1998

Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System

Ellen Ash Peters
University of Connecticut School of Law

NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 73 OCTOBER 1998 NUMBER 4

CAPACITY AND RESPECT: A PERSPECTIVE ON THE HISTORIC ROLE OF THE STATE COURTS IN THE FEDERAL SYSTEM

ELLEN A. PETERS*

Twenty years ago, Justice William J. Brennan sounded a clarion call to lawyers and judges not to overlook the capacity of state law, especially state constitutional law, to assist in the pursuit of justice for all. Today, the judges and justices of state courts have taken that message to heart by undertaking innovative measures to protect individual rights through state constitutions and through independent interpretations of the Federal Constitution. Despite this emerging trend, litigators, law reviews, and legal scholars have continued to focus on the federal system. In this Brennan Lecture, Senior Judge Ellen A. Peters of the Supreme Court of Connecticut responds to this not-so-benign neglect, observing that state courts determine the totality of rights of the vast majority of litigants, draw on a broad reservoir of common law principles and remedies, and play an integral role in maintaining our federalist system. Developing this last point, Judge Peters examines the history of state courts in the federal system, the extent to which state courts may invoke neutral procedural and jurisdictional rules in the face of arguably different federal mandates, and the implications for the role of the states of recent developments in United States Supreme Court jurisprudence.

The annual William J. Brennan Lecture Series at New York University School of Law performs a very special jurisprudential service by promoting the interests of a wide-angled view of federalism.[1] Any

* Senior Justice, Supreme Court of Connecticut; Chief Justice, Supreme Court of Connecticut (retired); former President of the Conference of Chief Justices; former Southmayd Professor, Yale Law School. I am grateful for the fine research assistance of Giovanna Shay, J.D., Yale Law School, 1997.

[1] This Article is an edited and annotated version of remarks delivered on February 11, 1998. The annual Justice William J. Brennan, Jr., Lecture on State Courts and Social Justice is sponsored by The Institute of Judicial Administration and the Brennan Center for Justice at the New York University School of Law.

lecture series that focuses on the work of the state courts of this country makes a unique contribution to a better understanding of the concept of dual sovereignty. Any lecture series in the name of Justice Brennan affords a unique opportunity to reflect on the Justice's extraordinary insight into the diverse facets of our nation's jurisprudence. Any lecture series that has engaged the wide-ranging interests of my distinguished predecessors[2] provides a unique occasion for assessment of the contributions of state courts in furthering the Justice's all-inclusive vision of American law.

Only once was I fortunate enough to meet Justice William J. Brennan. Some fifteen years ago, he was the keynote speaker at a conference held at the Columbia Law School. The subject of the conference was an examination of constitutional law in other countries of the world. As a state court judge, I quickly understood that my mission was to represent another one of those "other" countries. In all candor, I remember nothing about the conference except the honor and pleasure of meeting Justice Brennan. As has been observed universally, Justice Brennan was the soul of kindness and graciousness in every personal encounter.[3] It did not seem to matter to him that I was only an obscure state court judge with little competence in constitutional law. Our conversation was an unforgettable encounter to be remembered and cherished forever.

The topic of this Article is an exploration of one aspect of the far-reaching legacy that Justice Brennan left to state courts. More than many federal judges and justices, he recognized the importance of dual sovereignty as a structural component of our federal system. His famous 1977 article, "State Constitutions and the Protections of Individual Rights,"[4] was an eloquent and cogent reminder that because of

---

[2] The first Brennan lecturer was Judith S. Kaye, the dynamic Chief Judge of the New York Court of Appeals. See Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U. L. Rev. 1 (1995). Chief Judge Kaye was followed by Justice Stewart Pollock, one of the most widely admired justices on the New Jersey Supreme Court. See Stewart G. Pollock, The Art of Judging, 71 N.Y.U. L. Rev. 591 (1996). The third Brennan lecturer was Justice Stanley Mosk, a longtime member of the California Supreme Court whose tireless devotion to judicial duty has led him to continue to serve on that court past the normal age of retirement, despite adverse economic consequences dictated by California law. See Cal. Gov. Code § 75075 (West 1992); Stanley Mosk, States' Rights—and Wrongs, 72 N.Y.U. L. Rev. 552 (1997).

[3] See Stephen Wermiel, William J. Brennan, Jr., in The Supreme Court Justices: Illustrated Biographies, 1789-1995, at 446, 449-50 (Clare Cushman ed., 2d ed. 1995) [hereinafter Illustrated Biographies]; see also David Halberstam, The Common Man as Uncommon Man, in Reason and Passion: Justice Brennan's Enduring Influence 22, 25-26 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) [hereinafter Reason and Passion]; William H. Rehnquist, Foreword to Reason and Passion, supra, at 10.

[4] William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

dual sovereignty, state law and state courts could play an important role as guarantors of civil and political rights.[5] His article was a clarion call to lawyers and judges not to overlook the capacity of state law, especially state constitutional law, to assist in the pursuit of justice for all. From the state court perspective, his article was not only of great substantive interest, but also served as a vote of confidence in the integrity and the capacity of state courts to carry out these high aspirations.

Twenty years later, the judges and justices of the state courts have taken Justice Brennan's message to heart by undertaking innovative measures to protect individual rights through state constitutions and through independent interpretations of the Federal Constitution. Some state courts are considering whether the failure to present a reasoned analysis of relevant state constitutional law, when federal constitutional law is manifestly unpromising, may subject an attorney to a claim of malpractice or of ineffective assistance of counsel.[6] Even when state constitutions use language similar to that found in the Federal Constitution, attorneys should be aware by now of the competence of state courts to construe such language independently.[7] More important, it should be old news that state constitutions contain some provisions for which there are no federal counterparts.[8]

---

[5] See id. at 498-504.

[6] But see James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761 (1992) (criticizing project of creating independent state constitutional analysis and pointing out difficulties of crafting state constitutional claims).

[7] For example, various provisions of the Connecticut Constitution have been interpreted to be more protective of individual liberties than the analogous federal provisions. See, e.g., State v. Linares, 655 A.2d 737, 753-57 (Conn. 1995) (adopting more flexible, speech protective approach to free speech questions under Article I, §§ 4, 5 of Connecticut Constitution than forum based analysis employed by United States Supreme Court); State v. Oquendo, 613 A.2d 1300, 1308-09 (Conn. 1992) (holding that search and seizure clauses of Connecticut Constitution, Article I, §§ 7, 9, are more protective of individual liberties than Fourth Amendment of United States Constitution); State v. Dukes, 547 A.2d 10, 17-23 (Conn. 1988) (adopting more protective standard for judging motor vehicle searches under Article I, § 7 of Connecticut Constitution than standard employed under Fourth Amendment); State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988) (holding that, contrary to result reached under Federal Constitution in Moran v. Burbine, 475 U.S. 412, 422 (1986), Article I, § 8 of Connecticut Constitution requires police to inform a suspect of his or her attorney's efforts to render legal assistance); see also Jennifer Friesen, State Courts as Sources of Constitutional Law: How to Become Independently Wealthy, 72 Notre Dame L. Rev. 1065, 1073 (1997); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1154-57 (1993); Robert F. Williams, In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 Notre Dame L. Rev. 1015, 1017 (1997).

[8] New York's constitution contains a number of such provisions. It provides, among other things, for the public support of the needy. See N.Y. Const. art. XVII, § 1. See generally, Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 61 St. John's L. Rev. 399, 409-10 (1987). Article I, § 8 of the New York Constitution provides greater pro-

Connecticut courts, for example, must construe free standing constitutional provisions, such as a right of access to the courts[9] and a right to a publicly financed elementary and high school education.[10] Over the years, our state constitution has been amended to include an equal protection clause that is especially capacious.[11] It forbids discrimination based on "religion, race, color, ancestry, national origin, sex or physical or mental disability"[12] and prohibits both a denial of the equal protection of the law and "segregation or discrimination."[13] Read conjointly, these distinctive state constitutional rights furnished the underpinnings for our recent school desegregation case, *Sheff v. O'Neill*.[14]

Despite this emerging trend in state court jurisprudence, Justice Brennan's message, that state courts play an invaluable role in assuring justice for all, has not resonated as well with other players in the judicial arena. Litigants continue to invoke federal diversity jurisdic-

---

tection to the press than the Federal Constitution. See Richard J. Tofel, "Every Citizen May Freely . . . Publish": Protecting the Press Under the New York State Constitution, 40 Syracuse L. Rev. 1041, 1044 (1989).

Criminal procedure is one area in which state constitutions commonly are more protective of individual rights than is the Federal Constitution. For example, although the Federal Constitution permits less than unanimous verdicts in state criminal trials, the Maryland Constitution requires a unanimous jury verdict for a criminal conviction. See Md. Const. Decl. of Rights art. XXI. See generally Peter J. Galie, The Other Supreme Courts: Judicial Activism Among State Supreme Courts, 33 Syracuse L. Rev. 731, 751-52 (1982).

Another evocative example is the provision in the New Mexico Constitution providing a fundamental right of "seeking and obtaining safety and happiness." N.M. Const. art. II, § 4. The New Mexico Supreme Court recently relied on that provision for a narrow construction of the term "fugitive from justice" for the purposes of the Extradition Clause, U.S. Const. art. IV, § 2, and the Extradition Act, 18 U.S.C. §§ 3181-3196 (1994). The court refused to extradite a person within its jurisdiction to the demanding state, Ohio, because it found a significant risk of his abuse by Ohio prison officials. See Reed v. State ex rel. Ortiz, 947 P.2d 86, 106-08 (N.M. 1997). The United States Supreme Court reversed, however, in a brief opinion citing the Extradition Clause. See New Mexico ex rel Ortiz v. Reed, 118 S. Ct. 1860, 1862 (1998). Presumably, although a state constitutional provision may provide greater protection for individual liberties than an analogous federal provision, it cannot, under the Supremacy Clause, U.S. Const. art. VI, conflict directly with a federal constitutional mandate.

[9] See Conn. Const. art. I, § 10; Binette v. Sabo, 710 A.2d 688, 690 (Conn. 1998); Kelley Property Dev., Inc. v. Lebanon, 627 A.2d 909, 918 (Conn. 1993); cf. Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279 (1995) (discussing history of state constitutions' open courts provisions and arguing against interpreting such provisions as mandate to fashion new remedies).

[10] See Conn. Const. art. VIII, § 1; Horton v. Meskill, 486 A.2d 1099, 1104-05 (Conn. 1985).

[11] See Conn. Const. art. I, § 20.

[12] Id.

[13] Id.

[14] 678 A.2d 1267, 1288 (Conn. 1996).

tion and supplemental jurisdiction because they believe that federal courts provide a more professional forum.[15] Law reviews, newspapers, and *U.S. Law Week* continue to direct a disproportionate amount of attention to the work of the federal courts.

Legal scholars also have failed to embrace Justice Brennan's message. For example, scholars continue to publish casebooks on the federal system that focus almost exclusively on the work of the federal courts. The 1996 edition of *Hart & Wechsler*[16] is an invaluable source book for scholars, students, and practitioners. Nonetheless, it contains some telling oversights. For example, when the authors describe the prohibition against advisory opinions that is embedded in federal law,[17] they acknowledge that "other legal systems" have come to a different conclusion.[18] The "other legal systems" that they discuss are those in foreign countries.[19] The contrary practice in various American states, including their home state of Massachusetts,[20] is not even a blip on their federalism radar screen.

A possible explanation for this not-so-benign neglect is the widely shared perception that state courts are unimportant courts, lacking economic resources and analytic brain power. How many federal judges have been heard to say that the judges in their state courts are deplorable, with the possible exception of a dear friend, Judge X? Justice Brennan, himself formerly a state court judge, knew better. Why then bother with state courts when they are considered by many to be an intellectual waste land?

One potential answer is that state courts carry more than ninety-five percent of the nation's judicial workload.[21] That figure will only increase if Congress adopts the suggestions of the Federal Courts Study Committee to limit diversity jurisdiction.[22] What we in the state courts do, and how well or badly we do it, determines the totality of

---

15 See Ellen A. Peters, State-Federal Judicial Relationships: A Report from the Trenches, 78 Va. L. Rev. 1887, 1888-89 (1992).

16 Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996).

17 The "case or controversy" requirement of Article III, § 2 of the United States Constitution, which underlies the prohibition on advisory opinions in the federal system, has no counterpart in many state constitutions.

18 See Fallon, supra note 16, at 98.

19 See id.

20 See Mass. Const. art. II, § 83.

21 See Brian J. Ostrom & Neal B. Kauder, Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 3 (1995).

22 See Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts 29-35 (1995); see also Harlon Dalton, Judicial Federalism and Individual Rights: Some Reflections on the Proposed Long Range Plan, in Preserving Access to Justice: The Impact on State Courts of the Proposed Long Range Plan for the Federal Courts (Report of the 1995 Forum for State Judges) 17 (1996).

rights of the vast majority of litigants.[23] We are important because we are there. State courts provide the major judicial forum for most litigants.

A second answer might be that state jurisprudence raises issues that differ in kind, not just in form, from those confronting the federal courts. In previous Brennan lectures, both Chief Judge Kaye[24] and Justice Pollock[25] discussed the fact that state courts, even when their immediate assignment is statutory or constitutional interpretation, continue to draw upon a broad reservoir of common law principles.[26] For example, the Connecticut state courts have relied on the common law to determine that the language of state statutes must be applied so as to accommodate state rights to bodily integrity[27] or to mesh with state equitable principles governing foreclosures.[28] Conversely, state courts may need to modify the common law to reflect the wisdom of related statutory mandates.[29] Many of us who serve on state supreme

---

[23] Furthermore, federal statutory mandates and federal constitutional law all too often shape and constrict popular and academic notions of civil rights law. Much of the workload of state courts, however, includes other areas of law, most notably family law, that raise equally important human rights issues. In order to appreciate state courts' role in shaping civil rights law, therefore, one must recognize the human rights dimensions of uniquely state law domains.

As Anne C. Dailey has written recently:

> Although in law, as elsewhere, we are accustomed to thinking of the family as a private realm free from governmental influence and control, the domestic sphere is deeply patterned by state laws regulating the formation, maintenance, dissolution, and boundaries of family life. Legal regulation of the family forms domestic roles, directs intimate relationships, and consequently shapes human identity in profoundly normative ways. Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce, and the standards governing foster care and adoption. In answering such questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.

Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1790 (1995).

[24] See Kaye, supra note 2.

[25] See Pollock, supra note 2.

[26] See generally Ellen A. Peters, Common Law Antecedents of Constitutional Law in Connecticut, 53 Alb. L. Rev. 259 (1989). But see Hans A. Linde, Are State Constitutions Common Law?, 34 Ariz. L. Rev. 215, 227 (1992) (cautioning that importing common law methods into state constitutional analysis may lead to over reliance on "questionable judge-made formulas"); Herbert Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U. L. Rev. 887, 888 (1980).

[27] See, e.g., McConnell v. Beverly Enters. Conn., Inc., 553 A.2d 596, 603 (Conn. 1989).

[28] See New Milford Sav. Bank v. Jajer, 708 A.2d 1378, 1382-83 (Conn. 1998).

[29] See, e.g., Fahy v. Fahy, 630 A.2d 1328, 1332-34 (Conn. 1993) (finding that legislative change of laws governing child support requires change of common law principles governing alimony).

courts see the creation of an integrated state jurisprudence, without sharp lines of demarcation between constitutional law, statutory law, and judge made law, as part of our judicial responsibility.

Accordingly, in the discharge of that judicial responsibility, we have access to a wider range of remedial options than the federal judiciary due to our different principles of separation of power.[30] For example, to implement an earlier state constitutional law decision broadening the rights of litigants to challenge the impartiality of potential jurors,[31] we were able to invoke not only our constitutional authority but also our supervisory authority over Connecticut courts.[32] Going the route of supervisory authority leaves more flexibility for further input from all the interested constituencies. For another example, the availability of remedial flexibility led us, in our school desegregation case, *Sheff* v. *O'Neill*,[33] deliberately to craft a mandate that, in Lawrence G. Sager's nomenclature, underenforced our state constitutional law.[34]

The implications of so extensive a judicial role merit greater attention in the present national and international legal landscape. On the national level, this is a time when uninformed criticism of judges is once again rampant.[35] Does the broad interpretation of judicial authority add fuel to that fire?[36] Internationally, this is a time when, after careful consideration, many new democracies, faced with the antimajoritarian dilemma described twenty-five years ago by Alexander M. Bickel in his book entitled *The Least Dangerous Branch*,[37] have gone a different route. They have decided to strengthen the independence of their judiciaries by limiting the judiciary's authority to act.

---

30 See Ellen A. Peters, Getting Away from the Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L. Rev. 1543, 1558-59 (1997).

31 See State v. Brown, 668 A.2d 1288, 1303 (Conn. 1995).

32 See Conn. Practice Book (1998) § 60-2 (formerly § 4183).

33 678 A.2d 1267 (Conn. 1996).

34 See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978) (discussing remedial choices).

35 For media coverage of such criticism, see, e.g., Greg McDonald, Bill Imperils Judge's Grip on Prisons, Houston Chron., Nov. 21, 1997, at 1 (reporting House Majority Whip Tom DeLay's (R-Sugerland) comment that Prison Litigation Reform Act of 1995 would "end [Judge] William Wayne Justice's reign of error over the Texas prison system"); Cindy Moy, Reactions Run Along Philosophical Lines After Hawaii Recognizes Same-Sex Marriages, West's Legal News 13039, 1996 WL 694924, Dec. 6, 1996, at *2 (reporting that Tom Pritchard of Minnesota Family Council denounced Hawaii Supreme Court's decision in Baehr v. Miike, 910 P.2d 112 (Haw. 1996), as "bald legal activism").

36 See Linde, supra note 26, for a criticism of recourse to common law methodology in the interpretation of state constitutional provisions.

37 See Alexander M. Bickel, The Least Dangerous Branch 16-23 (Yale Univ. Press 1986) (1962).

Perhaps a countervailing principle may be derived from our long standing common law heritage, which elsewhere is neither fully understood nor shared. This is one of many issues confronting state courts that would be enlightened by further discussion and guidance.

A third reason why state courts are important, the reason that is the principal focus of this Article, is that state courts play an integral part in maintaining our federalist system. The relationship between federal law and the state courts is destined forever to be a work in progress, with borderlines that continue to shift in response to changing political pressures and to changing schools of jurisprudence.

To illustrate why, in my view, strong state courts play an essential role in federalism, this Article explores several aspects of the complex relationship between state and federal courts. The first section will examine the history of state courts in our federalist system, with particular attention to the role of state courts in safeguarding human rights. The second section will discuss the extent to which state courts may invoke neutral procedural and jurisdictional rules in the face of arguably different federal mandates. Finally, the third section will examine the implications for the future role of state courts in our federalist system given recent developments in United States Supreme Court jurisprudence.[38]

I
STATE COURTS' CHANGING ROLES IN THE FEDERALIST SYSTEM

The debate regarding state courts' role in our federalist system long predates Justice Brennan's call for a renewed state court activism. Questions about the proper relations between state and federal courts have persisted ever since the adoption of our constitutional government in 1789. At various times in our constitutional history, these questions have been resolved differently due to changing perceptions about the proper function of state courts. Differing assumptions about the competence and reliability of state courts, although often unarticulated, undoubtedly have influenced the prevailing view of the appropriate balance between state and federal judicial power.

[38] Candor requires disclosure at the outset that I come to this topic without any credentials as a veteran constitutional lawyer. Federalism is, alas, far removed from my past scholarly expertise in the intricacies of the Uniform Commercial Code. The questions that it raises are, however, of considerable importance for all state chief justices in the discharge of their oversight responsibilities over state judicial systems.

A. *The Rich Heritage of State Courts and Constitutions*

For a historical perspective on this issue, it bears remembering that state courts have been discharging their judicial responsibilities for many years and often have served as laboratories for the future development of federal constitutional law.[39] Furthermore, in states along the eastern seaboard, such as New York and Connecticut, state courts rendered important civil rights decisions predating the adoption of the United States Constitution.[40]

It is difficult to gather much detailed information about the agenda of early state courts because both arguments and opinions often were presented orally rather than in writing and were filtered through scriveners more focused on outcome than on reasoning. Nonetheless, the early courts rendered far reaching decisions, especially on matters that would now be characterized as raising constitutional questions. For example, as early as 1785, in *Symsbury Case*, the Connecticut Supreme Court, without a qualm (but also, alas, without much discussion), unanimously held unconstitutional a state statute infringing on established rights to real property.[41] Three years later, in 1788, another Connecticut court unhesitatingly declared ex post facto laws to be "inoperative."[42]

Other early state courts presumably were equally forceful in implementing civil rights provisions found in early state constitutions that predate the adoption of the Federal Constitution. New York's constitution of 1777 contained a guarantee of the right to counsel,[43] while Massachusetts, during the same period, provided a broad right to a jury trial.[44] Indeed, satisfaction with existing state constitutional law was one ground for opposition to the addition of an arguably superfluous Bill of Rights to the Federal Constitution.[45]

The state judges who shaped the early contours of state constitutional rights included public servants of great distinction. In Connecti-

---

[39] See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that each state "serve[s] as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country").

[40] See also Peter J. Galie, Ordered Liberty: A Constitutional History of New York 1 (1996) (noting that between 1776 and 1787 original states adopted state constitutions that later served as models for Federal Constitution).

[41] Kirby 444, 447 (Conn. 1785). Although the dissenting judge disagreed on the facts, he did not disagree with the principle. See Wesley W. Horton, Day, Root and Kirby, 70 Conn. B.J. 407, 411 (1996).

[42] See Place v. Lyon, Kirby 404 (Conn. 1788); see also Horton, supra note 41, at 411.

[43] See Galie, supra note 8, at 764.

[44] See Wilkins, supra note 26, at 924 n.220.

[45] See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 537 (1986); Kaye, supra note 8, at 400-01 (1987).

cut, in the years from 1786 to 1788, the five person bench included Oliver Ellsworth[46] and Roger Sherman.[47] During those same years, the call of the state court calendar apparently did not prevent Sherman and Ellsworth from serving as delegates to the Constitutional Convention in Philadelphia.[48] Not surprisingly, although both were staunch federalists committed to crafting an effective federal government, they also were vigorous defenders of the independence and the importance of state courts.[49] Sherman was an outspoken critic of plans to confer exclusive jurisdiction over federal law on the federal courts.[50] Both Sherman and Ellsworth participated in forging the Madisonian Compromise, under which lower federal courts have only limited jurisdiction over specifically identified federal causes of action.[51] On the principle that the devil is in the details, Ellsworth served on the committee entrusted with filling in the interstices of this bedrock constitutional principle.[52]

Despite numerous decisions at the Constitutional Convention to respect the integrity of state government at the Constitutional Convention, the accompanying debates and the Federalist Papers paint a picture of ambivalence toward state courts. For example, Alexander Hamilton, in Federalist Paper No. 81, chastised state courts for their lack of prudence and independence and the excessive entanglement "of a local spirit."[53] In contrast, in Hamilton's very next paper, the oft-cited No. 82, he applauded the adoption of the principle of concurrent jurisdiction, without any visible concern regarding the capacity of state courts to carry out their new mission as part of the new nation as a whole.[54]

My limited exploration of early nineteenth century federalism suggests that the state courts performed their assignments under fed-

---

[46] Oliver Ellsworth is an interesting figure whose wide-ranging constitutional contributions have been insufficiently recognized. He drafted the Judiciary Act of 1789 which, for more than one hundred years, left most of federal law to be enforced by state courts and even now is the framework for state/federal judicial relationships. After four years of service as the third Chief Justice of the United States, he returned to Connecticut in 1800 and became once more a justice on our state supreme court, having declined to serve as its chief justice. See James Buchanan, Oliver Ellsworth, in Illustrated Biographies, supra note 3, at 48-50.

[47] See Horton, supra note 41, at 410.

[48] See id.

[49] See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 63 n.56 (1995).

[50] See id.

[51] See id.

[52] See Buchanan, supra note 46, at 49.

[53] The Federalist No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[54] See The Federalist No. 82, at 492-93 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

eral and state law with little controversy except with respect to federal authority to require states to enforce federal criminal law.[55] Focusing on that exception would, however, distort the overall picture. In 1801, the Congress itself determined that it could not compel state courts to perform the duties conferred upon them by the national government.[56] In 1842, in *Prigg* v. *Pennsylvania*,[57] the Supreme Court echoed that view. Throughout the antebellum period, state courts generally were understood to have taken on concurrent jurisdiction, not as a mandate of federal constitutional law, but out of a shared sense of mutual and common interest.[58]

B. Early State Courts and Human Rights

An additional limitation on the reach of federal law in the first part of the nineteenth century was that the United States Supreme Court then construed the provisions of the Federal Bill of Rights as not binding on state courts.[59] It would be wrong, however, to infer

---

[55] See Collins, supra note 49, at 84-86; Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 580 (1925).

For example, in Davison v. Camplin, 7 Conn. 244 (1828), the Connecticut Supreme Court concluded that state courts have no jurisdiction to enforce federal criminal law. The court remarked:

> Should it be said, that it is a matter of convenience to sustain jurisdiction in cases of this nature; that courts and magistrates are not appointed by the United States, to hear and determine these apparently trivial offences; nor has Congress ordained and established such inferior courts as could, with propriety, take cognizance of these offences; an easy reply can be made. The Congress have the power. Let them occupy, with their courts, the whole judicial ground. If from any motives, (and we are not at liberty to enquire at all on that subject) they omit to ordain and establish inferior courts, or to vest judicial power in courts already established; that cannot justify a court in Connecticut in exercising judicial power of the United States, never vested in them by the constitution, nor in obeying a law not made in pursuance of the constitution.

Id. at 249.

[56] See Collins, supra note 49, at 151-54.

[57] 41 U.S. 539 (1842).

[58] See Collins, supra note 49, at 45-49.

[59] In the Slaughter-House Cases, 83 U.S. 36 (1872), the United States Supreme Court suggested that it was understood in the antebellum period that the Bill of Rights of the Federal Constitution limited the power of the federal government alone:

> The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

from the absence of federal strictures that state courts at that time were oblivious to claims for human rights.

An individual state's own heritage sometimes provided constitutional protections as a matter of state law, often as a result of the state's common law. Early in the nineteenth century, Connecticut courts held criminal defendants to be entitled, unconditionally, to the assistance of counsel, for misdemeanors as well as for felonies.[60] In a similar vein, Connecticut courts held sheriffs personally liable for illegal searches and seizures.[61]

Later in the nineteenth century, on the eve of the Civil War, numerous state court judges struggled to protect the rights of former slaves by limiting the reach of the federal fugitive slave laws. Robert M. Cover, in his book entitled *Justice Accused: Antislavery and the Judicial Process*, described the demoralizing experience of Massachusetts judges who were called upon to enforce these laws.[62] Many state judges faced the same dilemma of having to choose between their consciences and their oaths to execute federal law faithfully.

For example, in 1854, in the case of *Booth v. Ableman*,[63] the Wisconsin courts tried unsuccessfully to provide shelter for a man whom a federal officer had arrested allegedly for helping a fugitive slave escape.[64] In the trial court, and in the state supreme court, Wisconsin judges held the Fugitive Slave Act of 1850 to be unconstitutional and consequently declared the man's detention to have been illegal.[65] Pre-

---

> Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.
>
> But, however, pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering [the thirteenth and fourteenth], we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

Id. at 82.

60 See State v. Davis, 506 A.2d 86, 91-92 (Conn. 1986).

61 See, e.g., Grumon v. Raymond, 1 Conn. 40, 48 (1814).

62 See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process, 229-32 (1975).

63 In re Sherman M. Booth, 3 Wis. 1 (1854).

64 See id. at 3-5.

65 See id. at 64-65:

> We are of opinion that so much of the act of congress in question, as refers to the commissioners for decision, the questions of fact which are to be established by evidence before the alleged fugitive can be delivered up to the claim-

dictably, the United States Supreme Court reversed.[66] It concluded that state courts lack habeas corpus jurisdiction to review federal action taken pursuant to federal law.[67] On remittitur, the Wisconsin Supreme Court did not modify its constitutional ruling but agreed to obey the federal mandate on a different ground, namely a newly found lack of state court jurisdiction because of intervening action by a federal trial judge.[68] The *Booth* decisions illustrate that at least one antebellum state judiciary was willing to engage in a vigorous struggle to safeguard human rights.

In sum, it was federal law and the federal courts that, bowing to the perceived political imperatives of the time, provided the authoritative voices that protected the economic rights of slave owners over the human rights of people of color. Writing in 1943, Henry Steele Commager reviewed the first one hundred and fifty years of United States Supreme Court jurisprudence and concluded that:

> [The record] discloses not a single case, in a century and a half, where the Supreme Court has protected freedom of speech, press, assembly, petition, or religion against Congressional attack. It reveals no instance . . . where the [C]ourt has intervened on behalf of the underprivileged. . . . It reveals, on the contrary, that the Court has effectively intervened, again and again, to defeat Congressional attempts to free the slave, to guarantee civil rights . . . to protect workingmen, to outlaw child labor, to assist hard-pressed farmers, and to democratize the tax system.[69]

Some state courts, at least, demonstrated their independence and integrity by greater devotion to the call of social justice.

II
STATES' NEUTRAL RULES OF JURISDICTION AND PROCEDURE

Throughout these vicissitudes in our constitutional history, there have been procedural as well as substantive difficulties in implementing appropriate state and federal relations. This section explores one such significant, recurring question of federalism: whether Congress

---

ant, is repugnant to the constitution of the United States, and therefore void for two reasons: First, because it attempts to confer upon those officers judicial powers; and second, because it is a denial of the right of the alleged fugitive to have those questions tried and decided by a jury, which we think is given him by the constitution of the United States.

66 See Ableman v. Booth, 62 U.S. 506, 510 (1858).

67 See id. at 514-16.

68 See In the matter of Booth, 11 Wis. 498, 521 (1859).

69 Henry Steele Commager, Judicial Review and Democracy, 19 Vir. Q. Rev. 417, 428 (1943), reprinted in Judicial Review in American History 103 (Kermit L. Hall ed., 1987).

may order state courts to carry out the mandates of federal legislation and administrative regulations in disregard of preexisting state rules of jurisdiction and procedure. This question, in turn, has two parts. The sub-inquiries are: (a) whether federal law dictates the applicable rules of procedure governing federal law claims litigated in state courts; and (b) whether states must provide a forum, not available to state law litigants, in which to litigate federal claims.

A. The Application of Neutral State Court Rules

The question of when a state court may apply its neutral rules of procedure and jurisdiction to litigants' federal claims requires further examination of the history of state and federal relations. The Civil War and its aftermath produced seismic changes in the law of federalism. By virtue of the Fourteenth Amendment and the authority that it conferred upon Congress,[70] the independent policymaking role of state law and state courts gradually became subject to ever greater federal supervision. These changes challenged the authority of state courts to invoke their own organic law in the face of seemingly contrary federal law.

Claflin v. Houseman,[71] decided in 1876, was an early post-war opportunity for the Supreme Court to describe both the expansive authority and the limitations of federal law.[72] The Court held that, as a general proposition, state courts had the power, and perhaps were required to exercise the power, to provide relief to all litigants with a federal cause of action.[73] The Court did not, however, overrule its 1842 decision in *Prigg v. Pennsylvania*[74] which had recognized a more independent role for state courts. Furthermore, *Claflin* stated that state courts were not required to entertain federal litigation that "interfere[d] with the [state courts'] proper jurisdiction."[75] The *Claflin* Court thus expressly linked state court concurrent jurisdiction over federally prescribed causes of action with the continued viability of state court rules of jurisdiction and procedure.

---

[70] United States Constitution Amendment XIV, Section 1 states in relevant part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution Amendment XIV, Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[71] 93 U.S. 130 (1876).

[72] See id. at 136-42.

[73] See id. at 136.

[74] 41 U.S. 539 (1842).

[75] *Claflin*, 93 U.S. at 137.

In my view, the Civil War Amendments changed the role of state courts more definitively than did the implementation of the New Deal in this century. Nevertheless, the New Deal broadened federal authority in general and furnished a mindset congenial to decisions like *Testa v. Katt*,[76] which upheld congressional authority, in time of war, to require state courts to assume concurrent jurisdiction.[77] Even that case, however, reserved the possibility that some state jurisdictional rules might limit the enforceability of a federal mandate.[78]

My limited exploration of the case law and the secondary literature suggests that federal law has not yet firmly decided the extent of federal displacement of state rules of jurisdiction and procedure. Since the 1912 decision in *Mondou v. New York*,[79] it has been accepted wisdom that state courts may not close their courthouse doors so as to discriminate against rights arising under federal law. Plenary civil rights actions under § 1983,[80] accordingly, have become a staple of state court dockets. The question that remains is whether and when nondiscriminatory state jurisdictional and procedural rules are subject to a federal override.

One argument for protecting state courts from a federal procedural override is the well-established principle of federalism that prohibits federal courts from challenging state court decisions concerning the meaning and effect of state law, whether that state law is constitutional, statutory, or of common law derivation. As the Supreme Court reiterated only last year, in *Johnson v. Fankell*[81]: "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state. . . . This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules."[82] Even more germane, the Court cited one of its former cases for the proposition that "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."[83]

State rules of procedure may be outcome determinative in criminal as well as civil cases. Since the time of *Wainwright v. Sykes*,[84] fed-

76 330 U.S. 386 (1947).
77 See id. at 394.
78 See id. at 393.
79 223 U.S. 1 (1912).
80 42 U.S.C. § 1983 (1994).
81 117 S. Ct. 1800 (1997).
82 Id. at 1804.
83 Id. at 1805.
84 433 U.S. 72 (1977).

eral courts reviewing state court criminal convictions under habeas corpus have been limited by the rule of procedural default.[85] Under that rule, federal courts have no authority to provide habeas corpus relief for petitioners whose case histories demonstrate a failure to comply with state rules of procedure.[86] The rule of procedural default stems from the proposition that, as a matter of federal as well as state law, such procedural lapses improperly interfere with full state court consideration of an issue that a petitioner belatedly wants to raise in federal court.[87]

The *Wainwright* decision is but one example of the principle of federalism that state courts have the final word in rendering decisions that rest on articulated, adequate, and independent state law grounds.[88] Some scholarly work has found yet another basis for protecting state authority over state rules of jurisdiction and procedure: the federal constitutional provision guaranteeing to each state a republican form of government. Deborah Jones Merritt suggests that the guarantee was intended to protect state governments not only from internal subversion but also from congressional overreaching.[89] Whatever the constitutional basis for recognition of state autonomy, it is difficult to reconcile these views of federalism with unlimited congressional authority to override state rules of procedure and of jurisdiction in concurrent jurisdiction cases.[90]

B. The Coercive Creation of State Court Jurisdiction

A related issue is whether Congress may require states to enlarge the jurisdiction of state courts to hear federal causes of action. State courts routinely accept concurrent jurisdiction over federal causes of

---

[85] See id. at 87.

[86] See id.

[87] The converse of the federal courts' renewed respect for state procedural rules and state court autonomy is that state judiciaries bear increased responsibility for interpreting the mandates of both the state and federal constitutions and, ultimately, for safeguarding the rights of criminal defendants. See Charles F. Baird, The Habeas Corpus Revolution: A New Role for State Courts?, 27 St. Mary's L.J. 297, 311-15 (1996); Mosk, supra note 2, at 555, 559-66.

[88] See, e.g., Michigan v. Long, 463 U.S. 1032, 1040 (1983).

[89] See Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 2-10 (1988).

[90] Another possible source of analogy is the law that has developed under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Although *Erie* requires federal courts to follow state substantive law in diversity cases, it permits federal courts to follow their own procedures in enforcing such state law. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945). One might argue that the same distinction between substance and procedure applies to state courts enforcing federal law. But see Felder v. Casey, 487 U.S. 131, 138 (1988); Brown v. Western R.R. of Ala., 338 U.S. 294, 296 (1949); Angel v. Bullington, 330 U.S. 183, 187-89 (1947).

action because virtually all such cases resemble actions that are cognizable under state law. As the United States Supreme Court recently reiterated in *Printz v. United States*,[91] although state executives cannot be drafted to carry out federal law, state judiciaries do not have similar immunity.[92] Pursuant to the Supremacy Clause[93] and the Madisonian Compromise,[94] state judiciaries bear a direct responsibility for substantively implementing federal mandates. Nonetheless, it is unclear whether federal authority to confer substantive concurrent jurisdiction carries with it the authority to dictate the manner in which state courts enforce federal law. To what extent does federalism provide a basis for a federal bypass around neutral, generally applicable, state rules of jurisdiction and procedure?

A national conference of all the state chief justices debated this issue in the summer of 1994. The context was a provision of the health care bill that was discussed in the early years of President Clinton's first term of office.[95] The bill arguably required state courts, but not federal courts, to adjudicate any and all claims about medical care, medical coverage, medical bills, and the like. Furthermore, the proposed legislation was reported to be unusually specific about the manner in which state courts were to exercise their federally mandated jurisdiction. State courts would have been required to exercise exclusive health care jurisdiction without any preliminary screening or fact finding by state administrative agencies. As chief justices, we were deeply concerned that enactment of such legislation, with or without federal financial assistance, would have a crippling impact on crowded state court calendars and limited state court resources.[96] Fortunately for us, the air was cleared by the subsequent withdrawal of so intrusive a health care initiative.

More recently, the issue arose again, closer to home, when the Connecticut Supreme Court heard a case dealing with state court en-

---

91 117 S. Ct. 2365 (1997).

92 See id. at 2371-72.

93 U.S. Const. art. VI.

94 Under the Madisonian Compromise, the United States Constitution provides for the creation of one Supreme Court and "such inferior Courts as the Congress may from time to time ordain or establish." U.S. Const. art. III, § 1. See generally Collins, supra note 49, at 42. As a result, state courts were expected to exercise sole or concurrent jurisdiction over a wide range of federal causes of action.

95 See Mark Curriden, State Court Chiefs Flex New Muscle: Chief Justices' Conference Sheds Benign Image and Challenges Washington, 17 Natl. L.J., Oct. 17, 1994, at A1 (discussing state supreme court justices' reaction to elements of Clinton's health reform plan that would have increased workload of state courts). See generally Sharon McIlrath, The Battle Begins (Health Care Reform), Am. Med. News, Oct. 11, 1993, at 3.

96 Possibly, Congress ultimately would have eased our load or provided ample federal resources. Neither possibility was anything other than a very long shot.

forcement of the federal program for protection of the rights of the disabled.[97] No one involved in this litigation questioned the propriety of engaging in state adjudicatory processes to implement this invaluable federal program. The question was, rather, one of state administrative law. For litigants unhappy with the outcome of state administrative decisions about disability claims, the federal statute and its accompanying regulations seemed to require state trial level courts to take jurisdiction to review the case on its merits.[98] For other litigants, invoking similar state programs, state law seemingly promised only administrative but not judicial review.[99] Could federal law bypass state law and enlarge the jurisdiction of our trial courts?[100] What weight should be assigned to the fact that, by resisting the siren song of federal grant money, the state could have sidestepped the problem?[101] It was a puzzlement. We too ended up sidestepping the problem by retroactively applying a state statute that, as a matter of state law, conferred on all disability claimants an express state right to judicial review.[102] Sooner or later, however, state and federal courts will have to confront the issue head on.

---

97 See Toise v. Rowe, 707 A.2d 25 (Conn. 1998).

98 See id. at 26.

99 See id. at 28-29.

100 See Collins, supra note 49, at 196 ("[E]ven those [of the Founding Generation] who argued for a more cooperativist federalism seem not to have admitted the possibility of jurisdictional coercion."); Jed Rubenfeld, The Federal Question, in Preserving Access to Justice: The Impact on State Courts of the Proposed Long Range Plan for the Federal Courts (Report of the 1995 Forum for State Judges) 7, 17 (1996). But see Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2037 (1993) ("[W]here the federal government has the constitutional authority to act, it may command the assistance of state executives and courts.").

101 See South Dakota v. Dole, 483 U.S. 203 (1987); see also Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 848, 893 (1979) (finding that "[a]t times the lower courts do seem to suggest that the extent of economic pressure to participate in a federal program is pertinent to the validity of a condition"); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1250 (1977) (stating that "grant conditions may not contravene any of the constitutional prohibitions that limit the exercise of all federal powers"); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1430 (1989) (observing that "[t]he Court has been reluctant in practice to find that conditions on federal spending coerce recipients"); Note, Federalism, Political Accountability, and the Spending Clause, 107 Harv. L. Rev. 1419, 1431 (1994) (stating that "[t]he problem is that Congress may purposefully avoid accountability by requiring the states, through their legislative apparatus, to implement federal policies").

102 See *Toise*, 707 A.2d at 28.

III
THE NEW FEDERALISM OF THE UNITED STATES SUPREME COURT

Further federal incursions into state court autonomy are less likely today than they would have been twenty-five years ago. The "new federalism" that has emerged from recent United States Supreme Court decisions signals a sea change in the Court's attitude about state courts and has further underscored the importance of some measure of state court independence to dual sovereignty.

The most directly relevant example of the new federalism is the widely cited 1991 case *Gregory* v. *Ashcroft*,[103] written by another former state judge, Justice Sandra Day O'Connor. In *Gregory*, the Court held that federal law presumptively has limited authority to alter basic structural aspects of state governments.[104] Despite the federal laws that protect most state workers from mandatory retirement, the Court held that states retained the authority to require high ranking state officers, including judges, to retire at the age of seventy.[105]

Other recent United States Supreme Court decisions also reaffirm a newly articulated confidence in the integrity and reliability of state law and state courts. Cases such as *Seminole Tribe of Florida v. Florida*[106] have repositioned the defining markers of present day federalism to afford more authority to the states.[107]

In short, the auguries for greater state court autonomy over structural rules governing the procedures and the jurisdiction of state courts have not been better at any time within present memory. Since the turn of the century, when Langdell introduced the caselaw method into legal education, state courts have been a respected repository of jurisprudential learning with regard to basic first term law school courses such as torts and contracts. Today, state courts again have taken joint responsibility, with the federal courts, for the protection of civil and political rights. Full implementation of this challenging agenda can only be strengthened by recognition of state autonomy wherever appropriate. When federal courts acknowledge the vitality

---

103 501 U.S. 452 (1991).

104 See id. at 460-63.

105 Id. at 460. As Chief Justice, I welcomed that decision. I still welcome the principle in theory, but, now that my own retirement looms just over the horizon, my enthusiasm has diminished somewhat.

106 517 U.S. 44 (1996).

107 See also United States v. Lopez, 514 U.S. 549 (1995) (holding Gun Free School Zones Act unconstitutional because Congress had made no findings regarding effect of violence in and around schools on interstate commerce); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel state legislatures to enact a federal regulatory program).

of structural rules of state law, they help to underscore the capacity of state courts to respond to all of their agendas, including human rights challenges.

CONCLUSION

As history demonstrates, both state courts and federal courts provide important safeguards for human rights. Sometimes the leading role has been played by one set of courts and sometimes by the other. An increasingly heterogeneous society is best served by encouraging the checks and balances that flow from dual sovereignty.[108]

Without question, twentieth century state courts should have acted much sooner to fulfill their longstanding obligation to protect civil and political rights. When federal decisions gradually required state courts, pursuant to the Fourteenth Amendment, to enforce the Federal Bill of Rights,[109] many state courts felt no need to extend themselves beyond the federal law. Some mistakenly looked to federal law to provide shelter from criticism of unpopular constitutional decisions. Others, to the great dishonor of all state courts, fiercely resisted enforcement of any basic rights of freedom and self-expression. Predictably, abdication or abuse of state court power bred disrespect for state court authority.

As state courts, in some instances belatedly, have returned to their human rights agenda, they need recognition of their renewed competence and reliability as instruments of justice. Justice Brennan's message could not have come at a more opportune time. For the nation's most outstanding protector of civil and political rights to encourage litigants to pursue their claims in state court, under state law, was a much needed boost to state court self-respect. His message was received warmly, not only for its substance, but also for its vote of confidence that state courts would again assume the responsibility for their human rights agenda and would discharge that responsibility

---

[108] See Randall T. Shepard, The Maturing Nature of State Constitution Jurisprudence, 30 Val. U. L. Rev. 421, 436-40 (1996) (arguing that "meaningful differences" exist among states that legitimately can produce different outcomes in state constitutional questions).

[109] See Benton v. Maryland, 395 U.S. 784, 796 (1969) (holding Double Jeopardy Clause of Fifth Amendment applicable to states); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (finding Sixth Amendment right to jury trial applicable to states); Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (holding Sixth Amendment right to a speedy trial applicable to states); Washington v. Texas, 388 U.S. 14, 18-19 (1967) (holding Sixth Amendment right to compulsory process applicable to states); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding Fifth Amendment's privilege against self incrimination applicable to states); Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) (holding Sixth Amendment's right to counsel applicable to states); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (holding fourth Amendment's exclusionary rule applicable to states).

with renewed sensitivity and vigor. Indeed, reading his article may have brought able judges to the state bench who otherwise might have declined to serve.

Greater respect for the integrity of state court undertakings, both procedural and substantive, will enable the state bench to make the sometimes controversial decisions that need to be made. When federal authorities signal their respect for the independence of state institutions, they help state judges and justices exercise their full capacity and authority to enforce both tiers of constitutional protection. In the final analysis, such assurance may prove to be at the heart of Justice Brennan's legacy to us. We are grateful for his vision, and for the opportunity to work to fulfill it.