THE AMERICAN FEDERAL SYSTEM — AN INTRODUCTION FOR CANADIAN LAW STUDENTS*

Basic to an understanding of the American federal system is the concept that the federal government is one of limited powers. It may exercise only those powers given it by the U.S. Constitution. Any federal action must find a basis in the Constitution. However, the federal government has rarely exercised the full scope of its constitutional power in any field. Thus a study of American federal power must proceed on two levels: (1) how far may the federal government go in the area in question, and (2) how far has it in fact gone.

The Constitution serves a double function. It not only gives certain authority to the federal government, but equally important it places certain limitations upon the action of both federal and state governments. Certain actions and certain types of legislation are declared to be beyond the power of both the federal and state governments.[1] For instance, neither state nor federal governments may interfere with freedoms of speech, or assembly, nor may they interfere with the free exercise of religion. Neither state nor federal governments may deny certain specific safeguards to criminal defendants. Neither the state nor federal governments may deprive any person of life, liberty or property without due process of law—that elusive standard which permeates so much of American legal thinking. And the federal Congress is given power to enact legislation to enforce these limitations upon states, e.g. by providing penalties for state officials who interfere with protected rights.[2]

With a few exceptions under the Constitution state governments have the continuing authority to legislate in the areas in which authority has also been given to the federal government. However, when the federal government does in fact legislate in an area in which it has jurisdiction, that legislation is supreme over conflicting state laws. As one commentator has so well described it:

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* This article is based on a lecture given to first year law students at the University of Manitoba. It is intended to present a concise picture of the American federal system. Necessarily such emphasis on brevity results in generalizations which require more detailed analysis for proper understanding. A short selected bibliography follows to provide some guidance to the student in moving further into the subject area.

1. The limitations are similar but not identical in the cases of state and federal governments. A few prohibitions apply only to states, e.g. the prohibitions as to laws impairing the obligation of contracts, cf. **Norman v. Baltimore & Ohio R.R.** 294 U.S. 240 (1935). The Bill of Rights applied initially only to actions of the Federal government. The Fourteenth Amendment, passed after the Civil War to limit state action, has been interpreted as incorporating, through its "due process" clause, most but not all these limitations. Those restrictions which are "implicit in the concept of ordered liberty" [Palko v. Connecticut 302 U.S. 319 (1937)] are binding on the states. A few provisions, such as the requirement that indictment be by grand jury rather than by information, have not been applied to the states. See generally Henkin, Selective Incorporation in the Fourteenth Amendment, 73 Yale L. J. 74 (1963).

2. See e.g. the provisions of 42 U.S.C. §1983.

> "Federal law is generally interstitial in nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states . . . It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of common law, assumed to govern unless charged by legislation . . .
> "[This] explains why frequently in litigation federal law bears partially upon the case: [e.g., as] the basis of a defense when a state created right has been advanced. . . . ."[3]

What are the substantive areas in which the federal government has been given legislative power—the power to create the supreme law of the land if it so desires? These areas include the power to tax, borrow money, establish post offices and post roads, legislate for the District of Columbia, control naturalization and bankruptcy, copyrights and patents. The federal government may raise and maintain armies, conduct (through the executive branch) foreign relations, declare war, punish piracies and felonies on the high seas. Probably most importantly it may regulate interstate and foreign commerce. And on the peg of interstate commerce a vast amount of legislation has been hung. The power is broad enough for instance to cover control of wheat acreage for wheat to be consumed solely on the farm where grown, because of the economic effect of this on the interstate wheat market.[3a] It has been used on a basis for controlling employee-employer relations in businesses engaging in interstate commerce[4] and for barring discrimination in commercial establishments dealing in products in interstate commerce or serving interstate travelers.[5] Under the Constitutional provisions granting federal power to enact whatever legislation is "necessary and proper" to implement specific federal constitutional grants, the Congress finds its scope for legislation rather broad.

While in general states may enact legislation whenever Federal government has not spoken on the matter on hand, there are two types of exceptions to this principle. First as a matter of Constitutional law, a few matters within the scope of federal power are forbidden to the states. The most important of these are the conduct of foreign relations, the coining of money and legislation which places unreasonable burdens on the flow of commerce between states. This last restriction is one of judicial creation and has been used very sparingly.[6]

3. Hart and Wechsler, The Federal Courts and the Federal System 435-6 (1953).
3a. See e.g., **Wickard v. Filburn**, 317 U.S. 111 (1942).
4. E.g. Labor Management Relations Act, 29 U.S.C. §141 et seq.
5. E.g. Civil Rights Act of 1964, 42 U.S.C. §2000 et seq.
6. See e.g., **Bibb v. Navajo Freight Lines Inc.** 359 U.S. 520 (1959), **H. P. Hood & Sons v. Du Mond** 336 U.S. 525 (1949).

A showing of unreasonableness in this area is difficult in light of the broad police powers conceded to reside in state governments.

The second exception to the principle of concurrent federal-state legislative competence is less an exception than a not necessarily obvious form of divining federal legislative intent. In a few areas the courts have seen a comprehensive federal statutory regulation of a field as indicating an intent that the entire field be pre-empted by federal law, that is that matters not covered by a specific legislative provision be nevertheless deemed a matter of Federal law. In such cases the courts would be required to fashion interstitial federal rules rather than falling back on state law. A prime example of this is the decision that federal law governs collective bargaining contracts with unions in industries affecting interstate commerce—an implication from the provisions of the Labor Management Relations Act.[7]

THE JUDICIAL STRUCTURE

With this background as to the division of substantive legislative powers, we may now examine the judicial structure in the United States. Each state has its own system of trial and appellate courts. These are, as a unit, courts of general jurisdiction. That is, state courts are competent to hear all claims, state or federal, with the exception of certain federally created causes of action for which Congress has provided exclusive jurisdiction in the Federal courts. Such exclusive Federal jurisdiction exists most importantly as to Federal criminal prosecutions, but also as to actions under federal bankruptcy and tax statutes and a few other statutes, such as the Securities Exchange Act of 1934.[8]

Each state has complete control over the selection of the judges of its courts, and selection processes vary from state to state. Some states provide for an elected judiciary, some for appointed judges, and a few for hybrid schemes such as periodic vote for or against judges who are initially appointed.[9] The Federal constitution though preserves the supremacy of federal law by requiring state judges to apply it where applicable, any state law to the contrary notwithstanding.

The Federal court system exists as a separate set of trial and appellate courts. Federal judges are appointed for life or good behavior by the President with the advice and consent of the Senate.[10]

7. Textile Workers Union v. Lincoln Mills 353 U.S. 448 (1957).

8. See generally, Currie, Federal Courts Cases and Materials 355-62 (1968).

9. See generally, Countryman and Finman, The Lawyer in Modern Society 594-616 (1966).

10. Nominations for the federal district (trial level) courts, in practice, have become largely a matter controlled by Senators of the President's party from the state in which the vacancy exists. See Countryman and Finman, id note 9 616, 617.

In contrast to the state courts, the Federal courts are courts of limited jurisdiction. They may hear only those cases and controversies in which the Constitution specifically gives them jurisdiction and then generally only insofar as Congress implements the Constitution jurisdictional grants.[11] So again we must view federal power at two levels (1) what is the scope of Constitutionally permissible jurisdiction of the federal courts and (2) how much of this potential jurisdiction has Congress conferred on the courts.

The jurisdiction of federal courts is only in part a function of the substantive legislative powers given to the federal government. With the exception noted above as to exclusive federal jurisdiction, if the federal court has jurisdiction in a particular case, the parties usually have a choice of whether the action will be brought in state or federal court. The choice is initially the plaintiff's, but if he elects a state court, the defendant usually has the option to remove the case to federal court.[12] The option though is one way and in favor of federal courts—neither party may remove a case in which the federal court has jurisdiction from the federal court back to the state court.

The two most important classes of cases in which the federal courts have jurisdiction are those arising under the U.S. Constitution, treaties or federal laws and those between citizens of different states or of a state and a foreign country.

As to the first of these, the so-called federal question jurisdiction, Congress has provided for federal court jurisdictions at the trial level only when the plaintiff's claim arises under federal law,[13] and not when the only federal issue is a federal defense to a state law claim. However, appellate review of questions of federal law, whether part of the plaintiff's or defendant's case, lies from any state's highest appellate court to the United States Supreme Court. If the state court has ruled against a federal claim, review is of right, but is discretionary on the part of the U.S. Supreme Court if the state court has upheld a federal claim.[14] Thus a federal review of any interpretation of federal law by state courts is provided but a federal forum as a finder of fact (i.e., trial level jurisdiction) is, without any particular good rationale,

11. An exception to this is the seldom-used original jurisdiction of the U.S. Supreme Court. The Constitutional provisions as to this are generally thought to be self-executing, see Hart and Wechsler, id note 3 at 218-19.

12. However when the sole basis of jurisdiction is diversity of citizenship, an instate defendant may not remove a case from his own state's courts to the federal court. Presumably no prejudice will be present against in state residents. 28 U.S.C. §1441.

13. See **Louisville & Nashville R.R. v. Mottley** 211 U.S. 149 (1908).
Also in diversity cases and a few type of federal question cases, the federal courts have jurisdiction only when the amount in controversy exceeds $10,000.
As to diversity cases, see 28 U.S.C. §1332. As to federal question cases, see the general rule requiring $10,000 in controversy in 28 U.S.C. §1331 and the many exceptions which leave little room for the general rule to apply in 28 U.S.C. §§1333-1358 and §1361-1362.

14. 28 U.S.C. §1257.

limited to cases involving federal claims and denied when only federal defenses are present.

The diversity of citizenship jurisdiction of the federal courts is bottomed on premises much different from those underlying federal question jurisdiction. While federal question jurisdiction is primarily concerned with sympathetic and uniform application of federal law, diversity jurisdiction is concerned with avoiding prejudice to outsiders in the fact finding process. Federal judges hearing cases involving state law issues are bound to apply state substantive law in the same manner as would a state court sitting in the same geographical location. The common law applied by each state's courts is seen as a creation of that state as much as its statutory law, the federal judges must apply the state's common law rules including its conflict of law rules as well as its substantive statutory law.[15] However, uniform procedural rules govern federal court proceedings and this sometimes makes access to federal courts advantageous even if no prejudice is likely to exist in the state fact finding system. In particular, the existence of liberal pre-trial discovery devices and provisions for jury selection from broader areas of the population[16] often are seen as incentives to a federal court trial.

Federal courts have jurisdiction in certain other types of cases as well. These include cases in which the United States or a state is a party, cases in which an ambassador or similar foreign official is a party and in admiralty and maritime cases.

THE FUNCTION OF THE COURTS: JUDICIAL REVIEW

One of the most puzzling aspects of the American judicial system to those who have not been reared in it—and even to many of those who have—is the doctrine of judicial review. The doctrine is probably most incomprehensible because of the unfortunately popularized rendition of judicial review as "the courts' finding a law to be unconstitutional."

The basis for judicial review is first the Constitutional limitations on the legislative power of both federal and state governments which we have discussed previously. Many of these limitations are found in the first ten amendments to the Constitution (the Bill of Rights) and, as applied to the states, in the Fourteenth Amendment. Without these specific limitations upon legislative authority, no basis for judicial review would exist.

15. See **Erie R.R. v. Tompkins** 304 U.S. 64 (1938); **Klaxon Co. v. Stenton Electric Mfg. Co.** 313 U.S. 487 (1941).

16. Cf. e.g. Jury Selection and Service Act of 1968 82 Stat. 53, 28 U.S.C. §1861-1874.

But these limitations alone would not necessarily create judicial review. It would, after all, be a permissible interpretation of such restriction to find that since they are addressed primarily to the legislature, it is the legislative branch which decides finally whether proposed legislation is within its competence. It was the specific rejection of the doctrine that the legislature is to be the final arbiter of its own authority that led to judicial review—the decision that the courts were to have the final say as to whether Congress and state legislatures have acted within their Constitutional competence.

The rationale for judicial review as created by Chief Justice Marshall in *Marbury v. Madison*[17] is appealingly simple. Both before and after *Marbury*, it was accepted that the function of the American courts was to decide cases, to decide the controversies before it. Inherent in deciding a case is determining what rule of law applies to the facts before the court. In any particular case, a party may claim that a particular legislative enactment states the rule applicable. If however the opposing party claims that that enactment was Constituionally beyond the authority of the legislative body, he is asserting that the rule governing this case is the Constitution. A constitutional provision, it is asserted, provides that the party may engage in the conduct in question without governmental i.e., legislative, interference. So, said Chief Justice Marshall, the court is simply asked what rule or law governs this controversy—the one set out in a legislative enactment or the one set out in the Constitution. Now the answer is simple—the Constitution must, and by its terms does, take precedence over mere legislative enactments.

The implication of this attractively simple syllogism must though be explored at greater length. It is to be noted that the court is and can be asserting only that the Constitutional provision at issue is the law of the specific case before it. Thus a state requirement that no person may possess wine might be unconstitutional as applied to a person possessing it for purposes of religious ritual. The rule of the Constitution guaranteeing free exercise of religion takes precedence over the legislative enactment. However, the act may be constitutional as to persons possessing wine for any other reason.

However, there may be cases in which *any* potential application of a statute would conflict with a Constitutional rule. For example, a federal statute requiring that all criminal defendants be tried outside the state in which their crime was committed would probably violate the provisions of the Sixth Amendment[18] to the Constitution in *any*

17. 5 U.S. (1 Cranch) 137 (1803).

18. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."

potential application. Only in a case such as this—where no situation remains in which a statute may constitutionally apply,—may it with some accuracy be said that the *statute itself* is unconstitutional?

Brown v. Board of Education,[19] the famous school desegration case, illustrates the principle well. The clause of the 14th Amendment guaranteeing equal protection of state laws to all persons had been interpreted as barring state legislatures from making unreasonable classifications in enacting legislation. *Brown* seemed to say that under no circumstances could a classification on the basis of race be a reasonable one, that race was irrelevant to any legitimate exercise of state regulation. Yet assume the classical hypothetical of a state statute that would require Negroes walking on unlighted roads to wear light colored clothing. Might not race, i.e. skin color, in this instance bear a reasonable relationship to the regulation involved?

SOME FINAL COMMENTS

A description of the American federalism can hardly be concluded without a few words as to the merits or demerits of the horribly complex system with which the country is saddled. The system has its roots deep in the disputes and colonial exploitation—real or imagined—of its early history. The nation's present system, honed from the flexibility of such terms as "interstate commerce" and "due process," would probably be unrecognizable to its creators. Yet the French maxim that the more things change the more they stay the same is peculiarly appropriate to the American federal system.

Many devices in the system find a new justification in present-day circumstances. Thus diversity jurisdiction—long the whipping-boy of the system—certainly has not outlived all usefulness. While it may be that prejudice no longer follows state lines, it nevertheless exists for example along urban—rural or racial lines.[20] It is fortunate that many cases giving rise to such prejudice also happen to be between parties of diverse citizenship.

Perhaps new justifications are poor excuses to avoid change. Indeed, many Americans, raised in the system, do not realize that its complexity is so great or is remediable. More Americans, however, being not overly unhappy with the results of the system, have greater fear that a new system may be worse than the old and therefore find a defense of the status quo preferable. The wisdom of that decision may be challenged, but the method is hardly one which can be decried as a peculiarly American device.

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19. 374 U.S. 438 (1954).
20. See Currie id note 8 at 240-245.

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