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FEDERAL AND STATE COURTS: RESTORING A WORKABLE BALANCE

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We take the role of the inferior federal courts in this country for granted. It seems to us perfectly natural to have independent and inferior federal courts below the Supreme Court, and a separate system of state courts. But in fact, our system of parallel state and federal courts is unusual in a federalism, to put it mildly. In Canada, for instance, the provincial supreme courts are named by the central government.¹ It's as if the judges of the New York Court of Appeals or the justices of the Connecticut Supreme Court were named by the President of the United States. In Europe, there are virtually no inferior European courts. One goes from the national courts of France, Italy, Germany, and so on, directly to a European High Court, without (with the possible exception of antitrust) having any lower European courts.² In other words, it's as if we had *just* the courts of Connecticut, New York, California, and the rest, for *all* cases, and then went to our High Court in Washington, D.C.

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¹ British North America Act, 30 & 31 Vict., c. 7, § 96 (1867) (Eng.) (establishing structure of Canadian government).

² See Treaty on European Union, Dec. 24, 2002, art. 35, http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.html#000501 (establishing court of justice and conferring jurisdiction).

Parenthetically, it is rather interesting that there's been much talk in Europe about a *political* Europe or an *economic* Europe, but little talk, until very recently, of a *juridical* Europe.³ I think that the Europeans are going to have to consider what kind of a system of European courts they will want to have as the European Union develops. There's no need for them to copy the United States or Canada—one could have any number of different arrangements. One could, for instance, have judges named locally by Italy, France, or Germany, who sit in Amsterdam, or in The Hague, or in some other place. In contrast, the American system names federal judges nationally (with some help from local senators), and these judges then sit more or less locally. The system of local and national courts can be different for different federalisms, but each federalism must think about what kind of relationship it wants to have between the local courts of the sovereign states and the national courts of the federal government. Now, let's get back on track (Justice Frankfurter's wife used to say of him that he had two problems as a public speaker: one, that he always got off track; and two, that he always got back on).

In the American case, the strange parallel structure of state and federal courts was first considered at the time our Constitution was created. Its source, as with so much else, was James Madison. The idea of separate lower federal courts was Madison's, and Madison originally wanted the Constitution itself to provide for and grant jurisdiction to lower federal courts, just as it did for the Supreme Court.⁴ He lost. But Madison, that pesky little man with such a great mind, didn't give up easily. And so he suggested that if—*someday*—it might be too much work for the Supreme Court to deal with *all* of the federal issues that might arise, wouldn't it be useful if, under those circumstances (should they *ever* come about), Congress could create lower federal courts and give them jurisdiction . . . if that should ever happen. And that proposal got through.⁵ So the Convention that had

³ Much of the recent discussion has been in conversations, at conferences, with European scholars. See also Carol Harlow, *Voices of Difference in a Plural Community*, 50 *Am. J. Comp. L.* 339 (2002) (arguing for preserving "diversity and legal pluralism within the EU" as Europe moves toward greater legal harmonization and development of new institutions); Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law*, 21 *Penn St. Int'l L. Rev.* 569, 611-12 (2003) (discussing costs of institutional reform possibilities such as "the regionalization of the EC courts" and "the creation of a new European Court of Civil law"); J.A.E. Vervaele, *Counterfeiting the Single European Currency (Euro): Towards the Federalization of Enforcement in the European Union?*, 8 *Colum. J. Eur. L.* 151, 178 (2002) (noting that EU member states "are still unprepared for taking forceful steps in the direction of justice integration in the EU and the creation of a European judicial space").

⁴ 1 Records of the Federal Convention of 1787, at 21-22 (Max Farrand ed., 1911).

⁵ *Id.* at 125, 127.

rejected the idea of lower federal courts endowed in the Constitution with a particular jurisdiction, nevertheless allowed Congress to establish them.⁶ Congress did so almost immediately, in 1789, with the Judiciary Act,⁷ at the behest of Oliver Ellsworth of Connecticut.⁸ Whether he was put up to it by Madison or not I do not know, but I would not be surprised if he were. Thus were the lower federal courts created.

Over time, the balance between them and the state courts has changed greatly, but it has always rested on three or four pillars. The balance I will describe—one which is currently in crisis—is the balance that I grew up with in law school. It is the balance of some sixty years ago, the balance, if you will, since *Erie*,⁹ and since the coming of Supreme Court certiorari jurisdiction.¹⁰ It is the balance of the mid-twentieth century.

What was that balance, why is it in crisis today, and what can we do about the crisis? I will focus on four aspects of the balance. First, federal violations—federal actors violating federal rights—were tried in the lower federal courts. When the federal government allegedly did something that violated a federal right, constitutional or otherwise, federal courts were usually involved from the beginning. Second, criminal law; this was generally local and in state courts. Third, most private law in traditional common law areas—torts, contracts, and so on—was also in state courts. The exceptions were relatively few diversity cases and, even as to these, after *Erie*, local law ruled.¹¹ And last, there were state violations—state actors allegedly violating federal rights. In this area, regardless of what had been the case earlier, starting about sixty years ago, such cases were often tried out first, or reviewed *de novo*, in federal courts. One didn't count on the Supreme Court reviewing state court decisions on these issues: Federal courts were able to find the facts and decide questions of law, preparing them for the Supreme Court should that court wish to hear them.

Of these four pillars of federal-state court relations, I will argue that three—those involving criminal law, private law, and state violations—are currently in crisis, if not crumbling, and I will make some

⁶ U.S. Const. art. III, § 1.

⁷ Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 41 (2000)).

⁸ See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 27-53 (1995).

⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰ Certiorari jurisdiction was established in the Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.).

¹¹ *Erie*, 304 U.S. at 79-80.

rather radical, and some less radical, suggestions for reasserting or reconstructing them.

I

THE FIRST PILLAR IN CRISIS: CRIMINAL LAW

We all know that, increasingly in the last sixty years, criminal law of the ordinary sort has become federalized. Every time Congress meets, it passes a new law, or new laws, or many new laws, declaring actions that are already state crimes—acts parallel to those already prohibited by the states and punished by the states—to be federal crimes as well.¹² Why is that so? Because it is politically successful. When people are upset by some behavior, it is very easy for Congress to say, “We will make it a federal crime.” And Congress uses the Commerce Clause, or it uses the Banana Clause, or it uses some other clause to do so.¹³

This has been happening again and again, even in the face of some resistance. For instance, the Supreme Court has tried to limit this tendency in the *Lopez* line of cases.¹⁴ But that approach hasn’t really stopped the trend. And I don’t think it *will* in the future.

My colleague, Dennis Jacobs, who is here this evening, recently dissented in a case involving the Hobbs Act,¹⁵ saying, in effect, “It can’t go *that* far, for heaven’s sake, or we can make everything a Hobbs Act crime.”¹⁶ But the majority, also represented here today,

¹² See, e.g., 18 U.S.C. § 844(i) (2000) (arson); § 1951 (robbery, extortion).

¹³ See, e.g., *United States v. Nelson*, 277 F.3d 164, 190-91 (2d Cir. 2002) (holding that statute prohibiting private violence motivated by victim’s race, religion, or other discriminatory reason is constitutional exercise of Congress’s power under section two of Thirteenth Amendment because of victim’s use of public facility); see also *Yakus v. United States*, 321 U.S. 414, 422, 444 (1944) (noting that War Powers Clause, U.S. Const. art. 1, § 8, gives Congress constitutional authority to prescribe commodity prices and to criminalize sale of commodities at higher prices as war emergency measure). See generally Edward D. Re, *Federal-State Relations: The Allocation and Distribution of Powers of Government in the United States*, 15 *St. Thomas L. Rev.* 265, 276-83 (2002) (discussing Congress’s power to legislate using Commerce Clause).

¹⁴ See, e.g., *Jones v. United States*, 529 U.S. 848, 850-51 (2000) (holding that federal arson statute, 18 U.S.C. § 844(i) (2000), if applied to arson of owner-occupied residence not used for any commercial purposes, would exceed Congress’s Commerce Clause powers); *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (holding that Violence Against Women Act’s regulation of intrastate noneconomic activity exceeds Congress’s Commerce Clause powers); *Printz v. United States*, 521 U.S. 898, 936-40 (1997) (Thomas, J., concurring) (noting that Congress lacks power under Commerce Clause to regulate “wholly *intrastate*, point-of-sale transactions”); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Gun-Free School Zones Act exceeds Congress’s Commerce Clause powers).

¹⁵ 18 U.S.C. § 1951 (2000).

¹⁶ See *United States v. Jamison*, 299 F.3d 114, 121-23 (2d Cir. 2002) (Jacobs, J., dissenting).

said “No. That’s what Congress can do. It’s a Commerce Clause thing and there it is.”¹⁷ In the end, *Lopez*-type approaches, whether by courts of appeals or by the Supreme Court, cannot solve the problem because any solutions that would prohibit the federal government from making some of these things federal crimes either don’t go far enough to keep the federalization of criminal law from overwhelming us, or go so far as to restrain the federal government from taking actions in areas where only the federal government can act effectively.

It’s a game attempt, but it simply does not work. That people—even those who push for it—don’t believe that it can work can be readily seen. Thus, some legislators who hailed the Supreme Court’s restriction on criminalizing, as a federal matter, certain types of behavior—violence against women,¹⁸ for example—are the very ones who proposed that Congress pass a law prohibiting what they call partial-birth abortions.¹⁹ Now one can feel however one wants about these abortions—about whether they are good or bad—but if one believes that there is no constitutionally valid federal interest in prohibiting violence against women under the Commerce Clause, it is very hard to understand what the valid federal interest is in banning this type of abortion. It is hard to understand because, in fact, people *want* contradictory things. They want the federal government to make criminal those things they believe to be deeply wrong, and (at the same time) they worry about the federalization of criminal law.

Apart from the dramatic change that such federalization effects in our federal system, making criminal law national rather than local causes great problems for the lower federal courts. I would guess that cases that involve federal criminal law, where there is already a state criminal law that would cover the same thing, total somewhere between thirty and fifty percent of the Second Circuit’s appellate docket, depending on how you define that docket and those cases. Most of the drug cases, of course, fall into that category. If the federal courts are overwhelmed—with the result that they become ever larger, and inevitably of lower quality, all of the problems that Judge Newman spoke of in his review of the situation of federal courts several years ago²⁰—it is preeminently due to this. What, then, can we do?

¹⁷ See *id.* at 118-19 (majority opinion by Leval, J., with which McLaughlin, J., concurred) (noting Second Circuit’s conclusion that Supreme Court’s decision in *Lopez* does “not raise the *de minimis* threshold for satisfying the jurisdictional element of the Hobbs Act” (citing *United States v. Arena*, 180 F.3d 380, 389-90 (2d Cir. 1999); *United States v. Farrish*, 122 F.3d 146, 148 (2d Cir. 1997))).

¹⁸ See *Morrison*, 529 U.S. 598.

¹⁹ See, e.g., Partial-Birth Abortion Ban Act of 2003, S. 3, 108th Cong. (2003) (passed); Partial-Birth Abortion Ban Act of 2003, H.R. 760, 108th Cong. (2003) (passed).

²⁰ See Jon O. Newman, Remarks Given at a Panel Discussion on “Legal Issues in the

Well, here's a possible solution.²¹ Suppose Congress were to pass a law that said that whenever a federal crime parallels a state crime, both crimes will be tried, together, in state courts. Federal prosecutors are available, the FBI can investigate, but the power to *try out* the case in the first instance—the jurisdiction—will lie not in federal courts, but in state courts. Some of you will say “Brady”²² and say that it is unconstitutional to assign federal duties to the state courts, and so on. But Brady *doesn't apply* to courts: It applies to everything else *but* courts, as various Supreme Court decisions during the Second World War, as well as postwar Office of Price Administration cases, have made clear.²³

Since Congress *can* assign criminal cases under federal law to state courts, suppose that Congress were to say: *State* courts are where such cases will be tried. The federal government could continue to make all sorts of things federal crimes. And it could, if it wanted, demand that the penalties be more severe than those man-

21st Century” at the Fifty-Seventh Judicial Conference of the Third Circuit in Philadelphia, Pa. (May, 15, 1997), in 70 Temp. L. Rev. 1125, 1128-29 (1997).

²¹ It is one that might also do away with such small abominations as dual sovereignty-double jeopardy, which become ever more possible when there are ever more things that are both federal crimes and state crimes. I mention this because that was the abomination that Justice Black was particularly concerned with in the 1958 Term when I was clerking for him. As he predicted, correctly, see *Bartkus v. Illinois*, 359 U.S. 121, 163-64 (Black, J., dissenting), dual sovereignty-double jeopardy is used especially in cases that are politically hot—when the person who had been acquitted is politically unpopular—whether from the right or the left. See, e.g., *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (involving federal civil rights conviction of African American youth who had been acquitted in state court of murder charges arising from death of Orthodox Jewish man during racially motivated riot); *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993) (involving federal civil rights conviction of officers who had been acquitted in state court of charges arising from their beating of Rodney King).

²² See *Printz v. United States*, 521 U.S. 898 (1997) (holding that Brady Act violates Tenth Amendment by imposing obligation on state officers to execute federal laws).

²³ See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that Rhode Island courts cannot decline jurisdiction over claim under Emergency Price Control Act where courts otherwise “have jurisdiction adequate and appropriate under established local law to adjudicate this action”); *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 703-04 (1942) (stating that where Congress conferred concurrent jurisdiction on state courts to enforce Federal Employers’ Liability Act (FELA) and prohibited removal of actions brought in state courts, “opportunity to present causes of action arising under the F.E.L.A. in the state courts came . . . from [] federal” law, and therefore, “the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source” because “the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose”); see also *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 59 (1912) (“[R]ights arising under [FELA] may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.”).

dated by state laws. But, as a practical matter, the power to try such federal crimes would revert to local government.

Of course there might be some cases where such an approach wouldn't work. I would want to allow either party to petition the federal court (maybe the district court, maybe the court of appeals) to have such a special case be tried in a federal court. The petition would presumably be granted only if there was some reason to think the state court couldn't handle the case. And I would also want to have a system of certification so that if, in the course of trying out a case that seemingly could be heard as well in the state court, some unsettled question of complicated federal law arose, the state court could certify that issue to the federal court of appeals. And the court of appeals could accept "the question" and give back an answer as to the applicable federal law.²⁴

If Congress were to pass such a law, then thirty to fifty percent of the Second Circuit's appellate docket would disappear. And the trial of matters that are basically local—even though Congress wanted to impose a higher or a different penalty—would return to the way that they were treated from Madison's time until a few years ago.²⁵ Incidentally, this might also mean that federal judges—who are generally not picked for their knowledge of criminal law, while state judges much more often are—could return to the solemn duty of dealing with securities cases, which we handled so well in Learned Hand's time.

II

THE SECOND PILLAR IN CRISIS: PRIVATE LAW

In a national economy, the existence of diversity and pendent jurisdiction has meant that more and more cases are being tried in federal courts, even though the issue is one of local law. There are whole areas of law—certain aspects of intellectual property law, for example—that are not governed directly by federal law, but which are in federal courts because they are pendent to federal laws. In such areas, federal courts are supposed to state what the law of, say, New York is. As a result, in these areas, the law of New York is the law made by Second Circuit Judges like Jon Newman and Pierre Leval. It is made spectacularly well, perhaps. But this is supposed to be *local*

²⁴ Naturally, such certification would have to be structured so that the federal courts would decide only cases and controversies and not give advisory opinions. But that should be readily doable.

²⁵ Obviously, if Congress were to pass such a law, it would be wise to grant states the funds to take on the additional cases. But given the relative costs of federal and state courts, it could easily do so in ways that would be financially advantageous both to the federal and local fiscs, and especially to the state courts.

law, articulated by state judges, not by federal courts. The same is even more true in diversity cases dealing with torts and contracts, for the presence of national companies frequently leads to federal jurisdiction.

The problem here is that federal courts often get state law wrong because federal judges don't know state law and are not the ultimate decisionmakers on it. Inevitably, this leads to considerable forum shopping of just the sort that *Erie* sought to avoid.²⁶ One party or the other tries to get into federal courts because it *hopes* that the federal courts will get the law wrong.²⁷ I could give you any number of examples. For instance, the concept of duty in the tort law of New York is virtually unique to New York and is very complicated. As a result, federal judges who deal with the concept of duty in a New York tort case frequently get it wrong. They may be right in thinking that what they hold is what New York law *ought* to be, but it ain't New York law!

One answer to this problem is the one favored by quite a few federal judges: Simply get *rid* of diversity jurisdiction. Judge Feinberg, among others, has argued for that.²⁸ I'm against it. I'm against it for several reasons: First, I do not believe that the problem of the level playing field, which was the original reason for the creation of diversity jurisdiction, has ceased to exist. I think that it *matters*, if you are a citizen of New York, whether your case will be tried in a Texas state court or in a federal court, or, if you are a citizen of Texas, whether your case will be tried in a New York state court or in a federal court. If you're not a citizen of that state, I think, especially at the lower court level, that it makes a difference what the court is.²⁹ If you think of France and Germany it's perfectly obvious, but I think that it remains true in this country as well. And I believe it would

²⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

²⁷ Charles E. Clark, a predecessor of mine both as Yale Law School dean and on the Second Circuit, predicted this in an article he wrote soon after *Erie*. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 *Yale L.J.* 267, 290-94 (1946). What Clark was most worried about was the forum shopping that would occur if federal courts were required to follow old or dubious state court precedents. Because certification was not around at the time he wrote, and because he, correctly, viewed abstention as too cumbersome, Clark urged federal courts to be more flexible in their reading of state law. Absent certification, this seemed to him the best way to avoid having federal courts get state law wrong.

²⁸ See Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, *N.Y. St. B.J.*, July 1989, at 14.

²⁹ See, e.g., *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 539-41 (2d Cir. 1992) (holding that allowing defense counsel's statements designed to appeal to jury's regional bias in negligence action was reversible error and noting that original rationale for diversity jurisdiction—"fear that state courts would be prejudiced against out-of-state litigants"—"retain[s] validity").

matter even more if there weren't the "out" of diversity. The fact that people *can* go into a federal court, and avoid potential prejudice, makes the state courts a little more careful.

But there's another reason to keep diversity jurisdiction, and that is that diversity has an important unifying effect on the law. Federal courts tend to look to national law in these areas. When, on state law issues, judges like Newman or Leval focus on what the law is or should be, they are guided by the law all over the country, and that is a useful thing. National law shouldn't be the last word as to the state law, but having courts that are keenly aware of national law speak about state law does have a unifying effect, which it would be too bad to lose.

Well, what's the answer? My long-suffering colleagues know what *my* answer is, and that is certify, certify, certify.³⁰ In other words, I believe that whenever there is a question of state law that is even possibly in doubt, the federal courts should send the question to the highest court of the state, and let the highest court of the state decide the issue as it wishes. Federal judges don't like to certify, because we think we know, better than the states, what state law ought to be. But that isn't the point. We should be humble. We should realize that it *is* state law, and hence that it is up to the states. Moreover, we should recognize that the parties have a right to have state, rather than federal, judges decide issues of state law. If we are unwilling to certify frequently—indeed to certify almost all the time—then a more radical solution would be to have Congress pass a law allowing the parties to petition the highest court of the state to review, if it chooses, a decision on state law made by the federal courts of appeals. I don't think that that should be necessary, if we would just do our job of certifying. But it is a solution if we don't.

Where does that put federal appellate courts? I think that in cases of this sort, the intermediate federal courts should be no more than the "Appellate Division for Diversity Cases." We should think of ourselves as an intermediate state court whose function it is to decide *provisionally*, and let the highest court of the state ultimately determine state law. When I say that, I talk about a kind of certification that is quite different from the one that we are used to. What federal judges should do, if state law is uncertain, is write an opinion which says what we think that law ought to be. We should write an

³⁰ See, e.g., *Mark A. Varrichio & Assocs. v. Chi. Ins. Co.*, 312 F.3d 544, 548-50 (2d Cir. 2002) (certifying uncertain question of state law to New York Court of Appeals); *Tri-State Employment Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 269 (2d Cir. 2002) (same); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 149-54 (2d Cir. 2001) (same); *Henderson v. INS*, 157 F.3d 106, 123-24 (2d Cir. 1998) (same).

opinion of the same sort that the state's appellate division would write. And then we should certify, so that the New York Court of Appeals is able to decide (1) not to take the case, if it thinks that we are right, or if it is not ready to take the issue up, or if it just doesn't want to bother to take it at that time; or (2) to take it, if it likes, in exactly the same way it does cases brought up (on certiorari, essentially) from the appellate division.

If federal judges did that, if we had that structural view of our role, then we would not be *insulted* when the New York Court of Appeals declines certification. Now, when the New York Court of Appeals declines certification, some federal judges walk around saying, "What did they *do* to us? After all, *we* are the Second Circuit, they should listen to us!" My view is exactly the opposite. We have indicated how we would decide something, or simply explicated our doubts on the issue. If the state's highest court doesn't want to take it, great! That gives us authority to impose *our* view of state law, *provisionally*, until the highest court of the state decides to resolve the question.

Such an approach would also avoid the problem of delay, which is one reason why many federal judges don't like to certify. The only cases that *would* be delayed are the ones that the New York Court of Appeals decided were worth taking: in other words, those that it deemed important for a state court to decide. The others, it would simply decline to take. And, since it doesn't take more than a month or two for the New York Court of Appeals to say, "Thank you, we decline" (as it does frequently with the appellate division), no significant delay would occur. Such a view of certification would, moreover, preserve the unifying function of diversity jurisdiction. We on the Second Circuit would still be in a position to speak to national law, and could put before the New York Court of Appeals, or the Connecticut or Vermont Supreme Courts, what we think the law ought to be, given the more national vision that our court likely has. But the state high court could then accept our view or not, as it wishes.

Frequent certification would also have another advantage, which is very important in terms of the third pillar of the federal-state court balance now in crisis. It would have us act humbly in our relationship to the New York, Vermont, or Connecticut courts—to the state courts. These courts would realize that where it is their responsibility, and their law, we understand that we have no special expertise at all—that we are an intermediate court in their system, subject to them. And that would be extremely useful for the last point that I want to make.

III

THE THIRD PILLAR IN CRISIS: STATE ACTION

Some sixty or seventy years ago, cases involving state action that (allegedly or possibly) violated federal rights, instead of being tried out primarily in the states, with a review of the federal claim only at the Supreme Court, increasingly came to be tried in the lower federal courts. Some people thought that this occurred in reaction to massive resistance in the south, when some southern states attempted not to follow the Supreme Court's desegregation orders.³¹ And this was certainly one of the circumstances behind the popularity of that approach, but massive resistance was only a contingent reason for it. The *real* reason why it became essential for lower federal courts to hear these cases was that the Supreme Court had decided to take fewer cases after the advent of certiorari jurisdiction.³² As a practical matter, it was *impossible* for the Supreme Court adequately to police state courts to see whether state actions violated federal rights, and that made it essential for lower federal courts to hear such cases.³³ A hundred cases a year cannot test whether what the states are doing adequately protects federal rights.

The need for such *federal* fact and law finding increased for another related reason: The same thing that had happened with review from state high courts to the U.S. Supreme Court was also happening *within* the states. The New York Court of Appeals and the Connecticut Supreme Court, for example, were now hearing a very small proportion of the appeals from the decisions of the lower state courts.³⁴ And many of the appeals that the state high courts took, understandably, involved state issues which these courts felt they had to deal with. So, if there weren't a way—in lower federal courts—of

³¹ Commentators have argued that the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), reinterpreting the phrase "under color of state law" and thereby opening lower federal courts to many more lawsuits under 42 U.S.C. § 1983 (2000), "rested upon a fundamental distrust of state courts to protect federal rights." Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530, 539 (1989).

³² See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1646 & n.12 (2000) (collecting citations showing that, prior to passage of Judiciary Act of 1925, Court heard more than 300 cases per year).

³³ See, e.g., Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 253-54 (1988) ("[T]he Court expanded the scope of the writ of habeas corpus . . . because the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings.").

³⁴ See Conn. Gen. Stat. § 51-197f (2003) (giving Connecticut Supreme Court discretionary review in general); Conn. Gen. Stat. §51-199 (2003) (enumerating small class of cases that Connecticut Supreme Court must hear); N.Y. C.P.L.R. 5602 (McKinney 2003) (giving New York Court of Appeals discretionary review in general).

protecting federal rights from state action, it would be the lowest courts of the state, or perhaps the appellate divisions, that would be charged with the awesome task of protecting federal constitutional rights. That did not, and cannot, work.

The intermediate courts of any state have other things that they must be more concerned with. They are not experts on federal law and, with great respect to them, they are not good at it. Moreover, they are not all that interested in federal law, nor should they be. The result was that for some sixty years, through section 1983 actions, through declaratory judgment actions, through habeas petitions, through any number of other devices, lower federal courts got into the business of deciding these cases either in the first instance or essentially *de novo*.³⁵

Recently that's all changed. We now have any number of rules, judicial and statutory, that make it difficult for lower federal courts seriously to review state actions allegedly in violation of federal rights.³⁶ There are three reasons for the change. First, the state courts started feeling insulted by the fact that the federal courts were deciding these issues and telling state courts that they were wrong. State judges got mad and hurt and in effect said, "Who are *they* to tell us how to do our job?" Notice that this is the other side of federal judges' lack of humility with respect to state law. It would be very different if federal judges said, "We are federal judges, we have more knowledge of federal law. You are state judges, you have more knowledge of state law. Let each of us do our job and not be insulted."

The second reason for the change is the converse of the role southern states played in bringing about first-instance consideration of these cases in federal courts. Today, rather than criticizing southern resistance and implying that there is a need for greater federal court oversight, commentators talk about how the Ninth Circuit and other federal courts are "running wild" and "going too far" in protecting federal rights.³⁷ But that is the same kind of contingent argument,

³⁵ See 28 U.S.C. §§ 2201-2202 (2000) (declaratory judgments); 28 U.S.C. § 2254 (1994) (amended 1996) (habeas corpus); 42 U.S.C. § 1983 (2000); see, e.g., *Douglas v. Green*, 363 U.S. 192 (1960) (reversing district court's denial of writ of habeas corpus); see also *supra* notes 31 & 33 and accompanying text.

³⁶ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28 & 42 U.S.C.); *Teague v. Lane*, 489 U.S. 288, 310 (1989).

³⁷ See, e.g., Editorial, *One Nation, Under Zeus*, *Wall St. J.*, June 27, 2002, at A20 (deploring Ninth Circuit's ruling that recitation of Pledge of Allegiance in public schools

intimately connected to the political climate of a particular era, and it is no more fundamental or generalizable than was the opposite argument based on southern resistance.

The third reason for criticizing the heavy involvement of lower federal courts in such civil rights cases is a more serious one. In acting in these cases, federal courts were in an unusual role. They were dealing with federal law issues, of course, but often they were dealing with naked federal issues. That is, a federal constitutional right was involved, but it came up starkly, rather than arising in the course of a total litigation. For example, the case in federal court might involve the interpretation of a *state* statute which might, or might not, violate a federal law, depending on how it was construed. Was public nude photography permitted in New York?³⁸ What kinds of restrictions on assisting suicide did New York provide?³⁹ These were state statutes, the constitutionality of which, on the basis of a hypothetical interpretation of the statute's meaning, federal courts were called on to decide. In this respect, federal courts were in a position more akin to European constitutional courts, which are regularly called on collaterally to decide "neat" constitutional questions.

Contrast those cases with what federal courts do when an analogous issue comes up under a *federal* statute. Any number of delaying, avoiding, Bickelian passive-virtue tactics⁴⁰ are then available. The federal court can, for example, interpret the federal statute to avoid the constitutional issue. It has full control of the case and can slow down the constitutional question, the question of the fundamental right, until it is mature and ready for decision. Federal courts do this almost without thinking about it in fully federal cases; it is second nature. When federal courts get similar cases from a state, however, it is hard for them to do the same thing.⁴¹

violates Establishment Clause of First Amendment); George F. Will, Court of Silliness Strikes Again, *Seattle Post-Intelligencer*, Nov. 8, 2001, at B6.

³⁸ See *Tunick v. Safir*, 209 F.3d 67, 68 (2d Cir. 2000) (certifying to New York Court of Appeals question of whether photographic shoot involving 75 to 100 nude models arranged in abstract formation on public street qualifies under exemptions to statutory ban on public nudity for entertainment or performance in "play, exhibition, show or entertainment"; whether such exemptions are limited to indoor activities; and, if exemptions do not apply to such activity or apply only to such activity conducted indoors, whether statutes banning public nudity so interpreted violate New York Constitution).

³⁹ See *Quill v. Vacco*, 80 F.3d 716, 732 (2d Cir. 1996) (Calabresi, J., concurring) (noting that New York Court of Appeals had never clarified, and legislative history cast some doubt upon, question of whether New York ban on assisted suicide, first enacted in 1828, was "ever meant to apply to a treating physician"), rev'd, 521 U.S. 793.

⁴⁰ See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 49 (1961) (advocating judicial restraint through use of such tactics as interpreting statutes so as to avoid constitutional issues).

⁴¹ It is hard at least in part because it seems "grabby" for the federal court to say what

I believe that federal judges have to learn how to deal with state laws and state actions in the same prudent fashion they use for federal ones. Otherwise, they will be too aggressive, and states will properly get mad. Again, there are ways, and certification is one. The Supreme Court told the lower federal courts, in *Arizonans for Official English v. Arizona*,⁴² that they should ask the state's highest court to interpret the relevant statute before deciding on its constitutionality. Suppose, in the assisted suicide case,⁴³ that instead of deciding the case, and instead of having the Supreme Court decide the case, the Second Circuit had certified to the New York Court of Appeals the question of whether the New York law prohibiting assisted suicide (a) meant assisted suicide of somebody who was already dying, and (b) applied to *doctors* assisting suicide. Do we know what the New York Court of Appeals would have done? It is quite possible that the New York Court of Appeals would have interpreted the New York statute in a way that would have caused the whole issue of federal rights over state action to disappear. If that had been a *federal* statute, I do not doubt that a federal court of appeals would have done an awful lot of statutory interpretation before reaching any constitutional issue.

Once again, the state court might decline certification. But then the federal court would be free to interpret the state statute itself to avoid or delay the constitutional issue. Indeed, that is, desirably I think, what can be said to have happened in the nude photography case.⁴⁴

Certification is not the only technique for "slowing down" such cases. Federal courts should read the decisions of European constitutional courts, which have developed many methods for handling, with nuance and care, overly stark constitutional questions.⁴⁵ I would like federal courts to learn from these European courts that, when the question is one of a state statute or of state behavior, there exist any number of ways in addition to certification that can make plenary federal review less brittle. If our courts did this, it would become more acceptable to return to a system in which issues of federal rights are tried out first in federal courts, even when they involve state action.

the state statute means. Grabby and to some extent academic, since the state court can later on give the same statute a totally different reading.

⁴² 520 U.S. 43, 76-79 (1997).

⁴³ See *Quill*, 80 F.3d 716.

⁴⁴ See *Tunick v. Safir*, 228 F.3d 135, 136-37 (2d Cir. 2000). But see *id.* at 137 (Sack, J., concurring); *Tunick v. Safir*, 209 F.3d 67, 90-100 (2d Cir. 2000) (Sack, J., concurring).

⁴⁵ See *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (describing German and Italian courts' practice of announcing when laws are "heading toward unconstitutionality" and citing sources).

Such a return is as necessary now as it was sixty years ago, because it remains the case that the Supreme Court of the United States is not in a position adequately to protect those rights, and neither are the highest courts of the states. All of these courts can only take very few cases. And if such alleged rights are to be adequately examined and, where appropriate, protected, plenary consideration in lower federal courts is essential.

IV

RESTORING THE BALANCE

What, then, is the new and workable balance that I propose? I could talk a lot more about it, and give many details, but for purposes of this lecture a short summary is enough:

1. Federal claims: Jurisdiction in cases asserting federal rights against federal actors need not be changed. Such suits are properly in federal court and remain there currently, as do civil claims under federal statutes.
2. Criminal law: These cases usually belong in state courts, even if they involve federal crimes, so long as the crime is parallel to one that exists in the state. Reverse certification to federal courts is encouraged if a separate and undecided federal question arises.
3. Private law: Federal courts are the “appellate division” for diversity cases and other cases involving state laws. Certification to the states is, therefore, called for . . . after the federal court has indicated how it would decide the case if certification is refused. The state courts are then free to accept certification or not as they choose.
4. Federal rights against state actors: De novo or original consideration in federal courts is appropriate, with certification to states for state law interpretation and with frequent use of European-style passive virtues applied to such “collateral” constitutional reviews. (I am here incorporating by reference, because I don’t have time to describe them tonight, the many devices by which the European constitutional courts avoid deciding constitutional questions too soon.)⁴⁶

⁴⁶ I have noted some of these devices in *Then*:

Both the Constitutional Courts of Germany and Italy have addressed the problem of laws that were rational when enacted, but which, over time, have become increasingly dubious. Rather than jumping in and striking the laws down, or leaving them undisturbed and thereby allowing legislative inertia to dominate, these Courts have found a middle ground. They have, in a few

The effect of these changes would be that each set of courts would do what it knows and does best; that local dominance in traditionally local areas would be reestablished, and that federal dominance, when issues of federal rights are involved, would also be reestablished; and that each set of courts would learn that it is not a matter of “who is better than whom,” but rather that each should be humble about acknowledging the existence of areas as to which it knows less than other courts. (It is not insulting to be humble about the things that one doesn’t know as much as others do.) Moreover, if we did these things, there would be what economists, with their usual infelicity of phrase, would term significant “external benefits.” Federal dockets would be reduced and this would reinforce the unique position of the federal courts of appeals; the position that makes being a judge on a federal court of appeals such a wonderful job.

It would make courts such as mine the court of last resort in all sorts of cases involving federal issues. (This is so whenever we can be confident that the Supreme Court is not interested, and hence that what we say governs.) In such situations, which is most of the time, we would write the kind of opinion that is suitable to a court of last resort. At other times, we are an intermediate federal court. This occurs in situations in which we believe that the Supreme Court will take the case. It is then our job to write a menu for that Court—to write not as final decisionmakers, but instead to canvass all the possible ways in which the case should come out—so that the Supreme Court, when it takes the case, gets not only a result from us, but all the different possible approaches among which it might choose. Finally, in many cases involving local law, we are an intermediate state court. We then must readily yield to the state courts on state law. But we can give our opinion of what that law is, based both on local law precedents, and on what other states do in like cases. We can in such situations speak to what we think state law ought to be, but always adding, “On this, we are a lower court, and it is up to you, higher state courts, to decide.”

Three different hats, in one court. What a challenge. What fun. Madison would smile, I think. Thank you.

cases, announced that laws, because of changed circumstances, were heading toward unconstitutionality.

Id.; see also Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 60-61 & n.118 (1989) (chronicling cases and explaining that Constitutional Court of Germany utilizes this technique most often for “equal-protection claims . . . to give the legislature time to adjust to changing conditions”); Christian Beck Pestalozza, *Verfassungsprozessrecht: die Verfassungsgerichtsbarkeit des Bundes und der Länder: mit einem Anhang zum internationalen Rechtsschutz* § 20, at 337 & n.313 (3d ed. 1991) (describing German practice and citing cases).