Chapter 6

State and Federal Courts—Relationship and Interaction

by John Pizzo

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This chapter will discuss the interplay between the state and federal court system. Beginning with a brief overview of the limited jurisdiction afforded federal courts, the chapter will move on to discuss how the two systems conflict and cooperate—depending on the particular situation. The chapter intends to explore several main areas. It will discuss the practice, including the bases and processes, of removing cases from state court to federal court and the reverse process of remanding them back to state court. The chapter will also examine when and why federal courts must apply state law, including when it is necessary to certify questions to state courts. Lastly, it will survey the various abstention doctrines and the underlying reasons federal courts invoke them, as well as the somewhat related concept of dual sovereignty.

Under the United States' system of Federalism, the federal government and state governments are separate sovereigns that share power over their respective spheres of authority—a concept known as dual sovereignty. Our Constitution provides the basis for those spheres of authority: The federal government has certain enumerated powers; all others are left to the states. Generally speaking, each has the power to control its own affairs without interference from the other. Accordingly, both the federal government and state governments have their own independent, but sometimes overlapping, judicial systems to adjudicate criminal offenses and civil disputes.

This chapter discusses the relationship, conflicts, and cooperation between the federal and state judicial systems. It begins, as it must, with an overview of the composition of the two systems, as well as the scope of their jurisdiction, and the authority that grants them their powers. The chapter continues with a discussion of the principle of dual sovereignty, which allows both the state and federal governments to prosecute an individual defendant multiple times for the same criminal acts, and the principle of concurrent jurisdiction, under which state and federal courts have simultaneous jurisdiction to hear a case. Next, it discusses the process by which a party may remove a case filed in state court to the federal court in which that state court sits and, conversely, the process by which the opposing party may then remand the case to the original state court. The chapter follows with an explanation of when, why, and how federal courts must apply state law in their proceedings. We conclude with a discussion of abstention, a doctrine providing that sometimes a federal court may, or should, refrain from hearing a case if it would intrude on the province of state courts.

I. State and Federal Courts—Composition and Authority

State and federal courts share many similarities, but also have some significant differences. First among the differences is their relative size. There are approximately 31,000 state court judges[1] that hear roughly 47,000,000[2] cases annually. This dwarfs the 1,769 federal judges[3] that hear less than 1,500,000[4] cases annually. Many, but not all state courts have a structure similar to the federal court system: trial level courts, intermediate appeals courts, a court of last resort, and various specialty courts. The two systems differ, however, in where they get their authority and the extent of their jurisdiction. This section provides an overview of each.

A. State Courts

The states have a multitude of courts, partly because states are broken up into so many smaller components, such as counties, municipalities, and townships. Many states have smaller, more localized courts, including "magistrate courts," "small claims courts," and "municipal courts." These local courts usually handle civil disputes below a set monetary threshold or minor criminal infractions. People tend to be most familiar with these smaller courts because it is with these courts that they have most contact, whether paying a traffic ticket, settling a small financial dispute, or answering for a minor criminal infraction. In addition to these local courts, most states have established specialized courts to adjudicate specific types of cases or controversies. Among the most common specialized courts are family courts, juvenile courts, tax courts, chancery courts, probate courts, and drug courts. The formation, jurisdiction, and authority of these courts vary widely from state to state. For our purposes, the term "state courts" refers to the main state court system, which each state's constitution authorizes to handle felony criminal cases and civil disputes above any small claims threshold.

Most state court systems are similar to that of the federal government. The lowest level state courts are the trial courts, often labeled "Superior Court," "Circuit Court," County Court," or "Court of Common Pleas." The next level of courts is the intermediate appeals courts. A losing party can appeal the trial court's decision to their state's intermediate court of appeals, so long as they have a legal basis for their appeal.[5] Most states, although not all, have an intermediate appeals court, while yet others have multiple appeals courts.[6] Finally, every state has a court of last resort, usually labeled as the state supreme court.[7] States vary in how they select judges for their courts; some states elect their judges, others appoint judges for life or for a term of years.
Each state's constitution vests the state's judicial authority with its courts and provides the framework by which the states form their individual systems. State constitutions establish at least their court of last resort, usually labeled the "Supreme Court," and routinely establish some additional lower courts. For example, the state of Ohio's constitution provides that "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law."[8] Similarly, New Jersey's constitution provides that "[t]he judicial power shall be vested in a Supreme Court, a Superior Court, and other courts of limited jurisdiction. The other courts and their jurisdiction may from time to time be established, altered or abolished by law."[9] Most, if not all, state constitutions not only vest the judicial authority in certain courts but also provide that the state legislature may add or remove additional inferior and specialty courts.

Each court may only hear those cases over which it has jurisdiction. Courts can have original jurisdiction, meaning that they may hear a case for the first time or they can have appellate jurisdiction to review decisions of lower courts. Some courts, including most state Supreme Courts, have both original jurisdiction over certain types of cases, as well as appellate jurisdiction over the lower courts' decisions.[10] States generally confer jurisdiction to their courts in one of two ways. For those courts formed pursuant to the state's constitution, the constitution also provides their jurisdictional limits. When a state provides for its legislature to establish lower or specialty courts, the legislature establishes those courts' jurisdiction by statute.

B. Federal Courts

1. Article III Courts

Article III, § 1, of the United States Constitution provides the basis and authority for the federal court system:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*

Thus, federal judges appointed pursuant to Article III enjoy life tenure and cannot have their compensation lowered while they serve. These Constitutional protections are designed to "insulate federal judges from direct political pressure and ensure that they would uphold the Constitution and federal laws without regard to the popularity of their actions."[11]

Notably, the Constitution only requires the formation of ONE federal court—the Supreme Court of the United States. Currently, the Supreme Court consists of nine Justices, although Congress can, and at times has, altered the number of Justices. Although the Supreme Court is the only federal court mandated under the Constitution, Congress, nevertheless, has used the power granted to it under Art. III, § 1, to establish other inferior courts. Indeed, shortly after the Constitution's ratification, Congress passed the Judiciary Act of 1789, which established the lower federal courts.

At present, Congress has established thirteen intermediate Courts of Appeals. There are eleven Circuit Courts of Appeals, each of which covers a specific geographical area covering several states. The Circuit Courts hear appeals from the federal district courts of those states located within coverage area. For example, the Third Circuit Court of Appeals presides over appeals from the district courts of Delaware, New Jersey, and Pennsylvania. In addition to the eleven Circuit Courts of Appeals, there are the Circuit Court for the District of Columbia and the Court of Appeals for the Federal Circuit. The Circuit Court for the District of Columbia hears only those appeals from the District Court for the District of Columbia. The Court of Appeals for the Federal Circuit differs from the others because it is the only Court of Appeals that does not hear cases based on a geographical territory. Instead, it only has jurisdiction over cases involving certain types of subject matter, including patent appeals from any district court and appeals from Article I courts (discussed below).

Congress has also established federal district courts, which are the trial level courts in the federal system. The district courts preside over criminal prosecutions of federal crimes as well as civil disputes involving federal laws or citizens of different states. There are ninety-four federal judicial districts across the country;

every state has at least one district, with most states having multiple districts based on population and geographical spread. Within each district are multiple points of holding court, each of which has at least one presiding district court judge. As with Supreme Court Justices and Appeals Court Judges, the President, with advice and consent of the Senate, appoints district court judges, who also enjoy life tenure.

2. Other Federal Courts

Congress has also established other inferior specialty courts to handle specific types of disputes. Article I of the Constitution provides Congress the power to establish these courts. Accordingly, these courts are often called Article I courts or legislative courts. These courts differ from Article III courts in that the President does not nominate the judges presiding over these courts nor do those judges enjoy life tenure. The statutes passed by Congress that create these courts also provide the process by which the judges are appointed and the length of their terms. Among these courts are magistrate courts, bankruptcy courts, the Court of Federal Claims, the Court of International Trade, military tribunals, territorial courts, and the Foreign Intelligence Surveillance Court. Although an in-depth study of these courts is beyond the scope of this chapter, a brief overview of magistrate and bankruptcy courts is in order because of their close relationship to the Article III courts.

Magistrate courts work hand in hand with the district courts, handling a variety of duties in the initial stages of criminal prosecutions and civil disputes. The judges of each district appoint the Magistrate court judges, or "Magistrates," for their district. Magistrates serve a term of eight years. The district court judges may also remove a Magistrate during his term, but only for "incompetency, misconduct, neglect of duty, or physical or mental disability."[12] On the criminal side of the docket, Magistrates handle such pretrial matters as a defendant's initial appearance, bail hearings, suppression and other preliminary evidentiary hearings, and bond revocation hearings. Magistrates may also preside over misdemeanor criminal trials and some civil trials with the consent of the parties. As for the civil side of the docket, Magistrates handle a significant amount of discovery disputes, some early motions by the parties, and in some districts establish the entire case schedule. Some Magistrate decisions, for example, rulings on suppression hearings, are preliminary in nature and subject to review and approval by the district court. In those instances, the Magistrate prepares a "Report and Recommendation," to which the parties have a right to object. Absent any objections, the district court adopts the Magistrate's recommendations. If the parties object, however, the district court conducts a thorough review and decides whether to adopt or reject the recommendations.

As the name implies, bankruptcy courts preside solely over bankruptcy proceedings, both corporate and personal. The Circuit Court of Appeals appoints bankruptcy judges for each of the districts within its circuit. Bankruptcy court judges serve fourteen-year terms and the circuit court's judicial council may only remove them during their term for "incompetence, misconduct, neglect of duty, or physical or mental disability."[13] As with the magistrate courts, some rulings of the bankruptcy courts are subject to review by the district court.

Finally, there are multitudes of administrative courts within the various executive branch agencies of the federal government. These courts are created under the Article I powers granted to Congress. Administrative courts handle disputes falling within the purview of a specific agency and operate largely autonomously. Nonetheless, they interact with the federal courts because parties can often appeal their rulings to an Article III court, usually the Court of Appeals for the Federal Circuit. Chapter ___ covers administrative courts in much greater depth.

3. Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. This means that each court may only preside over those types of cases that it has statutory authority to hear. Article III, § 2, clause 1, of the Constitution originally provided the jurisdiction of the Supreme Court:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

The Constitution goes on to divide these cases into two categories: those over which the Supreme Court has original jurisdiction, meaning that it would be the first court to hear the case, and those over which it may hear appeals from lower courts:

> *In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*[14]

As noted above, the Constitution delegated the establishment of the lower courts to Congress. In the first Judiciary Act of 1789, Congress not only established the lower courts but also prescribed their jurisdictional limits. Since that time, Congress has enacted and amended numerous Acts defining or altering the jurisdiction of the various federal courts.[15] Each level of the Article III courts has their own jurisdictional limitations.

The federal district courts are the trial level courts in the federal system. District courts generally exercise one of four forms of subject matter jurisdiction. First is "federal question jurisdiction," which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[16] For example, someone suing his employer for a violation of the Family Medical Leave Act, a federal law, can initiate his lawsuit in a federal district court based on federal question jurisdiction. Second is "diversity jurisdiction." Under diversity jurisdiction, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."[17] If a corporation is one of the parties, the law deems it a citizen of the state in which it was incorporated, as well as the state in which it has its "principal place of business."[18]

The third basis of district court jurisdiction is "supplemental jurisdiction," which provides that " . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ."[19] So, for example, if the district court has original

jurisdiction because the plaintiff is suing her employer under the Family Medical Leave Act, but was also asserting a claim for violating a state law against sex discrimination, the district court could hear the state law claim under supplement jurisdiction. Finally, when a plaintiff originally files his suit in a state court, but a defendant subsequently seeks to transfer, or "remove," it to federal court, citing either federal question or diversity jurisdiction, a district court may exercise "removal jurisdiction." Part 3 of this chapter explores the concept of removal jurisdiction in more detail.

The Courts of Appeals' jurisdiction is also statutorily limited: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."[20] Parties wishing to appeal a district court decision may bring their appeal in "the court of appeals for the circuit embracing the district."[21] The Court of Appeals for the District of Columbia hears only those appeals from the District Court for the District of Columbia. Lastly, the Court of Appeals for the Federal Circuit hears a subset of specific appeals, including all appeals of patent cases from any of the district courts and appeals from the Court of Federal Claims.[22] Generally speaking, appeals of district court decisions are "appeals by right," meaning that the circuit court must hear the appeal.[23]

The Supreme Court can exercise both original jurisdiction and appellate jurisdiction as provided in Article III, § 2, clause 2. Congress has further defined the scope of the Supreme Court's original jurisdiction:

a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

b) The Supreme Court shall have original but not exclusive jurisdiction of:

   1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.

   2) All controversies between the United States and a State.

   3) All actions or proceedings by a State against the citizens of another State or against aliens.

Cases involving original jurisdiction are unusual[24]; most of the Supreme Court's caseload consists of appeals from the Courts of Appeals. Unlike the Courts of Appeals, however, whether or not the Supreme Court chooses to hear an appeal is entirely within its discretion. Instead of appeal by right, parties seeking review of a Court of Appeals decision must file a WRIT OF CERTIORARI, of which the Supreme Court grants only a small fraction. Indeed, the Supreme Court receives around 7,000–8,000 WRITS every year, but it usually only grants around eighty.[25] Finally, the Supreme Court may choose to hear appeals from final decisions of a state's highest court:

> *Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.*[26]

One of the most common types of appeals under this jurisdiction is an appeal of a state court ruling that potentially conflicts with a constitutional right, for example, cases involving searches and seizures under the Fourth Amendment, or death penalty cases implicating the Eighth Amendment prohibition on cruel and unusual punishment.

II. Dual Sovereignty and Concurrent Jurisdiction

As noted at the outset of this chapter, the states and the federal government are separate sovereigns under our system of federalism. Under this system, both the state and the federal courts can typically adjudicate the same case or controversy. The advantages and disadvantages of this system vary from the criminal context to the civil context under the principles of dual sovereignty and concurrent jurisdiction.

C. Dual Sovereignty

Under the common law, commission of a crime was considered an offense against the sovereign. When both state law and federal law prohibit an action, a person performing that action has committed an offense against both sovereigns. The doctrine of dual sovereignty provides that both the state and federal government, or even two or more states, can maintain separate and distinct prosecutions of an individual for the same unlawful conduct.[27] This may seem to contradict the Constitutional protection against double jeopardy, which states that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb."[28] However, courts have consistently held the opposite.

In UNITED STATES V. LANZA, in 1992, the Supreme Court clearly established that both sovereigns could prosecute an individual for the same acts. It justified the doctrine thusly:

> *We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government, in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.*[29]

Of course, state and federal prosecutors can exercise their discretion to forego a criminal prosecution if the other sovereign is already prosecuting the criminal defendant. Indeed, both the federal government and many state governments have adopted internal policies that limit implementation of the dual sovereign doctrine.[30] Nevertheless, dual sovereignty prosecutions do still occasionally occur and the doctrine provides a powerful tool for those instances that warrant a second prosecution, such as those cases where a criminal defendant may escape liability from a first prosecution due to technical reasons. Lastly, state and federal prosecutors may decide which sovereign should prosecute a defendant based on the penalties available under their respective laws.

D. Concurrent Jurisdiction

In civil matters, concurrent jurisdiction is an analog to the criminal law doctrine of dual sovereignty. Concurrent jurisdiction exists when both a state court and a federal court have jurisdiction to hear the same case or controversy. For example, a citizen of New Jersey can sue ABC Company of Delaware for breach of contract in state court in his home state, if that is where he entered into the contract, in Delaware state court, which has jurisdiction over ABC Company, or in federal district court based on the diversity of the parties. Concurrent jurisdiction provides the basis for the practice of "forum shopping," which allows a plaintiff to file his suit in the court that he believes will be most advantageous for a variety of reasons.

It is obvious that state courts can hear any state law claims. They also have "concurrent jurisdiction with federal courts over all matters within federal jurisdiction unless there is a specific federal statute creating exclusive jurisdiction."[31] Therefore, state courts can hear cases that include federal law claims, so long as Congress has not limited jurisdiction over those claims specifically to federal courts. For example, under 42 U.S.C. § 1983, Congress authorized civil claims against state actors that violate a person's constitutional rights, and the Supreme Court has consistently found that state courts are not only authorized to hear such claims but also obligated.[32] By contrast, Congress has statutorily limited patent claims to federal courts. There is a presumption that concurrent jurisdiction exists unless the federal law in question contains "an explicit statutory directive" or an "unmistakable implication from legislative history" to the contrary.[33] Because of concurrent jurisdiction, plaintiffs are able to file suits in state court that contain a combination of both state and federal law claims. At the same time, a federal court may have jurisdiction to hear the same exact claim under either federal question jurisdiction or diversity jurisdiction.

The concepts of concurrent jurisdiction and forum shopping provide the basis for significant legal wrangling and gamesmanship. Plaintiffs can shape their claims to avoid any federal questions or join parties to the suit that are not diverse, thereby divesting a federal court of jurisdiction. Defendants can fight these maneuvers through various tactics, including claims that federal laws preempt the state law claims, or by claiming that the plaintiff fraudulently joined certain defendants solely to destroy diversity.

Under the principle of concurrent jurisdiction, plaintiffs may sue in either state or federal court, or both. While there is no bar on cases duplicative litigation proceeding simultaneously in both state and federal court, this can lead to inconsistent outcomes, the waste of scare judicial resources, and friction between the state and federal courts if one believes the other is infringing upon their province. Sometimes in cases of duplicative litigation, a federal court will abstain from hearing the case in the interest of comity with the state court. Part 5 of this chapter explores the concepts of comity and abstention more fully.

III. Removal and Remand

E. A Defendant's Right of Removal

Defendants have the right to remove a case filed in state court to the federal court in which the state court sits, so long as there is either diversity jurisdiction or federal question jurisdiction. It is widely understood that the traditional basis for allowing federal courts to hear suits between citizens of different states was to

protect out-of-state defendants from state courts that might be biased in favor of their own citizens.[34] Federal question jurisdiction, it has been widely believed, is available "to provide litigants with a judge experienced in federal law, to protect litigants from state court hostility toward federal claims, and to preserve uniformity in federal law."[35] Thus, removal is tool defendants can use to seek a presumptively unbiased forum in which to defend themselves. Of course, defendants may have other tactical reasons for removal, such as a predictable judge, more defense friendly juries, or more favorable federal rules than those of the state court.

The presence of either basis of jurisdiction gives the defendant a right to remove the case to federal court, so long as the defendant files a notice of removal with the district court within thirty days of the plaintiff serving them with a copy of the complaint.[36] If there are multiple defendants, all of them must agree to the removal. It is incumbent upon the defendant to prove that removal is proper and the basis under which the district court can exercise jurisdiction. Further, if the defendant removes based on diversity jurisdiction, the burden is on them to show by a preponderance of the evidence that the case meets the amount in controversy threshold, currently set at $75,000.[37]

F. A Plaintiff's Ability to Remand

Generally speaking, the plaintiff is the "the master of the complaint,"[38] meaning that, the plaintiff may file the suit in either state or federal court, so long as that court has jurisdiction. There are a variety of reasons a plaintiff might prefer to bring his case in state court. For instance, a local plaintiff suing a large conglomerate for a defective product might feel that a jury made up of his local peers would prove more sympathetic and be more likely to award a higher verdict. Accordingly, "by eschewing claims based on federal law," or by deciding to include a diversity destroying defendant, a plaintiff may seek to prevent removal for tactical, thereby keeping his case in state court as a matter of preference.[39] Plaintiffs may try to plead their complaint artfully in an effort to hide a federal claim. Nonetheless, such efforts are fruitless if the court must address a federal question to resolve the claims.

So what is a plaintiff to do when his state course case is removed to federal court by a defendant seeking a federal forum? He must move the court to remand the case to the original state court. "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[40] Thus, if removal is defective, for example, because the defendant removed outside of the time limit, or because not all of the defendants agreed to the removal, the plaintiff must move to remand within thirty days of the removal. If at any point the court lacks subject matter jurisdiction, for example, if the defendant fails to show that the case meets the amount in controversy threshold, the court may SUA SPONTE, or upon motion by either party, order the case remanded.

A plaintiff may take certain actions post-removal that will not mandate remand or that may leave remand to the discretion of the court. The Supreme Court has held that, after a case has been properly removed, amending the complaint so that it seek less than the $75,000 amount in controversy threshold does not provide proper grounds for remand.[41] On the other hand, in cases where a plaintiff dismisses his federal claims after removal, leaving only state law claims, it is within the district court's discretion whether it keeps or remands the case.[42] Lastly, "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy [diversity] subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."[43]

IV. Federal Courts Applying State Law

As discussed above, federal courts can hear state law claims when the parties have reached the federal court by way of diversity or when the court is exercising supplemental jurisdiction over the state law claims brought along under federal question jurisdiction. When this happens, the question arises: What law is the federal court to apply?

G. The Erie Doctrine and Choice of Law

Beginning with the Judiciary Act of 1789, Congress has mandated that federal courts hearing state law claims must apply state law. Chapter 34 of the Judiciary Act of 1789, also known as the Rules of Decision Act ("RDA"), provides:

> *The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.*[44]

Essentially, the RDA requires that a federal court apply federal law to any federal claims in front of it, and state law to any state law claims. Early Supreme Court cases limited the effect of the RDA, finding that it required federal courts to apply only those state laws that were statutory, not based on common law.

In Tyson v. Swift,[45] Justice Story "concluded that the RDA did not require a federal court in a diversity case to apply any one state's common law"; rather, it should look at the entire body of common law in order to ascertain the correct principles controlling a particular legal issue and shape its ruling accordingly.[46] This spawned the concept of "federal common law," that is, law formed from the decisions rendered by the federal courts based on their own understanding of the entirety of the common law. Proponents of the federal common law concept believed that it would lead to more uniform interpretations of the law and that many state judges would then follow along in their rulings.[47] One problem associated with this principle was that it led to forum shopping, whereby a plaintiff would look at whether a state law or the federal common law was more advantageous and file accordingly. For nearly one hundred years, the holding of Tyson reigned supreme: federal courts would apply codified statutory state law if available and, if not, would look at the breadth of the common law, or its own federal common law precedents, to discern what the law really was on the issue at hand.

In Erie Railroad Co. v. Tompkins,[48] the Supreme Court derailed the principle enunciated in Tyson and "fundamentally altered the relationship between state and federal courts."[49] The Erie Court pronounced at least two significant principles. First, the Court's prior readings of the RDA were erroneous:

> *But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state,* unwritten as well as written.[50]

Consequently, federal courts must now apply state law whether the state has codified it by statute or it is the common law derived from the decisions of THAT STATE's courts. Second, "[t]here is no federal general common law."[51] The only federal common law is that which pertains to the Constitution of federal laws enacted by Congress—it does not apply to the laws of the states. In support of this decision, Justice Brandeis noted that the federal courts had no constitutional authority for the development of a federal common law that would overarch the laws of the states:

> *The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.*
>
> *The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.*
>
> *Thus the doctrine of* Swift v. Tyson *is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. . . .'*[52]

Although ERIE established that state law governed any state law claims, the question of which state law to apply still loomed. For example, two parties from Delaware and New Jersey meet in Pennsylvania to sign a contract for work they will perform in New York. One of the parties breaches the contract. Which state's law will apply? While a complete discussion of this topic is beyond the scope of this chapter, several overriding principles are helpful. First, all states have developed "choice of law" rules that govern which state's substantive law applies when the case is connected to multiple states.[53] The choice of law provisions vary from state to state and depend on the cause of the action. By way of example, most states provide that the law of the state in which a tort physically occurs will control. Other states, however, may apply the law of the state where the suit was filed or the state that has the most interest in the outcome.[54] In addition, parties may actively seek to dictate the applicable law. We see this in the fact that contracts containing choice of law provisions have become common and increasingly routine. Such provisions allow the parties to agree that a specific state law will apply in the event of a dispute, and courts routinely uphold these provisions unless they are inherently unfair or legally defective.

We can see that the ERIE doctrine and choice of law principles provide federal courts with a framework to determine which state's law should apply, but they may also lead to courts having to apply more than one state's laws to separate claims within the same suit. Cases that apply federal laws to one or more federal claims in a suit, while simultaneously applying one or more states' laws to the plaintiff's various state law claims, are not all that rare.[55] Further complicating the issue, problems may arise when a federal court must apply state law in an area that unsettled.

H. Certified Questions

What happens when a federal court must apply a state law to a particular set of facts that state courts have not addressed yet? Courts may attempt to predict what they believe the state's highest court WOULD say about the law. "Faithful application of a state's law requires federal courts to anticipate how the relevant state's highest court would rule in the case, and in doing so [courts] are bound by controlling decisions of that court."[56]

In making its decision, the federal court may look at all available data, and absent a ruling on the specific issue by the state's highest court, its intermediate appeals court rulings are binding authority.[57] Courts tend to avoid interpreting unsettled substantive state law instead of allowing the state's highest court to do so.

One way of avoiding this dilemma is to "certify" a question to a state's highest court. Many states, if not most, have a statutory process for a federal court to ask the state's highest court to answer the question for them and to settle the law in that area. Generally, the state's highest court can accept or decline the certification. Although having the state's highest court decide the issue would provide the most definitive resolution, federal courts do not commonly certify questions. That is because the cost of certifying a question is high in both attorney fees and time—the certification process can add a year or more to the length of a case.[58] Moreover, we task federal judges with interpreting state laws on a regular basis, and we generally respect their ability to do so. Finally, certifying every question that was not entirely clear would be onerous on the state's high court. Consequently, federal courts generally only certify questions that are important because they affect a substantial area of the law or when the ruling may affect a substantial number of people.

V. Comity and Abstention

"The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction."[59] Justice Black aptly and thoroughly defined the comity doctrine as:

> *a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.*[60]

Part and parcel of the comity doctrine is the concept of abstention. Abstention is the practice whereby federal courts decline to hear cases even though they meet the jurisdictional requirements necessary. The rules of abstention are not statutory; rather, the Supreme Court has created them over time.[61] Abstention is appropriate under three main categories: first, when there is an unclear question of state law; second,

when abstention would avoid unnecessary interference with pending state proceedings; and third, to avoid duplicative litigation. Although not exhaustive, this section provides a brief overview of the most prevalent abstention doctrines.

I. Unclear Questions of State Law

1. Pullman Abstention Doctrine

In Railroad Commission of Texas v. Pullman Co.,[62] the Supreme Court addressed whether a state statute violated the United States Constitution. The Texas Railroad Commission issued a regulation that forbade the operation of sleeping cars on trains without a conductor present, not just a porter. At the time of the regulation, conductors were white and porters were black; thus, it implicated a possible violation of the Fourteenth Amendment based on racial discrimination. Additionally, however, it was unclear whether state law even allowed the Railroad Commission to promulgate such a regulation.

The Supreme Court held unanimously that the district court should not have heard the case until the Texas state court had an opportunity to clarify the state law. If the state court determined that the commissioner could not create the regulation, then the issue would be resolved without interference from the federal courts. On the contrary, had the state court found that the commissioner properly promulgated the regulation, the district court would still be in a position to hear the case. Accordingly, "Pullman abstention is said to apply when the relevant state law is unclear," and clarification of that law by the state courts would render a determination by a federal court unnecessary.[63] To be precise, Pullman abstention is properly exercised when 1) the meaning of the state law is "substantial[ly] uncertain[]" and 2) it is a "reasonable possibility that the state court's clarification of the state law might obviate the need for a federal constitutional ruling."[64]

2. Burford Abstention Doctrine

Another abstention doctrine based on unclear state law comes into play when it is appropriate for federal courts to defer to state courts on matters of complex state administrative procedures. In Burford v. Sun Oil Co.,[65] the Texas Railroad Commission entered an order granting Burford a drilling permit for four wells in an East Texas oil field. Sun Oil challenged the order, claiming a violation of due process and a violation of state law. In affirming the district court's dismissal of the case, the Supreme Court noted that complicated issues, such as oil production, were best administered by a single agency, which had at its disposal a complex state administrative apparatus and an adequate system of judicial review. Moreover, the Court noted the importance of the oil and gas industry to the state. Ultimately, the Court held that Burford abstention was justified when two circumstances were present: (1) the state law was unclear and (2) the expertise and central administration of a state agency was necessary to administer an important state interest.

J. Unnecessary Interference with Pending State Proceedings

1. Younger Abstention Doctrine

In Younger v. Harris,[66] the state had indicted the plaintiff for a violation of a California statute prohibiting persons from handing out certain types of political leaflets. Harris filed suit in federal court seeking an injunction against the state law prosecution, claiming the California law violated his constitutional rights. Citing the doctrine of comity, Justice Black opined that the injunction "must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under

special circumstances."[67] He went on, citing the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[68] Thus, comity demands that federal courts abstain from interfering in ongoing state proceedings, particularly when the person seeking federal court involvement has judicial remedies available to them, such as the right to appeal an adverse decision, and when there has not been a showing of irreparable harm.[69] Indeed, an exception to the YOUNGER abstention doctrine would occur if there were no adequate state forum available; for example, if the only available forum was shown to be biased.[70]

2. Rooker–Feldman Abstention Doctrine

Briefly, the ROOKER–FELDMAN doctrine stands for the principle that federal courts cannot review final decisions of a state court. It comes from a pair of Supreme Court cases, both of which held that federal courts had no jurisdiction or authority to "entertain a proceeding to reverse or modify" a state court's final judgment.[71] Unlike YOUNGER abstention, which deals with ongoing proceedings, ROOKER–FELDMAN doctrine is "limited to those situations where the state court judgment has been rendered before the federal proceedings have been commenced."[72] When a state court renders its decision after the federal suit has begun, but prior to its completion, the federal court may have to give the state court decision preclusive effect under the doctrine of RES JUDICATA. Nevertheless, this differs from the jurisdiction denying effect of the ROOKER–FELDMAN doctrine.

K. Avoiding Duplicative Litigation

1. Colorado River Abstention Doctrine

Under the concurrent jurisdiction principles, identical suits may proceed simultaneously in both state and federal court. In COLORADO RIVER WATER CONSERVATION DISTRICT V. UNITED STATES,[73] the Supreme Court addressed the issue of whether, and under what circumstances, the federal court should abstain from hearing a case when the same case has been filed in state court. Should the federal court dismiss the action or stay the case under the principles of comity with the state court? The COLORADO RIVER decision established several key points.

Initially, the Court noted that federal courts have a "virtually unflagging obligation . . . courts to exercise the jurisdiction given them," and abstention based solely on the presence of a parallel proceeding in state court was improper.[74] The Court went on to set out four factors federal courts should weigh in deciding whether to abstain. Specifically, it noted that (1) "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"; (2) the federal court should consider whether the federal forum is inconvenient; (3) it should recognize the desire to avoid "piecemeal litigation"; and (4) it should look at the order in which the suits were filed.[75] Weighing these factors should guide the federal court's decision of whether to abstain.

VI. Conclusion

Under our system of federalism and dual sovereignty, the federal court system and the state court systems coexist with one another. Often they overlap; sometimes they cooperate and sometimes they conflict. Various statutes, doctrines, and principles regulate the interaction between the two systems. Chief among them is the

doctrine of comity, which allows the two systems to generally avoid conflict and defer to one another when it is more efficient, appropriate, or fair. It is an ever-evolving relationship, full of many complicated issues, but one that is vital in our system of government.

VII. Endnotes

1. This number is from 2010. *See* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx.
2. As of 2006. The number is over 104,000,000 if we include traffic offenses. *See State Court Caseload Statistics*, Bureau of Justice Statistics, http://www.bjs.gov/index.cfm?ty=tp&tid=30.
3. This includes Supreme Court Justices, Courts of Appeals Judges, District Court Judges, Bankruptcy Court Judges, and Magistrate Judges. *See* http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/305.
4. Notably, of the 1,500,000 cases, over 1,000,000 are bankruptcies. *See Federal Judicial Caseload Statistics 2014*, USCourts.gov, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014.
5. With the exception of certain pre-trial rulings, only a criminal defendant may bring an appeal, not the government.
6. There are nine exceptions: Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming lack any intermediate appeals courts. Alabama and Pennsylvania each have two appeals courts with different appellate jurisdiction.
7. To the bane of law students everywhere, New York labels its courts in an somewhat counter intuitive fashion. There, the Supreme Court is New York's trial court, the Appellate Divisions of the Supreme Court are the intermediate courts of appeals, and the Court of Appeals is the state's highest court. *See* http://www.nycourts.gov/courts/structure.shtml.
8. Oh. Const. art. IV, § 1.
9. N.J. Const. art. VI § 1, ¶ 1.
10. For example, the Ohio Supreme Court has original jurisdiction over, among other things, cases involving writs of mandamus, habeas corpus, and prohibition, as well as all issues regarding the practice of law, such as admission to practice and disciplinary actions. Simultaneously, it has appellate jurisdiction over, among other things, appeals from the state's courts of appeals, and direct appeals from the courts of common pleas if that court has imposed the death penalty on a criminal defendant. *See* Oh. Const. art. IV, § 2(B).
11. Erwin Chemerinsky, Federal Jurisdiction 225 (6th ed. 2012).
12. 28 U.S.C. § 631(i).
13. 28 U.S.C. § 152(a)(1), (e).
14. U.S. Const. art. III, § 2, cl. 2. Notably, this language allows Congress to regulate what types of cases and appeals the Supreme Court, or other federal courts, may hear. This court-stripping or jurisdiction-stripping maneuver is often perceived as an effort to "give[] state courts (or other tribunals) the last word on specific legal questions [that] will encourage them to chip away at Supreme Court precedents." *See* Martin H. Redish, Federal Courts:

Cases, Comments And Questions 466 (7th Ed. 2012). At other times, Congress's jurisdiction-stripping efforts are an effort to "shield legislative, executive, or state action from judicial review." *Id.*

15. Title 28 of the United States code provides a majority of the statutory authority for the jurisdiction of the federal courts.
16. 28 U.S.C. § 1331.
17. 28 U.S.C. § 1332. This section also provides for suits between citizens and foreign countries and class action lawsuits.
18. 28 U.S.C. § 1332(c).
19. 28 U.S.C. § 1367.
20. 28 U.S.C. § 1291.
21. 28 U.S.C. § 1294.
22. 28 U.S.C. § 1295.
23. *See* Fed. R. App. P. 3 (prescribing the procedure for filing an appeal as of right).
24. For example, in over 200 years, original jurisdiction based on "actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties" has been invoked only three times. Generally, cases of this kind are heard in the district courts. *See* Chemerinsky, *supra* note 11 at 700. Cases between states generally only show up on the Court's docket a few times in a given year. *Id.* at 698.
25. *See Frequently Asked Questions*, Supreme Court of the United States (Feb 20, 2016), http://www.supremecourt.gov/faq.aspx#faqgi9.
26. 28 U.S.C. § 1257.
27. *See* Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 Yale L.J. 281, 290 (1992).
28. U.S. Const. amend. V.
29. 260 U.S. 377, 382 (1922); *see also* Dawson, *supra* note 26 at 291–292.
30. *See* Dawson, *supra* note 26 at 293–294.
31. Chemerinsky, *supra* note 11, at 280.
32. *See generally*, Kenneth J. Wilbur, 134 U. Pa. L. Rev. 1207 (1986) (noting that state courts have an obligation to hear § 1983 claims).
33. *Tafflin v. Levitt*, 493 U.S. 455, 459–460 (1990).
34. *See* Chemerinsky, *supra* note 11, at 311–312.
35. John F. Pries, 42 Wake Forest L. Rev. 247, 247 (2007).
36. 28 U.S.C. § 1446(b). A defendant gets a new thirty-day period in which to remove if the plaintiff serves them with "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.* § 1446 (b)(3).
37. 28 U.S.C. § 1446(c)(2)(B).
38. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) (citation omitted).
39. *Id.*
40. 28 U.S.C. § 1447(c).

41. *See Saint Paul Mercury Indemnity CO. v. Red Cab Co.*, 303 U.S. 283 (1938) (holding that "events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court's [diversity] jurisdiction").
42. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).
43. 28 U.S.C. § 1447(e).
44. 28 U.S.C. § 1652. This is the current codified language of the RDA, which is essentially the same as the original language from 1789.
45. 41 U.S. 1 (1842).
46. Joseph W. Glannon, Civil Procedure: A coursebook 865 (1st Ed. 2011).
47. *Id.* at 879. Professor Glannon opines that this idea never reached fruition because many state court judges, who felt just as qualified to rule on the meaning of the common law, "often refused to follow federal decision." This led to situations where a party might get "one rule of law in the state court and another in the federal court across the street." *Id.*
48. 304 U.S. 64 (1938) (emphasis added).
49. Glannon, *supra* note 45, at 873.
50. *Erie*, 304 U.S. at 72–73.
51. *Id.* at 78.
52. *Id.* at 79 (internal citations and quotations omitted).
53. Glannon, *supra* note 45, at 887.
54. *Id.*
55. For example, a business dispute might simultaneously involve a federal trademark infringement claim, a breach of contract claim subject to the laws of State A, and a corporate dissolution claim subject to the laws of State B.
56. *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 608 (6th Cir. 2012).
57. *Id.* at 608–609.
58. Glannon, *supra* note 45, at 886.
59. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010).
60. *Younger v. Harris*, 401 U.S. 37, 44 (1971).
61. *See* Chemerinsky, *supra* note 11, at 811.
62. 312 U.S. 496 (1941).
63. Redish, *supra* note 14, at 466.
64. Chemerinsky, *supra* note 11, at 818.
65. 319 U.S. 315 (1943).
66. 401 U.S. 37 (1971).
67. *Id.* at 41.
68. *Id.* at 43–44.

69. *See id.* at 44–46 ("Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 46).
70. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).
71. CHEMERINSKY, *supra* note 11 at 850.
72. *Id.* at 851.
73. 424 U.S. 800 (1976).
74. *Id.* at 817.
75. *Id.* at 818.