

"Judiciaries, Futures of US State"

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The political system of the United States is formally that of a federation of formerly sovereign states or dependent territories which, by ratifying the Constitution of the United States, have agreed to a division of political powers between each state and the federal government. Further, within each state, and the federal government, political power is further separated into three branches of government: the legislative, the executive, and the judicial.

Political scientists and other observers argue whether this way of looking at things accurately captures the diversity and fluidity of political power in America now or for the future. Nonetheless, if the "tripartite separation" and the "federal division" of political power is accepted, one still might inquire whether power is equally distributed between the states and the federal system, or among the three branches within each level. Most people would probably maintain that the US federal government has become, over the years, significantly more powerful than any state or the states as a whole. Similarly, most people would probably also say that the powers of the American President (and many state governors) have grown at the expense of the US Congress (or the state legislatures). Virtually no one would argue that the US Judiciary is (or that of the states, individually or collectively are) more powerful than one or both of the other two branches. And yet the importance of the state courts should not be overlooked.

First of all, most US citizens are more likely to come in direct and repeated contact with a state (or local--which is ultimately a state) officer than with any federal officer (except perhaps someone in the US postal service). And that state officer is more likely to be an administrative officer relating to the judiciary (a police officer, prosecuting attorney, or public defender) or a member of the judiciary (a clerk or judge) than it is likely to be a governor, some other administrative officer, or a legislator or legislative aide.

Secondly, because of the doctrine of judicial review, first enunciated by Chief Justice John Marshall of the US Supreme Court in the case of Marbury vs. Madison in 1803, all courts, federal and state, have the power to declare any law of any legislature, and any actions carried out by any federal or state officer, to be contrary to the Constitution of the United States (unconstitutional) and thus null and void. Hence, in a very important sense, in the United States and each state, "law is what the judges say it is."

Thirdly, for a variety of structural and political reasons, legislators and executives at both levels of government in the US have increasingly left the most difficult policy decisions up to the courts, so that for more and more controversial matters, public policy is made by judges and not by state legislatures or the US Congress, or by presidential or gubernatorial decree. While this is often decried by political commentators as inappropriate "judicial activism," and frequently denied by judges who hide behind a cloak of conservatism and legal precedence, it does seem to be the case that judges as a

whole exercise rather impressive judicial leadership within the American system.

Finally, more and more matters that were once left to individual discretion, or private resolution, have been criminalized or otherwise made justiciable. The caseloads of almost all courts in the US has risen enormously--far faster than the number of courts and judges available to resolve the conflicts fully and equitably. Allegedly in the interest of achieving fairness and decisional predictability and conformity, Congress and most legislatures have also recently reduced the discretion of judges, requiring them to hear cases they might otherwise dismiss, and to reach specified decisions, often with specified sentences, even if a judge might prefer a different outcome in a specific case. This has been especially true of drug-related cases since the 1980s, and many criminal courts are severely backlogged as a consequence. Similarly, the increase of civil litigation means that civil courts (which deal with non-criminal conflicts between individuals or corporations) are ever more seriously backlogged.

At the same time, new technologies have emerged which are changing the way business, commerce, entertainment, religion, and all other facets of daily life are conducted. With varying degrees of enthusiasm and funding, most courts also are beginning to use, and some are well-advanced in using, new technologies in all aspects of judicial administration and decisionmaking.

As the percentage of so-called minorities increases in the United States and elsewhere, and as these minorities begin to insist that judicial procedures and principles follow their traditions rather than those of some historically dominant culture, it is possible that choice and diversity might be more typical of the judiciary of the future than it ever was in courts of the several United States. This possibility is even greater given the rising claims of the indigenous peoples of the American states.

This combination of the push from judicial overload and decreased relative or real funding, on the one hand, and the pull of new technologies and the movement for alternative dispute resolution techniques, on the other, has lead almost all state judiciaries during the 1980s and 90s to engage in a series of future-oriented activities aimed at more or less completely "reinventing justice" in the United States.

So, considering the continuation of past and present trends and challenges, and the active attempts by judiciaries and members of the public generally to design new, or reinstate old, systems of conflict resolution, four of the main alternative futures of state courts in the United States are these:

1. Generic justice

The anti-government political climate continues, and the economy of the US continues to decline, so that while the demand for judicial services increases along with the crime rate, the public continues to criticize all branches of government, including the courts, and refuses to pay sufficient taxes for the services it demands. Thus, traditional guarantees of "due process of law" diminish (especially for the poor), and most decisions are reached in a "cookie cutter" assembly-line fashion.

2. Judicial leadership

The incorporation of humane, consumer-sensitive, integrated, and future-oriented methods and procedures into the administration of justice enables the formal system to regain the confidence of the public, and to settle all issues brought before it in a timely and fair manner.

3. The multi-door dispute-resolution facility

The formal judiciary acknowledges and/or embraces many different forms of dispute resolution, with the presently-monopolistic system being but one choice contestants can make in order to settle their disputes to their satisfaction as well as that of the broader community.

4. The global virtual courthouse

Modern and emerging communications technologies break down the barriers of time and space so that people no longer need to meet at a specific day, hour and place to settle their disputes. Moreover, local, state, and national judiciaries give way to global dispute resolution procedures necessary for the global world of tomorrow.

It is of course not likely that any one of these four alternatives will become "the" future American state judiciary. Parts of each, and of problems, opportunities, and visions as yet unforeseen, are the more likely components of the American state courts of the future.

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