arguments connecting *Erie* with positivism); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285 (1993) (discussing same). For a valuable discussion of *Erie* and its historical context, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000).

77. *Erie*, 304 U.S. at 79-80.

78. *Id.*

79. 41 U.S. 1 (1842).

80. *See* Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291 (1832).

81. *Id.* at 298.

82. 68 U.S. (1 Wall.) 175 (1863); *see also* Township of Pine Grove v. Talcott, 86 U.S. 666, 677 (1873).

83. *See* Rutherglen, *supra* note 76, at 290.

general common law that was in some sense neither state law nor federal law.[84] After *Erie*, common law is either state law or federal law and is authoritatively construed by state courts or by the U.S. Supreme Court, respectively.

The legal realist component of *Erie* recognized that judges make law as much as they "find" it. Accordingly, the law reflected in state court decisions is as much the law of the state as is the product of the legislature.[85] Both legislatures and courts make law, and it makes no sense for federal courts to distinguish between these different sources when determining the content of nonfederal law.[86]

The federalism theme emphasizes the corresponding point that while state courts are agents of the state government, federal courts are agents of the federal government.[87] For federal courts to impose their interpretation of common law principles in preference to state court interpretation represents the federal government invading the domain of the states. Federalism entails an allocation of authority between the state governments and the federal government. The *Swift* era practice of federal courts independently interpreting general common law constituted an intrusion by the federal government into an area properly belonging to the states.[88]

Some scholars have combined these principles into an indictment of intersystemic adjudication. They argue that federal courts interpreting state law represents exactly the kind of federal intrusion into state affairs that *Erie* sought to end.[89] Intersystemic adjudication in this view is equivalent to the federal government setting up mini-legislatures to create state law.[90] Bradford Clark, for example, has stated that federal courts interpreting state law is like the *Swift* era practice of federal courts making general common

84. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

85. *See id.* at 78 ("[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

86. *See* PURCELL, *supra* note 76, at 181-85.

87. *But see* Post, *supra* note 11, at 1604 (arguing that before the New Deal transformation, the U.S. Supreme Court viewed itself as transcending the division of power between the states and the national government).

88. *See* FREYER, *supra* note 35, at 90 ("The *Swift* doctrine and its extensions in *Dubuque* and other cases were for the jurist clear subversions of state sovereignty and the Constitution.").

89. *See* Clark, *supra* note 76, at 1461.

90. *Id.* at 1470-71 (quoting KENT GREENAWALT, LAW AND OBJECTIVITY 208 (1992)).

law: "In either case, a federal court's practice of 'indulg[ing] in lawmaking by decisions' necessarily interferes with the sovereign prerogative of the states to decide both *whether* and *how* to regulate the conduct of the parties."[91] This argument would apply equally to state court interpretation of federal law. State courts interpreting federal law would be setting themselves up as mini-Congresses engaging in the potentially illegitimate creation of federal law. What this parallel suggests is that the force of Clark's argument lies not in the question whether a court's rulings have a lawmaking effect, but rather in the question whether such lawmaking is authorized.

Of course, given the existence of diversity jurisdiction and supplemental jurisdiction, scholars generally do not claim that federal courts should never interpret state law. Some scholars do urge, though, that federal court interpretation of state law should be minimized through devices such as abstention and certification.[92]

B. Defense

This Section defends the legitimacy of intersystemic adjudication. It agrees that *Erie* stands for a modern recognition of the insights of positivism and legal realism. It also agrees that *Erie* defines important issues of judicial federalism. I argue, however, that the critique developed previously misstates the implications of positivism, realism, and federalism.

1. Distinction Between Law and Judicial Interpretation

The key error of the critique of the legitimacy of intersystemic adjudication lies in its false attribution of exclusivity to the roles of state courts. One can accept the realist insight that when state courts interpret state law, they in effect make law. One also can accept the positivist concern for locating the authority underlying law. The decisions of state courts are law because state courts are

91. *Id.* at 1495 (footnote omitted) (quoting Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945)); *cf.* Goldsmith & Walt, *supra* note 76, at 706-07 (asserting that Clark's view of the interpretive responsibilities of federal courts is not mandated by legal positivism).

92. *See supra* note 4.

authorized by the lawmaking authority, the state, to make the law. In this sense, the state courts are lawmaking agents duly authorized by the states.

What about federal courts? In this realist/positivist sense, federal courts also are lawmaking agents, so authorized by the U.S. Constitution.[93] But does that grant of lawmaking authority violate principles of federalism? Are not the federal courts usurping the authority of the state courts?[94] Here, it is important to remember the nonexclusive nature of a court's lawmaking authority. One need not equate state law with the declaration of a state court.

If one believes that the exclusive legitimate source of state lawmaking is a state court, then federal interpretation of state law is a kind of usurpation. If state law is whatever the state court says it is, then the federal courts are operating with a major legitimacy deficit. The federal courts would necessarily be derivative. State courts would be making the pure, essential state law, and federal courts would be attempting to determine its content through a dark glass. In a recent article, Barry Friedman appears to take this position.[95] He criticizes an argument that I had made that, in certain circumstances, federal courts might render a "more impartial" reading of state law than would state courts.[96] My argument referred to some of the fears of bias raised in the context of diversity litigation, as well as to studies of political pressures experienced by state judges subject to electoral scrutiny. Professor Friedman responds, "It is difficult to know exactly what 'more impartial' means in this sentence. The only 'reading' of a state constitution that can be authoritative is that rendered by its highest court."[97] I take it that a "more impartial" reading is more likely to be correct than a "less impartial" (or "more partial") reading. Professor Friedman does not deny the potential for a federal court to be more impartial, nor does he deny the link between impartiality and

93. *See* U.S. CONST. art. III, § 1-2.

94. *Cf.* Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 773 (1941) (discussing the extent to which "a federal court is as much the 'organ' of a state that has adopted our Constitution, as it is of the federal union of states that was created by their adopting it").

95. *See* Friedman, *supra* note 8.

96. *See id.* at 1239 n.72 (citing Schapiro, *supra* note 4, at 1443).

97. *See id.*

correctness. Instead, he asserts that only the highest state court can be "authoritative."[98] It is this equation of "authoritative" and "correct" that I seek to challenge.

The interpretation of state law rendered by the state's highest court must be followed by state and federal courts. The state court's interpretation, nevertheless, may not be the best construction of the provision at issue. Fear of electoral repercussions, for example, might shape a state court's interpretation of the law. The opinion of a federal court interpreting the same item might provide a useful perspective, perhaps compensating for the perceived unpopularity of following a particular course. Potential bias does not make a decision less authoritative; it just makes it less likely to be correct. Federal courts also are subject to political pressures and have no monopoly on interpretive skill. The different perspective of the federal court, though, might assist the state court in its search for the best interpretation.

If, instead of equating state law with the opinion of the state court, one takes the slightly more modest position that state courts participate in the creation of state law, then there is nothing necessarily illegitimate about federal courts participating in the process as well. This argument applies to state common law, but applies with even more force to state constitutional law. In interpreting the state constitution, it seems much more apt to say that a state court participates in the making of the law, rather than to say that the state constitution is nothing more than what the state court says it is.

The debate about exclusivity discussed in Part III recognizes conceptual space between a constitution and what the court says it means. It is not conceptually incoherent to say that the U.S. Supreme Court misinterpreted the Constitution. In the case of state constitutions, plural interpretation seems an even greater practical necessity. Given the long, complex nature of state constitutions and the many activities of state government, state constitutional issues arise with great frequency. The interpretation of state attorneys general and other state officials will, in many areas, determine the meaning of the state constitution with practical finality.[99] Given the

98. *Id.*

99. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES & MATERIALS 632-47

necessarily plural nature of state constitutional interpretation, a federal role does little to diminish the goals of finality and uniformity.

I reject the view that the decision of the state court, as reviewed through the state appellate system, actually defines the contour of the state constitutional right. In this view, it is paradoxical to speak of state courts underprotecting the rights of individuals, for it is the courts that establish the breadth of the right. Disparity between the state and federal courts necessarily evidences error by the federal tribunal.

Once one recognizes that the state high court does not enjoy the exclusive authority to interpret the state constitution, the role of the federal court comes into focus. Federal intervention can contribute to an understanding of the meaning of the state constitution. The federal court is not an outsider, an interloper. Rather, federalism gives to the federal court the ability to speak about the state constitution as well as, under current understandings, the obligation to follow the state supreme court once that interpretation has been established.

In sum, *Erie* clarified that the state high court was the supreme interpreter of state law. This result followed from particular understandings of federalism, probably buttressed by jurisprudential commitments to realism and positivism. Positivism meant that all law was state law or federal law. General common law was therefore really state law. Realism reinforced that conclusion. If common law was state law, then the state high court enjoyed the right of authoritative interpretation. Neither *Erie*, nor a broader notion of the spirit of *Erie*, however, made the state supreme court the exclusive interpreter of state law. So when a federal court interprets a state constitution, it does not usurp state authority. As with other instances of polyphonic federalism, the federal and state courts can participate together in the protection of fundamental rights.

(3d ed. 1999) (discussing state constitutional interpretation by attorneys general and legislatures).

2. Erie *and the New Deal*

This understanding of *Erie* and of the kind of judicial federalism implied by *Erie* finds support in the larger federal context of 1938, when *Erie* was decided. *Erie* stands as part of the moment that witnessed the end of dual federalism. During this period, the Supreme Court recognized the difficulty in distinguishing categorically between national and local affairs, and largely stopped trying to do so.[100] Decisions from this period, such as *Darby*[101] and *Wickard*,[102] unleashed the federal government to pursue a wide variety of aims that might at one point have been understood to be within the exclusive province of the states. *West Coast Hotel v. Parrish*[103] allowed the state and federal governments to pursue social welfare aims that previously had been denied to them.[104]

State courts were advancing some of the social goals through the course of common law development. Using their power to declare general common law, the federal courts sometimes had impeded these state-law developments. *Erie* was an effort to prevent the federal courts from interfering with the social policy being developed by the state courts. *Erie* then is really about empowering states and state courts.

Erie also raises the issue of the appropriate separation of the state and federal court systems. *Erie* certainly responded to a perception of excessive federal court meddling in matters appropriately decided by state courts. The grounds of complaint, though, related not to federal courts adjudicating state-law issues, but to the non-deferential manner with which federal courts treated state court precedents. *Erie* need not stand for the necessity of rigidly separating the appropriate domains of state and federal courts. *Erie* came at a time when dual federalism was being rejected in favor of more cooperative models. *Erie* need not be understood as enforcing a regime of dual judicial federalism. With the decline of dual federalism, the state and federal governments exercised overlap-

100. *See* PURCELL, *supra* note 76, at 134-36; Corwin, *supra* note 5, at 17.

101. United States v. Darby, 312 U.S. 100 (1941).

102. Wickard v. Filburn, 317 U.S. 111 (1942).

103. 300 U.S. 379 (1937).

104. *Id.* (upholding a state law regulating working hours as a reasonable restraint of liberty to contract).

ping regulatory authority. Intersystemic adjudication represents an overlap of judicial authority. Just as state and federal governments may engage in cooperative, competitive, or even conflictual relationships, so may state and federal courts. *Erie* did not mandate the end of such judicial interaction.

VI. RIGHTS AND REMEDIES IN AN IMPERFECT WORLD

My goal in this Article has been to defend intersystemic adjudication in a particularly controversial setting. Intersystemic adjudication can be a valuable way to pursue a variety of goals. Certainly intersystemic adjudication contravenes important values in the legal system. Uniformity, finality, and hierarchical accountability all represent significant principles, and intersystemic adjudication undermines all of them to some extent. Against these losses, intersystemic adjudication promotes the values of plurality, redundancy, and dialogue. These principles are important as well.

The relative weight of these two sets of significant values depends on the relevant conception of federalism. Both sets remain important, but their relative value rises or falls in accordance with one's understanding of the relationship among the states and the federal government. One could adopt a dualist perspective, viewing federalism as concerned primarily with dividing power into separate spheres. Alternatively, one could understand federalism as promoting interaction among political or judicial systems that recognize largely shared goals. In this latter framework, plurality, dialogue, and redundancy would serve especially valuable roles. This interactive or polyphonic conception of federalism aligns with the benefits that intersystemic adjudication promotes.

One's view of intersystemic adjudication may also reflect one's assessment of relative risks. If one fears that a strict division of authority may lead to error, sharing may reduce the peril. As between "two heads are better than one" and "too many cooks spoil the broth," two heads may seem less risky. This assessment may well turn on one's appreciation of the risk of governmental error. To the extent that state or federal governments fail in their role of protecting vital liberties, the availability of a backup power becomes critical. An interactive understanding of federalism and an

acceptance of intersystemic adjudication facilitates this fail-safe option.

In several settings, intersystemic adjudication may provide for remedies that are unavailable within a unitary framework. This analysis has focused on federal court adjudication of state constitutional claims, but the implications are broader. Not only may federal courts participate in the enforcement of state rights, but state courts may participate in the enforcement of federal rights. By way of illustration, I will touch briefly on two situations in which state courts can fill remedial gaps in the application of federal law. Both sovereign immunity and federal justiciability requirements present instances in which intersystemic adjudication can realize the role of federalism in protecting rights.

Federal statutes provide extensive protection for individual rights against threats from private parties or from states. Doctrines of sovereign immunity, however, may impair the full enforcement of these rights against states. As a matter of federal constitutional law, individuals generally may not seek monetary redress from states for the violation of their federal rights.[105] Decisions of the U.S. Supreme Court have created a right without a remedy, at least on the federal level.

Federalism has a response: state courts may enforce the federal right against states. Federal law may not be able to require states to provide such remedies, but state constitutions can. Indeed, in some situations, state "right to remedy" clauses may mandate such enforcement.[106] State constitutional principles of sovereign immunity may bar such actions, but remedial principles available in state court provide at least the possibility of a remedy for the violation of federal rights. Many have argued that the U.S. Supreme Court erred in interpreting the federal Constitution to confer such

105. *See* Alden v. Maine, 527 U.S. 706 (1999) (holding that state sovereign immunity is inherent in the Constitution and that states are immune from suit in state courts); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity to allow private damages actions in federal court).

106. *See* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543 (2003); *see also* Jonathan P. Bach, Note, *Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform*, 98 YALE L.J. 1153, 1168 (1989).

immunity on states.[107] Whatever the merits of these critiques, the more general point is that error is part of any system. Through intersystemic adjudication, federalism in the United States provides a powerful way to address such errors.

Federal justiciability rules provide another example of a remedial gap. In certain areas, the U.S. Supreme Court has adopted restrictive understandings of the standing doctrine. The Court has held that the U.S. Constitution limits the ability of Congress to confer standing on plaintiffs for the enforcement of federal rights.[108] These restrictions impair the enforcement of federal statutes, particularly in the environmental context in which the harms targeted by the statute may be diffuse.[109] Situations may arise in which Congress clearly has the authority to provide environmental protections, but cannot guarantee the enforcement of the rules.

Intersystemic adjudication again provides an answer. Plaintiffs may bring the federal claims in state courts, which need not follow federal justiciability requirements. State courts can provide the remedial structure unavailable in federal court. When state courts hear federal claims that could not be brought in federal court, complicated jurisdictional issues may arise. The state courts' interpretations of federal law may not be reviewable in the U.S. Supreme Court. For this reason, some commentators have urged that state courts be forced to apply federal justiciability rules to federal causes of action.[110] Of course, federal courts' interpretations

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107. Critical analyses of the Court's sovereign immunity jurisprudence include: Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 40, 45 (1988).

108. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

109. *See id.* at 575 (specifying the constitutional requirement of concrete injury and particularized harm).

110. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 283 (1990) (noting that "[t]o the degree that the 'case or controversy' requirement serves the values of sensitive and wise adjudication, it should apply to both state and federal courts").

of state law are never subject to direct review by that law's ultimate interpretive body.

Unreviewable state court interpretations of federal law may impair principles of finality and uniformity in the law. For these reasons, Congress might choose to give federal courts exclusive jurisdiction in certain cases. Instead, though, Congress may wish to take advantage of the plurality, dialogue, and redundancy offered by state court enforcement of federal law. Congress might prefer that the Supreme Court allow broader standing in federal court. Congress also might prefer that the federal executive actively enforce federal statutes. However, federalism, in the form of intersystemic adjudication, provides a vital second (or third) best solution.

CONCLUSION

Intersystemic adjudication is a pervasive feature of the judicial system of the United States. This Article has sought to situate intersystemic adjudication within the larger system of federalism that involves the sharing of authority among states and the federal government. I have sought to defend intersystemic adjudication as another kind of potentially valuable instance of state-federal interaction.

A court's application of the law of a different political system entails potential benefits and potential harms. I have argued that the possibility of error in judicial interpretation makes the potential advantages particularly important and that the conceptual distinction between law and its judicial interpretation emphasizes the potential for such errors. If the law is more than just what a court says it is, then a court's saying so does not make its interpretation necessarily correct. This distinction also serves to refute the argument that intersystemic adjudication bears the taint of illegitimacy. Opponents of intersystemic adjudication stress that the practice invites non-authoritative interpretation of legal principles. Once one recognizes the potential fallibility of even authoritative interpreters, alternative interpretive perspectives lose their stigma. Authoritative interpretations need not be correct, and authoritative interpreters can certainly benefit from the opinions

of other interpreters. Non-authoritative interpretation may introduce some uncertainty, but it does not necessarily introduce error.

In an ideal world, a unitary government could provide citizens with efficient and responsive governance. In an ideal federalist world, state courts would always protect state rights, and federal courts would always protect federal rights. In the real world, though, intersystemic adjudication provides a valuable and legitimate way to address situations in which governments and courts fall short of these ideals.