Introduction

Daniel J. Elazar writes that, “Students of federal systems have tended to focus their attention on the federal constitution that frames the entire polity while neglecting the constitutional arrangements of the constituent polities.”\(^1\) Perhaps nowhere is this focus on the “entire polity” to the exclusion of its “constituent polities” clearer than in the study of the American judiciary. One need only peruse a law library or bookstore to see that the study of America’s courts, like the study of American constitutionalism generally, is tilted overwhelming towards the role that the federal government and federal judiciary play in the United States with scant attention given to the role of the states and state courts. Notwithstanding the emergence of the new judicial federalism movement in the 1970s with its renewed emphasis on the role of state courts and state constitutions in national governance and rights adjudication,\(^2\) the American public, many scholars, and most lawyers generally understand judicial power in reference to its exercise in the federal courts even though the administration of justice that most frequently touches daily life plays out in the states. Few if any law schools offer courses on state courts, preferring to focus on the federal judiciary as though America’s justice system is comprised of a unitary court arrangement where states play a subsidiary not coterminous role. Scholars have, therefore, largely ignored the state courts focusing the vast majority of their scholarship on the federal judiciary. Professor Frank Griffith Dawson exemplifies this scholarly bias writing that:

Although the bulk of cases decided in the US (sic) are by state courts, I focus on the federal system because over 200,000 cases a year are filed in federal courts and they adjudicate more cases than most if not any single state court system; produce more written decisions than all the state systems; hear cases which

\(^1\) Daniel J. Elazar, Exploring Federalism 174 (Univ. of Ala. Press, 1987).

\(^2\) See G. Alan Tarr, The New Judicial Federalism in Perspective, 72 Notre Dame L. Rev. 1097 (1999). See also State v. Carroll, 552 A.2d 69, 73–74 (N.H. 1988) (“In this era of new federalism, it is important to note that although this standard is similar to that established by the United States Supreme Court . . . the test which we adopt here today is our own interpretation of the New Hampshire Constitution, independent of any federal decisions interpreting the totality-of-the-circumstances test applied in fourth amendment analysis.”).
tend to be of national – or even international – importance rather than of local interest.[3]

Statistics alone portray the fallacy of this proposition. Rather than being subsidiaries or of passing importance, state judiciaries are organic to our understanding of the administration of justice, whether we recognize it or not, because they are the principal court systems of the United States both in terms of subject-matter reach and the number of people served.

To some extent this focus on federal judicial power is understandable, however. The American legal and popular lexicon is filled with famous (and sometimes infamous) United States Supreme Court decisions such as *Marbury v. Madison*;[4] *Scott v. Sanford (Dred Scott)*;[5] *Brown v. Board of Education*;[6] *Miranda v. Arizona*;[7] and more recently *Citizens United v. Federal Election Commission*;[8] and *National Federation of Independent Business v. Sebelius*. Moreover, state courts have often incorporated federal jurisprudential standards into their own interpretive processes either as a matter of national policy, *i.e.*, the federal Supremacy Clause,[10] or as a matter of national expediency, *i.e.*, promoting a more cohesive legal system, thereby lessening, to a degree, the range of their adjudicatory independence and the impact of their own state constitutions.[11] And in a strictly legal

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[10] U.S. Const, art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”).

sense, it is indisputable that the reach of the United States Supreme Court far surpasses that of any state high court given the geographical scope of its jurisdiction and its decisional finality, although state court decisions can and often do have profound and final impact on the nation as trendsetters.

Notwithstanding the expanding reach of the federal judiciary over the last eighty years, however, American judicial power is defined by more than the pronouncements of the United States Supreme Court, Article III (defining the scope of federal judicial power), or the Supremacy Clause of the Federal Constitution. These provisions define certain features to the exercise of judicial power in America; they do not define its totality. To understand the breadth of American judicial power is to look beyond the Federal Constitution and into the governmental arrangements of the states for it is here that American judicial power reflects a rich amalgamation of capacities and authorities distributed across diverse institutions operating under a dual constitutional order in which states retain considerable latitude in constructing and managing their internal political and legal affairs. This unique constitutional order greatly impacts the exercise of judicial power in the United States because it produces “a legal system unprecedented in form and design, establishing two orders of government, each with its own privity, its own set of mutual rights and obligations

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12 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).


to the people who are governed and sustained by it.\textsuperscript{15} The failure to appreciate this unprecedented “form and design” leaves a gaping hole in our understanding of the diversity reflected in America’s state courts, the wide and distinctive powers they exercise, their role in administering the bulk of the nation’s justice system, the myriad of structures under which they operate, and their impact on the country. There is no such thing as the American court system;\textsuperscript{16} rather it is America’s court systems with each state possessing wide latitude and broad responsibility in administering justice within its domain and even across the nation. If states are the laboratories of democracy,\textsuperscript{17} state courts have been and continue to be the laboratories of American judicial power.\textsuperscript{18} Virtually every evolutionary (and revolutionary) innovation in the structure and exercise of judicial power in the United States began in the states with these innovations then often impacting the nation and the larger global community.\textsuperscript{19} Judicial review, judicial independence based upon constitutionally embedded separation of powers,\textsuperscript{20} judicially enforced systems of checks and balances on governmental power,\textsuperscript{21} judicial tenure and security of compensation,\textsuperscript{22} the

\textsuperscript{16} See Kent S. Scheidegger, 
\textit{Habeas Corpus, Relitigation, and the Legislative Power}, 98 COLUM. L. REV. 888, 940 (1998) (submitting that there is no support for any supremacy of the lower federal courts over the state courts regarding federal questions; only the Supreme Court has this power over the states.).
\textsuperscript{17} New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting). See also People v. Scott, 593 N.E.2d 1328, 1348 (N.Y. 1992) (Kaye, J., concurring) (“States . . . by recognizing greater safeguards as a matter of State law can serve as ‘laboratories’ for national law.”).
\textsuperscript{18} See Shirley S. Abrahamson, \textit{Criminal Law and State Constitutions: The Emergence of State Constitutional Law}, 63 TEX. L. REV. 1141, 1166 (1985) (“[A] study of state constitutional criminal law should include state cases that adopt federal decisions as valid interpretations of state constitutions as well as those that do not. If the state is the laboratory, all experiments must be studied.”).
\textsuperscript{19} See Stephen Gardbaum, \textit{The Myth and the Reality of American Constitutional Exceptionalism}, 107 Mich. L. REV. 391 (2008) (noting that America was the inventor of modern constitutional supremacy enforced by the power of judicial review, which is now common in the constitutions of many other nations).
\textsuperscript{20} See, e.g., N.C. CONST. DECLARATION OF RIGHTS, cl. IV (1776) (legislative, executive, and supreme judicial powers of government should be forever separate and distinct). See also GA. CONST. art. I (1777).
\textsuperscript{21} See, e.g., Coffin v. Coffin, 4 Mass. 1 (1808) (government is founded on a system of checks and balances). See also INS v. Chadha, 462 U.S. 919 (1983) (fact that a law or procedure is efficient, convenient, and useful does not save it if it is contrary to the Constitution).
\textsuperscript{22} See, e.g., DEL. CONST. art. XII (1776) (judges shall enjoy tenure during good behavior and adequate compensation). See also N.Y. CONST. art. XXIV (1777).
merger of law and equity, the rise of specialty courts, recognition of an entrenched constitutional order defined by highest normative values, all have their roots in early state constitutional designs that were often legitimized in contests before state courts. Though many of these innovations have evolved over the years, there is little disputing that throughout the history of the United States, its state courts have been remarkably adaptable and pioneering institutions, unrestrained by more traditional notions regarding the role of judges and the judiciary. As Thomas C. Grey notes:

> [T]he absence of state apparatus comparable to those found in the old world—the “sense of statelessness” that accompanied the dominance of American government by courts and parties—made the courthouse the seat of government and the judges the main representatives of authority, and also important partners to the part-time legislatures in lawmaking. It is not surprising that judges who found themselves serving in effect as the government took on a less legalistic and more expansive conception of their role than judges surrounded by a corps of executive officials wielding state power.

Contrary to Thomas Jefferson’s vision of a severely restricted role for the judiciary, America’s judges have never been “mere machines”; they have never just “umpired” in the sport of constructing public policy. For good and ill, America’s judges, including its many state judges, have been heavily involved in shaping public policy, the mechanisms of government, the machinery of justice, and the rules underlying public order. It does not necessarily flow from these assertions that the American judiciary is

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24 See, e.g., Bayard v. Singleton, 1 N.C. 5 (N.C. Super. L & Eq. 1787) (right to trial by jury guaranteed by constitution; a legislative act to the contrary is unconstitutional); Commonwealth v. Posey, 4 Call 109 (Va. 1787) (Pendleton, J.) (constitution is supreme law of the land and directs legislature); State v. Blackiston, 2 Del. Cas. 229 (Del. Qua. Sess. 1786) (by the constitution no one may be tried but by jury which right shall not be abridged); Republica v. Chapman, 1 U.S. 53 (Penn. Sup. Ct. 1781) (ex post facto laws violate provision of constitution, which is superior).


27 Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States, U.S. Senate Judiciary Comm., 109th CONG. 55 (Sept. 12, 2005) (“Judges are like umpires. Umpires don’t make the rules, they apply them.”).

28 Placek v. Sterling Heights, 275 N.W.2d 511, 531 (Mich. 1979) (Coleman, C.J. concurring in part) (“Modern jurisprudence has . . . recognized the obvious and
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simply another political institution only that in America courts do, in fact, shape public policy in ways far more profound and consequential than in any other nation. And at the heart of this lies the state court systems of America.

In the following chapters we will dissect America’s court system by focusing on the many roles that state courts play in daily and national life. Chapter 1 provides overarching context by comparing the roles of state and federal courts along several lines of analysis within the nation’s judicial power structure. In this chapter we also provide an important constitutional context for understanding the organic bases of judicial power in the United States: the difference between power by enumeration as expressed in the Federal Constitution and plenary power as expressed in state constitutions. These two sources of judicial power have subtle yet highly relevant impact on understanding why state courts play such an important role in the United States and its federal system of government. Chapter 2 examines important concepts of judicial power such as the notion of structural and decisional independence and concept of jurisdiction. Chapter 3 examines the history of America’s state courts with particular emphasis on how state courts shaped many of the key aspects of judicial, many of which were incorporated into the Federal Constitution and often exported across the globe. Chapter 4 examines judicial selection processes utilized in the states. America elects more judges – either through partisan elections, non-partisan elections, or retention elections – than any other country in the world. Accordingly, America’s state courts are the most “democratic” courts in the world, but this electoral process also makes them more vulnerable to outside influences than most other court systems. Chapter 5 explores two themes: (1) the unique roles assigned to state courts, and (2) the varying structure of America’s state courts. Chapter 6 investigates the unique relationship between state judicial power and state legislative power. Given the nature of state constitutions and their myriad restrictions upon the use of legislative power, state courts in many states find themselves involved, often uncomfortably, in the very process by which law is created at a procedural and substantive level. This chapter also examines the relationship between the notion of “positive rights” found in state constitutions and the exercise of judicial power to protect those rights, an area ripe of constant conflict with powers held by the coordinate branches of state government. Finally, Chapter 7 looks forward to some the opportunities and challenges facing state courts. It is not an under-

acknowledged that whenever a court overrules prior precedent it is functioning in a lawmaking capacity.”).
statement to observe that increasing regulatory state courts are being
tasked as the short-stops in addressing many of the nation’s social and
political challenges as other systems fail. This has required state judges to
rethink their roles, develop innovative responses, and redefine the entire
notion of what constitutes adjudication. In the end, we hope the reader –
whether student, faculty, or a member of the general public – comes away
with a better understanding of the unique nature of the American court
system, the always critical role of state courts in our governmental system,
the astonishing innovative capabilities of state courts, and the unique
responsibilities that these courts have undertaken throughout American
history in helping govern a remarkably heterogeneous nation.