The Relation of the Federal and the State Judiciary to Each Other
Author(s): Horace H. Lurton
Source: *Michigan Law Review*, Vol. 1, No. 3 (Dec., 1902), pp. 169-178
Published by: The Michigan Law Review Association
Stable URL: http://www.jstor.org/stable/1274301
Accessed: 27-06-2015 00:51 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

The Michigan Law Review Association is collaborating with JSTOR to digitize, preserve and extend access to *Michigan Law Review*.

http://www.jstor.org

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

MICHIGAN
LAW REVIEW

VOL. I DECEMBER, 1902 No. 3

THE RELATION OF THE FEDERAL AND THE STATE JUDICIARY TO EACH OTHER [1]

IN the very cordial invitation extended to me by the distinguished President of your Bar Association to participate in the observance of this occasion it was urged that I should make a short address upon the relations of the Federal and State Judiciary to each other.

As a reason for my taking this particular subject it was suggested by him that I had had the advantage of a considerable service under both systems.

Whatever else may come from such a fact I am sure that it has deeply confirmed the view that in the administration of two different systems of judicature, exercising jurisdiction within the same territory but under different sovereignties, there are very many occasions demanding the exercise of the utmost comity of each court for the other.

From 1776 to 1789, a period of thirteen years after our independence was declared, there was no system of United States courts, except a court for the trial of prize and piracy cases, and no United States judiciary. The union under the articles of confederation possessed no judicial powers and the tribunals of the states were relied upon for the enforcement of the laws of the union.

All human experiences concur in teaching that no government can be effective which has no judicial power, or which having such power is obliged to rely upon the tribunals of another sovereignty for the interpretation of its powers and the application of its laws.

Weak as was the union under the old articles in consequence of the want of an executive head, of the power of taxation and of the

[1] An address delivered by Judge Lurton at the dedication of the new Wayne County Court House at Detroit on October 11, 1902.

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

power to regulate commerce with foreign nations and between the states, its most marked weakness was in this dependence upon state tribunals for the interpretation and administration of its laws.

The treaty which acknowledged our independence provided that no obstacle should be interposed to the collection through the courts of debts due to British subjects. The state courts in many instances continued to enforce the provisions of state law forbidding enforcement of such debts and we were threatened with all the consequences of a deliberate breach of this provision of our treaty because there were no federal courts in which such claims might be enforced and in which the stipulations of the treaty would have been upheld as the paramount law.

Nothing but the stress of the war for independence held the states together under the ineffective government of the old constitution, and when that pressure was removed the government fell into great contempt and threatened utter collapse for want of vitality enough to preserve even the appearance of authority.

There was, however, a widespread feeling that our safety and national existence depended upon our union and that an efficient and energetic central government was impossible unless wider powers should be granted by the states.

This sentiment in favor of union so far as we can now judge was well nigh unanimous, though there were wide differences of opinion as to the extent of the powers which were necessary to enable the government of the union to energetically exercise those functions necessary to the general safety and common welfare.

This sentiment led to the assembling of a convention of delegates representing twelve of the states of the then union for the purpose of proposing amendments to the articles of confederation.

Rhode Island did not participate in this convention and can of all the original states claim no credit for any part in the forming of our constitution, and both Rhode Island and North Carolina were left out of the new union by their failure to adopt and ratify the constitution until after it had, by its own terms, become effective between the other eleven states who had adopted and ratified it, each state acting for itself. But after the new government had been fully organized by the election and inauguration of its first president and congress those two recalcitrant states adopted the constitution, were admitted again into the union and the laws theretofore passed were extended to them.

A constitutional compact between states greatly varying in pop-

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

ulation and wealth and having widely divergent interests was necessarily the result of many compromises of opinion and interest.

When Washington transmitted as president of the convention a draft of the instrument agreed upon he called attention to the difficulties which had been surmounted only by mutual concessions. That incomparable statesman said that the constitution proposed "was the result of a spirit of amity and of mutual deference and concession which the peculiarities of our political situation rendered indispensable." With reference to the sacrifices of power made by the states and essential to secure the common welfare he added:—

"It is obviously impracticable in the federal government of these states to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests."

There was a wide and earnest opposition to the adoption of the constitution and in most of the states its ratification was secured only by very narrow majorities. The opposition came mainly from those leaders of opinion most deeply saturated with the advanced popular republican philosophy beginning then to find expression among the oppressed classes of Europe. It was believed by the opponents of the constitution that that government was best which governed least and that individual liberty had and would find its surest protection in the state governments. They believed that the powers conferred upon the union were unnecessary to the ends and purposes for which the union was established and were so sweeping as to endanger the existence of the states and thus destroy the best security for personal liberty and popular government.

This division of opinion continued after its adoption.

"We were," said John Marshall in his life of Washington, "divided into two great political parties, the one of which contemplated America as a nation and labored incessantly to invest the federal head with powers competent to the preservation of the union. The other attached itself to the state government, received all the powers of congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

One of the differences of opinion which divided our fathers was

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

as to the wisdom or necessity of federal tribunals. Under the articles of confederation the state tribunals had done the federal business and it was urged that the creation of a federal system of courts would create jealousies and opposition in the state tribunals with whose jurisdiction there would be necessarily much interference.

The reply to this was very obvious and was most effectively made both in the constituent convention and before the people. It was in substance, that all experience had proved that federal tribunals were necessary to render the authority of the congress effectual and that the varying scope of the powers of the two systems of governments would often place the general and local policy at variance.

On this latter account so radical a friend of popular government as John Randolph, of Virginia, urged that the courts of the states should not be intrusted with the administration of the national laws. By a great majority of delegate votes a considerable but definite judicial power was conferred upon the union and a federal judiciary provided for.

Now the states did not intend to strip themselves of all judicial power, and you will see that the judicial powers thus delegated to the United States are carefully enumerated, and, when we come to scan them, it cannot escape notice that the great mass of controversies which enter deepest into our social life are wholly outside the scope of the judicial powers granted to the United States. Thus the rights, duties and privileges of citizenship (certain prohibited discriminations aside) are enforced through the reserved judicial power of the states. The controversies which arise out of our manifold domestic relations, or in respect to the descent and distribution of our estates, or our contracts, and all of that great mass of regulations for the protection of life, health, liberty and property, depend upon the due administration of state law by state courts.

The judicial powers vested in the United States were carefully defined. These limited powers extend to: all suits arising under the constitution, or any law or treaty made in pursuance thereof; all cases of admiralty or maritime jurisdiction; all suits to which the United States shall be a party; to controversies between states, or between a state and citizens of another state; to controversies between citizens of different states; and to some other controversies of no great importance. The constitution also provided that it, and the laws and treaties made in pursuance thereof, should be the

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

supreme law of the land, and that "the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The line of demarcation between the judicial power granted and that reserved by the states would seem to be plainly marked. But congress, though it might have done so, did not when it came to create courts and regulate their jurisdiction make the jurisdiction of the courts of the United States exclusive in respect to many controversies to which the judicial power of the United States is declared to extend by the constitution. Thus from the original Judiciary Act of 1789 down to the present instead of giving to courts of the United States exclusive jurisdiction in all suits arising under the constitution and the laws of congress and treaties made in pursuance thereof, congress has made their jurisdiction concurrent with the state courts.

So suits between citizens of different states may not only be carried on in state courts, but can not be brought in or removed to a United States court unless the amount involved exceeds the sum of $2000.

Thus congress has not chosen to give to the federal courts nearly so extensive a jurisdiction as it might do if it saw fit to confer the entire judicial power of the United States exclusively upon the courts of the United States. I do not complain of congress about this. I think the congress is right. In respect of controversies arising under the constitution or laws of the United States there is a remedy if the state court denies to the litigant any right, title or interest arising under the constitution or laws of the union, and set up or claimed, by a writ of error from the supreme court of the United States to the highest court of the state.

There have been occasional clashes of jurisdiction between the two systems of courts arising out of controversies of which the jurisdiction is concurrent, but the general disposition of the judges of both classes of courts has been to act cautiously in all such cases and with the utmost respect for each other, following the well-settled rule which leaves the settlement of all such cases to that court which first acquired jurisdiction.

The courts of the union and the courts of the states have alike from an early day assumed jurisdiction, when two laws relating to the same subject have conflicted with each other, to decide which of the two was the paramount law and to apply that law to the settlement of the case. Thus, if the constitution of a state forbids a

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

law of a certain kind and the legislature in defiance of this constitutional restriction should pass the forbidden law, the state courts when called upon to enforce the law would find themselves confronted with the question as to whether they would enforce the organic law of the constitution, or the legislative mandate which violated that organic law.

So if the constitution of the United States and the laws and treaties made in pursuance thereof are in fact the supreme law of the land, as is declared by the constitution, any law passed by congress and any law passed by any state must be ineffective as law, and the courts of the United States from an early day have not hesitated, when called upon to give effect to such law of congress or of any state, to say that the law being repugnant to the supreme law was no law at all but a mere nullity. The exercise of this power of nullifying state laws has been the occasion of much resentment particularly in the early decades of our history, and the federal courts have been sharply criticised for the assertion of the jurisdiction and in particular cases for alleged mistakes in the application of the constitution.

Frequently very nice questions of interpretation have arisen. A law was valid under one construction of the constitution while under another quite plausible interpretation it was void. If the law was one of a political character, a law which one of the great parties had proposed and carried over criticism as to the power of congress in the matter, the validity or invalidity of the law often turned upon whether a very rigid or a very liberal interpretation should be given to the constitutional provision supposed to confer power to pass the law.

But still higher problems were often involved in controversies which brought into question the scope of the powers granted to the federal government. The constitution was the work of human intelligence. The great powers granted were conferred in broad terms, and could not but include some words and phrases of ambiguous meaning. The problem of the reconciliation of the supremacy of the nation, in respect of the great power delegated to it, with the sovereignty of the states—in respect to those powers of government which had been reserved and which most nearly touch the every-day life of the people and most concern their welfare and happiness, had to be worked out. The dual government thus instituted was most complex and involved a divided allegiance. The line of demarcation between the powers delegated and those

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

reserved was not always very distinguishable. Step by step the dark places had to be illuminated and the debatable questions cleared up. To the courts of the union, as the interpreters and administrators of that constitution as the supreme law of the land, was committed the final decision of all such controversies and the final marking of the line between the powers—of the nation and those of the states. The function thus exercised was delicate and yet vital to the endurance and supremacy of the union. Its fearless discharge has kept the federal courts constantly upon the firing line and has resulted at times in much intemperate criticism.

One of the most flagrant cases of conflict between the federal and state systems had its origin in the very firm antagonism to slavery which manifested itself shortly before our civil war. A prisoner convicted by the federal court for the District of Wisconsin for a violation of the provisions of the fugitive slave law was taken by a writ of habeas corpus issued by the supreme court of Wisconsin from the custody of a United States marshal, and discharged upon an opinion by that court holding the fugitive slave law void, and directing its clerk to recognize no writ of error from the supreme court of the United States. When this judgment was reversed by the unanimous judgment of all the justices of the supreme court of the United States[1] and the sentence executed, the legislature of Wisconsin passed a resolution charging the supreme court with usurpation and declaring that the remedy was open defiance.

Neither have our brethren of the state judiciary escaped the discharge of a like duty in respect of the interpretation and enforcement of their respective state constitutions. Indeed, this function of declaring a legislative enactment void which conflicted with the organic legislation of a state constitution, was first assumed by state courts and there were many precedents in state decisions for the opinion of the supreme court of the United States in *Marbury* v. *Madison*.[2] Neither have they escaped the hot shot of legislative and popular criticism for daring to declare void the enactments of state legislatures. During the evolution of the established constitutional principle concerning the supremacy of a constitution over an ordinary act of legislation the state judiciary bore the brunt of the battle. In Rhode Island and in Ohio the judges of the supreme

[1] See Ableman *v.* Booth, 21 How. 506; Tarble's Case, 13 Wall. 397.

[2] 1 Cranch, 137.

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

court were impeached, though a conviction was not secured, for daring to declare a law void for repugnancy to the constitution.

To this purely American principal of constitutional law we owe the whole body of that majestic law known as the "Law of Constitutional Limitations" of which your own and great lamented Judge Cooley was the most distinguished expounder who has yet arisen in this country. But I must even go further and repeat what I have said when touching upon the same subject in former addresses, that to this assumption by the courts, state and national, of the power to compel obedience to the constitution as the highest and supreme expression of the popular will, by declaring void every act, either of the legislative or executive departments of government, we owe the perpetuity and vitality of free, representative, limited, constitutional government.

I have referred to the necessity for the exercise of comity between the courts of the United States and those of the state. This arises, as we have seen, principally from the fact that in respect to quite extensive classes of litigations, their jurisdiction is concurrent. These courts, as has been many times decided, are foreign as to each other.

They are courts created by wholly different sovereignties, and neither holds any superiority over the other, except in the rare case of a writ of error from the supreme court of the United States to the supreme court of a state to review its decision in respect only to a claim set up on the record to some right, title, claim or interest arising under and dependent upon the constitution, or some law, or treaty made in pursuance thereof, when such right has been denied. With the single exception I have named, an exception due to the fact that congress has never made the jurisdiction of its courts exclusive in controversies arising under the federal constitution or laws, the two systems of courts are absolutely independent of each other, and the rules of jurisprudence and comity applicable between courts of different countries apply to them.

It is the highest duty of both courts to so administer the rules of procedure as shall best enable them to co-operate as two systems co-existing within the same territory, and alike submitting to the supreme authority of the constitution of the United States.

In *Taylor* v. *Carryl*,[1] Mr. Justice Campbell, after stating strongly the duty of harmonious co-operation, said:—

[1] 20 Howard (U. S.) 593.

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

"The decisions of this court that declare such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates of whatever class by the approbation and confidence of those submitted to their government."

The general principle which should govern the procedure of courts of concurrent but independent jurisdiction, was thus stated by the United States Circuit Court of Appeals for this circuit:—

"It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy or of the res should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided and the res discharged from its control. This rule has its foundation, perhaps in comity; but the fruits of its recognition have been so beneficial, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application."

Problems and difficulties always have, and always will, beset the path of every self-governing people. From the beginning, the question as to how to reconcile individual liberty with the restraints of law essential to the common safety and general welfare, has demanded solution. To these old and never-answered questions, we have added the further problem of how to reconcile the sovereignty of the nation with the sovereignty of the state. It was not to be expected that the complex machinery devised by our fathers to this end should work with absolute smoothness when first set in motion. The natural capacity of the American people for self-government, co-operating with the shaping which comes with the slow process of time and the lesson of experience, has largely solved the difficulties which from time to time have presented themselves. The complex systems of federal and state governments, and federal and state judicial systems, exercising their power over the same people, and within the same territory, have been made to work in wonderful harmony, and the genius of our people for self-government is day by day splendidly vindicating itself.

I have referred briefly to the great constitutional functions discharged by both judicial systems, and to the semi-governmental questions involved in the exercise of the jurisdiction of both federal and state tribunals as defenders and upholders of constitutional limitations. There is a wider jurisdiction exercised by both state

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions

and federal courts, which concerns only the administration of justice in the innumerable controversies which arise continually between man and man. In the discharge of this high and sacred duty, the judges of the federal and state courts are alike set apart for the exercise of the most exalted functions which man may assume over his fellow-men. The cleanness and uprightness with which we discharge this great and solemn duty of judgment is of the utmost concern to the welfare of all the people, and to the perpetuity of free institutions.

Judicial probity is the absolute essential to the very existence of an ordered social life, and the keystone of the arch of our common safety. When public confidence in the integrity of the judges of the land shall be shattered, the doom of government by law is sounded. I cannot fail to testify to the general confidence and affection of the people submitted to their jurisdiction for the magistracy of the states.

When I witness daily the integrity and devotion to duty with which my brethren of the state courts administer the state justice, and the general loyalty with which they are upheld, notwithstanding their short elective terms, my faith in the capacity of the people is strengthened, and my confidence in the endurance of popular government invigorated. The spectacle of this public regard which is exhibited for them, has at moments occasioned a sense of isolation and envy that the judges of the federal courts could not, by reason of the character of their duties, draw nearer to the people and share more in their confidence and affection. A more secure tenure, and slightly better compensation, are not a full compensation for the greater esteem in which the state judges are held, and the only reflection which reconciles us to the situation, is in the greater opportunities which the service of the great republic affords for the discharge of great duties; and of these none are so full of reward as that which comes from an earnest effort to present the courts of the union as also the courts of the people, in as full a sense as those of the state, with which they are more familiar.

In conclusion let me say that whatever be the constitutional relations of the two systems of courts to each other, the relation of the judiciary to each other is that of brethren co-operating in the administration of justice and priests serving around a common altar.

HORACE H. LURTON

Judges' Chambers
United States Circuit Court of Appeals
For the Sixth Circuit.

This content downloaded from 24.60.1.52 on Sat, 27 Jun 2015 00:51:11 UTC
All use subject to JSTOR Terms and Conditions