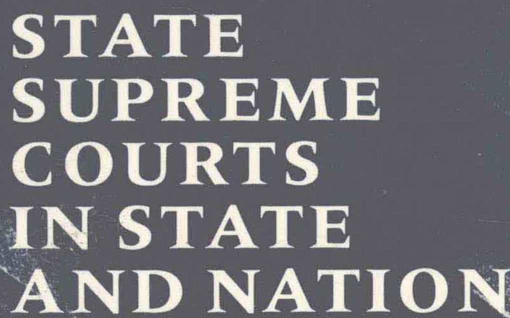

STATE SUPREME COURTS IN STATE AND NATION

G. ALAN TARR AND
MARY CORNELIA ALDIS PORTER

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YALE UNIVERSITY PRESS NEW HAVEN AND LONDON

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Designed by Sally Harris
and set in Meridien type by
TCSystems, Shippensburg, Penn.
Printed in the United States of America by
Halliday Lithograph, West Hanover, Mass.

Library of Congress Cataloging-in-Publication Data

Tarr, G. Alan (George Alan)
State supreme courts in state and nation.

Includes index.
1. Courts of last resort—United States—States.
I. Porter, Mary Cornelia. II. Title.
KF8736.T37 1988 347.73'36 87-2303
ISBN 0–300–03912–3 (cloth) 347.30735
0–300–04590–5 (pbk.)

The paper in this book meets the guidelines for
permanence and durability of the Committee on
Production Guidelines for Book Longevity
of the Council on Library Resources.

10 9 8 7 6 5 4 3 2

PREFACE

The title of this volume calls to mind V. O. Key's classic account *Southern Politics in State and Nation*—and designedly so.[1] In that study, Key demonstrated how both intrastate factors and broader national developments—and their interplay over time—shape the character of state politics. Equally important, he showed how a series of well-constructed case studies, focusing on politics in individual states over an extended period, can provide the basis for generalizations about the dynamics of state politics and state political development. Thus, in addition to being intrinsically interesting, Key's analysis is valuable as a model for conducting comparative research in state politics. In this book we seek to adapt this model to a comparative analysis of state supreme courts and of their roles in the political lives of the American states.

The claim that state supreme court rulings are influenced by events and legal developments beyond state borders is hardly surprising. In cases that raise federal questions, state supreme courts must give precedence to federal law over state law and must conform their interpretation of the federal law to the authoritative pronouncements of the United States Supreme Court. Even in the absence of hierarchical authority, the decisional trends among sister courts provide direction for the resolution of common legal problems, particularly in the common law area. More subtly, national political phenomena, fashions in judicial role and legal interpretation, and patterns of court reform may likewise influence the operations of state supreme courts.

These factors, as well as the common responsibilities shared by state high courts—for example, elaborating common law principles and interpreting the statutory and constitutional law of the state—promote a degree of uniformity in state supreme court rulings and

1. New York: Vintage, 1949.

activities. Yet, even a passing familiarity with state supreme courts reveals marked differences in jurisprudence and in the roles they play both nationally and within their states. Some courts have tended to defer to other state political institutions and to eschew independent policy development, whereas others have aggressively seized opportunities to define policy for the state. Still others have followed a more complex course, embracing activism in one period and judicial restraint in another or adopting different postures depending upon the substance of the issue or the type of law involved. Thus legal, political, and historical factors peculiar to the state affect the orientation of a state high court.

This initial recognition of both variety and uniformity and continuity and change in the operations of state supreme courts suggests the utility of comparative research along the lines of Key's comparative case study approach. In this volume we examine the activities of three distinctive courts—the Alabama, Ohio, and New Jersey supreme courts—from the end of World War II to the mid-1980s. By focusing on more than a single court, we can identify the range of variation in state supreme court activity and begin to explore the causes and consequences of that variety. By examining the activities of those courts over several decades, a focus facilitated by our comparative case study approach, we can explore those factors that have precipitated changes in the roles played by particular courts as well as those broader factors producing change on all courts. By restricting our focus to a limited number of courts, we can investigate in depth the developments we uncover. Finally, by structuring our analysis of each court along similar lines, we can produce research that is truly comparative and provide generalizations applicable to courts beyond those directly under examination.

Chapter 1 explores how the American system of judicial federalism affects the work of state supreme courts. Chapter 2 describes the interaction between state supreme courts and other state political institutions. Chapters 3, 4, and 5 examine the activities of the Alabama, Ohio, and New Jersey courts, respectively. Chapter 6 draws upon our case studies and upon the available research on other state high courts to offer generalizations and conclusions about the legal and political roles that state supreme courts play both within their states and in the nation more generally.

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ACKNOWLEDGMENTS

In undertaking a project of this sort, we have incurred debts to a host of people who have shared their time and insights with us.

We extend our thanks to the justices of the Alabama Supreme Court for responding to the questionnaire and for lengthy and wide-ranging interviews with one of the authors: Chief Justice Clement Clay Torbert, Jr., and Justices Hugh Maddox, James H. Faulkner, Richard L. Jones, Reneau P. Almon, Janie L. Shores, Samuel A. Beatty, Oscar W. Adams, Jr., and retired Justice Pelham Merrill. We are also grateful to the following, who provided information crucial to understanding the Alabama high court: Arthur Briskman, Francis H. Hare, Larry Yackle, Timothy Hoff, John Payne, Tinsley Yarbrough and Howard Mandell. Robert A. Martin read and made suggestions for chapter 3, coordinated the interviews, and, during a four-year period, generally assisted our endeavors. We owe him a special debt of gratitude.

The justices of the Ohio Supreme Court responded fully and thoughtfully to our questionnaire and gave generously of their time in interviews: A. William Sweeney, Ralph S. Locher, Robert E. Holmes, Andy Douglas, Craig Wright, and Chief Justice Frank D. Celebrezze. Justice Clifford Brown facilitated the interviewing process and supplied us with extensive and invaluable documentation of political and legal developments in the state. We also appreciate Mrs. William Brown's response to the questionnaire sent to her husband, who was then very ill and had retired from the bench. Several experts on the Ohio judiciary contributed valuable insights, including David Goldberger, Bruce Campbell, Louis Jacobs, Leslie W. Jacobs, Joseph Krabach, Stewart Jaffy, Dennis Hale, Jim Underwood, Sharon Crook West, Thomas Schwartz, Duke Thomas, John Thomas, and Jeffrey A. Hennemuth. (In chapter 4, interviews with the Ohio justices are generally so designated. Other interviews, since we promised anonymity, make no reference to the occupation or the position of the

person interviewed.) We are particularly indebted to Kathleen L. Barber for sharing her storehouse of information with us and for her painstaking and helpful critique of chapter 4. We also thank the editors of the Ohio State Law Journal for permitting us to use portions of a previously published article.

Robert Williams, Stanley Friedelbaum, and Stewart Pollock read an earlier version of the chapter on the New Jersey Supreme Court and offered valuable criticism and suggestions.

Walter Murphy undertook a close reading of several chapters and provided many helpful suggestions for improvements.

The New Jersey Administrative Office of the Courts and Arthur Vanderbilt III generously provided us with pictures of New Jersey justices.

The authors' initial research on this volume was aided by a grant from Project '87. Subsequent research by Alan Tarr was facilitated by grants from the Rutgers University Research Council.

We also gratefully acknowledge the assistance and support of Marian Ash, the political science editor at Yale University Press; the diligent copy-editing of Lawrence Kenney; and the useful suggestions of several anonymous reviewers. Any errors of commission and omission are, of course, ours.

In conclusion, we have special thanks for Bobby, Andy, and Mary, as well as for Susan and Roy, to whom this book is dedicated.

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ONE

JUDICIAL FEDERALISM AND STATE SUPREME COURTS

State supreme courts decide over ten thousand cases each year. In the vast majority of these cases, their rulings are determinative: most litigants do not seek to appeal the decisions, and should they wish to do so, often the United States Supreme Court either lacks jurisdiction or declines to hear the appeals.[1] Some of these rulings by state high courts define the allocation of powers among the branches of state government or between state and local governments. Others structure legal relations among residents in such areas as family relations, contracts, and torts, at times establishing new legal principles in the course of resolving private disputes. Still others may clarify the scope of individual rights, vindicate those rights when they are infringed by government or by private parties, or announce broad policy mandates.

Despite the intrinsic importance of these responsibilities, state supreme courts tend to operate in relative obscurity, and public knowledge about the courts is at best rudimentary. As Preble Stolz has observed, "Americans love the law and have long paid close attention to the U.S. Supreme Court, but they have tended to overlook the state supreme court."[2] This volume seeks to remedy this oversight by

1. During its 1985 term, for example, the United States Supreme Court either denied certiorari or dismissed appeals for want of a substantial federal question in 3,999 of the 4,289 instances in which review was sought. Altogether, it decided with full opinion only 26 cases on appeal from state supreme courts. Figures are drawn from the annual review of the Supreme Court's rulings published in *Harvard Law Review* 100 (November 1986): tables II and III.

2. Preble Stolz, *Judging Judges* (New York: Free Press, 1981), p. 4. For empirical verification of Stolz's claim, see "The Public Image of the Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders," in *State Courts: A Blueprint for the Future* (Williamsburg, Va.: National Center for State Courts, 1978).

demonstrating the significant roles played by state high courts within their states and nationally.

Underlying our analysis are several premises that will be elaborated and documented in the course of the book. First, the role that a state supreme court plays within a state and in American federalism more generally can be defined in terms of three sets of relationships: (1) the state high court's relations with federal courts (vertical judicial federalism), which entails a division of labor and patterns of interaction; (2) its relations with courts in other states, particularly other state supreme courts (horizontal judicial federalism); and (3) its relations with other institutions of state government, which again involve a division of labor and patterns of interaction.[3] Second, these relationships are defined, to a greater or lesser extent, by legal and extralegal factors. No element of the relationships is either totally determined by legal considerations nor altogether immune from them. Third, these relationships are dynamic, changing over time in response to legal and extralegal factors, to changes on the court and to changes outside its control. Fourth, although the similarities among state supreme courts impose a degree of uniformity in the relationships with other actors that define their legal and political roles, the considerable diversity among state supreme courts also has a pronounced effect on the character of those relationships. Because there is no typical state supreme court, there can be no typical role for a state supreme court in either the state or national arenas.

We emphasize these initial premises because they direct us away from the paths typically followed by previous studies of state supreme courts. One approach, particularly prevalent among legal scholars, has been to view state supreme courts primarily as participants in the system of vertical judicial federalism and to emphasize the legal aspects of their relations with federal courts, particularly the U.S. Supreme Court.[4] This research has accordingly described how law

3. In earlier research we distinguished between "vertical federalism," which pertains to the relations between national and state governments, and "horizontal federalism," which refers to patterns of communication and interaction among the states. See "Editors' Introduction," in Mary Cornelia Porter and G. Alan Tarr, eds., *State Supreme Courts: Policymakers in the Federal System* (Westport, Conn.: Greenwood Press, 1982), pp. xix–xxii. We continue to employ this terminology in the present study.

4. Much of the recent research on the development of state civil liberties law by state supreme courts, usually referred to as the "new judicial federalism," has followed this approach. See, for example, Peter J. Galie and Lawrence P. Galie, "State Constitutional Guarantees and Supreme Court Review: Justice Marshall's

creates separate spheres for state and federal courts and structures their areas of concurrent responsibility.

Valuable as these studies are, the picture of state supreme courts they paint is incomplete and, consequently, misleading. Most obviously, by viewing state supreme courts in terms of the roles they play in vertical judicial federalism, these studies ignore a host of other relationships, such as those with other state courts and with state political institutions, that are crucial for understanding state high courts. Moreover, even within their chosen parameters, these studies seriously oversimplify the nature of vertical judicial federalism. For one thing, these studies tend to depict the legal relationships within vertical judicial federalism as static, whereas in fact the governing law may—and often does—change as a result of developments within or outside of the legal system. For another thing, by focusing exclusively on the influence of legal factors in vertical judicial federalism, these studies slight the influence of extralegal factors. Legal factors are unquestionably significant in channeling the activities of state supreme courts, but by themselves they cannot fully explain the patterns of behavior found among these courts. Many aspects of judicial activity are not governed by legal principle. Where legal principles do apply, they may merely circumscribe the leeways legitimately available to judges rather than foreclose judicial choice, and extralegal factors may decisively affect choices within those legal parameters. Certainly, legal principles cannot preclude the development of patterns of conduct and influence beyond those which they prescribe. Indeed, as the contemporary literature on American federalism has shown, patterns of reciprocal influence are common even in legally hierarchical relationships.[5] And as has been documented in the

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Proposal in Oregon v. Hass," *Dickinson Law Review* 82 (1978): 273–93; "Developments in the Law--The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (April 1982): 1324–1502; and Harold J. Spaeth, "Burger Court Review of State Court Civil Liberties Decisions," *Judicature* 68 (February–March 1985): 285–91.

It is also revealing that the preeminent legal treatise on judicial federalism looks at the topic from the perspective of the federal courts and treats state courts as secondary. See Paul M. Bator, Paul J. Mishkin, David L. Shapiro, and Herbert Wechsler, *Hart and Wechsler's The Federal Courts in the Federal System*, 2d ed. (Mineola, N.Y.: Foundation Press, 1980).

5. The classic account remains Morton Grodzins, *The American System*, ed. Daniel J. Elazar (Chicago: Rand McNally, 1966). Other noteworthy studies from this perspective include Carl J. Friedrich, *Trends of Federalism in Theory and Practice* (New York: Praeger, 1968), and Daniel J. Elazar, *The American Partnership:*

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literature on judicial impact, judges may at times act contrary to the legal principles that govern them.[6]

Finally, as a result of their excessive emphasis on the legal structure of vertical judicial federalism, these studies tend to ignore both variations in the roles played by specific state courts and changes in those roles over time. As a result, they present an account of state supreme courts that is unduly narrow in focus and simple in description.

Other studies have sought to avoid this narrow perspective through a case study approach, intensively examining the work of a single state supreme court.[7] The advantage of this focused approach lies in the opportunity it provides for detailed consideration of judicial behavior over time in relation to the full range of other actors who help define its scope and character. As our survey of the legal and extralegal factors influencing state supreme courts will show, however, there are substantial differences in the legal and political contexts in which these courts operate. Thus case studies run the risk of being merely studies of particular courts that do not permit generalizations applicable to other courts.

Some political scientists, recognizing the opportunities for comparative research provided by fifty state supreme courts, have undertaken quantitative analyses based on data drawn from all the state high courts.[8] Obviously, this approach avoids the problem that

Intergovernmental Co-operation in the Nineteenth-Century United States (Chicago: University of Chicago Press, 1962).

6. Among these students are G. Alan Tarr, *Judicial Impact and State Supreme Courts* (Lexington, Mass.: Lexington Books, 1977); Jerry K. Beatty, "State Court Evasion of the United States Supreme Court Mandates During the Last Decade of the Warren Court," *Valparaiso University Law Review* 6 (Spring 1972): 260–85; Bradley C. Canon, "Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision," *Law & Society Review* 8 (Fall 1973): 109–34; Neal T. Romans, "The Role of State Supreme Courts in Judicial Policymaking—Escobedo, Miranda, and the Use of Judicial Impact Analysis," *Western Political Quarterly* 27 (March 1974): 38–59; and Kenneth N. Vines, "Southern State Supreme Courts and Race Relations," *Western Political Quarterly* 18 (March 1965): 5–18.

7. Representative studies include Thomas R. Morris, *The Virginia Supreme Court* (Charlottesville, Va.: University Press of Virginia, 1975); Robert J. Frye, *The Alabama Supreme Court* (University, Ala.: Bureau of Public Affairs, University of Alabama, 1961); Kenneth N. Vines, "Political Functions of a State Supreme Court"; and Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* (Seattle: University of Washington Press, 1987).

8. As Gregory Caldeira has remarked, "For the empirical social scientist, political and legal institutions in the American states have the singular virtue of encompassing intriguing peculiarities within a range of contexts that is sufficiently

plagues the case study approach, namely, the nongeneralizability of findings. Yet this advantage is purchased at considerable cost. Often these studies present a snapshot of state supreme courts, when a moving picture would be more revealing. In addition, the scope of these studies prevents them from providing the richly textured perspective necessary to delineate the range of legal and political roles played by various state supreme courts.

The comparative case study approach we employ represents a fundamental departure in the analysis of state supreme courts. To place our case studies in perspective, however, it is necessary to begin with an overview of state supreme courts' relationships with federal courts (vertical judicial federalism), with their sister courts in other states (horizontal judicial federalism), and with other governmental institutions within the state. For each set of relationships, we look first to the legal factors structuring them, then to the extralegal factors influencing them, and finally—where appropriate—to significant developments in substantive law.

Vertical Judicial Federalism

THE LEGAL CONTEXT

Federal law is extremely influential in structuring the relations between state supreme courts and federal courts.[9] First of all, it defines the jurisdiction of the federal courts. For although Article III of the United States Constitution grants the federal judicial power to the national government, it does not create a separate system of federal courts (save for the U.S. Supreme Court), leaving Congress free to

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invariable to be essentially comparable" (Gregory A. Caldeira, "Review Essay: Departures in the Study of State Supreme Courts," *Judicature* 67 [April 1984]: 459). Examples of this approach include Burton M. Atkins and Henry R. Glick, "Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort," *American Journal of Political Science* 20 (February 1976): 97–115, and Dean Jaros and Bradley C. Canon, "Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges," *Midwest Journal of Political Science* 15 (May 1971): 322–46. The approach used in these studies was pioneered in Thomas R. Dye, *Politics, Economics, and the Public* (Chicago: Rand McNally, 1966).

9. This section draws upon the excellent general treatments of vertical judicial federalism from the federal perspective in Bator et al., *Federal Courts in the Federal System;* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Indianapolis: Michie, 1980); and Richard A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard University Press, 1985).

Table 1. Comparing the Business of State Supreme Courts (SSC) and Federal Courts of Appeals (FCA) (in percent)

	SSC (1940–70)	*FCA (1935–55)*	*FCA (1960–75)*
Real Property	11	3	1
Business Cases	16	30	16
Criminal Justice	18	16	21
Public Law	19	37	38
Torts	22	13	15
Family Law/Estates	12	—	—

establish inferior federal courts and to assign them the jurisdiction it deems appropriate. Historically Congress has not vested in the courts it created the full range of judicial power that might be assigned to them. Prior to 1875, for example, the federal district courts did not have general original jurisdiction in cases raising federal questions, that is, cases arising under the Constitution, laws, and treaties of the United States. And although the federal judicial power extends to all civil cases between citizens of different states (the so-called diversity-of-citizenship jurisdiction), the Judiciary Act of 1789 permitted initiation of such suits in federal court only when the amount in dispute exceeded $500, in order to prevent citizens from being summoned long distances to defend small claims. (With the passage of time and the effects of inflation, the minimum amount has been raised to $10,000.) Furthermore, in conferring diversity jurisdiction on federal courts, Congress has also determined what restrictions shall be placed on the removal of a suit from a state court to a federal district court. Lastly, it is Congress alone that decides whether federal jurisdiction is to be exclusive, thereby precluding initiation of actions in state court, or concurrent.

By determining what sorts of cases may be initiated in federal courts and what sorts may not be initiated in state courts, federal law does more than affect the business of federal and state trial courts. Since state supreme courts serve as appellate tribunals within state judicial systems, the mix of cases they receive is vitally affected by the mix of cases at the trial level. Perhaps not surprisingly, then, comparative analysis of the dockets of federal courts of appeals and state supreme courts reveals major differences in the sorts of issues each addresses. Generally speaking, state supreme courts are much more likely to address issues of state law, and federal courts to address issues of federal law, especially federal statutory law. In more substantive

terms, state supreme courts issue many more rulings involving tort law, family law and estates, and real property than do federal courts of appeals (table 1).[10] On the other hand, federal appellate courts confront public law issues much more frequently—indeed, they compose the single largest category of business for those courts.

Despite these differences, each system of courts may have occasion to rule on issues of both federal and state law. For example, at least since the United States Supreme Court's decision in *Erie Railroad Co.* v. *Tompkins* (1938), federal courts have been required to apply state law in deciding diversity cases.[11] And since federal constitutional or statutory claims may be advanced in a state proceeding, a state court may need to resolve issues of both state and federal law in reaching its decisions. Three legal principles govern the exposition and interrelation of these two bodies of law. First is the supremacy of federal law. Under the Supremacy Clause of the United States Constitution, all inconsistencies between federal and state law are to be resolved in

10. Data for this table were drawn from Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler, "The Business of State Supreme Courts, 1870–1970," *Stanford Law Review* 30 (November 1977): 121–256, esp. 133–36, and Lawrence Baum, Sheldon Goldman, and Austin Sarat, "The Evolution of Litigation in Federal Courts of Appeals, 1895–1975," *Law & Society Review* 16 (1981–82): 291–309. Although these data represent the best available estimates of the business of state high courts and federal appeals courts during the period, they should be viewed with due consideration of their limitations. First, the data are drawn from samples of courts. The Kagan study collected data on sixteen state supreme courts selected to furnish a cross-section of state high courts, and the Baum study collected data on three courts of appeals. Second, both studies drew samples of cases rather than surveying all decisions of the courts under scrutiny. For the Kagan study, eighteen cases were randomly selected from each court every five years. For the Baum study, it was fifty cases per court every five years. Third, because the Baum study failed to aggregate the findings from the various appeals courts, we have undertaken this task, and thus the composite figures in this table represent estimates based on data reported for the various courts, among whom there was at times considerable variation, rather than computations by the Baum research team. Finally, although Baum and his fellow researchers readily acknowledged their debt to the Kagan study, some questions must remain about differences in coding and other potential disparities in approach between the two research groups.

For somewhat different approaches to cataloguing the business of state supreme courts and of federal courts of appeals, see Atkins and Glick, "Environmental and Structural Variables," and J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton, N.J.: Princeton University Press, 1981), app. 2, pp. 315–18.

11. 304 U.S. 64 (1938). This landmark decision overruled *Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842).

favor of the federal law. Indeed, the Constitution expressly mandates that "the Judges in every State" are bound by this principle and requires that they take an oath to support the Constitution. Second is the authority of each system of courts to expound its own body of law: state courts must not only give precedence to federal law over state law but also interpret that law in line with the current rulings of the U.S. Supreme Court. As the Mississippi Supreme Court put it in striking down a state law prohibiting the teaching of evolution in public schools, "In determining this question we are *constrained* to follow the decisions of the Supreme Court of the United States wherein that court has construed similar statutes involving the First Amendment to the Constitution of the United States."[12] Conversely, in interpreting state law, the federal courts are obliged to accept as authoritative the interpretation of the highest court of the state. Third is the so-called autonomy principle, that is, when a case raises issues of both federal and state law, the U.S. Supreme Court will not review a ruling grounded in state law unless the ruling is inconsistent with federal law.[13] The legal basis for this principle is somewhat unclear. Some legal scholars have insisted that it is a constitutionally mandated jurisdictional requirement grounded in the Case-or-Controversy provision of Article III of the U.S. Constitution. Other scholars have contended that the principle lacks a firm legal base, viewing it as a matter of congressional policy or judicial self-restraint.[14] The Supreme Court's own pronouncements on the matter have varied over time and contributed to the confusion on the subject, although recent cases have taken the position that the principle is jurisdictional.[15] More important is the variation in the Court's willingness to assume, when the matter is disputed, that state rulings are in fact

12. *Smith* v. *State,* 242 So.2d 692, 696 (Miss. 1970).

13. For discussion of this principle, see "Developments—Interpretation of State Constitutional Rights," pp. 1332–47.

14. The relevant literature is surveyed in Daniel Kramer, "State Court Constitutional Decisionmaking: Supreme Court Review of Nonexplicit State Court Judgments," *Annual Survey of American Law* (1983): 277–302, and in Stewart G. Pollock, "Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts," *Texas Law Review* 63 (1985): 977–94. According to some authors, a proper respect for the principles of American federalism requires that the United States Supreme Court should overturn state judgments only when their reliance on federal law is undeniable. See, for example, Robert C. Welsh, "Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of *Michigan v. Long,*" *Notre Dame Lawyer* 59 (1984): 1118–44.

15. *Herb* v. *Pitcairn,* 324 U.S. 117, 126 (1945).

grounded in state law.[16] Yet whatever the disagreements about the source and application of the principle, when a state ruling rests on an "independent state ground," it is immune from review by the U.S. Supreme Court.[17]

As this reference to review by the Supreme Court implies, Congress has established mechanisms to ensure the accuracy and faithfulness of state interpretations of federal law. Foremost among these is the provision for review by the Supreme Court of state rulings that present issues of federal constitutional or statutory law. Originally, under the Judiciary Act of 1789, the Supreme Court was empowered to review state rulings involving federal constitutional claims only if the state judges rejected the constitutional claim and upheld the challenged state law. Underlying this limitation was the assumption that whereas state courts might be prone to favor state law against federal claims, they would be unlikely to expand federal restrictions on the governing power of the states. During the early twentieth century, however, state courts began striking down state economic regulations as violations of the Due Process Clause of the Fourteenth Amendment; and following the invalidation of the first American workers' compensation act in *Ives* v. *South Buffalo Railway* (1911), Congress in 1914 extended the Supreme Court's appellate jurisdiction to encompass all state rulings that rest on federal law.[18] The result, as the Supreme Court has recently noted, is that "a State [court] may not impose greater restrictions [on state powers] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[19] This augmentation of the Supreme Court's authority to supervise the development of federal constitutional law by state courts has become increasingly important in recent years. According to one account, between 1972 and 1980,

16. See, in particular, *Michigan* v. *Long*, 463 U.S. 1032 (1983).

17. Although state supreme court rulings premised on independent and adequate state grounds may escape direct appellate review by the United States Supreme Court, they are not immunized from federal habeas corpus review. Thus even if a petitioner has not met state procedural requirements, he may seek federal collateral review. *See Fay* v. *Noia*, 372 U.S. 391, 399 (1963). But cf. *Engle* v. *Issac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); and *United States* v. *Frady*, 456 U.S. 152 (1982).

18. 201 N.Y. 2712 (1911). For discussion of the aftermath of *Ives*, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: Macmillan, 1928), pp. 193–98.

19. *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).

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