

# William & Mary Law Review

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Volume 22 (1980-1981)  
Issue 4 National Center for State Courts  
Marshall-Wythe School of Law Symposium on  
"State Courts and Federalism in the 1980's"

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Article 2

May 1981

## Introduction to the Symposium "State Courts and Federalism in the 1980's"

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### Repository Citation

John R. Pagan, *Introduction to the Symposium "State Courts and Federalism in the 1980's"*, 22 Wm. & Mary L. Rev. 599 (1981), <https://scholarship.law.wm.edu/wmlr/vol22/iss4/2>

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# WILLIAM AND MARY LAW REVIEW

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VOLUME 22

SUMMER 1981

NUMBER 4

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## INTRODUCTION

JOHN R. PAGAN\*

When the Framers of the Constitution fashioned our judicial system, they deliberately shunned simplicity. Instead of cleaving the power to adjudicate into two distinct parts, assigning one exclusively to the national government and the other to the states, the Republic's founders devised a highly complex scheme of overlapping jurisdiction. Under the constitutional plan, state courts retained general authority to decide issues of federal as well as state law, while federal tribunals, to the extent authorized by article III and Congress, acquired the right to hear both state and federal question cases. Concurrency inevitably produced friction, and intricate doctrines proved necessary to keep state and federal courts working cooperatively. Many of those doctrines underwent profound changes during the 1960's and 1970's. As we enter a new decade, the time seems ripe to evaluate federalism's present condition and to ponder its future prospects.

With those purposes in mind, the National Center for State Courts and the Marshall-Wythe School of Law of the College of William and Mary cosponsored a symposium on "State Courts and Federalism in the 1980's" in Williamsburg, Virginia, on January 23-24, 1981. Over a hundred persons, including scholars, state and federal judges, practicing lawyers, and students, attended. The participants devoted their attention to the relationship between

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state courts and the lower federal courts, focusing primarily upon state judges' role as interpreters and enforcers of the United States Constitution and upon the scope of federal judges' power to review or interfere with performance of that role.

At the symposium four leading scholars—Professors Paul M. Bator and Martha A. Field of Harvard Law School, Professor Burt Neuborne of New York University Law School, and Professor Robert M. Cover of Yale Law School—presented papers. Revised versions of their remarks appear in this issue of the *William and Mary Law Review*. Following their addresses, three prominent jurists—Chief Justice Robert J. Sheran of the Minnesota Supreme Court, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, and Judge Sandra D. O'Connor of the Arizona Court of Appeals—offered perspectives from the bench. Chief Justice Sheran and Judge O'Connor have contributed essays to this issue of the *Review*, as has Judge Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit.

The symposium's principal participants represent diverse points of view. Collectively their articles provide a comprehensive examination of the most important contemporary issues affecting allocation of jurisdiction. Professor Bator's wide-ranging essay entitled "The State Court and Federal Constitutional Litigation" supplies our keynote. He analyzes the significance of state judges' involvement in the formulation of federal constitutional law, and he addresses the controversial subject of state and federal courts' relative competence to adjudicate constitutional questions. Professor Bator stresses that worthwhile comparisons are possible only if one remains mindful of the context in which state judges generally confront such questions. While it is true that civil rights-civil liberties plaintiffs sometimes choose to sue in state court, constitutional issues usually arise there when someone invokes a federal defense to a state-initiated enforcement action. When that happens we do not enquire whether, in the abstract, a federal judge would do a superior job of construing the Constitution. Rather, we have to make a pragmatic choice. We can either allow the case to proceed to final judgment in state court, subject only to Supreme Court review, or we can take the federal question wholly or partially out of the state judge's hands. The latter choice can be effectuated by removing

the entire proceeding to United States district court, by carving out the federal issue for separate trial in a federal-court injunctive or declaratory action, or by subjecting the state court's determination to collateral relitigation in a subsequent habeas corpus or 42 U.S.C. § 1983 suit. Professor Bator contends that, given the costs involved, these kinds of encroachment upon state judicial sovereignty should be reserved for extraordinary situations such as cases involving bad faith, harassment, or denial of a full and fair opportunity to litigate in state court. Moreover, he reminds us, since state tribunals enjoy immunity from Congress' jurisdictional control, they constitute our ultimate safeguard against tyrannous government. That is another weighty reason why federal courts should not monopolize constitutional adjudication. Professor Bator brings his essay to a close with a provocative refutation of the claim that federal judges are more sensitive to constitutional values than state jurists.

In contrast to her colleague Professor Bator, Professor Field is an ardent federal interventionist. In "The Uncertain Nature of Federal Jurisdiction," she decries the fuzziness of existing jurisdictional rules and urges adoption of clearer, simpler guidelines. She attributes much of the current system's confusion to the Supreme Court's schizoid approach to problems of federalism. In one line of cases, the Court denominates federal judges the primary guarantors of constitutional liberties and emphasizes litigants' congressionally conferred right to seek protection in a federal forum. But in a different line of cases, the Court manifests great faith in state judges' fidelity to the supremacy clause and directs the lower federal courts to refrain from interfering with or second-guessing state courts. The Supreme Court's contradictory signals, coupled with the imprecise nature of present federal jurisdictional tests, render decisionmaking unpredictable and inconsistent. We must rationalize federal adjudicative policies, Professor Field asserts, but we must also scrap or drastically modify those doctrines which restrict constitutional claimants' right to a federal forum. She sharply criticizes abstention, relitigation bars, justiciability rules, and judge-made limitations upon federal declaratory and injunctive relief. Their combined effect is to oust or at least delay federal jurisdiction in many constitutional cases, a result Professor Field considers antithetical to the intended purpose of the civil rights acts. She

maintains that when Congress has conferred jurisdiction, a strong presumption ought to exist in favor of its exercise. Furthermore, federalism should not serve as a convenient excuse for dodging difficult or politically sensitive questions.

Professor Neuborne shares Professor Field's preference for affording civil rights-civil liberties litigants a largely unfettered right to seek redress in federal district court. However, he also favors creating incentives that will induce more people to select a state forum instead. In "Toward Procedural Parity in Constitutional Litigation," Professor Neuborne explores ways of making state courts better forums in which to adjudicate constitutional claims. Taking his examples from New York law, he examines a variety of "collateral rules" that often impede constitutional litigation in state court and contrasts them with their federal counterparts, which he considers more sympathetic to constitutional rights. He contends that state courts are obliged to entertain section 1983 suits and, finding them analogous in many respects to Federal Employers' Liability Act and Jones Act cases, says they should be subject to an "obverse *Erie*" analysis. Using that methodology, a state court hearing a section 1983 suit would have to apply a federal rather than a state "collateral rule" if the rule probably would affect either the defendant's behavior or the plaintiff's ability to enjoy the cause of action's full benefit. Such rules include those regulating attorneys' fees, defenses and immunities, remedies, burden of proof, sufficiency of pleadings, class actions, selection of limitations periods, and certain aspects of discovery and evidence. According to Professor Neuborne, the "obverse *Erie*" principle would produce a uniform and hospitable body of law governing constitutional litigation in both state and federal court.

Professor Cover takes a somewhat different tack. In "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," he concentrates not upon federalism's defects but upon its virtues. He assesses concurrent jurisdiction's utility in light of adjudication's twin purposes—dispute resolution and norm articulation—and concludes that redundancy has three chief advantages. First, the availability of an alternative forum inhibits corruption and protects suitors when self-interest infects a particular judicial system. Second, where the ideology of one forum's dominant social group distorts decisionmaking, access to a forum controlled by a

different elite helps correct the other's bias. Third, permitting multiple legal systems to articulate behavioral standards encourages innovation and fosters creative dialogue across jurisdictional boundaries. In Professor Cover's judgment, the federal system's jurisdictional structure, messy as it is, supplies a dispute resolution/norm articulation mechanism that is well-suited to a social order fraught with conflict.

Redundancy wins fewer plaudits from Chief Justice Sheran and Judges O'Connor and Aldisert. They strongly disagree with those who suggest that, as a general rule, state judges are less willing and able to uphold the Constitution than members of the federal bench. State courts merit citizens' confidence and federal judges' deference, they insist. Having seen federalism function at a practical level, they criticize the wastefulness of repetitive adjudication and call for greater restraints on federal intervention in state judicial affairs. Their comments also canvass current trends and respond to the various arguments made by Professors Bator, Field, Neuberne, and Cover.

We hope the seven essays in this issue of the *Review* will enhance our understanding of the relationship between state and federal courts. In addition, we trust this symposium will prove to be only the first in a long series of mutually beneficial joint ventures involving the Marshall-Wythe School of Law and the National Center for State Courts.