

Michigan Law Review

Volume 86 | Issue 6

1988

The Role of State Supreme Courts in the new Judicial Federalism

Jonathan T. Foot

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jonathan T. Foot, *The Role of State Supreme Courts in the new Judicial Federalism*, 86 MICH. L. REV. 1311 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/25>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM. By *Susan P. Fino*. Westport, Conn.: Greenwood Press. 1987. Pp. xxi, 154. \$29.95.

The Reagan administration and a strengthened conservative presence on the United States Supreme Court has maintained a rhetoric, if not a consistent policy, of increased attention to and support of federalism and state power. The recent roots of this trend are arguably in the 1970s with the Burger Court. A new interest in federalism for liberals arguably sprouted from these same roots. As the Burger Court pleased conservatives by drawing back from and limiting the Warren Court's expansive protection of individual rights, most notably in the criminal defense area, liberal interests found hope in state court decisions utilizing state constitutions to provide greater protection for individual rights.¹ This apparent new emphasis on states and state courts has been referred to as the "New Federalism" or as the "New Judicial Federalism."²

Professor Susan P. Fino,³ in her book *The Role of State Supreme Courts in the New Judicial Federalism*, understands "[t]he new judicial federalism [to] require[] state supreme courts to take on increased responsibility in constitutional interpretation in general and the development of a tradition of state constitutional interpretation in particular" (p. 35): in essence, to act as the functional equivalent of federal courts for constitutional interpretation. Fino attempts to create a *system* of analysis that will expand and strengthen our understanding of how state court systems work and why they vary in performance. Knowledge of what makes a "good" court good⁴ should allow state courts

1. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. See generally Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075 (1985); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

3. Assistant Professor of Political Science, Wayne State University.

4. [A] "good" state supreme court is one which is committed to the development of an independent body of state law through the rendition of principled decisions. Here, principled decisions are those based upon more than personal whim or exigent circumstances;

better to fulfill the needs of the new judicial federalism. The book is primarily a description of court performance, rather than a proposal and defense of a specific theory of court performance.

Fino follows two primary paths of analysis. First, she lays out a model of state supreme court performance that relies on certain institutional and contextual factors which, she believes, explain and predict court performance.⁵ The model is built largely upon earlier social science studies which attempted to identify and describe discrete aspects of the interrelationship of these factors.⁶ The model consists of seven factors, including "Political Culture," "Characteristics of and Role Perception of the Justices," "State Judicial System," and "Socio-Economic Development and Diversity."⁷ Fino discusses how the different factors might be expected to influence court performance. For instance, under the category of "Political Culture" Fino identifies three different political cultures (Individualistic, Moralistic, and Traditionalistic)⁸ and predicts what performance characteristics we should expect to find in the legal and political system of a state with any given culture.

Fino's model predicts that a state with an Individualistic political culture will emphasize marketplace values, with an attendant triumph of private concerns over community interests.

[S]ince the pure Individualistic culture is devoid of community interests, the role of government is to serve as referee among many competing

instead, principled decisions embody historical and legal considerations which help to make the law knowable. . . . By this definition, a "good" state supreme court is also an "activist" supreme court in the development of state law.

P. 5. Fino quantifies the "good," or "activist," state court by measuring (1) how often opinions rely upon independent and adequate state grounds, (2) how often precedents from other states are cited, and (3) how often law review or other scholarly work is cited. *Id.*

5. Institutional factors are those characteristics of the court system that are man-made and organizational in nature. Examples would include the existence of an intermediate level court, discretionary review by the state supreme court, and the selection process for judges. Contextual (or noninstitutional) factors are more difficult to characterize, but act as important background influences on the court system and the attendant institutional factors. Political or religious cultures and socioeconomic development are characterized as contextual factors. Given the greater degree of control that may be exerted over institutional factors, they offer the more promising path towards improved performance and receive more attention from Fino than contextual factors.

6. Some of the researchers Fino draws upon include Daniel J. Elazar, Austin Sarat, John R. Schmidhauser, Douglas C. Chaffey, Kenneth N. Vines; the teams of Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman and Stanton Wheeler; and Burton M. Atkins and Henry R. Glick.

7. These four factors receive the most attention from Fino. The other factors are "Legal Culture," "Litigation," and "State Government."

8. The three major political cultures are said to form imperfect geographical patterns. "Generally, the Individualistic culture prevails in the northeastern states, the Traditionalistic dominates in the South and the Moralistic in the Midwest." P. 26. The western states are recognized as problematic, displaying mixtures of cultures. Fino spends substantial time discussing political culture, even claiming success "in treating [it] as a legitimate independent variable." P. 43. The admitted 'crudeness' of these generalization and their assignment to various census bureau regions leave doubt in the reader's mind as to their validity and usefulness.

individual interests, not to implement any broad policy of the public good. Therefore, I believe that, in general, litigation rates in [Individualistic] cultures will be relatively high, and I would expect to find challenges to economic regulation as well as a good deal of private litigation in the courts. [p. 10]

Fino also suggests that, in such a system, we should expect to find career judges who are well salaried and in a highly bureaucratized system, reflecting the marketplace value of efficiency.

The heart of the book is the second path of analysis, where Fino attempts to *measure* state supreme court performance with empirical work gathered from six state court systems and case opinions from 1975 and 1977.⁹ Fino closely examines three specific variables of state supreme courts in an effort to test the utility of her predictive model and the accuracy of her specific predictions, such as those just discussed with a state having an Individualistic political culture. Listed below are the three variables and just a few of the subvariables she considers:

<i>Institutional Structure</i>	<i>Judges' Background</i>	<i>Docket</i>
recruitment method	education	caseload
system size	political activity	legal issue
salary	religion	dissenting &
levels of courts	military service	unanimous opinions

Fino discusses these areas in separate chapters before considering them together for each of the six state supreme courts. In bringing together these variables Fino “suggest[s] that state internal unity, political culture and institutional characteristics of the state judiciary are related to the performance of the courts although the relationships are far from perfect” (p. 87).

Fino considers each state in turn and engages in both statistical analysis and “impressionistic application of the model of performance” (p. 87). She tries to determine whether her predictions are accurate. For instance, an Individualistic culture is attributed to New Jersey, and Fino concludes that its judicial system exhibited a number of the expected institutional characteristics, including well paid jus-

9. The six courts examined are those of Arizona, California, Kentucky, Michigan, Nebraska, and New Jersey. They are chosen as representative of each of the six categories in a classification system Fino develops to ease and standardize research and comparison. The classification system is based upon forms of judicial recruitment, cross tabulated with points scored on a System Size scale. These points are a function of support staff, number of judges in the intermediate courts, number of judges in the trial courts, and salary.

The 1200 opinions studied are from 1975 and 1977, and are chosen as representative of “the beginning of the interest in the new judicial federalism.” P. xii. Fino bases her opinion analysis upon a coding system whereby every opinion is given a series of numbers to represent its holding. There are five series or major areas of coding: 100 Series, Federal Constitution; 200 Series, State Constitution; 300 Series, State Statutes; 400 Series, Common Law; 500 Series, Federal Statutes. Then within these series there are specifically assignable categories such as 100 Supremacy Clause, 101 Separation of Powers, 102 Qualifications, election of legislature, etc.; or 400 Estoppel, 401 Standards of proof, 402 Burden of proof, etc. See Table A.5, p. 134.

tices who were well supplied with secretarial and clerical assistance. However, it scored lower on the judicial professionalism scale than predicted for an Individualistic culture. Such conflicting results were common.

Fino's quantitative analysis of these variables offers some interesting profiles of state supreme courts and addresses some existing assumptions about state supreme court performance. However, the results are generally inconclusive. Institutional variables appear to have more predictive utility than contextual variables, but are themselves still rather limited. The existence of an intermediate tier of courts, subject to discretionary supreme court review, is the one factor Fino shows to offer some correlation with a "good" state supreme court. But the overall limited utility of her predictive model leaves one wondering if her method of analysis is worth the effort.

What is worse, Fino's presentation discourages the reader with confusion. The confusion is largely a result of the humbling task of attempting to quantify state supreme court behavior. Fino's general model interrelates many pressures influencing state supreme courts. In quantifying the variables necessary to her model and in attempting to organize and clarify the variables, Fino creates an almost unfathomable fog. The discussion relies heavily upon models, variables, sub-variables, and scales of measured performance. Though the reader encounters little that is more complex than percentage comparisons, the reader might easily become lost in a sea of "factors," "variables," and "models." This is admittedly the heart and soul of Fino's research; but better graphic and organizational explication would have been helpful. The graphs and tables used to supplement the text are inconsistent and of limited assistance in comparative analysis of the different state courts. For example, with each state Fino discusses, she provides a pie graph to show what percentage of a docket any general issue (*e.g.*, state rights, state power, common law, civil procedure, etc.) occupies. However, the issues portrayed are not the same for each state, and this limits the ability to make comparisons between the states. Given that one of Fino's goals is to identify those qualities that make the better state courts better, in hopes of reproducing them in other courts and improving their effectiveness in the new judicial federalism, the ability to compare states is important.

Future work of such a quantitative nature should broaden the data base: Inclusion of more states will make patterns of contextual factors easier to identify, if they exist; consideration of case opinions over a longer period of time will allow for the appearance in shifts in performance. Also, if Fino's hope is to help state courts become the functional equivalent of federal courts for the purpose of constitutional interpretation, it might be useful to make a similar study of the federal courts and then make a state-federal comparison. Such quantitative

studies are not only theoretically difficult but practically demanding given the large amount of information that needs to be reliably quantified, and therefore it is unlikely that such extended studies will pour forth from researchers.

Fino's title offers the promise of an interesting federalism discussion with insights into the interaction between state courts and federal courts, and the interpretation of state and national constitutions. Yet while Fino presents an ambitious and challenging method of analysis, the book leaves the reader unsatisfied and frustrated. This book offers some interesting but limited insights into the specific courts discussed, as well as factors to consider in the study of state courts. It is not an easy book to read or digest, and it is not recommended to the casual reader; the insights are too limited for the effort expended. For those seriously interested in the functioning of state courts, and possible new ways of analyzing these courts, this book may be worth consideration. But be prepared with pencil and paper nearby to keep track of all the variables and subfactors, and a mind ready to critically evaluate the validity of underlying assumptions.

— *Jonathan T. Foot*