THE STATE JUDICIAL ARTICLE

G. Alan Tarr

Whereas the component units of all federal systems exercise legislative and executive power, many federations—for example, Austria, Canada, and India—have not instituted complete sets of courts at both the federal and component-unit levels. The United States, in contrast, has fifty-one court systems, fifty state and one federal, each with the full panoply of trial and appellate courts. The federal government determines the structure and operation of the federal courts, and each state determines the structure and operation of its own courts. Federal law primarily determines the division of authority between these court systems.

Three legal principles govern the relations between federal and state courts. The first principle is the supremacy of federal law: all inconsistencies between federal and state law are to be resolved in favor of the federal law, as long as the federal government is acting within the sphere of its authority. Thus, the federal Constitution, federal statutes, and federal administrative regulations all supersede state enactments, including state constitutions. A second principle is the authority of each system of courts to expound its own body of law. State courts must not only give precedence to federal law over state law; they must also interpret the federal law in line with current rulings of the U.S. Supreme Court. Conversely, in interpreting the law of a state, federal courts are bound to accept as authoritative the interpretation of that law propounded by the highest court of that state. A third principle is the so-called autonomy principle: when a case raises issues of both federal and state law, the U.S. Supreme Court will not review a ruling grounded in state law unless the ruling is inconsistent with federal law. Thus, when a state ruling rests on "adequate and independent state grounds," it is immune from review by the U.S. Supreme Court.

Because all residual powers under the federal Constitution lie with the states, the state judicial power extends to all cases that do not fall within the exclusive jurisdiction of the federal courts. This encompasses the vast majority of legal disputes. Moreover, in determining what constitutes a "case" appropriate for judicial resolution, the states are not bound by the justiciability limitations imposed on the federal courts by Article III of the federal Constitution. Rather, state constitutions and state statutes determine what sorts of claims can be litigated in state courts. Thus, whereas federal law imposes rather strict standing-to-sue requirements, many states have been far more liberal in awarding standing—e.g., thirty-four states permit taxpayers' suits to challenge state government action. Similarly, whereas federal courts cannot issue advisory opinions, seven state constitutions expressly impose on their supreme courts a duty to render such opinions, usually upon request by the legislature or the executive. Finally, whereas federal courts have developed the political-questions doctrine to avoid impinging on coordinate branches of the federal government, such separation-of-powers concerns seldom affect state courts.

More than ninety-five percent of criminal cases are state cases, arising under state criminal laws. Familial matters (divorce, child custody, and adoption) and landlord-tenant relations are regulated by state law and addressed by state courts. So, too, are traffic violations, creditor-debtor disputes, most personal injury suits, and most commercial transactions. Such issues not only arise in state courts but also are ultimately settled by state courts. Although some state judicial decisions are subject to review by the federal courts, most fall outside the federal judicial power—that is, they resolve disputes under state law between citizens of the same state. Even when the U.S. Supreme Court might in theory review state rulings, the sheer number of state cases means that only a miniscule percentage actually receive federal judicial scrutiny. Thus, state courts render the final and determinative decision in almost all the cases they consider.

Reform Principles

Judicial Independence: Judicial independence involves the insulation of the judiciary from undue or improper influence by other political institutions, interest groups, and the general public, so that judges can render impartial judgments according to law in the cases they decide. This decisional independence is designed to serve not the parochial interests of judges but rather the interest of the public in even-handed justice.

Autonomy of the Judicial Branch: Complementing decisional independence of the judiciary is institutional independence or autonomy. Separation-of-power principles require recognition of the autonomy of the judicial branch as a coequal partner in state government. This means that the judicial branch, like the other branches of state government, must have the authority to govern and manage its own affairs, free from undue interference by other branches of government, although not from the scrutiny of those branches or of the public.

Effective Delivery of Judicial Services: State judicial systems must be structured and managed so that they ensure access to justice for all citizens and provide for the expeditious and cost-effective administration of justice.

Accountability of the Judiciary: The American system of government embraces the notion of accountability for public officials in order to prevent corruption or other abuses of power and to ensure that governmental policy reflects the values and interests of the community. Like the other branches of state government, the judiciary too must be accountable. With respect to the judiciary, two different types of accountability can be distinguished. With regard to their decisions, judges must be accountable to the law. With regard to the operation of the judicial branch, the judiciary is accountable to the people and to their representatives through the normal processes of legislation and appropriations. Among the mechanisms for promoting judicial accountability are (a) appellate review of judicial decisions, (b) judicial retention processes, whether electoral or appointive, sometimes guided by judicial performance evaluations, (c) judicial discipline processes enforcing codes of professional conduct, and (d) impeachment. Accountability is often in tension with judicial independence.

Constitutional Design Issues

Trial-Court Consolidation. For much of the nation's history, most state court systems were essentially "non-systems," characterized by a proliferation of limited-jurisdiction and specialized courts, often with their own distinctive rules of procedure and with overlapping and/or ill-defined jurisdictions. Over the course of the twentieth century, most states recognized the problem posed by multiple trial courts and, following reform prescriptions, consolidated their trial courts into either one-tier or two-tier systems (a two-tier system retains a trial court of general jurisdiction and a separate trial court of limited jurisdiction).

Jurisdiction. Should one constitutionalize the jurisdiction of various courts? One possibility is to assign the allocation of jurisdiction to the Legislature, to maximize flexibility. Another possibility is to allocate the jurisdiction of each court in the constitution. This is problematic, particularly if the Legislature is authorized to create additional courts, as it hampers the reallocation of jurisdiction to those new courts. Many state constitutions grant broad authority to the Legislature to allocate jurisdiction but nonetheless constitutionalize certain choices, particularly as they relate to the jurisdiction of the supreme court. These include: (1) Are there appeals that the constitution should require be heard by the state's highest court as a matter of right? (2) Should the constitution authorize the supreme court to issue advisory opinions or address the constitutionality of bills before their enactment into law? (3) Should the constitution authorize the supreme court (or some other body) to rule on whether proposed initiatives meet state constitutional requirements governing the initiative process before the proposals appear on the ballot? (4) Should the constitution protect against legislative use of its power over jurisdiction to infringe on the autonomy of the judiciary?

Administrative Unification. Administrative unification includes: (1) vesting rulemaking authority in the state supreme court in order to encourage uniform procedures throughout the court system, (2) making the chief justice the administrative head of the court system in order to promote a system-wide management perspective, (3) creating and empowering chief judges of trial courts in order to strengthen management at that level, and (4) establishing vertical lines of authority within the court system.

Judicial Selection & Tenure. Judicial selection is the most controversial issue in the state judicial article, because it raises in the clearest fashion the tension between judicial independence and judicial accountability. Methods currently used in selecting state judges include:

1. Merit selection. A judicial nominating commission, composed of lawyers selected by the state bar and non-lawyers typically appointed by the governor nominates three to seven candidates when a vacancy occurs, and the governor then selects the judge from that list. After a

short period of service on the bench, the judge runs in an uncontested retention election, which allows voters to determine whether the judge should remain in office. If retained, the judge stands for re-election in retention elections periodically thereafter.

2. Election by the legislature.

3. Appointment by the governor: In four states the governor initially appoints judges with the advice and consent of the state senate, using either gubernatorial reappointment or retention elections for subsequent terms.

4. Partisan election.

5. Nonpartisan election.: Nineteen states conduct judicial elections with no party affiliation indicated on the ballot. Typically, the top two candidates in a nonpartisan primary qualify for the general election. In most states judges run for reelection in retention elections.

Reform groups have long espoused merit selection, During the 1960s and 1970s several states shifted to merit selection, but in recent decades voters have consistently opposed merit selection. This loss of reform momentum has led reform groups to seek ways of improving existing modes of selection rather than transforming them, at least in the short run.

Judicial Discipline & Removal. The legislature may remove judges by impeachment, and the citizenry either by defeat at the polls or (in nine states) by the recall of judges. However, the deficiencies of these weapons plus the judicial branch's concern to police its own personnel, led to the adoption in all states of commissions within the judicial branch for the discipline of sitting judges. These commissions receive complaints about judges, investigate those complaints (or on occasion initiate their own investigations), file and prosecute formal charges, and either recommend sanctions to the state's highest court or impose sanctions themselves. Sanctions include: (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) suspension; or (4) removal from office.

Forty-one states employ a "one-tier" model, under which prosecutorial and adjudicative functions are combined, thereby avoiding duplicative work and promoting a speedier disposition of cases. In such systems, the final disposition of cases rests in the hands of the state supreme court, which has administrative authority over the judicial branch. Nine states employ a "two-tier" system, under which the prosecutorial and adjudicative functions are separated in order to avoid biased decision-making. Because commissions typically include public members who are neither judges nor lawyers, the "two-tier" system allows the public to be represented in the final disposition of cases.

State constitution-makers may decide whether the constitution should prescribe the one-tier model or the two-tier model. Alternatively, they may merely create the Judicial Discipline Commission and leave the selection, structure, and operation of the Commission to implementing legislation.