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The 1987 Lewis H. Case Memorial Lecture

THE TENSIONS OF A DUAL COURT SYSTEM AND SOME PRESCRIPTIONS FOR RELIEF

*Roger J. Miner**

For nearly two hundred years, our federal constitutional structure has been subject to some significant strains arising out of the need to maintain a proper balance of power between state and national governments. Nowhere has the stress been more evident than in the problems generated by the side-by-side existence of federal and state courts. The United States Supreme Court recently referred to "the tensions inherent in a system that contemplates parallel judicial processes."¹ It is my purpose to discuss some of those tensions, to review the measures that have been established to alleviate them, and to suggest some other palliative approaches grounded in the principles of comity and federalism of which the Supreme Court so often speaks. My discussion will focus on frictions produced by the exercise of federal court jurisdiction in cases involving diversity of citizenship, habeas corpus, civil rights, criminal law and attorney discipline.

The potential for friction between state and federal court systems was foreseen early on. James Madison's *Journal of the Constitutional Convention* records the following comments made during the debate over the provision for inferior federal courts:

Mr. Butler could see no necessity for such tribunals. The State Tribunals might do the business.

Mr. L. Martin concurred. They will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere.²

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¹ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987).

² 2 RECORDS OF THE FEDERAL CONVENTION 41 (M. Farrand ed. 1937), reprinted in 4 THE FOUNDERS' CONSTITUTION 133, 137 (P. Kurland & R. Lerner eds. 1987) [hereinafter FOUNDERS' CONSTITUTION].

Ultimately, of course, the Constitution provided for "such inferior Courts as the Congress may from time to time ordain and establish."³ Alexander Hamilton attempted to downplay the potential for conflict in the dual court system spawned by this provision. In No. 81 of *The Federalist Papers*, he wrote that "the authority of the judicial department . . . has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature."⁴ Acknowledging, however, that there was a question as to "what relation would subsist between the national and state courts in . . . instances of concurrent jurisdiction,"⁵ he indicated that the Supreme Court, in the exercise of its appellate jurisdiction in respect of both court systems, would resolve such problems as might arise.⁶ The only purpose of having inferior courts, according to Hamilton, was "to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance."⁷

What Hamilton never contemplated was inferior federal court interference with state court decisions and decision-making through the exercise of an expanded federal question jurisdiction granted by Congress and approved by the Supreme Court. Hamilton was not even very prescient in his explanation of how conflicts inherent in the exercise of concurrent jurisdiction would be resolved. The explanation he provided failed to answer the following question, posed in one of the anti-federalist essays:

If the *State* courts have *concurrent jurisdiction* with the *inferior federal* courts, . . . is it not self-evident that there may be *different* adjudications on the SAME question . . . if decided in the *inferior federal* court with an appeal, [or] if decided in a *State* court without any appeal, to the *supreme federal* court?⁸

There was extended debate in Congress prior to the adoption of the Judiciary Act of 1789, which created an inferior federal court system consisting of district and circuit courts as authorized by the newly-ratified Constitution.⁹ Those who foresaw conflict with the state courts opposed adoption of the Act. One congressman, with obvious sarcasm, "asked whether the people could ever consider such an accumulation of courts of justice calculated to promote their inter-

³ U.S. CONST. art. III, § 1.

⁴ THE FEDERALIST No. 81, at 416 (A. Hamilton) (G. Wills ed. 1982).

⁵ THE FEDERALIST No. 82, at 419 (A. Hamilton) (G. Wills ed. 1982).

⁶ *Id.*

⁷ THE FEDERALIST No. 81, at 412.

⁸ A [Maryland] Farmer, No. 6 (April 1, 1788), reprinted in 4 FOUNDERS' CONSTITUTION, *supra* note 2, at 378 (emphasis in original).

⁹ Judiciary Act of 1789, ch. 20, §§ 2, 4, 1 Stat. 73-75.

est.”¹⁰ He answered his rhetorical question by saying “he was sure, under the circumstances, the freemen of America could never submit to it.”¹¹ Another congressman predicted disaster in these words: “[S]eparate jurisdiction will twine into such a state of perplexity, as to render it impossible for human wisdom to disentangle it without injury.”¹² He pointed to the historical example of the English courts that “put the whole community in commotion with the clashing of their jurisdictions.”¹³

A. Diversity of Citizenship

The concurrent authority of state and federal courts to resolve controversies between citizens of different states often produces the type of clashing referred to in the Judiciary Act debates. The original reasons for the establishment of diversity of citizenship jurisdiction in the inferior federal courts are unclear. In the Virginia Ratifying Convention, John Marshall opined that, although such jurisdiction was not *absolutely* essential in general, it might prove to be needed in connection with “the laws and regulations of commerce” and “in cases of debt, and some other controversies.”¹⁴ A similar concern with commerce was expressed at the Pennsylvania Ratifying Convention by James Wilson, who there spoke of the need to provide a “just and impartial tribunal” as a means of restoring public and private credit and of providing “security . . . for the regular discharge of contracts.”¹⁵ Hamilton’s argument in the matter was based on the need to maintain an “equality of privileges and immunities” in cases where citizens of one state are opposed to the citizens of another state.¹⁶ Although it has been disputed, the most commonly accepted reason for conferring diversity jurisdiction on the federal courts has been the fear of prejudice to out-of-state litigants.¹⁷ In any event,

¹⁰ 1 ANNALS OF CONG. 843 (J. Gales ed. 1789) (statement of Aedanus Burke of South Carolina), reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 2, at 145, 152.

¹¹ *Id.*

¹² *Id.* (statement of Michael Jenifer Stone of Maryland).

¹³ *Id.*

¹⁴ 1 THE PAPERS OF JOHN MARSHALL 279-80 (H. Johnson ed. 1974) (address to the Virginia Ratifying Convention June 20, 1788), reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 2, at 247, 248.

¹⁵ 2 THE DEBATES IN THE SEVERAL STATE RATIFYING CONVENTIONS ON THE FEDERAL CONSTITUTION 491-92 (J. Elliot 2d. ed. 1888), reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 2, at 228, 230.

¹⁶ THE FEDERALIST No. 80, at 405 (A. Hamilton) (G. Wills ed. 1982).

¹⁷ C. WRIGHT, LAW OF FEDERAL COURTS § 23, at 133 (4th ed. 1983).

diversity jurisdiction has been with us in one form or another since the original Judiciary Act was adopted pursuant to article III of the Constitution.¹⁸ At least until general federal question jurisdiction was conferred in 1875,¹⁹ it apparently accounted for a substantial portion of the business of the federal courts.

Whatever the reason for its establishment, diversity jurisdiction presently is a source of substantial tension between state and federal courts at both the trial and appellate levels. It is not at all unusual for a plaintiff to commence an action based on diversity jurisdiction in the federal district court that is in all respects similar to an action already commenced in the state court, or vice versa.²⁰ Attorneys find it most difficult to explain to their clients the reason for the double expense necessarily incurred in defending the same action in two courts. The potential for conflict increases as each case progresses, because there are two judges monitoring discovery, hearing motions and scheduling the procedural steps leading to trial. When a case finally reaches a conclusion by the entry of judgment in one court, the doctrine of *res judicata* concludes the case in the other court,²¹ rendering useless all the time, money and effort expended in the second court. Another area of conflict in diversity cases is the invocation of the removal statute,²² which provides for the transfer of such cases from state to federal courts at the mere demand of a defendant. It is, of course, the supremacy clause of the federal Constitution²³ that allows Congress to enact a statute permitting the ouster of state court jurisdiction by this means.

¹⁸ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (1789). See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1050-53 (2d ed. 1973) (discussing the statutory and historical background of diversity jurisdiction).

¹⁹ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

²⁰ The Supreme Court has stated that "[g]enerally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). See generally G. HOLT, *THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS* §§ 23-24 (1888 & photo reprint 1980) (noting general principles of concurrent federal and state jurisdiction).

²¹ 28 U.S.C. § 1738 (1982) states that "judicial proceedings [of any state court] shall have the same full faith and credit in every" federal court "as they have . . . in the courts of such State." See *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Article III's grant of judicial power to the federal courts includes the "authority to enter judgments that command" a *res judicata* effect; federal judgments thus bind state courts through the supremacy clause of article VI. 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4468, at 649 (1981).

²² 28 U.S.C. § 1441 (1982).

²³ U.S. CONST. art. VI.

The greatest tension between state and federal court systems in diversity cases, however, occurs when there are different adjudications of the same issue by courts of concurrent jurisdiction, a problem referred to in the anti-federalist essay quoted earlier.²⁴ Although conflicting rules of decision are not uncommon where there is concurrent jurisdiction, this particular tension supposedly was relieved in *Erie R.R. v. Tompkins*,²⁵ when the Supreme Court determined that federal courts must apply state substantive law in diversity cases. Nevertheless, the application of state law by the federal courts can present serious difficulties when a state's highest court has not yet resolved a specific issue or when state decisional law seems to be moving in a new direction. The rule in such cases seems to be that the federal court must *predict* what the highest state court would do when confronted with the question.²⁶ In the Second Circuit Court of Appeals, we "make our best estimate" of what the state's highest court would do, giving consideration to "all the resources" that court could use, including the decisions of other jurisdictions.²⁷ Should the prediction be wrong, the inevitable consequence is not only tension between the court systems but also a losing federal litigant who could have prevailed by pressing the issue to conclusion in the state court system.

The devices heretofore used to relieve diversity tensions caused by conflicting decisions, or the desire to avoid them, have proved less than satisfactory. The device of judgment modification, for example, is highly impractical. Federal court diversity judgments cannot be modified every time a state supreme court changes direction and undermines the basis for the federal judgments. Although the Second Circuit Court of Appeals has gone as far as to recall its mandate in order to modify a judgment after a state supreme court reversal of an intermediate appellate court decision upon which the Circuit had relied,²⁸ the process employed is an especially cumbersome one. It also rests almost entirely in the court's discretion and is less likely to be used as time passes following the entry of judgment.²⁹ There

²⁴ See *A [Maryland] Farmer, No. 6*, (Apr. 1, 1788), reprinted in 4 FOUNDERS' CONSTITUTION, *supra* note 2, at 378.

²⁵ 304 U.S. 64 (1938).

²⁶ See generally C. WRIGHT, *supra* note 17, § 58, at 373.

²⁷ *Francis v. INA Life Ins. Co.*, 809 F.2d 183, 185 (2d Cir. 1987).

²⁸ *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied sub nom. Addabbo v. Curtiss-Wright Corp.*, 400 U.S. 829 (1970).

²⁹ See FED. R. APP. P. 40 (petition for rehearing to be filed within 14 days after entry of judgment in court of appeals); FED. R. CIV. P. 60(b) (depending on grounds, motion for relief from judgment in district court to be made within one year or "within a reasonable time" after entry of judgment).

is also a question as to what sources of state law can form the basis for modification. One district court suggested that an unreported decision of the Tennessee Chancery Court might impel the Second Circuit to grant a rehearing in a diversity case to correct its earlier estimate of Tennessee law!³⁰ Strangely enough, the Second Circuit estimate was based on a Sixth Circuit evaluation of the descendibility of the right of publicity in the State of Tennessee.³¹

Federal courts also have invoked the doctrine of abstention as a means of avoiding interference with the administration of state law by state courts and of maintaining consistency in the decisional law. However, the very limited circumstances in which abstention can be applied in diversity cases have restricted its value as a tension reliever. While the Supreme Court has allowed federal courts to abstain from the exercise of their diversity jurisdiction when state law was unclear,³² it also has spoken of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."³³ Although the Court has approved deference to state tribunals when difficult and important questions of state law transcend the results in a particular case,³⁴ it also has held "that difficulties and perplexities of state law are no reason for referral of the problem to the state court."³⁵ In the face of these conflicting signals from the Supreme Court, commentators have been vociferous in their condemnation of any yielding of federal court jurisdiction through the judicially created doctrine of abstention.³⁶ Deference to parallel state court proceedings for reasons of wise judicial administration and economy of judicial resources especially have been criticized for failure to recognize the jurisdictional responsibilities of federal courts as mandated by Congress.³⁷ In its most recent pronouncement on this type of abstention, the Supreme

³⁰ *Factors Etc., Inc. v. Pro Arts, Inc.*, 541 F. Supp. 231, 234 (S.D.N.Y. 1982), *vacated on other grounds*, 562 F. Supp. 304 (S.D.N.Y. 1983).

³¹ *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). The Sixth Circuit evaluation was made in the context of a dispute over the right to exploit the name and likeness of Elvis Presley, apparently a valuable property right. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

³² See, e.g., *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

³³ *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (citation omitted).

³⁴ *Id.* at 814; see *id.* at 814-16 (discussing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Burford* abstention).

³⁵ *McNeese v. Board of Educ.*, 373 U.S. 668, 673 n.5 (1963).

³⁶ See, e.g., Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

³⁷ See generally Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651 (1985).

Court has indicated that deference to state court litigation involves the balancing of a number of factors, "with the balance heavily weighted in favor of the exercise of jurisdiction."³⁸

A preferred means of avoiding the clash of different rules of decision in diversity cases is the certification of questions of law by federal courts to state courts. The problem with this procedure is that, for the most part, acceptance of the inquiry is discretionary with the highest court of the state, and certification may come only from a Circuit Court or the United States Supreme Court. The jurisdiction recently conferred on the New York Court of Appeals to review certified state law questions is limited in this fashion.³⁹ Although the New York Court of Appeals already has accepted two certifications from the Second Circuit Court of Appeals,⁴⁰ it has rejected such a question on one occasion.⁴¹ The rejection understandably was grounded in the policy of New York's highest court to address important questions of state law only after they were filtered through the lower and intermediate appellate courts.⁴²

More out of concern for the burgeoning caseload of the federal courts than for the tensions of a dual court system, numerous proposals to modify diversity jurisdiction have been made over the years. In 1965 the American Law Institute proposed that plaintiffs be barred from bringing diversity actions in their home states; that business enterprises be prohibited from invoking diversity jurisdiction, either originally or by removal, in any state where they maintain a local establishment; and that natural persons be denied access to the federal courts in the state where they have their principal place of business or employment.⁴³ There have been proposals that appeals to the United States Courts in diversity cases be made discretionary;⁴⁴ that diversity jurisdiction be abolished except in multi-party tort cases;⁴⁵ that federal

³⁸ *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

³⁹ N.Y. CONST. art. 6, § 3(b)(9) (1985). This provision is implemented by N.Y. R. CT. § 500.17 (McKinney). The Second Circuit is authorized to "certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court." 2D CIR. R. § 0.27. Certification may be made by the circuit court *sua sponte* or on a party's motion filed with the circuit court clerk. *Id.*

⁴⁰ *Loengard v. Santa Fe Indus.*, 69 N.Y.2d 867, 507 N.E.2d 315, 514 N.Y.S.2d 721 (1987); *Kidney v. Kolmar Labs., Inc.*, 68 N.Y.2d 343, 502 N.E.2d 168, 509 N.Y.S.2d 491 (1986), *submitted after certification*, 808 F.2d 955 (2d Cir. 1987).

⁴¹ *Rufino v. United States*, 69 N.Y.2d 310, 506 N.E.2d 910, 514 N.Y.S.2d 200 (1987).

⁴² *See id.*

⁴³ AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS pt. I, 2-3 (1965 Official Draft).

⁴⁴ McGowan, *The View from an Inferior Court*, 19 SAN DIEGO L. REV. 659, 665-66 (1982).

⁴⁵ NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, ABOLITION OF DIVERSITY JURISDICTION: AN IDEA WHOSE TIME HAS COME? xiii n.2 (1983).

courts be authorized to abstain in diversity cases if adequate and timely state remedies exist;⁴⁶ and that a system for the mandatory arbitration of diversity claims be established.⁴⁷

It seems to me, however, that total elimination of diversity jurisdiction is the best prescription for the relief of the tensions it causes. Although I have in the past suggested an increase in the amount in controversy as a compromise with those who are opposed to the complete elimination of diversity jurisdiction,⁴⁸ I now am convinced that the time has come for complete repeal. Diversity causes more trouble than it is worth. It fails a cost/benefit analysis and just about any other test that can be applied to it. Most of all, it creates unnecessary stress in our dual court system by making possible conflicting adjudications and procedural interferences. While the courts have been creative in fashioning the doctrine of abstention and in creating the domestic relations and probate exceptions to diversity jurisdiction,⁴⁹ the limited reach of these devices makes it clear that congressional action is necessary.

B. Habeas Corpus

Whenever a single federal judge grants a writ of habeas corpus releasing a state prisoner whose conviction was affirmed by the state's highest court, there is a palpable strain in the dual court system. In such a case, the message from the inferior federal court to the state judges involved in the proceeding is as follows: "Although you have sworn to uphold the Constitution of the United States, you have failed to correct a violation of the federal constitutional rights of this defendant; you have failed in your trial court, in your intermediate appellate court, and in the highest tribunal of your system; and the fact that the United States Supreme Court has denied certiorari review is of no importance." This message, of course, has been made possible by the congressional grant of power to federal judges to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 251, 256 (1987).

⁴⁹ See generally Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095.

laws or treaties of the United States.”⁵⁰ As a consequence of this provision, a significant portion of the workload of the federal judiciary is composed of habeas corpus challenges to state convictions.⁵¹ Representatives of the state court systems have not been hesitant in calling for repeal of federal court jurisdiction over these challenges.⁵²

Congress has provided for some alleviation of the tensions it created in the Habeas Corpus Act through certain provisions in the Act itself. The statute requires that state court remedies be exhausted⁵³ and that state court fact-finding be presumed correct if certain criteria, such as a full, fair and adequate hearing, are met.⁵⁴ The statute also provides that no appeal from denial of the writ may be taken without a certificate of probable cause.⁵⁵ Procedural rules have been adopted allowing for summary dismissal of facially insufficient habeas petitions⁵⁶ and for denial of the writ when delayed or successive petitions have been filed.⁵⁷ The Supreme Court has added some tension-relieving elements through decisional law—the rule that a state’s contemporaneous objection requirement must be respected in the absence of a showing of cause and prejudice;⁵⁸ the rule that a fourth amendment claim will not form the basis for habeas relief if there was an opportunity for full and fair litigation of the claim in the state court;⁵⁹ and the rule prohibiting the joinder of exhausted and unexhausted claims.⁶⁰

Despite these measures, the clash of jurisdictions continues. At its last term, the Supreme Court was faced with the question of what law to apply when a successful habeas petitioner seeks release pending the state’s appeal.⁶¹ Referring to “traditional notions of federalism

⁵⁰ 28 U.S.C. § 2254(a) (1982).

⁵¹ Ten thousand seven hundred twenty-four habeas corpus cases were commenced in United States District Courts during the year ending June 30, 1986. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 179 (1986).

⁵² *Brown v. Allen*, 344 U.S. 443, 539 n.13 (1953) (Jackson, J., concurring) (citing *Conference of Chief Justices—1952*, 25 STATE GOV'T 249 (1952)).

⁵³ 28 U.S.C. § 2254(b) (1982).

⁵⁴ *Id.* § 2254(d).

⁵⁵ *Id.* § 2253.

⁵⁶ Rules Governing Section 2254 in the United States District Courts, R. 4. (codified at 28 U.S.C. § 2254, R. 4 (1982))

⁵⁷ *Id.* R. 9.

⁵⁸ *Wainwright v. Sykes*, 433 U.S. 72 (1977). For criticism of this rule, see Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984).

⁵⁹ *Stone v. Powell*, 428 U.S. 465 (1976).

⁶⁰ *Rose v. Lundy*, 455 U.S. 509 (1982). For criticisms of this approach, see *id.* at 522 (Blackmun, J., concurring); *id.* at 532 (Brennan, J., concurring in part and dissenting in part); *id.* at 538 (Stevens, J., dissenting).

⁶¹ *Hilton v. Braunskill*, 107 S. Ct. 2113 (1987).

and comity," Justice Marshall, in dissent, wrote that state rules, as applied by state courts, should govern release (or "enlargement" as it is called in the Federal Rules of Appellate Procedure).⁶² For the majority, Chief Justice Rehnquist enumerated various considerations that should prevail and rejected state law as the rule of decision.⁶³ As to the federalism and comity concerns of the dissenters, he asserted that any strain in federal-state relations stemming from the exercise of federal habeas jurisdiction "comes because of the granting of habeas relief itself, and not the existence of any discretion . . . to refuse enlargement . . . pending appeal."⁶⁴

The sheer volume of frivolous habeas filings⁶⁵ and the obvious confusion engendered by redundant adjudications,⁶⁶ as well as the strains alluded to by the Chief Justice,⁶⁷ have led to proposals to restrict further the scope of federal habeas jurisdiction. A bill recently introduced in Congress proposes a one-year statute of limitations for filing habeas petitions (there presently is no limitation period), and a requirement that, prior to the consideration of any constitutional claim, there be a showing that the state court has not "fully and fairly adjudicated" the claim.⁶⁸ In the past, the Justice Department has supported legislation limiting habeas to constitutional issues relating to fact-finding in the state courts;⁶⁹ it also has supported legislation requiring a showing of a basis for reasonable doubt as to guilt.⁷⁰ Some Supreme Court Justices now seem inclined to require a colorable demonstration of factual innocence in habeas petitions,⁷¹ and Professor Remington has made out a persuasive argument in support of his conclusion that "[f]ocusing on the possibility of innocence seems clearly best from the point of view of the state prisoner and the state correctional program."⁷²

⁶² *Id.* at 2120-22 (Marshall, J., dissenting).

⁶³ *Id.* at 2117-20.

⁶⁴ *Id.* at 2120.

⁶⁵ See Miner, *A Judge's Advice to Today's Law Graduates*, N.Y. ST. B.A. J., Nov. 1985, at 6, 9.

⁶⁶ See Aldisert, *State Courts and Federalism in the 1980's: Comments*, 22 WM. & MARY L. REV. 821, 834-38 (1981).

⁶⁷ See *Hilton*, 107 S. Ct. at 2120.

⁶⁸ S. 2301, 99th Cong., 2d Sess., 132 CONG. REC. S4211-12 (daily ed. April 14, 1986). For a discussion of this bill, see Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV. 570, 575-77 (1986).

⁶⁹ See Remington, *supra* note 68, at 578.

⁷⁰ *Id.*

⁷¹ See *Kuhlmann v. Wilson*, 106 S. Ct. 2616, 2627 (1986) (opinion of Powell, J.) (federal courts required to entertain successive habeas petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence").

⁷² Remington, *supra* note 68, at 590.

Although I previously have prescribed a five-year limitations period, measured from the exhaustion of state remedies, for the relief of the tension caused by federal habeas jurisdiction,⁷³ I now am convinced that stronger medicine is necessary. If there is to be true equality and mutual respect in a parallel system of courts, there is no room for double adjudications of the same issues in a single case. Since the United States Supreme Court stands at the apex of each system for the adjudication of federal constitutional issues, it seems especially ludicrous to allow the lowest court in the federal system to tell the highest court in the state system that it is wrong on the law. Accordingly, I suggest that the proposal advanced by Justice Jackson, Albany Law School's most distinguished student, is most worthy of examination.

The Jackson proposal is set forth in his concurring opinion in *Brown v. Allen*⁷⁴ as follows:

My conclusion is that whether or not this Court has denied certiorari from a state court's judgment in a habeas corpus proceeding, no lower federal court should entertain a petition except on the following conditions: (1) that the petition raises a jurisdictional question involving federal law on which the state law allowed no access to its courts, either by habeas corpus or appeal from the conviction, and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the mill case certainly does not.⁷⁵

Although this formula may seem too restrictive to many, it seems to me that it is an excellent prescription for the relief of habeas corpus tension. Moreover, the prescription is not an untested one, for there was a time when only jurisdictional challenges were permitted by way of habeas corpus.⁷⁶

C. Civil Rights

The post-Civil War civil rights statute,⁷⁷ now codified as 42 U.S.C. § 1983, creates a cause of action for deprivation of a federal consti-

⁷³ Miner, *supra* note 48, at 256.

⁷⁴ 344 U.S. 443, 532 (1953) (Jackson, J., concurring).

⁷⁵ *Id.* at 545 (Jackson, J., concurring).

⁷⁶ C. WRIGHT, *supra* note 17, § 53, at 333-34.

⁷⁷ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

tutional or statutory right under color of state law. Since 1793, the Anti-Injunction Act, in one form or another, has prohibited federal court stays of state court proceedings,⁷⁸ but section 1983 has been held to fall within one of the Act's exceptions.⁷⁹ Accordingly, federal court intrusion into the processes of a state court is considered permissible when deemed necessary to redress civil rights violations infecting those processes.⁸⁰

The inevitable tensions caused by intervention under the authority of section 1983 have impelled the Supreme Court to formulate the doctrine commonly known as "*Younger* Abstention."⁸¹ The doctrine, named for the case of *Younger v. Harris*,⁸² prohibits federal courts from enjoining pending state court proceedings except on a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief."⁸³ The doctrine is grounded in the principle of comity, which Justice Black defined in *Younger* as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."⁸⁴ Referring to the dual system of government envisioned by the Framers, Justice Black emphasized the need for sensitivity to the interests of both systems.⁸⁵ Most importantly, he warned that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [must] endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States."⁸⁶ In defining "comity," Justice Black was expressing his concern for the survival of the concept of federalism. In doing so, he articulated a means by which dual court tension could be alleviated when state court proceedings are threatened by federal court application of section 1983.

Although *Younger* involved the denial of a federal court injunction

⁷⁸ M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 259 (1980).

⁷⁹ *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972).

⁸⁰ *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding that state prejudgment replevin statutes violated debtor's due process rights).

⁸¹ S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 5.12, at 302 n.146 (2d ed. 1986).

⁸² 401 U.S. 37 (1971).

⁸³ *Id.* at 54.

⁸⁴ *Id.* at 44.

⁸⁵ *Id.*

⁸⁶ *Id.*

against an ongoing state criminal prosecution, the doctrine it enunciated has been extended, most recently in *Pennzoil v. Texaco*,⁸⁷ to apply to civil proceedings as well. In *Pennzoil*, the Supreme Court dealt with a district court order enjoining the plaintiff from enforcing a Texas state court judgment in its favor in the amount of approximately eleven billion dollars.⁸⁸ Texaco contended that the judgment was in conflict with various federal constitutional provisions and that the Texas bond and lien provision, which would have required a bond of more than thirteen billion dollars to suspend execution of the judgment, also suffered from federal constitutional infirmities.⁸⁹ The Supreme Court said that “[b]oth the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system”⁹⁰ and “should have abstained under the principles of federalism enunciated in *Younger v. Harris*.”⁹¹ The Court noted that the Texas courts could have resolved the issues in the case on state statutory or constitutional grounds and should have been afforded the opportunity to decide the federal constitutional claims as well.⁹² The Court also noted that the claims could have been advanced during a state court appeal that was pending at the time the federal injunction was issued.⁹³ Moreover, the “open courts” provision of the Texas Constitution at all times afforded access to the state courts for the resolution of issues that were not, but could have been, raised in those courts. In light of the access available, the Supreme Court concluded that “the lower courts should have deferred on principles of comity to the pending state proceedings.”⁹⁴

To me, the most interesting part of the *Pennzoil* decision is not the extension of the *Younger* doctrine to all cases that “involve challenges to the processes by which the State compels compliance with the judgments of its courts.”⁹⁵ Rather, it is the suggestion of the merger of the abstention doctrines that grabs my attention. In his concurring opinion to the *Pennzoil* decision, Justice Blackmun expressed his view that “the District Court should have abstained under the principles announced in *Railroad Comm’n of Texas v.*

⁸⁷ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987).

⁸⁸ *Id.* at 1522-23.

⁸⁹ *Id.* at 1523 n.6.

⁹⁰ *Id.* at 1525.

⁹¹ *Id.* (citing 401 U.S. 37 (1971)).

⁹² *Id.* at 1528-29.

⁹³ *Id.* at 1528.

⁹⁴ *Id.* at 1529.

⁹⁵ *Id.* at 1527.

*Pullman Co.*⁹⁶ *Pullman* abstention requires a federal court to defer ruling on a constitutional question pending a determination of state law issues by a state court, on the theory that such a determination may resolve the entire case.⁹⁷ There are other abstention doctrines, some of which I have referred to earlier.⁹⁸ The point is that the *Pennzoil* majority, rejecting *Pullman* abstention for appellant's failure to argue it, said the following in a footnote:

We merely note that considerations similar to those that mandate *Pullman* abstention are relevant to a court's decision whether to abstain under *Younger*. The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.⁹⁹

I believe that this footnote holds the potential for much greater deference to the state courts under principles of federalism and comity.¹⁰⁰ I think that the realization of this potential by the Supreme Court on a case-by-case basis will contribute greatly to a softening of the tensions between court systems arising from section 1983 litigation. There are others, of course, who would view the expansion of abstention in civil rights cases as a very negative development.¹⁰¹

It is difficult to conceive of a conflict that causes more strain in the dual court system than a lawsuit, brought against a state judge in a federal court, relating to the judicial function of the state judge and alleging a civil rights violation. Although state judges, when engaged in the performance of judicial acts, are absolutely immune from liability for damages in civil rights actions,¹⁰² they "are not immune in [section] 1983 actions when they are sued for declaratory or injunctive—rather than monetary—relief."¹⁰³ In such a case the Supreme Court has held that counsel fees may be recovered against the judge under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976.¹⁰⁴ That holding came in a case in which a United

⁹⁶ *Id.* at 1535 (Blackmun, J., concurring) (citing 312 U.S. 496 (1941)).

⁹⁷ See 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.15(a), at 163 (1986).

⁹⁸ See *supra* notes 32-38 and accompanying text.

⁹⁹ 107 S. Ct. at 1526 n.9 (citations omitted).

¹⁰⁰ For a discussion of principles of federalism and comity in this context, see Comment, *Texaco Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REV. 767, 822-24 (1986).

¹⁰¹ See Ziegler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987.

¹⁰² *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978).

¹⁰³ 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 99, at 187 (2d ed. 1980).

¹⁰⁴ Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1977) (codified as amended at 42 U.S.C. § 1988 (1982)).

States District Court enjoined a state magistrate from incarcerating people charged with non-jailable offenses who could not make bail.¹⁰⁵ I find myself in agreement with Justice Powell's dissent in that case. He not only considered counsel fees barred by the doctrine of judicial immunity, but went further to say the following:

In sum, I see no principled reason why judicial immunity should bar suits for damages but not for prospective injunctive relief. The fundamental rationale for providing this protection to the judicial office—articulated in the English cases and repeated in decisions of this Court—applies equally to both types of asserted relief. The underlying principle, vital to the rule of law, is assurance of judicial detachment and independence. Nor is the Court's decision today in the broader public interest that the doctrine of absolute immunity is intended to serve.¹⁰⁶

If the Supreme Court won't do it, Congress should provide by statute for the sort of judicial immunity envisioned by Justice Powell and thereby remove a great source of inter-court system tension.

D. Criminal Law

In the area of criminal law, duplicative prosecutions often cause conflict between state and federal courts. The same criminal conduct often forms the basis for prosecution under state law as well as federal law.¹⁰⁷ Although some states, including New York, have statutory provisions prohibiting state prosecution after a prior federal prosecution,¹⁰⁸ the double jeopardy clause of the Constitution¹⁰⁹ has been held to be no bar to separate prosecution by two sovereign governments.¹¹⁰ The upshot is a strange situation whereby courts are maneuvered by prosecutors into positions of conflict. For example, if a person charged with criminal conduct can be convicted in a New York court first, he or she can be prosecuted for the same criminal conduct in a federal court at a later time. There can then be two separate, consecutive sentences for what is in effect the same crime. Because of the New York statute, however, the converse is not true. At the behest of the prosecutor, the state court in such a situation

¹⁰⁵ Pulliam v. Allen, 466 U.S. 522 (1984).

¹⁰⁶ *Id.* at 557 (Powell, J., dissenting) (citation omitted).

¹⁰⁷ See *infra* note 113 and accompanying text.

¹⁰⁸ See N.Y. CRIM. PROC. LAW §§ 40.20(1), 40.30(1) (McKinney 1981).

¹⁰⁹ U.S. CONST. amend. V.

¹¹⁰ *Abbate v. United States*, 359 U.S. 187, 194-95 (1959) (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922) (Taft, C.J.)).

would make every effort to schedule a state trial first, even at the expense of disrupting the federal court's calendar and causing problems relating to compliance with the federal Speedy Trial Act.¹¹¹ Moreover, witnesses and defense lawyers cannot be present in two courts at the same time, a fact that exacerbates the tension.

Aside from fairness concerns regarding double punishment and prudential concerns relating to the expense of double prosecution, the concept of dual sovereignty is not served by conflicts of this nature. Proposals to afford relief have been varied. One such proposal involves congressional preemption under the supremacy clause.¹¹² While Congress has the power to preempt state criminal statutes, it has done just the opposite by saving state jurisdiction in several statutes defining federal crimes.¹¹³ Despite such a savings clause, however, Pennsylvania's Sedition Act was held to be displaced by the federal Smith Act, which prohibited the overthrow of the United States Government by force or violence.¹¹⁴

The Department of Justice has attempted to afford some relief through a policy "designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power."¹¹⁵ This policy, however, "is not constitutionally mandated and confers no rights upon the accused."¹¹⁶ An expansion of the policy to include a total prohibition against dual prosecution might be considered.

Other proposals include allowing the defendant a choice of forums; prohibiting federal prosecution after state conviction; and simply prohibiting dual prosecution altogether.¹¹⁷ My prescription in this area is state court jurisdiction over federal crimes¹¹⁸ in all cases where the same criminal activity is charged under both federal and state statutes.

¹¹¹ 18 U.S.C. §§ 3161-3174 (1982 & Supp. III 1985).

¹¹² U.S. CONST. art. VI.

¹¹³ *E.g.*, 18 U.S.C. §§ 896 (extortionate credit transactions), 927 (firearms offenses), 1084(c) (transmissions of wagering information) (1982); 21 U.S.C. § 903 (1982) (drug abuse prevention and control); see Miner, *Preemptive Strikes on State Autonomy: The Role of Congress*, 99 THE HERITAGE LECTURES 1, 7-8 & n.36 (1987).

¹¹⁴ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹¹⁵ *Rinaldi v. United States*, 434 U.S. 22, 28-29 (1977) (per curiam) (discussing the *Petite* policy). This policy was adopted "[i]n response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power" and disallows a "federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement." *Id.* at 28 (footnote omitted).

¹¹⁶ *United States v. Frederick*, 583 F.2d 273, 274 (6th Cir. 1978) (citation omitted), *cert. denied*, 444 U.S. 860 (1979).

¹¹⁷ N. ABRAMS, *FEDERAL CRIMINAL LAW* 785-87 (1986).

¹¹⁸ See generally Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POLY 117 (1987).

This prescription will relieve dual court tension, reduce the expense of multiple prosecutions and allow a single judge to impose one sentence for each instance of criminal misconduct.

E. Attorney Discipline

Federal courts are authorized by statute to establish rules regarding admission to practice and conduct of attorneys.¹¹⁹ They are also said to have "inherent power" in such matters.¹²⁰ Similar authority is considered to reside in the various state judiciaries, since the practice of law is so intertwined with the operation of the state courts.¹²¹ Reciprocity in disciplinary matters seems to be the norm, although state and federal courts have separate and distinct control over rules of admission and conduct.¹²² The rub comes when federal courts are asked to intrude in cases involving the discipline of attorneys by state courts. The Supreme Court was confronted with that exact problem in 1982 in a case involving disciplinary charges made against a New Jersey lawyer.¹²³ The lawyer was accused of an ethical violation, conduct prejudicial to the administration of justice, as the result of certain comments he made to the press criticizing a trial and a trial judge. When the charges were made by a county ethics committee, he did not respond but instead filed an action in the United States District Court complaining that the disciplinary rules were overbroad and that they violated his first amendment rights. The Supreme Court posed these questions in his case: "*first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges."¹²⁴ Answering all three questions in the affirmative, the Supreme Court held that the district court properly abstained from intervening in a disciplinary proceeding that was, in effect, a judicial matter being conducted under the aegis of the New

¹¹⁹ 28 U.S.C. § 1654 (1982).

¹²⁰ See, e.g., *Ex parte Secombe*, 60 U.S. (19 How.) 9 (1857) (Taney, C.J.).

¹²¹ 7 AM. JUR. 2D *Attorneys at Law* § 2, at 55 (1980); see, e.g., *MacKay v. Nesbett*, 412 F.2d 846, 846 (9th Cir.) (citing the "substantial policy interest[] arising from the historic relationship between state judicial systems and the members of their respective bars"), *cert. denied*, 396 U.S. 960 (1969).

¹²² See, e.g., *In re Ruffalo*, 390 U.S. 544, 547 (1968).

¹²³ *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

¹²⁴ *Id.* at 432.

Jersey Supreme Court. The majority relied on the *Younger* doctrine, but Justice Brennan opined in his pre-*Pennzoil* concurrence that *Younger* generally is inapplicable to civil proceedings; he did say, however, "that federal courts should show particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the State's bar, where there is an adequate opportunity to raise federal issues in that proceeding."¹²⁵

The rule is a salutary one. As a district court judge, I abstained from considering an attorney's constitutional challenge to a New York Appellate Division determination that the attorney's disciplinary hearing should be closed. The attorney pursued the matter in the New York Court of Appeals and obtained a ruling there that the hearing should be open, if the attorney waived confidentiality, unless due cause for closure were demonstrated.¹²⁶ New York's highest court found it unnecessary to address the constitutional question. Thus was the clash of courts avoided and balance in the dual court system maintained.

Conclusion

The expansion of federal court jurisdiction inevitably has increased the conflict between state and federal courts.¹²⁷ It seems to me that all prescriptions for relieving these tensions of our dual court system should be guided by the understanding that one court system is not superior to another, either hierarchically¹²⁸ or intellectually,¹²⁹ that

¹²⁵ *Id.* at 438 (Brennan, J., concurring).

¹²⁶ *In re Capoccia*, 59 N.Y.2d 549, 453 N.E.2d 497, 466 N.Y.S.2d 268 (1983).

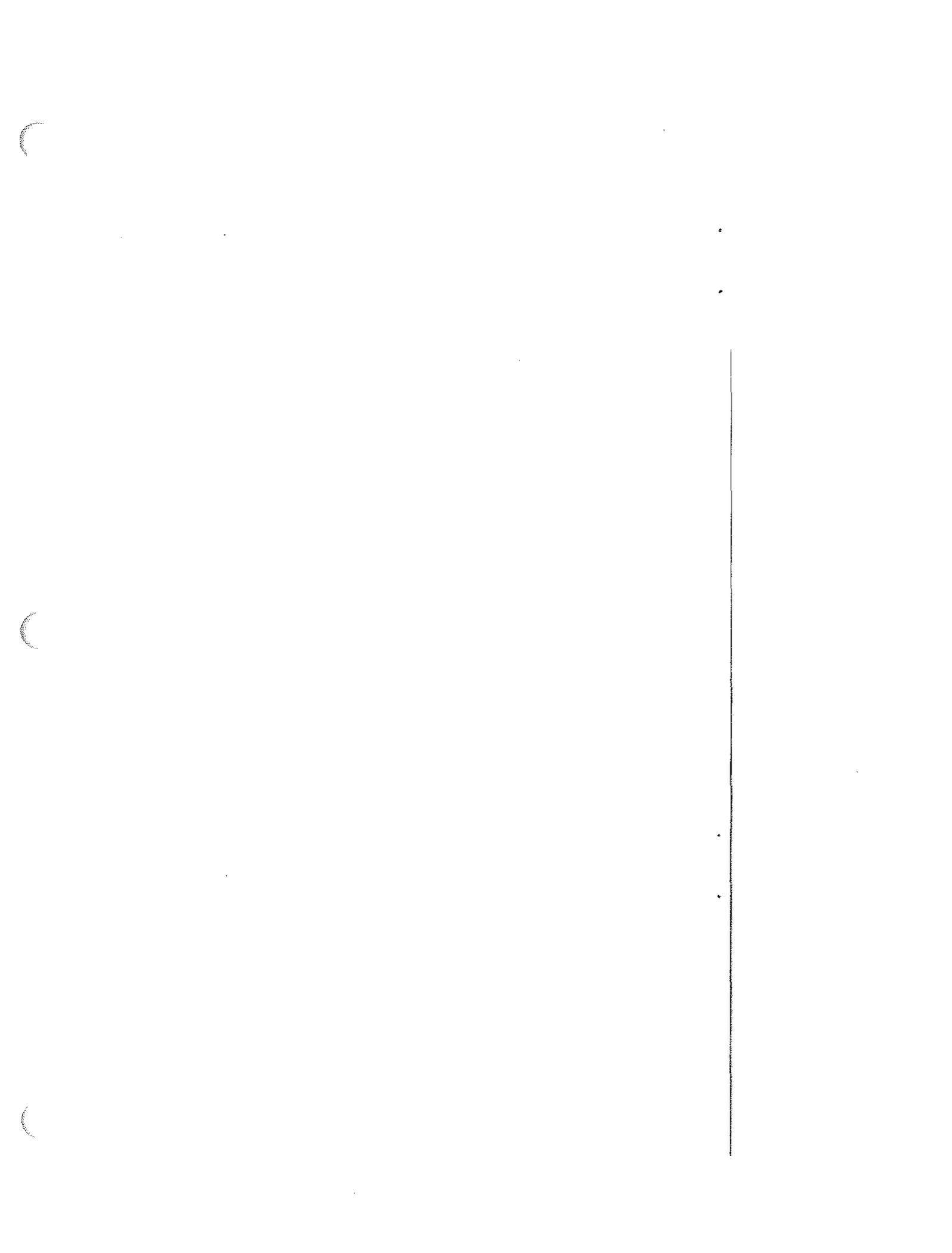
¹²⁷ See Bartels, *Recent Expansion in Federal Jurisdiction: A Call for Restraint*, 55 ST. JOHN'S L. REV. 219 (1981).

¹²⁸ See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (federal district courts have "no authority to review final judgments of a state court in judicial proceedings").

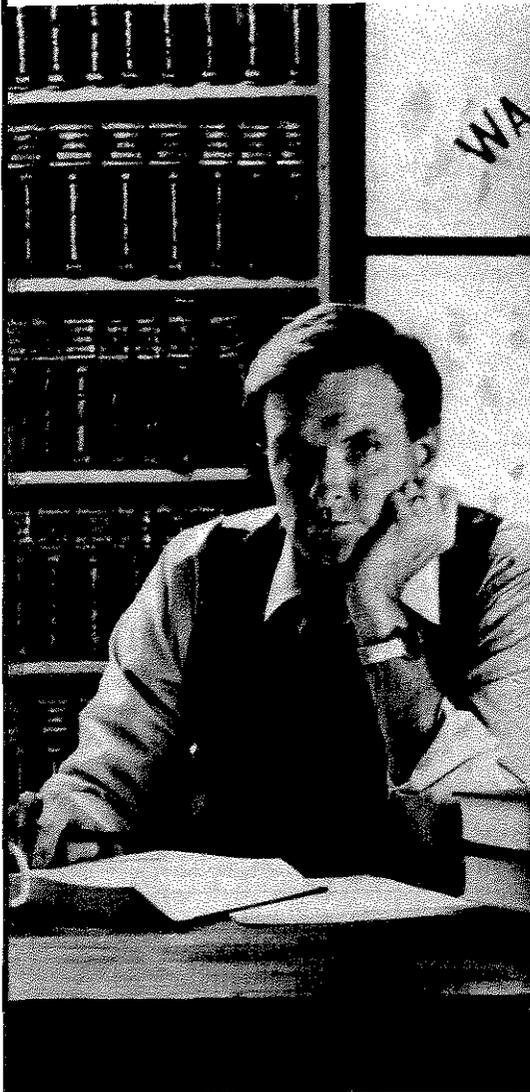
¹²⁹ See *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Judge*, 22 WM. & MARY L. REV. 801, 812-14 (1981); see also Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 252 (1983) (concluding that "there is simply no widespread disregard . . . of federal rights in state appellate courts"); Comment, *Federal Injunctive Relief Against Pending State Civil Proceedings: Younger Days Are Here Again*, 44 LA. L. REV. 967, 977 n.76 (1984) (stating that "to maintain that the state courts are not as capable and diligent as federal courts flies in the face of nearly a hundred years of Court jurisprudence"). But see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-28 (1977) (arguing that federal judges, rather than state judges, are better able to decide claims based on federal constitutional rights).

there always will be some overlapping of jurisdiction;¹³⁰ that the goal of equal justice is superior to the goal of tension reduction; and that the federal system of government erected by the Framers still stands.

¹³⁰ Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1485 (1987) (stating that “[i]nteraction between the federal and state systems is . . . inherent in the constitutional structure”).



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