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The William B. Lockhart Lecture

Getting Away from the Federal Paradigm: Separation of Powers in State Courts

The Honorable Ellen A. Peters*

INTRODUCTION

One of the pleasures afforded to a senior justice, freed from many of the pressing demands of the judicial agenda, is the chance to take a step back and to survey the larger legal landscape in which state courts function. This vantage point has provided me with a welcome opportunity to reflect on the state court system in a personal and impressionistic manner, as a member of the larger legal community and not strictly as a jurist. Having not enjoyed this vantage point for many years, I hope for the reader's indulgence in a fledgling effort to explore new ground.

This is a particularly opportune moment to reflect on the special role of state courts. Jurisprudentially, the United States Supreme Court has signaled a renewed respect for the role of state law in our federal system.¹ Administratively, the

* Senior Justice of the Supreme Court of Connecticut. This Article is an edited and footnoted version of remarks that I had the privilege to deliver on October 15, 1996, as the William B. Lockhart Lecturer at the University of Minnesota Law School. The Lockhart Lecture Series honors former University of Minnesota Law School Dean William B. Lockhart. I am grateful to the Dean and the faculty of the Law School for the invitation to give this lecture. It is a great honor to become associated, in a small way, with the Law School's distinguished former Dean, and to follow in the footsteps of the distinguished speakers, some of them my personal friends, who have preceded me in this lectureship. I want also to acknowledge the fine research and editorial assistance that I have received from my law clerk, Matthew L. Beltramo, J.D. 1996, Yale Law School.

1. The era of the "new federalism" has been proclaimed for over two decades now. See Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 29 (1989) (identifying renewed interest in

Proposed Long Range Plan for the Federal Courts would return many diversity cases to state courts.² Politically, devolution of authority from the federal government to state governments is the order of the day.³

Nonetheless, an exploration of the academic literature indicates that, with some exceptions, leading contemporary scholars focus their attention mainly on the work of the federal courts.⁴ A reader could easily infer that the federal courts alone furnish the appropriate paradigm for any serious, in-

state constitutions). Even so, recent Supreme Court decisions serve to reinforce the limitations on congressional power over the states. *See, e.g.*, *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1133 (1996) (holding that the Eleventh Amendment restricts Congress's power to authorize suits against states pursuant to Article I); *United States v. Lopez*, 115 S. Ct. 1624, 1650-51 (1995) (invalidating the Gun-Free School Zones Act of 1990).

2. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 29-32 (1995) [hereinafter LONG RANGE PLAN]. The Long Range Plan includes 93 specific recommendations aimed predominantly at abating the increase in the federal caseload. *Id.* at 23. In addition to reducing the number of diversity cases currently on the federal docket, these recommendations also include removing to state courts most ERISA, FELA, and maritime cases. *Id.* at 34-35; *see also* Jon O. Newman, *Determining the Proper Allocation of Cases Between Federal and State Courts*, 79 JUDICATURE 6, 6-7, 46 (1995) (advocating a system of discretionary access to federal courts).

3. One of the salient features of the recently enacted welfare reform bill is the appropriation of block grants to the states in order to "increase the flexibility of States" in administering the national welfare program. 42 U.S.C.A § 601(a) (West Supp. 1996).

The dissatisfaction with the federal bureaucracy and the renewed interest in states' rights are themes that have also resonated in presidential politics. So while President William Clinton has officially declared that "[t]he era of big Government is over," *Address Before a Joint Session of Congress on the State of the Union*, 32 WEEKLY COMP. PRES. DOC. 90, 90 (Jan. 23, 1996), his Republican adversary, former Senator Robert Dole, reportedly carries with him a copy of the Tenth Amendment as a token of his own support for states' rights. *See* David Hosansky, *Reshaping the Federal-State Relationship*, 54 CONG. Q. WKLY. REP. 2824, 2824 (1996).

4. Although Justice William J. Brennan's famous article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), has justly been credited with sparking renewed jurisprudential interest in state constitutions, this interest has yet to manifest itself in equalization of the vast disproportions in federal versus state scholarship. *See* ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 1-2 (2d ed. 1993) (noting that lawyers and law schools have largely confined the study of constitutional law to the federal Constitution). The *AALS Directory of Law Teachers 1995-96* is illuminating. It lists more than 10 pages of scholars of constitutional law, but has no listing for state constitutional law. *AALS DIRECTORY OF LAW TEACHERS 1995-96*, at 1045-57 (Association of American Law Schools ed., 1995-1996). Even more tellingly, it lists five pages of scholars whose subject is federal courts, but lists no scholars whose subject is state courts. *Id.* at 1118-22.

formed analysis of the court systems in this country. The academic community seems to regard state courts as minor versions of federal courts, like third cousins once removed. Since state courts concededly dispose of large numbers of cases, vastly more than the federal courts,⁵ the dearth of scholarly commentary suggests that state court decisions are relatively unimportant and merely reflect the work product of under-qualified judges burdened by inadequate resources.

In all candor, state judicial resources are strained almost everywhere.⁶ It would be unduly optimistic to anticipate greater legislative largesse in the near future. The other assumptions of the federal paradigm are, however, no longer true, if ever they were.

State courts, by conservative estimates, conduct ninety-five percent of the judicial business in this country.⁷ From my biased perspective as a former president of the Conference of Chief Justices, they do so effectively and creatively. State courts succeed by drawing on their own heritage, their own constitutions, their own common law, and their own statutes to craft and apply a broad range of jurisprudential principles that often differ substantially from those that govern the federal courts. State courts might, of course, more completely satisfy these serious responsibilities if their work had the benefit of sustained academic input.

An exploration of the independence and strength of the state courts in our federal system could start from any number of vantage points. One would be the renewed commitment by state courts to enforcement of the provisions of state constitutions.⁸

5. In 1993, for example, 35 million cases, including 13 million criminal cases, were filed in state trial courts. See BRIAN J. OSTROM & NEAL B. KAUDER, NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT at viii (1995) (indicating that in 1993 state courts handled 20 million civil and domestic relations cases, 13 million criminal cases, and nearly 2 million criminal cases, as well as 55 million traffic and ordinance violations). At the same time, less than 280,000 cases were filed in federal district courts. LONG RANGE PLAN, *supra* note 2, at 16.

6. This strain often appears even more pronounced when a state court system is compared with its federal counterpart. See Judge Harold Baer, Jr., *A View from Two Courthouses*, N.Y. L.J., June 13, 1996, at 2 (comparing New York trial court with Manhattan federal district court).

7. Cf. OSTROM & KAUDER, *supra* note 5, at 3 (estimating that state courts perform 98% of adjudication).

8. In the area of individual rights, the Supreme Court's more recent interpretations of the protections available under the federal Constitution serve

Another would be the ongoing commitment by state courts to improve their capacity to deal with changing case flow needs.⁹

For now, however, this Article will address a more basic topic: the doctrine of separation of powers. Jurisprudentially, separation of powers represents a view of the body politic that, although not a prerequisite to a republican form of government, is nonetheless fundamental to any discussion of the appropriate ordering of governmental responsibilities, state or federal.¹⁰ Operationally, separation of powers provides doc-

as an invitation to state courts to develop, where appropriate, more expansive rights derived from the provisions of their own constitutions. See Brennan, *supra* note 4, at 502 (positing that decisions based on the federal Constitution are not necessarily dispositive in issues of state law); James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1748 (1992) (explaining that some state constitutions provide more protections than the federal Constitution and that state courts must enforce them); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1259-64 (1978) (indicating that states will increasingly rely on provisions of state constitutions in defining governmental values, but also arguing that state courts should have more leeway to enlarge an underenforced federal constitutional norm); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 444-56 (1996) (discussing "free speech" and "equal protection" analyses based on state constitution free expression and equal privileges and immunities clauses).

9. Budgetary restraints have forced state court judges and administrators from all parts of the country to explore more efficient ways of court management. See ROBERT W. TOBIN, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES* 13-23 (1996) (cataloguing suggestions for improving court management made during the National Interbranch Conference on Funding State Courts, including entrepreneurial management techniques, organizational unification, and geographic reorganization). In some states, legislative initiatives intended to stiffen penalties on repeat offenders have further challenged courts to stretch resources to accommodate a mushrooming caseload. See Laurie D. Zelon, *Three Strikes and We're Out*, L.A. L., Nov. 1995, at 13 (arguing that Los Angeles County practitioners must help courts by lobbying for more trial court funding and additional judgeships, given the overwhelming volume of criminal cases and the anticipated additional burden of the "three strikes" law).

10. For a discussion of the manner in which the Framers conceived of and acted upon separation of powers principles, see Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

In *Calder v. Bull*, the Supreme Court was called upon to decide whether the Connecticut legislature had violated two clauses of the federal Constitution, the clause requiring states to have a republican form of government (Article IV, § 4) and the clause forbidding the states from enacting an ex post facto law (Article I, § 10). 3 U.S. (3 Dall.) 386, 387-89 (1798). At issue was the action of the Connecticut legislature to set aside the judgment of a state probate court and to order a new probate hearing to be held. *Id.* at 386.

Only Justice Chase addressed the first issue specifically. He concluded

trinal guideposts for courts to consider when drawing the line between the role of the judiciary and the role of popularly elected political institutions.¹¹ Politically, separation of powers safeguards the independence of the courts while providing a principled foundation for appropriately defined judicial deference to the views of other community policymakers.¹²

that the vital principles inherent in a republican form of government must be evaluated in the context of a challenge to particular legislation. *Id.* at 388. "An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* Only specifically impermissible acts, such as one punishing a citizen for acts legal when done, or impairing lawful private contracts, fall within the general principles of law that a legislature may not enact. *Id.* The remainder of his opinion focused on the ex post facto issue and found no violation of that constitutional prohibition in the absence of a retroactive change in a law affecting a criminal defendant. *Id.* at 389-91.

In a concurring opinion, while agreeing about the scope of the Ex Post Facto Clause, Justice Iredell also alluded to the fundamental question of whether a legislature rightfully has the authority to overturn judicial decisions. *Id.* at 398. His comments on this score suggest that by 1798 the concept of legislative dominance over the judiciary had already lapsed into anachronism. He wrote:

It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her Legislature.

Id. (emphasis omitted).

With Connecticut as a counterpoint, Justice Iredell moved into a discussion of the proper separation of governmental branches, drawing largely on the country's recent experience with constitution making:

In order . . . to guard against so great an evil [as legislative omnipotence], it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.

Id. at 399 (emphasis omitted). Because of the "delicate and awful nature" of the issue, Justice Iredell did not go so far as to invalidate the Connecticut legislature's authority to superintend its judiciary. *Id.* His opinion, however, serves to underline the emerging centrality of separation of powers principles in American political philosophy in the immediate post-Revolutionary period.

11. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1456-57, 1463 (1995) (invalidating § 27A(b) of Securities Exchange Act of 1934 on grounds that § 27A(b) unduly abrogates judicial power by requiring federal courts to reopen final judgments and is therefore violative of separation of powers principles); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (identifying standing doctrine as a "landmark" to guide federal courts in determining whether they can properly hear a case).

12. See THE FEDERALIST NO. 48, at 333-37 (James Madison) (Jacob E.

An overview of how separation of powers works, as a matter of state law, is a useful lens for bringing into focus a variety of significant differences between the work of the state courts and the work of the federal courts. Three major sources of difference are illustrative:

(1) some state courts have a constitutional history with respect to the separation of powers that differs from that of the federal courts;¹³

(2) many state courts confront, under the general rubric of the separation of powers, legal issues that differ from those encountered in the federal courts;¹⁴ and,

(3) most state courts, in their daily operations, deal with separation of powers in a manner that differs from the operations of the federal courts.¹⁵

I. THE EFFECT OF STATE CONSTITUTIONAL HISTORIES ON THE SEPARATION OF POWERS DOCTRINE

Let me start with differences in constitutional history and heritage. The renewed state court interest in independent construction and application of the provisions of state constitutions has sparked, as one of its salutary by-products, an exploration of the sources of our own home-grown organic documents. Of necessity, my principal point of reference on this topic will be the constitutional history of Connecticut.¹⁶

Cooke ed., 1961) (arguing that the legislative, judicial, and executive branches must have some degree of power over one another in order to preserve their distinct roles).

13. See *infra* Part I (discussing the effect of constitutional history on the separation of powers doctrine).

14. See *infra* Part II (discussing the different legal issues that the separation of powers doctrine raises in state courts).

15. See *infra* Part III (discussing the effect of the separation of powers doctrine on the functioning of the state courts).

16. For a sampling of historical research on other state constitutions, see, for example, PETER J. GALIE, *ORDERED LIBERTY: THE CONSTITUTIONAL HISTORY OF NEW YORK* (1996); John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1119-89 (1995); Jack Nordby, *Thirty-Two Reflections on the Birth, Slumber and Reawakening of the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 245, 251-67 (1994); John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1759-96 (1992); and David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 611-41.

A. CONSTITUTIONAL HISTORY OF CONNECTICUT

Connecticut constitutional history begins with a 1639 document, known as the Fundamental Orders, memorializing the undertaking of three towns along the Connecticut River to "associate and conjoin [themselves] to be as one Public State or Commonwealth" and to describe the laws and rules by which their affairs were to be governed.¹⁷ The Fundamental Orders were supplemented by the Ludlow Code of 1650, which itself contained a detailed Declaration of Human Rights.¹⁸ Inspired by natural law principles and framed in the terms of consensual compacts, these early documents anticipated what, thirty years later, John Locke would come to describe as a social contract.¹⁹ Although largely statutory in form, they were treated, in colonial times, with the respect we accord to constitutional charters. Referring to a time substantially pre-dating the adoption of our federal Constitution, Professor Christopher Collier, the Connecticut state historian, notes that "[t]he [Connecticut] Declaration and supplementary statutes relating to individual rights were . . . viewed as inviolate. Abridgments perpetrated by the government were considered void on their face and courts were to refuse to enforce them."²⁰

Local Connecticut leaders thereafter drafted subsequent governmental charters, each of which was approved, essentially unaltered, by reigning English monarchs.²¹ Connecticut's

17. MARY JEANNE ANDERSON JONES, *THE FUNDAMENTAL ORDERS OF CONNECTICUT* 55-60 (1988).

18. See Henry S. Cohn, *Connecticut Constitutional History: 1636-1776*, 64 CONN. B.J. 330, 336 (1990) (describing the Ludlow Code of Laws).

19. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* §§ 95-122 (Peter Laslett ed., Cambridge University Press 1988) (1690) (arguing that by agreeing to live in a society, a person consents to living by the rules of the majority, and that this consent, or social compact, relinquishing full freedom, is necessary to forming societies); see also Suri Ratnapala, *John Locke's Doctrine of Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 196-220 (1993) (discussing Locke's theory of separation, the historical context of its origin, and its impact on constitutional theory).

20. Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 94 (1982).

21. This includes the Royal Charter of 1662, which, following the political tumult of the Glorious Revolution, was reratified by King William in 1694. See Cohn, *supra* note 18, at 337-43 (discussing the charters from 1660-1698). The 1662 Charter functioned, more or less, like a constitution. It set forth the structure of government, dictated how that government would function, and guaranteed citizens the "liberties and immunities" available in England. See *id.* at 339 (describing the charter).

colonial government had the good fortune never to be burdened by the imposition of either royal governors or royal judges.²² Whatever its other charms, Connecticut's lack of a major sea-port probably accounts for England's benign neglect.

Because of Connecticut's long history of self-governance, the Revolution in 1776 occasioned no dramatic changes.²³ Connecticut simply reenacted its then-existing charter "under the sole authority of the people [of Connecticut], independent of any king or prince whatever."²⁴ The then-governor of Connecticut, Jonathan Trumbull, helped to lead the Revolution and organized Connecticut support for the Declaration of Independence. In due course, Connecticut adopted the novel federal Constitution of 1787 but saw no urgent need for in-state change.

The colonial documents established in Connecticut a form of government in which a General Assembly, selected by and composed of residents of Connecticut, was the repository of all ultimate power, executive, legislative, and judicial.²⁵ Until 1784, the highest court in Connecticut was the General Assembly; thereafter, until 1818, when Connecticut finally adopted a formal constitution, the state's appellate tribunal was the legislature's upper house, led by the governor.²⁶ In form and function, the government of Connecticut mirrored that of the English Parliament. Notably, although Connecticut's early government manifested an immediate and sustained commitment to the protection of individual rights, this political philosophy coincided with the conspicuous absence of any notion of separation of powers.²⁷

22. See Wesley W. Horton, *Connecticut Constitutional History: 1776-1988*, 64 CONN. B.J. 355, 357 (1990) (noting that England essentially ignored Connecticut).

23. See Christopher Collier, *William J. Hammersley, Simeon E. Baldwin, and the Constitutional Revolution of 1897 in Connecticut*, 23 CONN. L. REV. 31, 33 (1990) ("[I]n a conscious assertion of its pre-Revolutionary autonomy, Connecticut continued its government under the Charter of 1662 merely by purging any mention of the King.").

24. See Horton, *supra* note 22, at 357 (quoting the General Assembly of 1776).

25. See Collier, *supra* note 20, at 37 ("Under the Charter [of 1662] and local concepts of natural law, the General Assembly was omnipotent.").

26. See EVERETT C. GOODWIN, *THE MAGISTRACY REDISCOVERED: CONNECTICUT, 1636-1818*, at 85 (1981) (discussing the change in Connecticut law that transferred authority for the law's interpretation and articulated a separation of powers involved in the activity of legal application).

27. Collier notes that "[i]n the period before [the Constitution of] 1818, neither the principle nor the practice of separation of powers played any part in Connecticut government." Collier, *supra* note 20, at 35-36.

It is a treasured part of Connecticut lore that the adoption of the constitution of 1818 resulted in substantial part from *Lung's Case*.²⁸ In 1815, Lung was tried and convicted for the crime of murder in a trial presided over by Zephaniah Swift, a distinguished and learned chief judge of the superior court.²⁹ Swift was reconciled to the possibility that, despite substantial evidence of Lung's guilt, the General Assembly might grant Lung's request for a pardon. But Swift was outraged when the General Assembly decided instead, *sua sponte*, to order a new trial for Lung.³⁰ The General Assembly's action displaced the established appeal route which was then to the legislature's own upper house.

Swift argued, far and wide, that such a legislative power play was intolerable. Jurisprudence in the courts, he said, could not coexist with unconstrained, politically-minded legislators exercising "an absolute and uncontrollable power over all the rights of the people."³¹ Swift was persuasive. The constitution of 1818, for the first time in Connecticut's constitutional history, included provisions formally distinguishing between the separate powers of the three branches of government.³²

Despite this textual breakthrough, the mindset of the past continued to exercise considerable influence for most of the nineteenth century.³³ Scholarly commentaries by Swift³⁴ and Chief Justice Jesse Root³⁵ written around the turn of the century referred freely, and without much distinction, to principles derived from natural law, common law, and statutes as sources of fundamental authority. Even after the adoption of the 1818 constitution, the judiciary continued to defer to legislative policymakers by looking to statutory guidance for the in-

28. *Lung's Case*, 1 Conn. 428 (1815).

29. ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* (1795-1796) is generally regarded as the first textbook on American common law. See GOODWIN, *supra* note 26, at 95 (discussing the development of the separation of powers in Connecticut).

30. See GOODWIN, *supra* note 26, at 112-15 (analyzing Swift's actions in light of the General Assembly's decision).

31. See *id.* at 113 (discussing separation of powers in Connecticut).

32. CONN. CONST. of 1818, art. II.

33. See Collier, *supra* note 20, at 48 ("[E]ven after the constitution of 1818 was in place, the [Connecticut Supreme Court] continued to construe judicial review in natural law terms rather than on constitutional principles.").

34. See *supra* note 29 (discussing Swift's textbook on American common law).

35. Jesse Root, *Introduction* to 1 ROOT'S REPORTS at i-xlvi (Banks Law Publ'g Co. 1899) (1798).

interpretation of constitutional text. Tellingly, in 1831, a Connecticut Supreme Court decision described the new constitution as a limitation on, but not an abrogation of, the plenary authority of the legislature.³⁶

It was only at the end of the century, in 1897, that a Connecticut case held a legislative act unconstitutional because it assigned to the judiciary non-judicial functions and, therefore, violated separation of powers principles.³⁷ Before and after that time, despite repeated allusions to the existence of a power of judicial review of legislative actions, that power has been exercised only rarely.

The Connecticut history with regard to separation of powers stands in marked contrast, therefore, to that of the federal Constitution. The federal Constitution incorporates principles of separation of powers through the creation of separate executive, legislative, and judicial departments³⁸ and concomitant provisions for checks and balances.³⁹ Having anticipated Locke, Connecticut, for a significant period of time, bypassed Montesquieu.⁴⁰

B. CONSTITUTIONAL HISTORY OF OTHER STATES

What about other states? Massachusetts had a different colonial heritage, colored by numerous perceived injustices at

36. *Starr v. Pease*, 8 Conn. 541 (1831). In *Starr*, the Connecticut Supreme Court was called upon to decide whether the legislature, in granting a divorce to the plaintiff, had violated the separation of powers clause of the 1818 constitution. The supreme court, led by Chief Justice David Daggett, himself an opponent of the early nineteenth century constitutional movement, held that it had not. Daggett reasoned that the new constitution was not an enabling document that authorized the legislature to act only in certain, well-defined areas. Rather, the constitution placed limitations on the powers of the legislature as they had existed prior to 1818. So construed, the constitution left the legislature largely free to function as it had in the past, constrained only by explicit textual limitations. See Horton, *supra* note 22, at 361-62 (examining the role of the legislature under Connecticut's constitutional separation of powers in light of *Starr v. Pease*).

37. *Appeal of Norwalk St. Ry. Co.*, 37 A. 1080, 1089 (Conn. 1897) (holding it unconstitutional to vest power in the judiciary to approve of location of trolley lines).

38. See U.S. CONST. art. I (executive); *id.* art. II (legislative); *id.* art. III (judicial).

39. See, e.g., *id.* art. I, § 3, cl. 6 (congressional power to try all impeachments); *id.* art. I, § 7, cl. 2 (presidential veto); *id.* art. II, § 2, cl. 2 (senatorial advice and consent required for treaties and appointments).

40. CHARLES MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., David Wallace Carrithers ed., 1977).

the hands of various royal mandates.⁴¹ Not surprisingly, revolutionary political leaders drafting the Massachusetts Constitution of 1780 provided expressly for the separation of powers.⁴² Other states, including Maryland,⁴³ New Hampshire,⁴⁴ North Carolina,⁴⁵ and Virginia,⁴⁶ did likewise. As other states joined the union, they too followed the path charted by these early states. When Minnesota achieved statehood in 1858, its constitution incorporated particularly strong separation of powers provisions.⁴⁷

These diverse histories demonstrate that even though state constitutional provisions may textually resemble those found in the federal Constitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts. Far from being arbitrary departures from a superior federal model, these interpretations have the legitimacy of differences rooted in the past and adaptable for the future.

41. For example, in a petition supporting the concept of popularly elected county officials, Reverend Thomas Allen of Pittsfield, Massachusetts reminded his countrymen that:

We have been ruled in this Country for many years past with a rod of Iron. The Tyranny, Despotism & oppression of our fellow Subjects in this Country have been beyond belief. . . . We find ourselves in Danger of [returning] to our former state & of undergoing a Yoke of Op[pression] which we are no longer able to bear.

Reverend Thomas Allen, *Petition of Pittsfield, December 26, 1775*, in *MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780*, at 18 (Robert J. Taylor ed., 1961).

42. MASS. CONST. of 1780, Part the First, art. XXX.

43. MD. CONST. of 1776, Declaration of Rights, art. 8.

44. N.H. CONST. of 1784, pt. 1, art. 37.

45. N.C. CONST. of 1776, Declaration of Rights, § 4.

46. VA. CONST. of 1788, art. 1, § 5. Thomas Jefferson observed that a major defect in the 1781 version of the Virginia state constitution was that it permitted concentration of power in the legislative branch. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 120 (William Peden ed., 1954) (advocating that the powers of government be divided and balanced among several bodies).

47. See, e.g., MINN. CONST. art. III, § 1 ("The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.").

II. THE LEGAL EFFECT OF SEPARATION OF POWERS IN STATE COURTS

For many state courts, the legal issues that the separation of powers doctrine raises differ from those encountered in the federal courts. These issues tend to involve areas of tension between legislative and judicial authority, and have only rarely, if at all, concerned limitations on the non-budgetary authority of the executive branch. Additionally, even within the separation of legislative and judicial powers, state courts, for structural as well as textual reasons, have dealt with many issues that have no federal counterpart.

As a structural matter, one of the flash points of conflict for state courts has been the question of who determines the rules of judicial procedure. This is not an open question in the federal system, in which that authority unambiguously belongs to Congress,⁴⁸ although it has been delegated to the Supreme Court.⁴⁹ In Connecticut,⁵⁰ however, as in Minnesota,⁵¹ hegemony

48. See *Mistretta v. United States*, 488 U.S. 361, 387 (1989) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . .") (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941)).

49. See 28 U.S.C. § 2071 (1994) (delegating authority to federal courts to prescribe rules of conduct); *id.* § 2072 (delegating authority to the Supreme Court to prescribe rules of practice, procedure, and evidence).

50. The Connecticut Supreme Court addressed this issue in *State v. Clemente*, 353 A.2d 723, 727-28 (Conn. 1974). There, we held that an act requiring trial courts to order disclosure of a prosecution witness's statements infringed on the inherent power of the Connecticut Supreme Court to control discovery and therefore violated the separation of powers principles of the Connecticut Constitution. Twenty years later, however, we upheld the constitutionality of a statute that permitted counsel, during closing arguments, to suggest an appropriate monetary recovery. *Bartholomew v. Schweizer*, 587 A.2d 1014 (Conn. 1991). In *Bartholomew*, we observed that, at least with respect to the control over oral argument, judicial and legislative authority may properly coexist. See *id.* at 1018 (noting that the "court's authority [is not] exclusive of concurrent legislative authority"). Later Connecticut Supreme Court opinions have construed *Bartholomew* to have overruled, or at least undermined, the validity of the holding in *Clemente*. See, e.g., *State v. Diaz*, 628 A.2d 567, 590 (Conn. 1993) (Berdon, J., dissenting) ("*Clemente*, however, was finally put to rest by our decision in *Bartholomew* . . ."). For a pre-*Bartholomew* discussion of this issue, see Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975) (focusing on the allocation of power between the legislature and judicial branches under the constitutional law of Connecticut as pronounced in *State v. Clemente*).

51. See Maynard E. Pirsig & Randall M. Tietjen, *Court Procedure and the Separation of Powers in Minnesota*, 15 WM. MITCHELL L. REV. 141 (1989) (discussing the constitutional dimensions of rule-making authority in Minnesota).

over court procedures has long been a troublesome issue. The issue may arise with respect to specific legislation purporting directly to regulate some aspect of the conduct of trials.⁵² Alternatively, it may arise with respect to legislation, such as a mandatory open meeting law, that is general in form but that, in its application, may interfere with judicial proceedings such as settlement conferences or rules committee conferences.⁵³ Despite best efforts to minimize such points of conflict, state courts recurrently have had to resist legislative acts that seriously intrude into judicial authority over such judicial agendas.

A. EFFECT ON STATUTORY CONSTRUCTION

Structural considerations do not invariably point to conflict. Consider, for example, the role of courts in statutory construction. Most state court judges, like most federal judges, take a mainstream view of statutory construction. Contrary to the views of Justice Antonin Scalia,⁵⁴ state court judges construe statutes by assessing not only the statutory text but also the policy that the legislature has sought to implement.

In undertaking to interpret statutory text and to implement statutory policies, however, the state courts differ from the federal courts in an important respect. State courts have the opportunity to consider not only the entire body of statutory enactments but also the large reservoir of common law principles that continue to fall exclusively within the judicial domain. The

52. See *Bartholomew*, 587 A.2d at 1018 (allowing coexistence of the regulation of oral argument between judicial and legislative branches).

53. See *Rules Committee v. Freedom of Info. Comm'n*, 472 A.2d 9, 15 (Conn. 1984) (holding that a rule-making committee meeting is not an "administrative hearing" for purposes of Connecticut Freedom of Information Act); see also Margaret S. DeWind, Note, *The Wisconsin Supreme Court Lets the Sun Shine In: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 830 (discussing privacy as a shield from "electoral retribution" for Wisconsin politicians); Note, *What Constitutes a Meeting Under the Minnesota Open Meeting Law?*, 11 WM. MITCHELL L. REV. 251, 265 (1985) (discussing privacy as a shield from electoral retribution for Minnesota politicians).

54. For a critique of Justice Scalia's approach to statutory construction, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 262-69 (1990). For a slightly different view of Justice Scalia's jurisprudence, see Bradley C. Karkkainen, "Plain Meaning": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 402 (1994) (arguing that Scalia's new textualism is neither "new" nor strictly "textualist").

federal courts, by contrast, can draw on very little by way of federal common law to assist them in statutory construction.⁵⁵

Access to common law principles is a two-way street for state courts. On one hand, common law constructs are a ready source of context and definition to flesh out ambiguities in statutory language. On the other hand, statutorily defined policies can have a spill-over impact on common law doctrines.

Historically, state courts have taken the position that, in case of conflict between legislation and the common law, it is the legislation that should be restricted in its impact, principally through narrow construction of the statute.⁵⁶ More recently, though, state courts have entertained the possibility that there are cases in which, in response to far-reaching legislative policy decisions, it is the common law that should be modified.⁵⁷

B. SPECIFIC APPLICATIONS

A recent Connecticut example of such common law adaptation arose in the context of legislation that altered the jurisdictional ground rules for child support but not for alimony.⁵⁸ We recognized that family dissolution cases would often raise both of these issues, and that, practically speaking, they would often be closely intertwined. We therefore modified our common law rules for alimony to conform to the statutory rules for support.⁵⁹

55. See *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (holding that federal courts, unlike state courts, "do not possess a general power to develop and apply their own rules of decision"). For a dialogue on the legitimacy of federal common law, compare Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) and *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989), with Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989) (debating the federal judiciary's ability to promulgate rules of federal common law).

56. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 4 n.15 (1982) (discussing the changes and problems associated with the American legal system's movement from the common law to a statute-based system).

57. See *id.* at 5 ("[U]nlike earlier codifications of law, which were so general that common law courts could continue to act pretty much as they always had, the new breed of statutes were specific, detailed, and 'well drafted'"); see also Ellen A. Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 1005-06 (1982) (discussing the appropriate boundaries in which to consider statutes).

58. *Fahy v. Fahy*, 630 A.2d 1328 (Conn. 1993).

59. *Id.* at 1333.

In reaching this result, we were, perhaps unconsciously, echoing the historical deference of Connecticut courts to legislative authority. From another point of view, however, we were turning separation of powers on its head. Instead of emphasizing separate judicial and legislative magistracies, we were using our authority over the common law to find an accommodation between the two branches. There is no readily discernible parallel in the federal courts to the capacity of state courts to craft a legal landscape that encompasses and harmonizes statutory and common law principles.

In addition, specific textual provisions that may or may not co-exist in federal and state constitutions may require unique state applications of the separation of powers doctrine. For example, in Minnesota,⁶⁰ as under federal law,⁶¹ specific legislative authority to decide the eligibility of members of the legislature arguably casts doubt on the jurisdiction of a court to intervene.⁶² Some state constitutional provisions leave little room for doubt on that score, however. For example, Connecticut has adopted a constitutional amendment requiring a balanced budget.⁶³ The test for determining whether a budget is balanced requires the legislature to analyze the budget's component parts in accordance with definitions that the amendment expressly directed

60. The Minnesota Constitution provides: "Each house shall be the judge of the election returns and eligibility of its own members." MINN. CONST. art. IV, § 6.

61. The Constitution provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . ." U.S. CONST. art. I, § 5, cl. 1. *But see* *Powell v. McCormack*, 395 U.S. 486, 514 (1969) (holding that determining whether the House of Representatives has comported with constitutional directives in declaring a candidate ineligible is not a nonjusticiable political question).

62. For a telling example of the exercise of judicial restraint in a legislative eligibility dispute, see *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979). In that case, voters asked the Minnesota Supreme Court to decide the legitimacy of a state congressional election where one candidate allegedly made knowing misstatements about the other in campaign brochures. *Id.* at 844-46. The *Scheibel* court began by acknowledging that pursuant to the Minnesota Constitution, the legislature has unrivaled authority to determine the eligibility of its members. *Id.* at 847. The court held, therefore, that the judiciary would be beyond the bounds of its constitutional powers by ruling on the merits of the case. *Id.* at 848. The court went on, however, to recognize the "unique necessities of the case," including the legislature's reliance on the court. *Id.* at 851. In light of these necessities, the court felt compelled to issue an advisory opinion to guide the legislature's resolution of the dispute. *Id.* at 851-53.

63. CONN. CONST. art. III, § 18.

the legislature to enact by supermajority.⁶⁴ Perhaps predictably, the legislature has been unable to agree by the requisite majority so far. Disappointed voters asked the court to fill in the blanks, but we held that we lacked jurisdiction to do so.⁶⁵ In similar circumstances, most state courts would undoubtedly conclude likewise.

C. EFFECT ON DEFINING CONSTITUTIONAL PROVISIONS

Apart from questions of jurisdiction, policy implications derived from the separation of powers doctrine may shape the form of judicial intervention even in cases where state courts indubitably have authority to act on the merits. State courts regularly are called upon to enforce state constitutional obligations⁶⁶ that, for sound reasons of federalism, federal courts have declined to enforce. Because these state constitutional rights impose affirmative obligations on the state, they differ from federal civil rights guarantees, in kind as well as in text.

In construing and applying these uniquely state-centered constitutional provisions, state courts have a dual assignment. They must not only define the scope of the affirmative state constitutional obligation at stake, but they must also determine whether the state has fulfilled its constitutional duty. Defining the constitutional right is the quintessential judicial obligation, but at least initially, elected officials, rather than judges, can better determine the precise contours of the appropriate policy response.

The exercise of such judicial restraint illustrates the close fit between the principles of separation of powers and the prudential ideals identified many years ago by Professor Alexander M. Bickel.⁶⁷ Furthermore, as Professor Lawrence G. Sager

64. *Id.* art. III, § 18(b).

65. *Nielsen v. State*, 670 A.2d 1288, 1293 (Conn. 1996).

66. Examples of such state constitutional obligations include the right to a public education and the right to public welfare. *See, e.g.*, MINN. CONST. art. XIII, § 1 (placing a duty on the Minnesota legislature to maintain an effective public school system throughout the state); N.Y. CONST. art. XVII, § 1 (placing on the New York legislature an affirmative duty to provide social welfare services), *construed in Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977).

67. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (discussing judicial review and the proper role of the judiciary in the federal government). For a treatment of Bickel and his prudentialist approach to jurisprudence, see CALABRESI, *supra* note 56, at 16-30 (citing Bickel as a primary source of the adjudicatory theory of selective inaction) and Anthony T. Kronman, *Alexander Bickel's Philosophy*,

has recently observed, such restraint exemplifies a practice of what he describes as desirable judicial underenforcement of constitutional norms.⁶⁸ In his words, selective judicial underenforcement supports "the substantial virtues of ongoing popular participation in the process by which we aspire to identify and achieve the elements of a just politics."⁶⁹ Courts are not well positioned to enforce affirmative constitutional obligations. It makes judicial as well as political sense and comports with the values represented by the doctrine of separation of powers for courts to enlist the creative talents of the legislative and executive branches of government.⁷⁰ Given space and time within which to respond, political actors are more able than judges to identify remedial social strategies and social programs that will be politically acceptable and that will enforce the judicial mandate for the long term.

The soundness of these jurisprudential observations is borne out by judicial experience. Like the Minnesota Supreme Court in *Skeen v. State*,⁷¹ Connecticut courts have traveled this road in cases dealing with state constitutional challenges to inequalities in public school educational opportunities. Without knowing what the popular reaction was to *Skeen*, I am nonetheless mindful of the reaction to *Sheff v. O'Neill*,⁷² in which the Connecticut Supreme Court recently held that the Hartford public schools were operating unconstitutionally as a result of de facto racial segregation.⁷³ Controversial as that conclusion was, the court was able, in substantial part, to defuse resistance by expressly deferring to political decisionmaking for the negotiation and prescription of a remedial implementation plan.⁷⁴

As these examples illustrate, there are reasonably well-defined jurisprudential principles, manifested principally in state appellate court opinions, that govern the relationship between the three branches of government as a matter of state law.

94 YALE L.J. 1567 (1985) (asserting that Bickel held to a political and judicial philosophy based on prudence throughout his career).

68. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 421 (1993).

69. *Id.* at 417-18.

70. *See id.* at 421 (noting that while "claims of political justice have a constitutional core, their satisfaction requires a welter of social decisions that belong to the institutions of popular politics" and not to the judiciary).

71. 505 N.W.2d 299 (Minn. 1993).

72. 678 A.2d 1267 (Conn. 1996).

73. *Id.* at 1289.

74. *Id.* at 1290-91.

III. THE FUNCTIONAL EFFECT OF SEPARATION OF POWERS IN STATE COURTS

The third and final point that deserves attention is the extent to which, as a matter of practice, these principles of separation of powers affect the day-to-day functioning of state courts. More particularly, what role do these principles play in the daily operations of judicial administrators and staff? What role do they play in the trenches, in the work of the trial courts?

A. SPECIFIC EXAMPLES

Separation of powers manifests itself in daily judicial administration through budgetary mandates jointly imposed by the governor and the legislature. Although judicial independence would be enhanced by appropriation of a lump sum rather than by a line-item budget, in Connecticut that battle remains to be won.⁷⁵

Separation of powers also manifests itself in the limited role that judges play in the appointment of new members of the judiciary. In Connecticut, although the governor nominates from a list furnished by a judicial selection commission,⁷⁶ the nomination is subject to legislative inquiry and approval.⁷⁷ No judicial officer participates in any part of this process in any official fashion.

Finally, separation of powers is manifested in the doctrinal principle that courts should not give advisory opinions. Until an actual case or controversy is presented for resolution, most⁷⁸ state courts decline to exercise jurisdiction.

B. STATE TRIAL COURTS

Thus, structurally and doctrinally, state law with respect to separation of powers does not differ conspicuously from federal law. The picture becomes very different, however, when observing state trial courts in action. Operationally, at least in Connecticut, separation of powers is largely irrelevant to much

75. CONN. GEN. STAT. §§ 4-60 to -107a (1994).

76. *Id.* § 51-44a(h).

77. *Id.* §§ 2-40 to -42.

78. For examples of state constitutions that give their courts constitutional authority to give advisory opinions, see MASS. CONST. pt. 2, ch. 3, art. II; N.H. CONST. pt. 2, art. 74; and R.I. CONST. art. 10, § 3.

of the work of trial court judges and administrators. The governing principle is not separation but networking.

Let me cite a few examples that will be familiar to any observer of judicial administrative responsibilities on the state level. Whatever the propriety of formal advisory opinions on pending legislation, state judicial administrators keep track of pending bills in the state legislature. Deploying its administrative staff, the judiciary may influence the language, content, and effect of pending legislation to minimize the risk of future points of conflict. Judicial staff can also provide information about the likely impact of legislative initiatives on the judiciary. In Connecticut as in Minnesota, advance notice of pending legislation affords the judiciary the opportunity to exercise its rule-making authority and amend judicial rules to conform to forthcoming legislative policy initiatives.⁷⁹ Federal courts apparently have much more limited opportunities to participate in institutional interventions that emphasize collegial exchanges rather than separation of powers.

The divergence between federal and state courts is even more pronounced when one examines the myriad quasi-judicial functions performed by modern state trial courts. Classically, the judicial magistracy takes as its model the robed judge, sitting on a bench, hearing evidence, and deciding the merits of a case or instructing a jury on how to decide the merits. On any given day in Connecticut, according to the best available estimate, the work of no more than twenty percent of our trial judges fits this classic model. The remaining eighty percent is engaged in judicial work that is essential to the service of justice but looks very different from deciding cases in plenary fashion from the bench.

Federal courts, like state courts, frequently engage in various forms of alternative dispute resolution.⁸⁰ In this respect, state and federal courts are alike. Unlike federal courts, however, state courts also administer social services agendas that transcend classic judicial responsibilities. Some examples from Connecticut illustrate this point.

79. See CONN. GEN. STAT. § 51-15a (requiring annual consultation between the supreme court rules committee and the legislative judiciary committee).

80. See Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1994) (recognizing arbitration as a form of dispute resolution and discussing proper arbitration procedure).

In family court, judicial officers engage the services of mental health professionals to protect children and help dysfunctional families defuse their anger.⁸¹ A statewide family docket brings together a variety of specialists to assist the judge in providing guidance to divorcing parties so they can work out a lasting solution to their personal difficulties. Elsewhere within the state, family court judges order parents struggling through divorce to attend parenting classes,⁸² and they go and they benefit. The subject matter of such judicial interventions bears little resemblance to the mainstream judicial agenda of even the recent past.

In a special drug court recently opened in New Haven, the judge has the responsibility of identifying nonviolent offenders who will benefit from a program combining corrective supervision by the court with therapeutic treatment for drug addiction.⁸³ The treatment part of the program includes residential and outpatient placements, linkage to community support services, and assistance with educational or employment issues. The personnel providing the actual services are retained by the judicial branch on a contract basis; they are not state employees, but they are accountable to state employees. The criminal defendant remains accountable to the judge at all times. Again, judicial involvement to this degree in matters that relate as much to rehabilitation as to punishment describes a new role for the judiciary.

In our victims' rights program, judicial staff advise victims of their rights and provide funds to offset their losses.⁸⁴ Although this program is not staffed by judges, it involves judicial administrators in an assignment that more closely resembles the work of an executive branch agency than traditional judicial branch responsibilities.

In undertaking these programs as part of the judicial social service agenda, judges and judicial staff fill roles that historically would have been performed by private groups or other branches of government. These roles have come to the judiciary more by way of default than by design. The judicial engagement

81. See CONN. GEN. STAT. § 46b-38c (authorizing a cooperative effort between the judicial branch and the state's attorney's office to create a family violence response unit).

82. *Id.* § 46b-69b.

83. See 1995 Conn. Acts 131 (Reg. Sess.) (initiating the drug court program).

84. CONN. GEN. STAT. ANN. § 54-209 (West Supp. 1996).

usually results from intensive consultation and negotiation with the executive and legislative branches. Whatever the relevant pros and cons of judicial participation, concern for separation of powers has not been high on anyone's list.

CONCLUSION

My closing question is this: Is this functional blurring of the lines of executive, legislative, and judicial power a matter for applause or for concern? Are we moving back toward the parliamentary practices of colonial Connecticut? Should we do so? Separation of powers is rooted in very important democratic values. If the judiciary is even indirectly involved in the drafting of legislation, will it retain its independence to resolve constitutional challenges to the validity of such legislation? Perhaps more importantly, does such a role risk undermining the appearance of judicial impartiality and independence? If a judge embraces the role of a participant in the provision of social services, will the judge continue vigilantly to protect the individual rights of the litigants and to act conscientiously on their claims of innocence in the face of their need for therapy? Again, even more importantly, will the judge risk being perceived as having a personal stake or psychological investment in the outcome, so as to cause litigants or the general public to doubt the judge's impartiality? Finally, in a judicial world in which accommodation with political actors has many visible rewards for the judiciary, do we risk creating a judicial climate, or risk being perceived as having created a judicial climate, in which the voices of politically unrepresented minorities do not get a fair hearing?

One way to approach these questions is to recast them in the terms advanced by Professor Harry H. Wellington. In *Interpreting the Constitution*, Professor Wellington ventured the opinion that "law made by judges must in the end be politically digestible."⁸⁵ Political digestibility is a particularly urgent aspiration for state courts, many of whose judges are elected, and few of whose judges have lifetime tenure.

What counsel does the notion of political digestibility provide? Rigorous insistence on absolute separation of powers is indigestible; rigid lines of demarcation cannot be reconciled with the operational interdependence of the three branches of

85. HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 19 (1990).

government that marks the modern state. However, widespread abandonment of the political wisdom underlying the separation of powers should also give us pause. The absence of meaningful limitations on the power of any one branch of government, even in only some parts of its governmental operations, may also prove to be indigestible in the long run. It is appropriate to wonder whether unchecked governmental power anywhere, no matter how well intentioned and how expedient, can provide enduring assurance of the full protection of individual and civil rights that is basic to a democracy.

What guideposts should courts consider, and what multi-factor analyses should courts invoke to decide where to locate the proper midpoint between these unacceptable extremes? How can we make sure that the calls for efficiency in moving state court dockets and for constructive partnerships with the other branches of state government do not seduce us away from the bedrock principle of providing justice for all? These are serious matters for every serious student of American courts. We in the state courts urgently need the assistance of the academy to clarify these issues and explore possible resolutions. If there were easy answers, someone would have already found them.