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The Line Between Federal and State Court Jurisdiction

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THE LINE BETWEEN FEDERAL AND STATE COURT JURISDICTION

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CHANGES of conditions and clearer perspective have historically brought alterations to both the organization of American courts and the law which they apply. These alterations have occurred without undue disturbance to either the federal or state judiciaries and with benefits to the judiciary most immediately affected.

In a country having a plurality of governmental systems, it is possible that the laws of one will frustrate contrary rules of another or that there will be a Babel of confusion if several persist. There should be a "give" at times and change should occur according to developing needs. The public is not well served when touchiness or hubris is the basis for clinging to jurisdiction, or to a requirement that the law of a particular jurisdiction must apply, or even to forms of court organization.

From the beginning of this nation, there have been controversies involving the division of jurisdiction between federal and state courts. Often, these controversies have centered on the diversity of citizenship provision of the federal constitution. Today, however, the more poignant question is whether *any* division of jurisdiction between the federal and state systems retains logical bases.

Although myriad developments have relevancy with respect to this question, I have here focused upon two of the more important ones: the increasing overlap of subject matter being litigated in federal and state courts and the growing uniformity of standards to be applied in the decision-making process under recent Supreme Court decisions. In the light of these developments, certain proposals for unifying our judicial system and the advantages to be gained from such changes may properly be considered.

I. THE OVERLAP OF JURISDICTION

Mr. Justice Brennan has stated that "the fundamental obligation to administer federal law rests on both [federal and state] courts."[1] The *Erie*[2] case imposed a similar obligation upon federal courts with respect to the law of the states.

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1. N.Y.L.J., Aug. 10, 1964.

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

It is submitted that jurisdictional distinctions based upon subject matter justify themselves only because we are historically used to some of them. For instance, while patents have always been the subject of litigation in federal courts, it is probable that few federal court judges have had any patent experience before their appointment to the Bench.

Federal courts frequently deal with state and local legislation. State courts handle cases arising under both the federal constitution and acts of Congress. The Federal Employers Liability Act,[3] outlining rights of action for injury or death of railway employees, and the Jones Act,[4] establishing similar rights for injury or death of seamen, confer joint jurisdiction upon federal and state courts. Federal courts not located within a state, as in the District of Columbia, deal efficiently with subject matter identical to that which federal and state courts deal with separately in the various states. The trial courts of Canada and Australia operate similarly, although with some other differences.

A single advance sheet of the Federal Supplement taken at random by this writer contains seven diversity of citizenship cases involving the following subject matters: to quiet title; for injunctive relief related to violation of a state fair trade act; damages for fall from a horse rented out by a hotel; wrongful death; damages for injuries suffered aboard a Brazilian airliner; fraud; and a claim against a tenant for breach of lease. These cases all have a ring of frequent familiarity to the state trial courts.

Additional decisions in the advance sheet include six reviewing adverse rulings on disability benefit claims by the Secretary of Health, Education and Welfare; five for patent infringement; four for federal tax refunds; two antitrust cases; an admiralty case; a proceeding for injunctive relief against the Federal Trade Commission; a proceeding against the Spanish Ministry of Commerce for damage to a vessel; and a proceeding for the foreclosure of liens against real property where the United States held a subordinate mortgage and removed the case to a federal court.

Problems in the handling of criminal cases are in many ways quite identical in both court systems, and questions arise regularly as to whether a convicted person should be committed to a state or to a federal institution. A similar problem arises in the federal courts. One may ask why there should be both a federal prison and a state penitentiary. Social problems such as probation and

3. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-59 (1958).
4. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958); Engel v. Davenport, 271 U.S. 33 (1926).

parole are identical in both jurisdictions, and their handling needs better coordination. State and federal judges depend upon FBI information in determining what ought to be done with law violators. Both the commission of crimes and the conduct of legitimate commerce are involved increasingly with interstate operations. Criminal laws passed by Congress may increase federal court burdens by placing jurisdiction in them; but the laws are no less reasonable subjects for state court handling.

Federal courts have been plagued with a quantity of petty criminal matters, and there have been moves to free them from this burden.[5] A similar problem exists in the personal injury field where a great mass of automobile cases, no less federal than state in nature, has both glutted calendars everywhere and, because of their general sameness, contributed an atmosphere with fertile potential for intellectual stagnation on the bench. Congress increased the minimum amount for diversity of citizenship jurisdiction from three thousand to ten thousand dollars and certainly expected thereby to lift cases out of federal courts and move them into state courts. Yet, if Congress really believed such cases were federal alone on principle, by what moral justification should it have passed the burden of any of them to the states? If it felt that the cases were too trifling for federal court attention, then it must have borne some attitude that state courts were inferior. Moreover, although the increase in the jurisdictional amount must have rid the United States courts of some litigation, inflation and the natural sagacity of lawyers to decide for themselves the unliquidated amounts to pray for make it highly problematical that the number of cases actually transferred out by the change has been particularly large. Federal trial courts still receive their good share of automobile accident litigation.

II. The Growing Uniformity of Standards for Decision-Making Making

What many in recent years have viewed as the judicial mist coming up from the ground relates to the line of decisions in the criminal, social, and political fields under the fourteenth amendment. Despite some opposition to these rulings, the trend continues without apparent change of vein. Law enforcement agencies simply must adjust and must be enlarged and upgraded. What remains desired

5. Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses—Need and Constitutionality*, 107 U. Pa. L. Rev. 443 (1959).

is such stability of Supreme Court ruling on certain subjects that trial court judges, both state and federal, can adjudicate with some sureness in matters of serious public import.

A. *Rights of Criminal Defendants*

The fourteenth amendment has long been regarded as embracing certain provisions of the first eight. Thus, even in *Twining v. New Jersey*,[6] while Mr. Justice Moody stated that "the first ten Amendments are not operative on the States,"[7] Mr. Justice Harlan pointed out in his dissent that certain provisions of the first ten amendments do bind them.[8] It would be unlawful, for example, for a state to abridge the freedom of speech safeguarded by the first amendment, or the exemption from cruel or unusual punishments, or the exemption from being put twice in jeopardy of life or limb for the same offense, or the exemption from unreasonable searches and seizures. However, despite the fifth amendment and the rule to the contrary in federal court practice, the *Twining* majority held that a state trial judge could instruct a jury in a criminal case that they might draw an unfavorable inference from a defendant's failure to testify in his own behalf.

Certainly the Supreme Court has the constitutional power to declare that all of the provisions of the Bill of Rights are within the fourteenth amendment's purview. Some provisions simply have not been esteemed of such vital concern that general thinking over the years would regard them as fundamental in the conduct of a free nation. Mr. Justice Cardozo rationalized the lack of total incorporation by saying that certain rights "are not of the very essence of a scheme of ordered liberty" and "to abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[9] He cited a number of instances in which the fourteenth amendment was held to impose upon the states restrictions guaranteed by the Bill of Rights against federal encroachment.

Cardozo thus suggests a highly subjective standard for determin-

6. 211 U.S. 78 (1908). "Principles of free speech are carried to the states only through the Fourteenth Amendment." McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (concurring opinion). The Court's analysis of the fourteenth amendment in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), may have been a practical one for the time, but it was quite restrictive. "Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others." Twining v. New Jersey, 211 U.S. 78, 96 (1908).

7. *Id.* at 93.

8. *Id.* at 114-27 *passim*.

9. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

ing whether a provision of the first eight amendments is to be regarded as embodied within the fourteenth. If this be the test, one must understand the inner workings of the individual Justices in order to know the law. The Court in 1949 held that state trial courts could receive illegally-obtained evidence in a criminal case,[10] and Mr. Justice Frankfurter indicated that what constitutes due process of law will be reconsidered from time to time. He pointed out that thirty states had rejected the federal rule requiring exclusion of illegally-obtained evidence and only seventeen had accepted it. "We cannot brush aside the experience of States," he said, "which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence."[11]

Two years previously, in *Adamson v. California*,[12] Frankfurter had stated that "it ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth."[13] Mr. Justice Black dissented from the *Adamson* decision, and Justices Douglas, Murphy, and Rutledge concurred with his statement that,

> "I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."[14]

With some shift of judicial personnel, what followed came naturally. *Mapp v. Ohio*[15] declared that the right-to-privacy provisions of the fourth amendment operate upon the states through the due process clause of the fourteenth and that illegally-obtained evidence could no longer be admitted in either state or federal courts against a defendant from whom it was taken. Development of improved methods in both the commission and the detection of crimes are so interwoven between the state and the nation that police methods of one government can materially affect another.

10. Wolf v. Colorado, 338 U.S. 25 (1949).
11. *Id.* at 31-32.
12. 332 U.S. 46 (1947).
13. *Id.* at 66 (concurring opinion).
14. *Id.* at 89 (dissenting opinion).
15. 367 U.S. 643 (1961). "[N]ow . . . more than half of those [states] . . . passing upon it . . . have wholly or partly adopted . . . [the federal] rule." *Id.* at 651. See also Aguilar v. Texas, 378 U.S. 108 (1964) (affidavit that there was "reliable information" from a "credible person" was held not sufficient basis to justify magistrate in issuing warrant for search and seizure).

The federal court rule repudiating the use of evidence illegally seized could be rendered impotent in some cases if a contrary rule for state courts were continued, since federal officers might take such evidence across the street to the state prosecutors for prosecution of the defendant by them. The *Twining*[16] and *Adamson*[17] cases have also been overturned,[18] and states which permitted judges to instruct juries that they might draw unfavorable inferences from the failure of an accused defendant to testify may do so no longer.

These rulings suggest the increasingly-knitted interrelationship between federal and state law enforcement and the further blending of function between state and federal courts.

B. *Civil Rights*

Growing national unity and the increase of interstate interplay are bound to focus more significance on the supremacy clause of the Constitution;[19] both federal and state courts have a responsibility with relation to it. Laws of the United States enacted pursuant to the Constitution are the supreme law of the land, and the Supreme Court will not permit those laws to be thwarted by strategic conduct within the states.

When the Supreme Court directed the admission of Negro children to state public schools on a non-segregated basis,[20] it affirmed what most people in most states were well prepared to accept.

The Court affected the conduct of state government more intimately, however, when it held that a federal district court could require a county board to exercise its power to levy taxes for financing the reopening and maintenance of closed schools on a racially-integrated basis.[21] When in that case it was argued that, by customary procedure, the plaintiff should first have awaited a declaratory judgment determination presently pending in the state courts, Mr. Justice Black indicated that pertinent determinations had been made in another case. Then, illustrating the power of the Supreme Court over procedures in the state courts, he said,

> "But quite independently of this, we hold that the issues here imperatively call for decision now. . . . There has been entirely

16. Twining v. New Jersey, 211 U.S. 78 (1908).
17. Adamson v. California, 332 U.S. 46 (1947).
18. Malloy v. Hogan, 378 U.S. 1 (1964).
19. U.S. CONST., art. VI.
20. Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896)).
21. Griffin v. County School Bd., 377 U.S. 218 (1964).

> too much deliberation and not enough speed in enforcing the constitutional rights . . . denied Prince Edward County Negro children."[22]

It was reported that approximately three thousand sit-in Negroes had been guilty of violations of state trespass statutes before passage of the Civil Rights Act of 1964. The decision in *Hamm v. City of Rock Hill*[23] ordered all the convictions to be vacated and pending prosecutions abated. For our purposes, it is not necessary at this point to analyze the majority's reasoning in that case. The effect of the holdings in the other two Civil Rights Act cases decided the same day[24]—that the more controversial features of the act were constitutional—would have been dulled had the Court failed to rule as it did. Clear conflict existed between the spirit of the Civil Rights Act and the adverse atmosphere that permeated the hold-over convictions and threats of further prosecution.

The effects of the *Hamm* decision on the balance of state and central government relationships are, of course, another problem, and the impact on law enforcement within the states remains to be seen. Yet the decision makes it clear that the functions of federal and state courts in this field are quite identical—social morality is a matter of both federal and state concern. A major established national policy of social morality cannot exist side-by-side with a conflicting state practice.

C. *Political Rights*

In the 1964 Term, the Court held that it is a violation of the equal protection clause for one house of a state bicameral legislature to be elected on the basis of population and the other on the basis of area.[25] A legislative body must be apportioned on the basis of population; otherwise, the votes of citizens living in the more popu-

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22. *Id.* at 229.

23. 379 U.S. 306 (1964).

24. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (as to motel); Katzenbach v. McClung, 379 U.S. 294 (1964) (as to restaurant).

25. Reynolds v. Sims, 377 U.S. 533 (1964). See generally *Reapportionment Symposium*, 63 MICH. L. REV. 209-78 (1964). For a contrary point of view, see the 1948 statement by Mr. Chief Justice (then Governor) Warren: "The agricultural counties of California are far more important in the life of our state than the relationship their population bears to the entire population of the state. It is for this reason that I never have been in favor of restricting their representation in our state senate to a strictly population basis. It is the same reason that the founding fathers of our country gave balanced representation to the states of the Union, equal representation in one house and proportionate representation based upon population in the other." Time, June 26, 1964, p. 22.

lous areas are diluted. Mr. Justice Harlan disagreed with the majority, saying:

> "These decisions . . . relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. . . . Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people . . . . I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so."[26]

This dissent would appear to be an appeal both for judicial restraint in the field of federal-state relations and for withholding extension of the fourteenth amendment's purview. But the voice of Mr. Justice Harlan alone was raised.

III. Implications for the Continuance of Separate Judicial Systems

A. *The Law To Be Applied*

Decisions of the Court, in broad perspective, seem to justify the conclusion that most restrictions upon the federal government set forth in the first eight amendments are now to be regarded as restrictions upon the states as well and that the Court will determine more specifically as occasion demands what restrictions or guarantees will be so enforced. The tenth amendment, which reserves powers to the states, must conform accordingly.

The recent cases reviewed above indicate that the Supreme Court is generally tolerant as to social, economic, moral, or legal principles which are acceptable in some states, but unacceptable in a large proportion of them. But when these principles become more generally accepted as prescribing the right, just, and fair thing to do, notwithstanding strong disagreement by many people or even some state governments, or if the application of a state-adopted rule will probably interfere unreasonably with a rule or standard adopted by the central government, the Supreme Court has the power, and will exercise it as occasion demands, to make binding upon the states what is regarded as the higher standard or what constitutes the federal practice.

May one not ask today, then, with the highest devotion to both federal and state judicial systems, what basic distinction still re-

26. Reynolds v. Sims, *supra* note 25 at 589, 590 (dissenting opinion).

mains between them? Why should we retain both a federal judiciary and fifty separate state court organizations? Mr. Justice Harlan has warned that the growing feeling that the correction of social deficiencies should be a judicial function holds a capacity "for serious mischief";[27] but the move for amalgamation of judicial determination for the national common good and for compulsion upon the states nevertheless continues. The concepts of interstate and intrastate subject matter have become of diminishing significance. So much can be accomplished on a national scale which the states otherwise would not or could not do, that the central growth has snowballed with general public tolerance and acquiescence. The Supreme Court has followed in some ways and has taken the leadership in others.

The recent cases referred to above are random examples which, for the most part, have been so publicized and debated that many a person on the street has general familiarity with them. They indicate the overlap of state and federal law, the final power of the United States Supreme Court, and how new vistas generate the concept that law as administered by courts, whether they be state or federal, is the same within any state.

B. *Administration and Procedure*

Whether one favors it or not, court administration, state and federal, increasingly is becoming centralized everywhere in the United States. *Mapp v. Ohio*[28] required uniformity as to one type of evidence in criminal cases. A movement is afoot for the adoption of a uniform code of evidence in the federal courts; if it is adopted, the states will surely move swiftly to adopt similar evidentiary rules. Rules of civil procedure in an increasing number of state courts approach identity to the federal rules. Coming largely from the National Conference of Commissioners on Uniform State Laws, various state codes have been enacted to accomplish uniformity between the states on certain subjects, both adjective and substantive. The American Law Institute has drafted restatements of the law which incline all jurisdictions toward unification of various common-law concepts.

Because of the identity of many of their problems, the appellate judges of federal courts have joined state appellate judges in a single voluntary association within the American Bar Association; there

27. Harlan, *Thoughts at a Dedication—Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943 (1963).

28. 367 U.S. 643 (1961).

has been some suggestion that state and federal trial judges should do likewise.

IV. Federal and State Courts: A Qualitative Comparison

In this writer's observations, both the federal and the state courts have gone far in the field of administrative improvement and in the development of the quality of the law itself. State judicial systems have developed individually, and the progress of accomplishment may have been slower in one state than in another and slower in all states than in the national courts. The larger federal system has developed as a whole and has certainly leavened state judiciaries with inspiration for their own betterment.

Advances have not come from judges alone. Bar associations and other bench- and bar-supported organizations have played leading roles.[29] Members of the United States Supreme Court have themselves gone into the states and into these associations to lend their personal encouragement and, in a manner, to persuade that state and federal courts alike are in a common race together.

A. *Federal Trial Courts*

Federal district courts have acquired a substantial prestige. They are part of the national government, and it, of course, bears a greater public command than does any single state. They are also identified closely with the United States Supreme Court through the federal judicial system, and the status of the Supreme Court surely spreads in part to all courts that appear to bask in the sunlight of its prestige.

Other reasons have been advanced for the high standing of the federal trial bench. Its judges have always been kept limited in numbers,[30] and the psychology and prestige of federal office lead to better selection of federal judges. Law and procedural reforms by national associations always have placed first emphasis on the federal system since it has the broader base geographically and thus permits the associations to call upon their members in all states

29. Most noteworthy, The American Judicature Society and The Institute of Judicial Administration, Inc.

30. "A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions." Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 515 (1928).

for support. It was in the federal courts that advanced procedural rules were first provided; they have seeped with some rapidity into state court systems.

The personal provisions for federal judges generally excel. These include the personnel and office facilities to spur efficiency and scholarly working conditions and to keep the judges conscious of the dignity and importance of their office. The salary level, life tenure, voluntary retirement at age sixty-five without reduction of salary, avoidance of the necessity of running in competitive elections all make the office of federal judge more attractive than that of the state counterpart. To these should be added as a factor of principal importance in the public thinking the method of selecting federal judges. It is far superior to that provided by most states, even though it could be improved by bringing the selection process closer to the states.

B. *State Trial Courts*

There are reasons why state courts may suffer comparatively in prestige.[31] It has been claimed that state courts have been subject to political forces that have made the quality of their determinations too unpredictable. Personal provisions for state judges are too often not nearly as attractive as those for the federal judiciary, and what desirable provisions have been made have often come only after a degrading type of lobbying by the judges themselves. State judges

31. Frankfurter gives us a historical beginning in the diversity of citizenship field: "Such distrust as there was of local courts derived, not from any fear of their partiality to resident litigants, but of their general inadequacy for the interests of the business community." *Id.* at 520.

Ohlinger, *Limitation of Diversity Jurisdiction in Cases Affecting Foreign Corporations*, 30 MICH. L. REV. 923, 927 (1932), suggests that the feeling averse to state courts "comes from such legislation as that limiting the terms of state judges, making them subject to popular election, prohibiting comment on evidence, allowing verdicts to be returned by less than the entire jury, the requirement of submission to the jury of issues of fact which are supported by only a scintilla of evidence . . . ."

"In the popular mind, at least, the federal courts are sagacious courts, in which political peccadillos are subordinate to an eagerness for justice; while the often mediocre state courts are subject to politics and a multitude of fallibilities. . . . Admittedly the federal courts are the better, the more respected. Their influence upon the courts of the states must be considerable, both as examples of dignity in procedure and as checks upon occasional heretical decisions." Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 369, 371 (1933).

"[T]he administration of justice in the federal courts offers important advantages over that available in many states. In their formative stages many state courts were under the influence of their legislatures and other political forces which made the quality of justice somewhat unpredictable. National justice, in contrast, was administered by judges with secure tenure and compensation . . . ." Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction—A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1449 (1964).

too generally have limited terms with the necessity of running again in competitive elections. Their staff facilities are usually too stinted, and, even so, hydra heads appear at times to reduce further their efficiency. Salaries are generally far lower than federal judges receive, the age of retirement is later, and provision for retirement, where made, is wholly inadequate. These conditions make it difficult to inspire enough of the best and more experienced lawyers to leave successful law practices for lives dedicated to the bench. There is a need for judges of background and substantial previous legal experience in order to invite the confidence of all parts of the community in all its phases.

Some of these are sad words from a member of a state trial bench who has found much inspiration among his own colleagues and in his state trial judge contacts across the country. Nor is the apparent prestige differential wholly justified. The National Conference of State Trial Judges, inspired largely by a member of the United States Supreme Court,[32] has done much to unify court administrative procedures and to provide scrutiny of substantive law problems common to trial courts of all states. This writer is personally acquainted with numbers of state trial judges who are deeply dedicated to their profession and who would more than grace any court. But the states too generally have failed to provide the quality of screening and method of judicial selection that could most inspire the confidence of the more capable bar, the general public, and even state judges themselves. The tenure and method of selection actually affect the spirit of court decision.

V. Some Proposals

American courts and public support of them constitute one of the major phenomena in the preservation of our democracy. Justice is one of the most sacred qualities in our being. Although decisions of courts may not always express it, judges of high character and ability always strive to approximate their highest concept of justice. Law reformers and judicial reformers always set a goal beyond present accomplishment and work toward an ideal. Arthur T. Vanderbilt's expression that judicial administrative reform is not for the short-winded gives ample justification now for putting up the damp finger to see in which direction governmental winds are blowing and for looking beyond our present horizons in an effort to guide the trend to the necessary goal.

32. Mr. Justice Tom C. Clark.

From the vantage point of the writer as a state trial court judge, it appears the line of demarcation between state and federal court jurisdiction is becoming persistently arbitrary and artificial. When, in one major area, the law is generally that of the state in both the federal and the state courts and, in another major area, the law to be applied in both court systems is that of the national government, and when the trend of judicial and legal reform is to encourage uniformity of both judicial administration and the rules of substantive law, then one may well question whether there is a very good sense in retaining one separate federal and fifty separate state judicial systems. What is here suggested is a basis for substantial, unified, over-all judicial betterment.

A. *One Unified System*

In a rather unpublicized talk to law students, the Honorable W. St. John Garwood, formerly a member of the Supreme Court of Texas, asked:

> "Should we not now be getting within at least thinking distance of the time when we might have . . . not separate federal and state courts, but a single system of courts for both state and federal law with, if you prefer, the judiciary selected and paid for by both the states and the nation jointly?"[33]

This in itself is no suggestion that the federal government exercise either less or more restraint in its relations with the states. We shall always have interests more conveniently treated as local and will always need state, county, and city governments. But courts are in a somewhat different category. Their need is always for an atmosphere of greater objectivity, and, to some degree, it is desirable to remove any feeling that the various courts represent particular governments. Courts are not properly the representative of their government against the people. Instead, they comprise one of the three major governmental departments and are to be available for fair and equal treatment of every person, entity, or controversy before them.

Articles by the late Felix Frankfurter and his associates placed some emphasis upon the empiricism with which certain types of courts have come into being.[34] Judicial administrative reform has

33. 32 HARV. L. REV. 4 (1961). "If the American lawyer could only get outside the confines of his own system . . . he would see how absurd it really is. When we are able to get such a perspective on ourselves we may be able to work out some better solutions for these problems." GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 79 (1964).

34. "Federal business seeks federal tribunals—even when state courts are available." Frankfurter & Hart, *The Business of the Supreme Court at October Term—1932*, 47

been in the direction of unification. The Uniform Judiciary Article, as proposed for state constitutions, places the probate or surrogate court on the trial court level, with appellate court justices in administrative control of the whole. The suggestion for the unification of all courts, state and federal, into a single, unified judicial system departs only slightly from recent organizational accomplishments or current reform proposals. The practical difficulties, created substantially by habit and historical prejudice, are obvious, but not insurmountable. Administrative and economical advantages of a unified court system can be considerable.

B. *Alternatives*

A unified system might be entirely federal or entirely state. If the former, it might be objected to as constituting too great a centralization; of course, unification into an entirely state system might well be considered too great a decentralization. A movement for either type would probably face insuperable political opposition, each from those who might favor the other; and both could encounter serious constitutional frustration.

But alternatives for unification may be suggested. I would propose a joinder of federal and state judicial systems without elimination of either. It is submitted that this could be accomplished under the federal constitution without need for amendment and possibly under some state constitutions as presently written.[35] The state and the federal governments would jointly provide the courts.

There has been some feeling that opinions of the states have been by-passed in the determination of constitutional questions that seriously affect local problems. All such questions could well be made to flow through the proper state appellate court for an ex-

HARV. L. REV. 245, 271 (1933). See also Blume & Brown, *Territorial Courts and Law—Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 39 (1962).

35. "[D]ifficulty . . . is caused by the outdated feeling that the federal courts are of a different system, ignoring the Supreme Court's counsel that the two sets of courts 'are not foreign to each other . . . .'" Cowen, *Federal Judicial "Interference" With the Finality of State Court Proceedings*, 50 GEO. L.J. 733, 752 (1962). "It is not essential to a federal government to have federal courts. No other English speaking union has such a system." Frankfurter, *supra* note 30, at 515.

"Roger Sherman of Connecticut . . . had written: 'The Constitution does not make it necessary that any inferior tribunals should be instituted, but it may be done, if found necessary . . . .'" Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923).

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

pression of state attitude, subject to further appeal in proper cases to another appellate tribunal. The state appellate courts could settle state law questions that are presently decided by federal courts without state court precedent. Existing procedures whereby a federal trial court may occasionally review proceedings in a state appellate court are both belittling and offensive to a degree; they ought to be eliminated. The level of functions in both the state appellate courts and the federal circuit courts could be raised, and a better buffer could be developed against the flood of matters approaching the United States Supreme Court.

There would have to be a new federal judiciary act that would bring states under its purview as they in turn raise their court standards to a specified level. The act would be supplemented by substantial use of the Supreme Court rule-making power. All of the litigation and the administrative duties of the state and federal courts might well be placed under management generally by the administrative office of the United States courts, and present state court administration could be unified on a national basis under the director of that office. This would promote efficiency and economy. One state court administrator of today could probably handle the work of a number of states.

While the federal constitution would not have to be amended to accomplish this end, developments in the study of judicial selection certainly indicate that article II, section 2, which deals with the appointive power, ought to be amended at some time in order to bring the selection of trial judges nearer to the states and to otherwise improve the method of judicial selection.

Individual states, of course, are reluctant to accept governmental centralization. A unification program would have to win their gradual support. If we were here considering federal aid in its usual sense, we would invite the usual political hurdles even though the concept of such aid is not new and has in other fields ultimately resulted in general, whole-hearted state acquiescence. The suggestion here is simply that the federal government do its part in the financing and administration of what has become increasingly a field of national government participation, and that the states accept the advantages that would flow from the unification.

The change proposed is largely an administrative one. Decisions would continue to be made within the states subject to final determination by the Supreme Court of the law to be applied. What states would give up would be small and would be far outweighed by the advantages of the administrative transformation. The states

would realize substantial economic benefits in addition to an improved judiciary.

It was initially expressed, when the judiciary article of the Constitution was being formulated, that, after the state courts had been placed on a sound footing, all litigation would be taken over by the states.[36] State courts have been improved and developed immeasurably. The winds of government, however, have blown in the opposite direction.

The unifying reform suggested above, which now looks so naturally possible, should require state court administration to be raised to a specified level before a state could have the advantage of the program. Being quantitatively statistical is not enough. The support of the practicing bar, the legislatures, and the general public, as well as leavening among judges themselves, are requisite. The possible rewards to a democracy and for those who acknowledge the sacredness of the concept of justice for their fellow man are great.

36. "James Madison had said: 'It will be also in the power of Congress to vest this power in the State Courts both inferior and superior. This they will do, when they find the tribunals of the States established on a good footing.'" Warren, *supra* note 35, at 66.