



Notre Dame Law Review

Volume 72 | Issue 4

Article 3

6-1-1999

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Recommended Citation

Randall T. Shepard, *State High Courts as Central Figures in the Future of the American Legal System*, 72 Notre Dame L. Rev. 1009 (1997).
Available at: <http://scholarship.law.nd.edu/ndlr/vol72/iss4/3>

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SYMPOSIUM
THE FUTURE OF STATE SUPREME COURTS
AS INSTITUTIONS IN THE LAW

STATE HIGH COURTS AS CENTRAL FIGURES IN
THE FUTURE OF THE AMERICAN LEGAL SYSTEM

*The Honorable Randall T. Shepard**

There is a curious dichotomy in the way we lawyers look at state supreme courts and their work. On the one hand, most American lawyers commit a substantial part of our attention in the day-to-day practice of law to the decisions announced by state supreme courts and, indeed, to decisions announced by the intermediate courts as well. The decisions of these courts have occupied a prominent place in the legal profession for more than a century. Ever since Christopher Columbus Langdell introduced the caselaw method of instruction at Harvard Law School in the 1880s, most American lawyers have commenced their introduction into the law by reading, criticizing, and debating appellate court opinions. In the basic first-year courses in which most law students enroll, courses like contracts, torts, and property, a substantial percentage of the reading material is the work of state appellate courts. Who can walk out of an American law school without having contemplated the intricacies of *Palsgraf v. Long Island Railroad Co.*¹ or *Hawkins v. McGee*?²

Teaching methods change, of course, and the practice of inculcating legal thinking in students through Socratic dissection of appellate decisions does not hold sway as it once did. Still, the sources of

* Chief Justice of Indiana. A.B. Princeton University 1969; J.D. Yale Law School 1972; LL.M. University of Virginia 1995.

1 162 N.E. 99 (1928).

2 146 A. 641 (1929) (the hairy hand case). Equally firm in the memory of most lawyers are the prominent English common law cases we read in the same courses, such as the light "squib" case concerning foreseeability of risk, *Shepherd v. Scott*, 95 Eng. Rep. 1124 (1773), or *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707) (the case of the duck pond decoy).

reading material have not changed a great deal. In the current era, even a topic recently so dominated by federal jurisprudence as constitutional law now finds itself joined in the law school course bulletins by a burgeoning number of courses on state constitutional law.³ In the daily practice of law, it is apparent that the opinions written by state appellate courts are still a strong force. Lawyers vote on this with their checkbooks. In 1996, they bought subscriptions sustaining the publication of 41,550 state court opinions.⁴

For all the time we lawyers and judges spend focused on the written decisions of state supreme courts, however, we spend relatively little time assessing the role of these courts as institutions in our profession.⁵ The legal literature on topics such as how appellate courts reach these decisions is sparse indeed.⁶ Similarly sparse is the list of articles about the other ways in which state supreme courts affect the practice of law, legal education, and the like.

3 Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

4 West Publishing Company published 41,550 opinions of the state courts and 17,209 of the federal courts in 1996. Telephone Interview with Kate MacEachern, Representative, West Publishing Company (Apr. 11, 1997). State court opinions outnumber federal opinions by nearly two and a half times, but the disparity in appellate work is even greater because the federal total includes opinions of the district courts. West does not release subscription information, but it is safe to bet that West sells many, many more subscriptions to its state law reporters than it does to the federal reporters, although electronic research may be narrowing the gap.

In another light, many of the federal cases reported are in the federal forum only on the basis of diversity jurisdiction, 28 U.S.C. § 1332 (1996). The substantive law in diversity cases is state law, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Accordingly, federal courts routinely look to the state supreme courts for controlling precedent when deciding cases, a principle of judicial federalism recently reiterated by the United States Supreme Court. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073-74 (1997) (certification of questions to state supreme courts for authoritative interpretation of novel or unsettled questions of state law is preferred to "[s]peculation by a federal court about the meaning of a state statute").

5 Among the best works examining the institutions are KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988); Robert A. Kagan et. al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); Thomas B. Marvell & Mae Kuykendall, *Appellate Courts Facts and Figures*, ST. CT. J., Spring 1980, at 9.

6 When I was appointed an appellate judge in 1985 after a stint as a trial court judge, I realized that I knew relatively little about what supreme court justices do all day and how they do it. I asked a teacher of law, a long-time friend, whether he could point me to any writing about the internal dynamics of appellate courts. He could not. Even today, I would be hard-pressed to do so.

Notwithstanding this paucity of legal literature, it is apparent that state supreme courts shape our work as lawyers from law school to filing complaints and arguing before juries. Moreover, they are engines of change.⁷

The ways in which state supreme courts shape the profession affect us as lawyers from the earliest point in our legal education. The system by which the American Bar Association (ABA) accredits law schools, a process which influences American legal education in substantial ways,⁸ rests in the main on the regulatory authority of state supreme courts. It depends principally on the willingness of those courts to designate graduation from a school accredited by the ABA as the leading credential necessary to sit for bar examinations.⁹

7 In civil procedure, for example, it has been the Arizona Supreme Court that has struck out on new paths to reform the system of discovery invented by the 1939 Federal Rules of Civil Procedure. Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1 (1993); Jeffrey D. Collins, Note, *Alaska Rule 26: A Quixotic Venture into the World of Mandatory Disclosure*, 11 ALASKA L. REV. 337 (1994). Modern jury reform is a state court movement. See JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997).

8 See, Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (1992). Professor Carrington discusses political correctness, *Bakke*, intellectual "ideological fashion," and the accreditation process. He concludes among other things that accreditation has had a significant impact on raising the status of legal education in comparison to other learned professions (e.g., medicine) within academic circles. He credits accreditation with effectively promoting and guarding intellectual freedom and administrative autonomy on law school faculties and in law school libraries. He maintains, however, that accreditation has had little, if any impact on the demographic make-up of law schools and that diversity requirements in accreditation may endanger the viability of the process.

9 There are two other relevant sources of authority. First, the United States Department of Education recognizes ABA's Council of the Section of Legal Education and Admissions to the Bar as the accrediting agency for the Department's purposes. Recognition of Accrediting Agencies, State Agencies for Approval of Public Post-secondary Vocational Education, 61 Fed. Reg. 66,026-03 (1996) (proposed Dec. 16, 1996) (petition for renewal of application). While this recognition connects the ABA process to the federal government, its actual impact is relatively modest. Most American law schools are accredited as part of their parent universities by regional accrediting agencies; for them, the Department of Education designation of the ABA is of no moment. For about a dozen law schools that stand independent of any university, however, ABA accreditation makes possible various federal loan and grant programs for which they would otherwise not be eligible.

Second, the Association of American Law Schools (AALS) performs an accreditation function with substantial standing inside the academic community. The accreditation function actually focuses on the membership requirements of the AALS. Robert W. Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. REV. 379, 382-83 (1995). AALS affords membership only to ABA accredited schools, of which there are 179. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, A

Similarly, the bar examinations themselves are administered almost wholly under the supervision of boards of bar examiners appointed or supervised by state supreme courts. Admissions to the bar of federal district courts, for example, is a relatively perfunctory matter for persons admitted to practice in a state's courts.¹⁰

The influence of state supreme courts and their bar examiners on bar admissions and thus on legal education has been most apparent in the recent movement spawned by state bars, law schools, and courts to collaborate on reforming the way lawyers are educated.¹¹ This collaboration has taken the form of state legal conclaves, of which there have been twenty-seven.

The entire field of legal ethics is focused on the rules adopted by state supreme courts.¹² While the ABA model codes of conduct for lawyers and judges¹³ are national in scope, their legal legitimacy rests on the decisions of state supreme courts to adopt them in whole or in part.¹⁴

Similarly, bar discipline in the American legal profession is largely state bar discipline. While federal courts act separately on disciplinary cases involving individual lawyers, in actuality they rarely run their own disciplinary operations.¹⁵

REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL 1995, at 1 (Rick L. Morgan ed., 1995). There are just 160 AALS member schools. See, *The Association of American Law Schools Has 160 Member Schools* (visited Mar. 29, 1997) <<http://www.aals.org/members.html>>.

10 See e.g., S.D. IND. L. R. 83.5(b).

11 These reforms have been set in motion in the wake of the ABA's "MacCrate Report." sSECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

12 See, e.g., S.D. IND., L. R. 83.5(f).

13 These are products of the Association's work from early in the twentieth century. See Randall T. Shepard, *Campaign Speech: Restraints and Liberty in Judicial Ethics*, 9 GEO. J. LEG. ETHICS 1059, 1063-64 (1996).

14 Virtually every state, for example, has adopted the ABA's principal code for judges. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 4 (1990) (noting that all states but Montana, Rhode Island, and Wisconsin adopted the 1972 code).

15 Generally, federal courts rely on state disciplinary commissions to prosecute allegations of professional misconduct. See, e.g., S.D. IND. RULES OF DISCIPLINARY ENFORCEMENT R. V (disciplinary proceedings), R. X (appointment of counsel); see also *In re Maternowski*, 674 N.E.2d 1287 (Ind. 1996). In fact, federal jurisprudence in disciplinary matters is so deferential that *Younger* abstention has been held to apply in civil cases where the plaintiff seeks to enjoin state disciplinary proceedings, *Hodari v. Attorney Grievance Comm'n*, 1996 WL 426485, *3 (E.D. Mich. 1996) (memorandum decision) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 475 U.S. 457 (1982)), and state disciplinary rules have been held to be the proper substantive law for deciding disciplinary cases in federal district court, *Cardona v. General Motors Corp.*, 939 F. Supp. 351, 355 (D.N.J. 1996) (same facts and legal issue may engender

In areas of substantive law, quite aside from the courses still used for first-year legal education that flow from Blackstone's influence, state supreme courts dominate fields such as products liability, families and children, and insurance, to name a few. Civil liberties advocates find themselves increasingly in state court, looking to make new law under state constitutions. The highest visibility cases of all, those involving the death penalty, are largely in the hands of state supreme courts, especially after the 1996 amendments to the federal habeas statutes.¹⁶

Which brings me to the other side of the dichotomy I spoke of at the outset. For all of the important tasks in which the states' highest courts are so central, analysis of their work does not regularly find its way into legal literature. The writings that are published often fail to focus adequately on the future these courts are building.

With this in mind, we present a symposium on the present and future role of state supreme courts. Professors Williams, Friesen, and Tarr address the important and developing field of state constitutional law. William Rakes then examines ways in which the three branches of the bar—courts, practitioners, and the academy—can work together; and Professor Uelmen addresses political threats to the independence of state judiciaries. Professor White, Erica Moeser, and Professor Hazard take up, respectively, the supreme courts' role in regulating the profession: legal education, bar admission, and ethics. Steven Brill turns our attention to televisions in the courtroom. And Ken Bode moderates the final roundtable, composed of Chief Justices Shirley S. Abrahamson of Wisconsin, Robert Benham of Georgia,

differing results within same circuit because "Our Federalism" permits states to adopt differing rules of professional conduct).

In cases where judicial misconduct is alleged, the ordinary proceeding is for the circuit court to appoint an investigatory committee to conduct hearings on the matter after initial review by the chief judge. The procedures are governed by circuit rules under the authority of federal statute. 28 U.S.C.A. 372(c) (West 1993 & Supp. 1996). Assembly of an investigatory committee is episodic; the circuits do not maintain permanent judicial disciplinary committees. *See, e.g.*, 7TH CIR. JUDICIAL MISCONDUCT R. 4(e), 9 (committee composed of chief judge and an equal number of circuit and district judges not of the respondent judge's district convened upon order of chief judge).

The difference in investigatory processes between allegation of attorney misconduct and judicial misconduct is a simple matter of subject matter jurisdiction. The federal judicial power was established by Article III of the Constitution, but attorneys' licenses to practice law are granted by the states. Accordingly, judicial misconduct is a circuit matter.

16 *Felker v. Turpin*, 116 S.Ct. 2333 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996).

Perry O. Hooper, Sr. of Alabama, and E. Norman Veasey of Delaware. The panel considers the work of state high courts in several fields of substantive law.

The symposium was presented at a recent meeting of the Conference of Chief Justices of the supreme courts of each state. It is a unique joint venture undertaken by the Conference of Chief Justices, the *Notre Dame Law Review*, and the Supreme Court of Indiana. We extend our earnest thanks to the chief justices, leading scholars, and practitioners who have contributed their thoughts to this endeavor.