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Paul M. Bator

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THE STATE COURTS AND FEDERAL CONSTITUTIONAL LITIGATION

PAUL M. BATOR*

I.

I am honored to participate in this symposium, and particularly pleased to do so in this remarkable place. In Williamsburg the sense of history merges creatively with the contemporary in the important work of teaching, research, and law reform carried on at the Marshall-Wythe School of Law at William and Mary and at the National Center for State Courts.

We are gathered here to discuss "State Courts and Federalism in the 1980's." The subject I wish to consider is the role of the state courts in the elaboration of *federal* constitutional law and the enforcement of *federal* constitutional principles. I lay stress on the word "federal" to emphasize that my subject, and my perspective, diverge sharply from the discussions which have recently focused on the possible use of *state* constitutional provisions to guarantee rights which the United States Supreme Court has found not to be contained in the Federal Constitution.¹ My focus is on state courts

* Professor of Law, Harvard University. A.B., Princeton University; M.A., LL.B., Harvard University.

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1. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). It is an important feature of these discussions that, if a state court finds that its state constitution extends greater protection to its citizens against state action than does the Federal Constitution, the state court judgment is normally immune from Supreme Court review because it rests on an independent and adequate state-law ground. (I say "normally" because there are some cases in which a substantial and independent federal question can be raised with respect to the validity of the protection-extending decision of the state court. See, e.g., *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980). Usually, however, such a state court holding—for instance, a holding that the state constitution, unlike the federal, *absolutely* prohibits the state from imposing the death penalty—would not be subject to Supreme Court review.) Those who regard the current Supreme Court as too grudging in its protection of individual rights thus see the state courts as constituting an alternative forum for vindicating such rights, a forum which, in this context, has the great advantage of not being subject to Supreme Court supervision. See, e.g., Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at

as pronouncers of federal constitutional law—a role in which they are of course subject to Supreme Court review. The question I seek to raise is this: why do the state courts have a role here at all? Why should we look to the state courts to continue to participate in the enterprise of defining and enforcing federal constitutional principles?

You may consider these questions to be naive and even a bit peculiar. The participation of the state courts in the formulation and application of federal constitutional principles is, after all, the explicit premise of the supremacy clause,² and has been deeply engrained in our institutional structures since the beginning.³ Its legitimacy and desirability are buttressed by an enormous tradition of federalistic rhetoric, running in an unbroken line from the *Federalist Papers*⁴ down to today's Supreme Court opinions.⁵ We might use as the signature phrase of this rhetorical tradition the ubiquitously quoted lines of the first Justice Harlan in *Robb v. Connolly*: "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States"⁶

31.

I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply "available" to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory. And I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court. See, for an example of a not at all subtle invitation of this sort, *Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." U.S. CONST. art. VI, cl. 2.

3. It is a commonplace known to every student of federal jurisdiction that from the very first judiciary act until today the state courts have had either exclusive or concurrent original jurisdiction over an enormous body of federal-question litigation. See generally BATOR, MISHKIN, SHAPIRO & WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. VII, sec. 2 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER and HART & WECHSLER 1981 SUPP., respectively], for the statutory and case materials showing the gradual development of the lower federal courts' federal-question jurisdiction, a development which did not even begin seriously until 1875.

4. See THE FEDERALIST No. 82 (Hamilton).

5. See, e.g., *Allen v. McCurry*, 101 S. Ct. 411, 419-20 (1980).

6. 111 U.S. 624, 637 (1884).

But is this true? I do mean to raise the question in the most deliberately naive way I can. I want to do so because there is another rhetorical tradition, running directly to the contrary. It asserts that, since the adoption of the Civil War amendments and the post-War civil rights and jurisdictional statutes, the task of formulating and enforcing federal constitutional principles should in increasing measure be regarded as the task of the federal, rather than the state, courts. The federal courts are to be preferred because, we are told, federal judges are more competent and expert in adjudicating issues of federal law; are more independent in resisting popular and political pressures; and are likely, through institutional perspective, to be more sensitive to claims of federal right and more zealous and even conscientious in upholding them against assertions of state power, than are state judges.⁷ The signature phrase of this rhetorical tradition is the line from Frankfurter and Landis' classic work, *The Business of the Supreme Court*, characterizing the lower federal courts as "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."⁸ Its logical culmination was best expressed, however, in a remark I once heard from my distinguished colleague, Charles Alan Wright: federal courts should adjudicate issues of federal law; state courts should adjudicate issues of state law.⁹

And, indeed, why not? The argument that parity is a myth,¹⁰ that the federal courts are a preferable forum for vindicating federal constitutional interests, surely cannot be dismissed as insubstantial. Why should we bother to resist it? Why should we continue to try to tailor our jurisdictional rules so as to preserve a role for the state courts in federal constitutional litigation? Why should we continue to have exhaustion rules and forfeiture rules and equi-

7. In recent years the most forceful articulator of the rhetorical tradition I refer to has been Justice Brennan, particularly in his opinions (both for the Court and in dissent) on the scope of habeas corpus and on the proper limits of the *Younger* doctrine. The best summary of the functional arguments in favor of federal-court superiority is Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

8. FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1927).

9. I should emphasize that the context of the remark was a discussion of federal diversity jurisdiction; its thrust was therefore that federal courts should get out of the business of adjudicating cases arising under state law, rather than the converse.

10. The phrase comes from the title of Professor Neuborne's article, *supra* note 7.

table restraint rules and *res judicata* rules, whose cumulative purpose is to channel the adjudication of federal questions into the state courts? There are, of course, the conventional arguments for federalism, the arguments about the benefits of dispersing powers and of having multiple laboratories of social experimentation. But the applicability of these "decentralization" arguments to our question—the proper role of state judges in deciding issues of *federal* law—seems, at least at first glance, doubtful. These arguments may tell us that some matters should be subject to state, rather than federal, regulation and therefore governed by state, rather than federal, law; but they do not in any obvious way tell us that, once we have decided that an issue is to be governed by federal law, the task of pronouncing it should be assigned to the state courts.

And, anyway, there remains the naive question: are these arguments valid?

II.

I want to start my analysis by persuading you that it is critically misleading to think about our question in the abstract, apart from its setting in specific contexts of institutional design. Most arguments comparing federal and state courts as forums for litigating federal constitutional issues seem to focus on whether a plaintiff with a federal claim should be allowed to take it to a federal court or be forced to go to state court. In that context, once it is established that the federal court may, on balance, do a better job, the argument that a plaintiff should be free to choose the federal forum seems especially powerful.¹¹

11. Indeed, an alternative form of the argument in this context asserts that we needn't decide whether the "better" forum is the federal or state court; if the plaintiff is allowed to choose, the two court systems will "compete" in offering juster justice and the resulting "market" will determine which is "better."

Note that there are some problems even within the structure of this argument. Why should it be the *plaintiff's* choice which is decisive? What about the preference of the *defendant*? (The latter preference would be honored if we allowed the defendant to remove cases from state to federal and from federal to state court. On the other hand, if we wanted to honor consumers' preferences and were prepared to treat plaintiffs and defendants equally, some kind of auction system would have to be devised.) The argument simply assumes that the forum the plaintiff is likely to choose—that is, the more pro-plaintiff forum—is also the "preferable" forum from some neutral or "constitutional" perspective. It is

But that is not the only, not even the typical, context. Many of the federal claims we are concerned with are claims that the Constitution prohibits or limits the exercise of official state power. And the great, the insuperable difficulty is that the institution asked to enforce state law and state policy will often be the state court. The criminal law is of course the paradigm example: criminal sanctions imposed by state law will not—may not—be effectuated without resort to a court to render judgment. But the point is wider: when the state government seeks to tax or to regulate, to prohibit or to require, it will frequently find it desirable to go to court to do so. Indeed, if coercion is involved, it usually must do so. For we should remember that the use of courts, including state courts, as enforcement tools is a benign, not a malign, aspect of our legal system—one that is probably required by the Federal Constitution itself. It exemplifies the principle that, at least when the government seeks to coerce the citizen, judicial process is part of due process.¹²

But note that, for our question, the use of state courts as tools of enforcement is a source of critical complications. For the federal claim must now be that the Constitution forbids or limits the application of official power being asserted or about to be asserted *in a state court*. The question is not whether a plaintiff should be directed into a state or federal court; we have a defendant or prospective defendant on our hands, in a state proceeding which will happen in any event unless we do something about it. The federal claim is, in turn, logically relevant to and potentially decisive of the outcome of that state court action: the argument will be that the state court may not convict me, or admit this evidence against me,¹³ or order me to comply with this regulation or pay this tax,

based, I believe, on the premise that in these cases the plaintiff represents "the Constitution" in a sense that the defendant doesn't. I discuss that premise later in this paper. See pp. 632-33 *infra*.

12. I say "at least" because the constitutional right to judicial review may extend beyond cases of government coercion. See generally HART & WECHSLER 330-60; and see the materials in BREYER & STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 891-921 (1979).

13. A federal claim of this sort (for example, that evidence cannot be admitted) presents a somewhat special case because, even if upheld, it does not necessarily end the state court enforcement proceeding. For purposes of this essay, however, such a "partial" federal defense presents no special analytical problems and thus can be assimilated to "complete" federal defenses. When I refer, therefore, to federal defenses which would have the effect of "aborting" the state enforcement proceeding, I mean to include the case where the proceed-

because the Federal Constitution prohibits it. The state court cannot decide the case and authorize enforcement *without* considering the federal claim, unless of course we are prepared to repeal the supremacy clause and overrule *Marbury v. Madison*.¹⁴

Now, then, what are we to do if we decide that, because of their superior competence or other reasons, we want federal rather than state courts to adjudicate this federal claim? I submit that we have only three ways to "enact" such a decision: (1) We can remove the entire enforcement proceeding to federal court. (2) We can allow the entire proceeding, including the federal claim, to be adjudicated in the state court, and then allow the federal issue to be re-litigated in a collateral federal proceeding. (3) Finally, we can carve out the federal defense and try it separately in a federal court, presumably in an injunctive or declaratory proceeding, with the effect of aborting the enforcement proceeding if the federal claim is sustained.¹⁵

Each of these devices is, of course, in current use in some cases. But what I wish to stress here is that the issues of comparative competence must at least in part be addressed in the institutional context of these devices.¹⁶ The question is not, *tout court*, whether

ing would be affected but not necessarily ended if the federal claim is upheld.

14. 5 U.S. (1 Cranch) 137 (1803). The point was clearly perceived by Justice Story in his famous opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-42 (1816), in which he pointed out that it is inevitable that many contentions based on federal law would come up by way of defense or replication in cases arising purely under state law.

15. One can conceive of a variety of "mixed" cases and of shifts in nomenclature. For instance, a defendant could be permitted to "remove," not the entire case, but merely the federal defense, for separate trial in the federal court. But this would be the functional equivalent of a separate injunctive or declaratory action, and thus does not require separate analytical treatment. My submission is that, analytically, these are the three major modes through which a federal court could address a federal question relevant by way of defense to a state court enforcement proceeding.

Another point should be made for analytical clarity. There are federal constitutional claims whose very content is that a state enforcement court has exercised power in a manner inconsistent with the Federal Constitution. A paradigm example would be the federal constitutional right, recognized in *Jackson v. Virginia*, 443 U.S. 307 (1979), not to be convicted in a state criminal proceeding unless the evidence supports a finding of guilt beyond a reasonable doubt. Here we have a federal constitutional question which cannot be "carved out" of the state enforcement proceeding; it is a question with respect to that very proceeding. If it is to be addressed by a federal court, it must be addressed either on appeal or by way of collateral attack.

16. I am of course not asserting that the question of comparative competence arises only in the context of these devices. There are enormous and important categories of cases where

federal and state courts stand in parity. The question is whether a preference for the federal forum justifies removing to federal court all state court enforcement proceedings in which a federal question is raised; or justifies relitigating all federal questions already adjudicated in the state courts; or justifies separate federal litigation of all federal defenses in injunctive or declaratory actions in the face of pending or impending state court enforcement proceedings.¹⁷

III.

It is my submission that the question whether there is any basis for resisting claims in favor of a federal forum takes on a new aspect when considered in the context of these institutional devices. Let us glance briefly at each of them.

A.

Removal need not detain us long. The notion that all state criminal and civil enforcement proceedings should be automatically removable whenever a federal constitutional claim is raised by way of defense strikes me as obviously unacceptable, a classical cage of wagging a huge shaggy dog by a slender tail. Such a scheme would impose a large and unnecessary burden on the federal courts by implicating them centrally in the task of enforcing state criminal and administrative regulation, even in cases where the federal constitutional issue is but a minor and separable feature of the controversy. It would gratuitously buy us a whole new host of Erie problems. It would constitute a gross interference with the power of the states to design their own institutional schemes for enforcing

there is no state court enforcement proceeding under way or in the wings, and the question really is the one conventionally addressed: should the plaintiff have to go to state court, or to federal court, or have a choice? That in fact is the case in most ordinary federal-question cases where the plaintiff is suing to enforce an ordinary federal cause of action, one which does not impinge on a state court enforcement action.

My paper does not deal with the question of what criteria should govern the allocation of such cases to state or federal court. I address, at least directly, only one narrow (but, I hope, significant) phenomenon: cases where state enforcement courts must and will adjudicate federal constitutional defenses unless some affirmative intervention occurs to "reroute" the federal question into a federal district court.

17. I use the word "all" with respect to my three procedural contexts because the proposition I seek to test is whether state courts have *any* role to play in adjudicating federal constitutional questions.

state law and policy. It is, therefore, not only not surprising but, I submit, virtually inevitable that Congress has been historically reluctant to provide for federal defense removal and that the Supreme Court has rejected attempts to persuade it to interpret the Civil Rights Removal Act¹⁸ to accord defendants a virtually automatic right to abort, by removal, state court civil and criminal enforcement proceedings involving a federal constitutional defense.¹⁹

B.

Collateral relitigation of federal constitutional issues already adjudicated in the state courts is, of course, what we do on habeas corpus, when the state enforcement proceeding is a criminal prosecution ending in detention and the constitutional issue is cognizable on habeas under the rule of *Brown v. Allen*.²⁰ Fourth amendment (and perhaps other) claims may also be relitigated on habeas corpus under *Stone v. Powell*, but only on a showing that the petitioner did not have a full and fair opportunity to have that claim considered in the state courts.²¹ Note, however, that there are rules

18. 28 U.S.C. § 1443 (1976).

19. Materials with regard to the development and present structure of the federal courts' removal jurisdiction are gathered in chapter VIII, section 4 of HART & WECHSLER and HART & WECHSLER 1981 SUPP. Federal defense removal is not generally permitted in civil or criminal cases. Federal officers may usually remove state court enforcement actions against them, see 28 U.S.C. § 1442 (1976), and federal defense removal is under certain circumstances permitted by the Civil Rights Removal Act, 28 U.S.C. § 1443 (1976). The cases interpreting that Act, referred to in the text, are *Georgia v. Rachel*, 384 U.S. 780 (1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), rejecting the position urged in Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). In *Peacock*, the Court said:

Has the historic practice of holding state criminal trials in state courts . . . been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

384 U.S. at 834. See also *Johnson v. Mississippi*, 421 U.S. 213 (1975).

The American Law Institute, in its *Study of the Division of Jurisdiction Between State and Federal Courts* (1969), proposed that federal defense removal should normally be permitted in civil cases. See § 1312. State and local government enforcement actions were, however, specifically excluded from the proposal. *Id.* § 1312(b)(6).

20. 344 U.S. 443 (1953).

21. 428 U.S. 465 (1976). The Court subsequently held the rule of *Brown v. Allen* (rather than that of *Stone v. Powell*) applicable to the claim that there was racial discrimination in

of exhaustion and rules of waiver/forfeiture—rules which coexist with both *Brown* and *Stone*—which do create pressures to allow the state courts to consider the federal claim initially, even though the consideration may be nondispositive.²²

This is obviously not the place to rehearse in detail the well known and voluminous controversies surrounding federal habeas corpus for state prisoners and the rule of *Brown v. Allen*.²³ (Some of you may know that I participated in those controversies with a long article in 1963—an article which has had the strange history of being pronounced dead almost as soon as it was written, only to enjoy a mysterious recent resurrection.²⁴) What is relevant now is this. There are, obviously, impressive arguments in favor of the collateral relitigation model, particularly in the context of the criminal law.²⁵ I should note that a stimulating and ingenious addi-

the selection of a grand jury, *Rose v. Mitchell*, 443 U.S. 545 (1979), and to the claim that the evidence did not support a finding of guilt beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307 (1979). See further HART & WECHSLER 1981 SUPP. 388-95.

22. See generally HART & WECHSLER 1481-94 and HART & WECHSLER 1981 SUPP. 395-414, for materials on the question of when a failure to raise a federal constitutional issue in a state criminal proceeding will lead to a forfeiture of the right to raise it on federal habeas corpus, and the (distinct) question of when a prisoner is required to exhaust state court remedies before resorting to federal habeas corpus.

23. Citations to the literature are collected in chapter X of HART & WECHSLER and HART & WECHSLER 1981 SUPP.

24. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (espousing views rejected a few months later in *Fay v. Noia*, 372 U.S. 391 (1963)). See further *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring); *Stone v. Powell*, 428 U.S. 465 (1976).

25. It is in the context of the criminal law that we most prize the value of "reliability" in judicial proceedings; and, as is stressed by Professor Cover in his contribution to this Symposium, see Cover, *Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, pp. 639-82 *infra*, habeas corpus, by affording an additional ("redundant") inquiry, reduces the chances that an innocent person will be convicted of crime. (Of course, in the context of the criminal law, this is not quite the same as saying that redundancy increases over-all accuracy, since no provision is made for correcting the reverse mistake, that is, the acquittal of the guilty. Our system of criminal appeals and collateral reviews is designed to increase reliability on a one-way ratchet. What this system does to over-all accuracy is unknown.)

In my own article on habeas corpus I explored some of the epistemological problems inherent in trying to establish the "real" truth through repeated inquiry. Bator, *supra* note 24, at 444-53. However, I, too, stressed that the task of assuring that innocent persons are not convicted constitutes a major justification for collateral review of criminal convictions, and suggested that the federal habeas corpus jurisdiction might be reoriented to focus with somewhat more precision on that task. *Id.* at 508-09, 525-28. See also Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). These themes were in turn made the subject of attention in *Stone v. Powell*, 428 U.S. 465 (1976).

tion to these arguments was made in 1977 by Professor Cover and Mr. Aleinikoff, in an article in the *Yale Law Journal*, stressing that the redundancy entailed by the habeas model has the virtue of producing a creative dialogue between the state courts and the lower federal courts in the development of federal constitutional principles.²⁶

On the other hand, it is equally obvious that the case the other way is not frivolous either. The automatic collateral relitigation model exacts severe costs. It is profligate with resources at a time of increasing scarcity, and profligate in the service of a remedial enterprise whose contribution to the fair administration of criminal justice is itself beset by doubts.²⁷ By denying finality to criminal convictions, it tends to undermine the deterrent and rehabilitative functions of the criminal law. It creates a peculiarly abrasive and intrusive relationship between the federal and state courts, since it subordinates the entire hierarchy of state tribunals to a single federal district judge²⁸ even in cases where there is no show-

Jackson v. Virginia, 443 U.S. 307 (1979), presents a particularly testing context for assessing the extent to which the value of "accuracy" justifies repetitious inquiry. Its rule, giving state prisoners an opportunity to have a federal habeas corpus court review the sufficiency of the evidence to convict, has the attractive quality that it focuses attention on the most fundamental question of substantive justice: was the defendant guilty? On the other hand, Justice Stevens makes a powerful demonstration in his dissent that the case creates an unnecessary, disruptive, and demoralizing system of redundant review with respect to issues which are adequately and conscientiously handled by the state courts.

26. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). To minimize redundancy, I will hereafter refer to this article as one by Cover.

27. The doubts are primarily a product of the fact that habeas jurisdiction generates an enormous caseload but very few cases where it is eventually found that the detention was unlawful. (The latest empirical study of habeas corpus, including the "success rate," is reported in ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (Office For Improvements in the Administration of Justice, U.S. Dep't of Justice 1979). See also the pioneering study by Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

A difficulty with the argument that redundancy increases accuracy is that it does not suggest a method for assessing the problem of limits: at what point does the increase in accuracy become so small that it no longer justifies the resources which have to be devoted to the enterprise? This problem is especially acute with respect to a "commodity" such as habeas corpus which constitutes a "free good" for the petitioner.

28. Of course the judgment of the single federal judge is itself subject to review in a court of appeals. But in the first instance, the single district judge is given the authority to sit in judgment on the decision of the state's supreme court.

ing that the state courts failed to provide a fully hospitable forum for the litigation of the federal claim. And, for reasons I will return to, it may create a counterproductive set of incentives for state judges and legislators.²⁹

The point is not that we should eliminate habeas corpus. I do not even argue that we should necessarily narrow the scope of the writ. My submission is, simply, that the disadvantages of redundancy are so obviously substantial that claims of preference for a federal forum expressed in this institutional context will never monopolize the field of argument. As these claims are broadened and generalized, they will inevitably arouse increasing misgivings and, in the end, will generate resistance. Therefore, even in the criminal context, it has long seemed clear to me that there would come to be some reconsideration of the automatic relitigation model of *Brown v. Allen* and the correlative expansive waiver rule of *Fay v. Noia*.³⁰ Much more important, it has long seemed to me unlikely, even implausible, that we should generalize the rule of *Brown v. Allen* and install it across the board in civil as well as criminal cases. I, for one, was therefore not at all surprised when the Supreme Court recently rejected the invitation, warmly pressed on it by interventionist commentators and already accepted by a number of lower federal courts, to interpret the Civil Rights Act of

29. See pp. 625-27 *infra*. It should be noted, further, that at least some of the advantages of the collateral relitigation model are obtainable even if the scope of the writ is narrowed to prevent the full-scale automatic redundancy permitted by the rule of *Brown v. Allen*. Thus the creative dialogue celebrated by Professor Cover, *supra* note 26, is not ended even in the fourth amendment area by *Stone v. Powell*; federal district courts will continue to contribute to the formulation of fourth amendment law in cases involving federal criminal prosecutions (as well as in state cases in which it is found that a full and fair opportunity to litigate was not afforded in the state courts). The dialogue does not always have to occur in the very same case.

I might add, too, that the picture of "dialogue" given by Professor Cover seems to me to mute too much the fact that habeas corpus creates not an equal partnership but a hierarchical structure; in the case at hand it is the opinion of the federal court which always "counts." The extent to which this institutional structure subordinates the state to the federal courts is only somewhat relieved, it seems to me, by a factor stressed by Professor Cover, namely, that the opinions of the lower federal courts in habeas corpus cases are not necessarily authoritative in subsequent state criminal cases.

30. 372 U.S. 391 (1963). *Fay v. Noia* has been substantially eroded by *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, 433 U.S. 72 (1977). See generally HART & WECHSLER 1981 SUPP. 411-13.

1871, 42 U.S.C. § 1983,³¹ as authorizing the federal courts, notwithstanding the contrary command of the Full Faith and Credit Act,³² to deny res judicata effect to state court decisions of federal constitutional law. I agree with the Court's recent decision in *Allen v. McCurry*,³³ holding that collateral estoppel prevents the use of section 1983 to reconsider a fourth amendment issue which had been fully and fairly litigated in a suppression hearing in the state courts.³⁴ More to the point, it has seemed to me inevitable that, given the major doubts surrounding the use of habeas corpus as a device for automatic federal relitigation, some limits on its further expansion as a general model for the relationship between state and federal courts would have to be discovered.

C.

I turn now to the third possible device available to us for carrying out a preference in favor of a federal forum. Of the three, it seems to me to be clearly the most elegant and economical. It would allow our state court defendant (or prospective defendant) to carve out his federal contention from the remainder of the lawsuit and reformulate it as an affirmative claim in the federal court. The relief sought can be declaratory or injunctive; the difference between these is not germane to my analysis. In any event the point of the proceeding is to abort any pending or threatened state court proceeding if the federal claim is upheld.³⁵

31. 42 U.S.C. § 1983 (1976).

32. 28 U.S.C. § 1738 (1976) provides that state judgments must be given the "same full faith and credit" in the federal courts as would be given in the courts of the rendering state.

33. 101 S. Ct. 411 (1980).

34. For background with respect to the questions raised in *Allen v. McCurry*, and for citations to the wide variety of views on those questions, see HART & WECHSLER 1981 SUPP. 243-45. Few of the lower federal court decisions on these problems in fact have suggested that § 1983 allows the same scope for relitigating state court rulings on questions of federal law as is permitted the federal courts when exercising habeas corpus jurisdiction under the rule of *Brown v. Allen*.

35. I am intentionally vague in the text with respect to the question whether the state proceeding is pending or is merely threatened when the federal action is commenced. There are of course cases asserting that the difference should be decisive in determining whether federal intervention is appropriate. See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974). But see *Hicks v. Miranda*, 422 U.S. 332 (1975). I in fact do not agree with the thesis that federal intervention should be automatically available simply because the federal plaintiff has won a race to the courthouse; a rule which makes everything turn on which case starts first seems

Note that this form of federal intervention—let's call it, somewhat imprecisely, affirmative federal intervention³⁶—seems to eliminate some of the most egregious drawbacks of removal or relitigation. Unlike federal-defense removal, it does not necessarily draw into the federal court surrounding issues of state law and policy. Unlike collateral relitigation, it does not have duplication as its central feature. And, in the field of criminal law, federal affirmative intervention has what seems to me to be a major advantage: it provides a mechanism for avoiding the tragedy of having to undergo a criminal prosecution in cases where it is discovered that a valid

to me wooden and arbitrary. But in the present context I do not have to enter into that question at all, since my only inquiry is whether the arguments against this *sort* of federal intervention are serious enough to create a meaningful counter-tension against claims of superior federal-court competence. I am not, in other words, trying to determine what should be the precise contours of the *Younger* rule.

Analytical clarity does require one further point. It is a disadvantage of the overstated distinction between pending and threatened state proceedings that it obscures a distinction which is truly fundamental: the distinction between cases in which the plaintiff seeks an anticipatory ruling that future conduct is constitutionally immune from state punishment (or other regulation), and cases in which the plaintiff is claiming that past conduct is so immune. In the former case the state enforcement proceeding is by hypothesis not truly "ripe" (although the federal action may be); the violation has not yet occurred, and the whole point of the federal action is to obtain an adjudication of the federal claim without risking punishment (or regulation) even if the claim is rejected.

The important point to note is that there are substantial and interesting arguments in favor of permitting this sort of "true" anticipatory action which are not at all based on claims of superior federal-court competence; they are arguments which would be equally relevant in a unitary nonfederal system. Since I do not deal with these "additional" nonfederalistic arguments—for instance, the argument that anticipatory relief is necessary to avoid the chilling effect of an over-broad statute regulating speech—most of my essay is simply irrelevant to the question whether a federal court should take jurisdiction over these "true" anticipatory actions. The case I use as a focus is the case where a violation of state law has already occurred and the state enforcement action is either pending or at least "in the wings." I focus on that case because it seems to me to present the most testing context for the issue whether *superior federal-court competence as such* should lead us to allow a state court defendant to carve out a federal defense and, as plaintiff, submit it to federal court.

36. I don't want to call this a "federal anticipatory action," because (as I explained in note 35) I do not mean to canvass the question whether plaintiffs should have access to federal courts to test the validity of state statutes before they have been violated; and in any event, I do mean to discuss the case where the federal action is not "anticipatory" because the state enforcement proceeding started first. "Affirmative federal intervention" is, of course, also too broad, since I mean to focus only on cases where the intervention is with respect to pending or impending state court enforcement proceedings. I hope the qualification can be taken for granted when I use the shorthand phrase.

constitutional defense exists.³⁷

In spite of these features, we find yet again that the misgivings aroused by this model of federal intervention have been sufficiently weighty that courts have resisted the tendency to make it automatically available as a matter of right—and have resisted despite the fact that section 1983 seems to stand readily at hand to give it statutory grounding.³⁸

What are these misgivings? Note, first, that allowing federal affirmative actions may, in fact, be highly duplicative: although a plaintiff victory in the federal action should normally end the matter, if the federal court rules against the plaintiff the substance of the federal constitutional issue may have to be relitigated in the state court enforcement proceeding.³⁹ .

37. This advantage is strongest in the case of the "true" anticipatory action. But it is also relevant to the case where the alleged violation has already occurred and the plaintiff is seeking to avoid prosecution by raising a federal constitutional challenge to the validity of the enforcement proceeding. In that context my argument disputes the traditional equity maxim that it is not irreparable damage to be forced to defend a good-faith prosecution.

Note that this advantage could also be realized if affirmative intervention were available in a state court; indeed, many of the arguments in favor of "anticipatory" litigation are quite neutral with respect to the issue of choice between state and federal courts as such. For present purposes, however, I do not question the somewhat rough and ready categorizations of existing law, which force us to choose between an affirmative claim in federal court on the one hand, and an enforcement action in state court on the other. This is the case because, under existing law, if affirmative intervention is otherwise proper, the case may be brought in federal court without inquiring whether an affirmative state court remedy is or is not available. (This is one of the important consequences of *Monroe v. Pape*, 365 U.S. 167 (1961).)

38. Even Justice Brennan, the strongest supporter of affirmative federal interventions of this sort on the Court, has not read § 1983 as giving plaintiffs an absolute right to bring such federal claims in federal court. See his opinions in *Perez v. Ledesma*, 401 U.S. 82, 93 (1971), and *Steffel v. Thompson*, 415 U.S. 452 (1974), in which he argues that the critical issue is whether the state enforcement proceeding is actually pending when the federal action begins. It is also noteworthy that Justice Brennan's contention that a federal plaintiff has an automatic right to bring a declaratory judgment action if the state prosecution has not yet commenced derives its principle justification not from § 1983 itself, but from a highly iconoclastic reading of the Federal Declaratory Judgment Act of 1934, 28 U.S.C. § 2201 (1976).

39. A federal ruling against the plaintiff can have preclusive effect in a subsequent prosecution only with respect to those issues which do not have to be submitted to the criminal jury for a finding "beyond a reasonable doubt." If, therefore, the constitutional question in the federal case was not the validity of a state statute on its face, but rather the question whether the plaintiff's conduct is constitutionally punishable (validity "as applied"), the question of what that conduct was would have to be relitigated in the criminal case notwithstanding the federal adjudication. Indeed, I would suppose that the process of applying a

Second, this model of federal intervention loses the elegance it seems to possess in the abstract if the federal constitutional issue is hard to separate from other issues of fact, law, and policy imbedded in the enforcement action. This will often in fact be the case, particularly in disputes involving state administrative schemes. When constitutional issues involve judgments about reasonableness or feasibility, or depend on the assessment of complex economic and social factors, or where the purposes and even the motives of state officials must be assessed in order to resolve them, the question whether the plaintiff has a good federal "defense" cannot be established without passing on the entire case and thus providing, as it were, "total" judicial review. Indeed, there are many cases (including important first amendment cases) in which the federal claim, when analyzed, turns out basically to consist of the contention that the state enforcement proceeding is without justification—a contention which cannot be tested without examining the case for enforcement itself.

It turns out, then, that allowing the federal court to adjudicate in an affirmative proceeding is in some cases the functional equivalent of removal, because it brings to the federal court all of the intertwined issues in the case. Indeed, what sometimes happens, once we have decided to allow such a federal action, is that we then turn around and temporarily abort *it* by ordering abstention and requiring the federal plaintiff to resort to state court first.⁴⁰ In such cases—given the initial determination to allow the federal action—we protect the plaintiff's choice of federal forum through the so-called "England reservation," and permit him to return to the federal court after the state court litigation without

constitutional standard to that conduct would in effect also have to be repeated; a federal ruling that the plaintiff's movie was obscene or his speech a punishable incitement to violence should not preclude a reconsideration of those issues in a subsequent criminal prosecution. See generally RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 68.1 (Tent. Draft No. 1, 1973); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U.L. REV. 759, 765-66 (1979).

40. This would be the type of abstention authorized by *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). A plaintiff required to resort to state court under *Pullman* is not free to submit only the state law issues to the state court; the federal constitutional issue must itself be "presented." *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957).

worrying about *res judicata*.⁴¹ But note—and it does make one's head spin—that at this point we are back, functionally, at the collateral relitigation model, with all of its disadvantages.

More generally, I think the reluctance to give unlimited license to the federal affirmative action is founded on two separate central intuitions. First, it appears presumptively inefficient and wasteful—even unaesthetic—to carve up what seems like a single controversy between the state and its citizen, and to have two lawsuits, rather than one, devoted to its resolution. It is a deep tradition—and one wholly consistent with the direction of modern procedural reform—to insist that defenses to enforcement proceedings must presumptively be litigated in that proceeding and may not ordinarily be made the basis for independent affirmative actions.⁴²

Second, it is obvious that especially sensitive political nerves are likely to be touched if federal judges are free to enjoin—or to declare unconstitutional—state court enforcement proceedings on the basis of claims which could be adjudicated in those proceedings. Historically we have been reluctant to conclude that a generalized preference in favor of the competence and sensitivity of federal judges justifies giving them an automatic right to do so. This reluctance is, of course, exemplified by our ancient anti-injunction statute, 28 U.S.C. § 2283,⁴³ which prohibits federal court injunctions against state court proceedings. Note further that, although the Supreme Court ruled in *Mitchum v. Foster*⁴⁴ that actions under section 1983 are exempt from the bar of section 2283, it did so only after it had already put in place the judge-made doctrine of *Younger v. Harris*,⁴⁵ which serves an equivalent functional purpose; *Mitchum v. Foster* had its fangs pulled even before it was announced. And the *Younger* doctrine, itself with antecedents reaching far back into the history of federal equity, centrally re-

41. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

42. Note that this presumption applies only to the cases where the violation has already occurred. Where an anticipatory action is brought before the violation has occurred, it should constitute the only proceeding no matter which party prevails. See note 35 *supra*.

43. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335 (current version at 28 U.S.C. § 2283 (1976)).

44. 407 U.S. 225 (1972).

45. 401 U.S. 37 (1971).

flects the judgment that federal court interference with state court enforcement proceedings represents an extraordinary intervention, to be authorized only if there is a showing that the federal claim cannot be fully and fairly litigated in the enforcement court.⁴⁶

IV.

Where are we? My purpose thus far has been narrow and provisional. It is obvious that my arguments do not establish that we should never allow federal defense removal, or federal collateral re-litigation, or federal affirmative intervention.⁴⁷ Nor do my arguments show that our existing array of rules and doctrines limiting the availability of these devices are sound. I have not shown that *Stone v. Powell* or *Younger v. Harris* were correctly decided, nor that their rules should be extended. All I have tried to show is that there are sufficiently weighty and serious doubts and disadvantages associated with these devices that it is extremely unlikely that anything like automatic or unlimited access to them will, in the foreseeable future, be permitted. Once we see the context, it is clear that claims favoring a federal forum will not and should not exact an unconditional surrender. The federalistic position cannot simply be routed.

It turns out, then, that the question I posed at the outset—why should the state courts continue to participate at all in the enterprise of defining and enforcing federal constitutional principles—is a false question. It is virtually certain that they will continue to participate in the foreseeable future in some form. *They will do so because the institutional costs of the techniques available to put in place the opposite system will inevitably be assessed as too high.*

What we see further is that, although we may disagree with particular results, the Supreme Court, in cases such as *Georgia v.*

46. For the antecedents and current contours of the *Younger* doctrine, see the materials collected in HART & WECHSLER 1009-50 and HART & WECHSLER 1981 SUPP. 261-86. I appreciate, of course, that there is a line of cases, commencing with *Ex parte Young*, 209 U.S. 123 (1908), and running to *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which stand in tension with the cases supporting the proposition in the text.

47. See also notes 68-69 and accompanying text *infra* for a brief discussion of the question of federal *appellate* review of decisions of state courts on issues of federal law.

*Rachel*⁴⁸ and *Younger v. Harris* and *Stone v. Powell* and *Allen v. McCurry*, has at least been playing in the correct ballpark. In interpreting the various remedial and jurisdictional statutes defining the scope of federal intervention by removal or collateral review or affirmative action, the Court has plainly been engaged in the task of finding mediating solutions. It has wandered and wavered, but it has been firm in hewing to one basic principle: neither the federal courts nor the state courts are to be given a monopoly. Both must and will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise.⁴⁹

48. 384 U.S. 780 (1966).

49. It is the correct enterprise not only because this is institutionally the "correct" or "best" solution, but also because it seems to me to be the proper interpretation of the governing authoritative statutes. One sees, now and again, assertions that some or all of these statutes (particularly the Civil Rights Act of 1871 and the Habeas Corpus Act of 1867) give persons an "absolute" right of access to the federal courts, and that limiting doctrines (such as those announced in *Younger* or *Stone v. Powell*) are therefore illegitimate judicially-imposed limitations on a jurisdiction granted by Congress. See, for example, *Stone v. Powell*, 428 U.S. 465, 502, 515-33 (1976) (Brennan, J., dissenting). I find unimpressive the methods of statutory construction which lead to these assertions. Statutes such as § 1983 and the Habeas Corpus Act use language which, if woodenly and anachronistically read, can be interpreted to provide an "absolute" right of access to the federal courts. But these statutes were themselves passed against the background of a large body of standing law on matters of substance, remedy, and jurisdiction. As is true of all legislation, it is a major problem of *interpretation* how to fit the new enactment into this preexisting texture. No statute recreates the entire legal universe. The fact that a given remedial doctrine is not explicitly mentioned therefore does not automatically mean that the new statute was intended wholly to supersede it. Thus, to give an example, it seems to me implausible to assume that the cause of action created by and the jurisdiction granted in the Civil Rights Act of 1871 were meant wholly to supersede the preexisting equity doctrine that a good faith criminal prosecution will not ordinarily be enjoined simply because the plaintiff asserts that he has a valid defense to it.

The Supreme Court has, quite correctly, always taken the position that the post-Civil War jurisdictional and remedial statutes, with their generative language and their complex and multifaceted legislative histories, are essentially open-textured, leaving much to interpretation in light of contexts and postulates not always visible on their surface. (See, as an example, the judicial invention of the exhaustion rule in habeas corpus cases in *Ex parte Royall*, 117 U.S. 241 (1886).) Limiting doctrines themselves become part of the legal atmosphere. They may be highly relevant to the "acceptability" of the regime operating under a given statute and therefore to the question whether subsequent Congresses are moved to amend it.

In sum, therefore, it is my submission that, whatever one may think of the *Younger* result, it should not be criticized as an act of judicial usurpation. And *Stone v. Powell* is as

V.

I return to the question of comparative competence—to the question of “parity,” which of course continues to be central to the task of deciding where the lines should go.

Let us remind ourselves, briefly, of the arguments put forward to justify the conclusion that the federal courts are the preferred forum. The federal bench constitutes a relatively small elite.⁵⁰ Its judges are better paid and have more prestige than state judges; more competent lawyers are, therefore, attracted to the federal bench. That competence is reinforced by the expertise derived from specialization in questions of federal law. Protected by life tenure, federal judges are insulated from majoritarian pressures and will therefore be more receptive to controversial and unpopular constitutional principles. Further, the institutional bias of federal judges will be in favor of federal rights; state judges are more likely to be grudging when local authority is attacked on federal grounds. This sensitivity to federal rights is reinforced by the federal judges’ relative insulation from the daily grind of legal administration in our state and municipal lower criminal, family, and civil courts, which is said to breed cynicism and callousness with respect to abstract-sounding constitutional rights.⁵¹

It is immediately apparent that these contentions are intuitive; they rest on human insight rather than on empirical evidence or scientific measurement. But they surely cannot be dismissed on that account. Indeed, for the moment let’s leave aside the question whether, and to what extent, they are true. Assume that we are, more or less, persuaded that the federal forum is, on these grounds, preferable. What should we make of this? What weight should the conclusion have? Is it the case that it should lead us, whenever possible, to draw our lines so as to maximize access to a federal forum?

“legitimate” a contraction of habeas jurisdiction as *Brown v. Allen* was a “legitimate” expansion of it.

50. There are approximately 650 federal judgeships authorized for the article III courts (not counting senior judges). See HART & WECHSLER 1981 SUPP. 5. In California alone there are approximately 1000 *trial* (municipal and superior) court judges. JUDICIAL COUNCIL OF CALIFORNIA, 1980 JUDICIAL COUNCIL REPORT 65, 97.

51. My account is a pastiche of the splendid statement of the case for superior federal court competence by Professor Neuborne, *supra* note 7.

It is at this point, I submit, that the analysis I have heretofore put before you becomes important. I hope I have persuaded you that, no matter where we draw the line, it is virtually inevitable that the state courts will in fact continue to be asked to play a substantial role in the formulation and application of federal constitutional principles; the arguments in favor of the federal forum will not lead to a monopoly. If this is so, a new problem of fundamental significance emerges: we must try to create conditions to assure optimal performance by the state courts. Since it is given that they will continue to play a role, we might even ask how their performance can be improved. The comparative competence argument tends to assume a static universe. But in creating institutional designs, it is a mistake to think in static terms; the problem is, at least in part, a process problem. It is not enough to assert that the federal forum may be the more hospitable forum; we must also create conditions for assuring that the state courts will become a more hospitable forum, that the rhetoric of parity becomes a reality.

Ideally, we hope that state judges will conceive of the supreme federal law to be part of their own law, not an alien intrusion. We want state judges to think of themselves as really being charged, "*equally* with the courts of the Union," with an obligation to "guard, enforce, and protect every right granted or secured by the Constitution."⁵² How can such an attitude be fostered?

I have said before that our assessments of comparative competence and sensitivity in this area are based largely on human intuition. I hope you will allow me, therefore, to lay before you some intuitions of my own. Competence and sensitivity are themselves not static phenomena. Conscientiousness, dedication, idealism, openness, enthusiasm, willingness to listen and to learn—all the mysterious components of the subtle art of judging well—are at least to some extent best evoked by a sense of responsibility, by the realization that one has been entrusted with a great and important task. I can think of nothing more subversive to the judge's inner sense of responsibility than the notion that, to the greatest possible extent, all the important shots will be called by someone

52. The language is that previously quoted from *Robb v. Connolly*, see text at note 6 *supra*.

else because we don't believe in his or her competence and sensitivity. If we want the state judges to internalize the sense that they, too, speak for the Constitution—that it is *their* Constitution—we must not too easily construct our jurisdictional and remedial rules on the premise that they can't and won't speak for the Constitution. If we want state judges to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so.

Here again, it is critical to remember our various institutional contexts. We are not just talking about whether plaintiffs should have a choice of forum. We are talking, in the case of habeas, about whether we should tell the entire hierarchy of state judges that their judgments about federal rights bearing on the powers of the state will be automatically ignored, not because there has been a showing that the state court adjudication was less than full and fair, but because of a generalized mistrust of the competence and sensitivity of these judges. We are talking, in the case of the injunction action, about whether a state judge should be prohibited from adjudicating a proceeding for the enforcement of state law and policy, not because there has been a showing that federal defenses to the proceeding will not receive a full and fair hearing in the state court, but, again, because of a general mistrust of the competence and sensitivity of state judges.⁵³ Let us beware of breeding the very attitudes of cynicism and hostility which we fear.

I appreciate that the point I have been making counts as no more than a caution, and should itself be treated with caution. It does not tell us where particular lines should go. It tells us only that we must understand that since the state courts will inevitably continue to be partners in the firm, it is wise to treat them as partners rather than servants.

I turn now to an associated point. Again let me reiterate my starting place: like it or not, the state courts are going to continue to be the forum for the litigation of a substantial body of constitutional issues. The task of creating incentives to assure a hospitable

53. I stress again that I am not referring here to anticipatory actions to test the validity of statutes before they are violated. See note 35 *supra*. Federal jurisdiction, at least on a concurrent basis, may be justified in such cases on grounds having nothing to do with mistrust of state judges.

reception to claims of federal right in the state courts will, therefore, continue to be an important task. It is therefore an independent argument in favor of a jurisdictional rule if it can be shown to create such an incentive; whereas it is an argument against a jurisdictional rule if it removes pressure from the state courts to improve their processes for the litigation of federal constitutional issues. In my article on habeas corpus I criticized the rule of *Brown v. Allen* on this ground:

In effect it tells the states that not much will turn on whether or not they provide corrective process: no matter how conscientiously and fairly they apply themselves to the consideration of the merits of federal claims, whether presented at trial or on postconviction process, they will nevertheless automatically be second-guessed by federal district courts as to their conclusions of law and, possibly, factfindings too. . . . I do not, therefore, see the present system as conducive to state procedural reform. It was the "corrective process" doctrine of *Frank v. Mangum* which really created the stimulus for such reform; *Brown v. Allen* has merely blunted that stimulus.⁵⁴

The point holds, of course, in contexts other than habeas corpus as well. And it is striking that this is in fact a uniting theme in many of the recent cases which I have mentioned. What is the common message of *Stone v. Powell* and *Younger v. Harris* and *Allen v. McCurry*? It is that the state court will be allowed to adjudicate, and to do so dispositively, if—but only if—there was or will be a "full and fair opportunity" to litigate the constitutional question in the state court. *Per contra*, if it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim.

In terms of creating a sensible system of incentives, this approach strikes me as fundamentally sound. Of course I appreciate that the "full and fair opportunity" formula leaves untouched the more subtle and invisible aspects of comparative competence.⁵⁵ In-

54. Bator, *supra* note 24, at 523. Although Professor Cover has recently repeated Justice Brennan's assertions to the contrary, see Cover, *supra* note 26, at 1046, I have not as yet heard an argument that persuades me that my reasoning was wrong.

55. I appreciate, too, that the formula may invite an awkward inquiry that will seem espe-

deed, it does not purport to be a technique for measuring the state judge's competence and sensitivity at all. If we are fundamentally suspicious of the state court system—if the central problem continues to be the problem of mistrust—then the “full and fair opportunity” formula will not do. I realize, too, that much will turn on the spirit in which the “full and fair opportunity” formula is interpreted in the various specific contexts to which it is relevant.⁵⁶ Nevertheless, it is a virtue of this formula that it asks a question about the hospitable nature of the state courts rather than starting with an adverse presumption about it.

I can perhaps summarize this branch of my argument with the modest plea that, in deciding what weight is to be given to our current assessment of comparative competence, we think about the long as well as the short run. One can well understand the plea of civil rights plaintiffs' lawyers that they should be allowed access to the federal courts because that is where they will find juster justice. But the plea cannot in itself be decisive to those, legislators and judges, charged with the task of designing and implementing a *system* of remedial and jurisdictional rules. They must think of tomorrow as well as today; they must resist an exclusive fixation on the immediate case.

The importance of creating and maintaining conditions that assure that, in the long run, the state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing federal constitutional principles, has an additional weighty aspect. We must never forget that under our constitutional structure it is the state, and not the lower federal, courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights. The ability of the lower federal courts to vindicate federal constitutional rights is subject to Congress's decision to grant them a jurisdiction to do so. The power of Congress to eliminate the lower

cially obnoxious to state court judges: an inquiry into the “adequacy” of their court systems and remedial and procedural rules. On the other hand, in a number of contexts (for example, habeas exhaustion; “adequate and independent” state procedural grounds) we have managed to operate with this type of standard without too much difficulty or offense.

56. An especially sensitive and critical question is the extent to which there will be a meaningful exploration of the adequacy of representation by counsel in determining whether there was a full and fair opportunity to litigate.

federal courts entirely, or to exclude from their jurisdiction some or all categories of cases arising under the Constitution of the United States, cannot be the subject of serious doubt, notwithstanding occasional scholarly and judicial divagations to the contrary.⁵⁷ What, then, prevents Congress from turning this power over jurisdiction into a tool for depriving us of our substantive constitutional rights—in particular, the due process right of access to a judicial forum to complain about the illegality of coercive governmental action? As my teacher and colleague, the late Henry Hart, demonstrated almost thirty years ago in his celebrated Dialogue, the answer is this: Congress can validly limit the jurisdiction, or even end the existence, of the lower federal courts; but it cannot control the jurisdiction of the state courts of general jurisdiction so as to foreclose the vindication of a federal constitutional right.⁵⁸ The deepest significance of the judicial power recognized in *Marbury v. Madison*⁵⁹ is, ultimately, not that it permits the lower federal courts to disregard unconstitutional acts of Congress, but that

57. See HART & WECHSLER 1981 SUPP. 103-04, 117, 119-20. An unbroken line of legislative and judicial precedent upholds the clearly expressed plan of the Framers which left it to Congress to determine from time to time whether, and to what extent, access to lower federal courts is needed to assure the effective vindication of a given category of federal rights. The argument that, in light of "changing circumstances," we should override that plan and invent a constitutional right of access to a lower federal court in some or all cases arising under federal law, seems to me to be a classic instance of the "wish is father to the thought" school of constitutional interpretation.

It is of course a commonplace that Congress may not regulate the lower federal courts' jurisdiction so as to violate an independent constitutional rule. (Thus a grant of jurisdiction to the district courts to hear only cases brought by Catholics or whites would be invalid.) But it is a mistake to ooze from that proposition into a reiteration, under a different constitutional rubric (characteristically the due process clause), of the assertion that the right of access to a lower federal court is itself a constitutional right. The due process clause does not guarantee a lower federal court adjudication of a federal claim any more than does article III.

58. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

The point is not that any congressional restriction on state court jurisdiction is invalid. (Giving the federal courts exclusive jurisdiction in a given category of federal-question cases would be an example of a valid restriction.) Rather, Congress cannot prevent the state courts from *passing* on the validity of the restriction and from ignoring it if it is invalid. *Whether* it is invalid depends not on article III but on whether the case is one where the due process clause (or some other constitutional provision) guarantees judicial review and, if so, whether there is access to an adequate alternative forum.

59. 5 U.S. (1 Cranch) 137 (1803).

it makes it the duty of the state courts to do so.⁶⁰

I am not suggesting that it is part of the foreseeable future that Congress will in fact abolish the lower federal courts or will withdraw their jurisdiction to adjudicate cases arising under the Constitution. I am, however, saying that it is prudent not to put all our eggs in one basket. The state courts do constitute an ultimate protection against tyrannous government. We cannot afford the luxury of proceeding on the assumption that we will never need them. And this adds weight to my previous suggestion: we should devote serious and sustained attention to protecting and improving the conditions which determine whether constitutional claims are hospitably adjudicated in the state courts. This is a more fruitful enterprise than the channeling of more and more cases from the state courts to the federal courts.

VI.

I wish, finally, to make a few comments about the content of the arguments in favor of the superior competence and sensitivity of the federal courts. As I said before, many of these arguments are not implausible just because they are virtually all intuitive. But they do tend to be rather indiscriminating. They work with two undifferentiated categories—all state judges compared to all federal judges. They are, therefore, unable to account for the fact that, as we all know, there are tremendous variations in the quality of the bench from state to state—and, let's remember, in the quality of federal judges too. They also conceal, as I have noted before,

60. Even the most eminent of constitutional authorities can fall into the mistaken habit of asserting that *Marbury v. Madison* was addressed to the powers of the *federal* courts. See, e.g., TRIBE, *AMERICAN CONSTITUTIONAL LAW* 20-23 (1978) ("*Marbury* is the first case in which the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation . . ."; "The Constitution does not expressly confer such a power upon the federal courts."; "Marshall rested his defense of federal judicial review . . ."). But in fact Marshall's opinion is in no way directed to the question of "federal judicial review" or the powers of "the federal courts." It is directed to the question of the powers and duties of *courts*. (The relevant passage is 5 U.S. (1 Cranch) at 176-80.) And in arguing the "necessity" of judicial review as an incident of the judicial power, he invariably refers to "courts" and "judges," never to "federal" or "national" courts and judges.

The point is, of course, not merely semantic. The justification for judicial review put forward by Marshall has nothing to do, substantively, with the *federal* courts. It is a justification which deals with the questions of what constitutes "law," and what is the courts' obligation to maintain fidelity to "law," in a society with a written constitution.

that quality is not static. There are many states where it is clear that, in the past ten years, there have been substantial improvements in the receptivity of state judges to federal constitutional claims. What explains these variations? Don't they suggest doubts about the importance of some of the factors commonly assumed to operate?

Further, by lumping all state judges together, these arguments in favor of the superiority of the federal courts obscure another important point. In many cases the proper comparison is not between the federal courts and the state trial courts, but between the federal courts and the entire hierarchy of state courts, including the highest state appellate courts.⁶¹ This is most clearly visible in the case of habeas corpus; *Brown v. Allen* gives the federal district court the power to reconsider federal claims which have normally had a full hearing not only in the state trial court but also in the state appellate system. The point holds for original actions as well. When the federal court takes jurisdiction in an affirmative proceeding and determines a federal claim which could be raised as a defense to a state court enforcement proceeding, the effect is to prevent consideration of that claim by the state appellate as well as the state trial courts.

Does the argument for superior competence hold with respect to state supreme courts? I am doubtful. State supreme court justices as a group are as well paid and have as much prestige as federal judges. Those that I have met seem to me to be as expert on issues of federal constitutional laws as are federal judges. True, many are elected; few have life tenure. But at the state supreme court level, terms tend to be long enough to assure that at least the grosser threats to judicial independence are absent.⁶² It seems to me that the case for channeling cases to the federal courts on the ground that sufficiently competent and expert consideration of constitutional issues cannot be expected from the state appellate courts

61. Professor Neuborne's article, *supra* note 7, deserves credit for addressing this point explicitly rather than obscuring it. *Id.* at 1115-16 & n.45, 1118-19. Writing from the perspective of a plaintiffs' lawyer in civil liberties cases, Professor Neuborne naturally emphasizes the "expense, delay and uncertainty," *id.* at 1119, which attends the problem of vindicating federal rights in the state appellate system.

62. Indeed, in many states the election of state supreme court judges is largely a formality.

has simply not been made.

The point must be qualified in this respect: the vindication of the federal constitutional right may be blocked by an incompetent or insensitive state trial judge in a way that is invisible on appeal or at least cannot be remedied on appeal.⁶³ Nevertheless, it is clear that, once the state appellate system is folded into the consideration of the argument, claims for a clear federal superiority become greatly attenuated.

But what about the argument about institutional "set"? If it is true that state judges, just because they are *state* judges, will be less receptive to claims of federal constitutional principles than federal judges, then access to a state supreme court does not cure the problem at all.

I myself have come to doubt the validity—or at least the seriousness—of this argument. The existence of enormous variations among state judges suggests that it does not possess decisive significance. And the argument seems to me to derive primarily from a special historical experience, involving the division of the country on the issue of racial segregation, which is no longer of dominating significance in governing the attitudes of state court judges.

Moreover, there are some interesting and hidden subtleties to be considered in connection with this argument. We are told that federal judges will be more receptive to constitutional values than state judges. What is really meant, however, is that federal judges will be more receptive to *some* constitutional values than state judges. And the hidden assumption of the argument is that the Constitution contains only one or two *sorts* of values: typically, those which protect the individual from the power of the state, and those which assure the superiority of federal to state law.

But the Constitution contains other sorts of values as well. It gives the federal government powers, but also enacts limitations on those powers. *The limitations, too, count as setting forth constitutional values.* Will the federal judge be more sensitive than the state judge in insuring that these limitations are complied with?

63. Of course if the matter is so "invisible," it may not be readily apparent to the federal district court either, notwithstanding the *power* of that court to hold a new evidentiary hearing on collateral attack. If the problem of "invisible" errors committed by state trial judges were critical, surely we would *require* trial de novo on habeas corpus.

Whose institutional "set" is likely to make one more sensitive to the values underlying the tenth amendment? Is a federal judge likely to be more receptive than the state judge in honoring other structural principles, such as separation of powers? Why don't these sorts of issues ever seem to count?⁶⁴

More generally, we should note that the semantic repertoire of our constitutional law—we tend to speak of constitutional "claims" and "rights" rather than constitutional "principles" or "rules"—subtly suggests that when a constitutional question arises, constitutional values are represented only by one side or another. One party is said to seek the vindication of the Constitution; the other must therefore be seeking to defeat or subvert it. But the

64. It is also odd that we do not hear much about problems of "institutional set" in determining what court should pass on claims of individual liberties when these are threatened by the federal government. We are accustomed to a deep and complacent bias in favor of the federal judiciary; only such a bias could explain a rule such as the one in *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), which holds that state courts are without competence to pass on the legality of detentions authorized by federal executive officials. Wouldn't it be precisely the state court which would provide a more disinterested and unbiased forum in such a case? Would we not in such a case benefit from an interplay between the state courts, on the one hand, and the United States Supreme Court (which of course would have to continue to have jurisdiction to review the case) on the other? It is true that the federal judges do have life tenure; and that is an insulation. But those with a memory long enough to remember the cruelties inflicted on individuals by the federal government and solemnly legitimized by the Supreme Court in the 1940's and early 1950's know that the insulation provides no guarantee that a virulent pro-government "set" cannot exist. See, for example, *Korematsu v. United States*, 323 U.S. 214 (1944); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

Even more striking is that no question is ever raised about the problem of institutional "bias" or "set" when the federal courts deal with the powers of the federal judiciary itself. In defining the range of the federal judicial power, and in giving content to the values expressed by the "case and controversy" rule of article III, *quis custodiet ipsos custodes?*

Finally, what about cases in which the financial interests of the federal judiciary are at stake? In *United States v. Will*, 101 S. Ct. 471 (1980), the Supreme Court ruled that neither the judges of the lower federal courts nor the Justices of the Supreme Court were disqualified from passing on a case involving the question whether the Constitution invalidated federal statutes revoking previously authorized cost-of-living increases in the salaries of federal judges. Although all these judges and Justices had a direct financial stake in the lawsuit, the Court held disqualification unnecessary because the Rule of Necessity provides that there should not be disqualification if the result is that *no* court can hear the case. *Id.* at 479-81. I am indebted to Professor Cover for pointing out to me the irony of the fact that the Court concluded that the Rule of Necessity obtained in the case without even bothering to ask whether a state court might not have been available to consider the case, at least as a matter of original jurisdiction.

reality is more complex. Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication. It was Holmes who reminded us that the limits contemplated for the coverage of a statute are as significant a part of its purpose as is its affirmative thrust. When a court upholds a state criminal statute against the claim that it violates the first amendment, it is rejecting one sort of constitutional claim, but it is also upholding principles of separation of powers and federalism which themselves have constitutional status. And, increasingly, cases no longer even present clean-cut confrontations between "individual" and "governmental" interests. (Which side represents "the individual" in a case involving the validity of affirmative action?)

Note that I am not making an argument against the centrality of the supremacy clause. But it is worth reminding ourselves that the supremacy clause does not say that the *federal government* shall be supreme. It doesn't even say that the *federal courts* shall be supreme. It says, fundamentally, that the *Constitution* shall be supreme. And the Constitution itself contains a multiplicity of various sorts of values, many in tension with each other: process values as well as substantive values, structural and institutional values as well as those embodying individual rights.

My submission, therefore, is that the claim that cases should be channeled to the federal courts because of the special receptivity of federal judges to constitutional values may embody a narrow and partisan vision of what constitutional values are.⁶⁵ And this point

65. Indeed, the point has a somewhat broader resonance. One hears much talk, in all sorts of contexts, about what it takes to be a good judge and about what sorts of people should be appointed to the Supreme Court. Sensitivity to constitutional rights is frequently mentioned. Praise is bestowed on X and Y for their commitment to "first amendment values" or "ideals of equal protection." Such talk should make us uncomfortable, because it often becomes plain that what is sought is not fidelity to the Constitution as a whole, but to one or two favorite parts, like the first amendment or the equal protection clause. (On this view, the fourteenth amendment is seen as representing a constitutional value, except that the same fourteenth amendment's own restriction of its operation to "state action" is regarded as an inconvenient and mysteriously *anti*-constitutional embarrassment, to be parsed as grudgingly as possible! The first amendment is to be hospitably read, but it is perfectly legitimate to read the eleventh out of the document!)

My argument, in sum, is that it is misleading and simplistic to test a judge's fidelity to the Constitution in terms of supposed attitudes toward a narrow checklist of constitutional rules

is of fundamental importance to the original question I put: should we try to preserve a role for the *state* courts in formulating and applying principles of *federal* constitutional law? You may remember that at the outset of this lecture I said that conventional federalistic arguments relating to "decentralization" seem inapposite to this issue. But I now ask for your second thoughts. Are they not in fact highly relevant? Do we not derive enormous benefits from having a variety of institutional "sets" within which issues of federal constitutional law are addressed? The creative ferment of experimentation which federalism encourages is *not* irrelevant to the task of constitutional adjudication. And, given this context, it becomes clear that many of the arguments made in favor of the federal forum are, precisely, arguments in favor of partnership, not arguments for a federal monopoly. The elitism of the federal bench, its distance from much of the daily grind of the administration of justice, its specialization—all of these are advantages, but they are disadvantages too. Insight into issues of federal constitutional law should be available from *both* perspectives.

One more speculation remains. The argument that cases should, as much as possible, be directed toward the federal courts seems to me to embody, at a deep level, what might be called the positivist reflex, one which conceives of lawmaking in hierarchical terms and sees fidelity to law primarily as a matter of complying with pronouncements coming from a higher authority. The moral task is, fundamentally, the duty to obey. On this view, it is easy to fall into the habit of assuming that the task of the state judge, too, is to obey; the elaboration of federal constitutional law is a hierarchical task, in which commands come from the federal bench and, eventually, from the United States Supreme Court.

But there is a different, richer, and more coherent account of lawmaking which asserts that it is a cooperative enterprise in which each participant, including the citizen, shares in the privilege and duty of principled elaboration. And this competing account is not inapplicable to federal constitutional law. In respect to federal constitutional principles, too, there is a moral and legal community which is mutually and reciprocally charged with the mutual and reciprocal elaboration of these principles. We are not

especially favored by enthusiastic partisans of an interventionist federal judiciary.

entitled to deny to state court judges the competence to participate in this process; to do so would deny them *pro tanto* membership in this cooperative moral and legal community.⁶⁶

VII.

It is time to conclude this talk. Nothing I have said should be taken to disparage the historic contribution which the federal courts have made to the task of transforming constitutional ideals into reality. I am not—to put it in more pedestrian terms—arguing in any way against the original federal question jurisdiction. Indeed, most of what I have said is simply irrelevant to the role of the federal courts which is perhaps most important and certainly most controversial today: their use to remedy alleged unconstitutional practices on a broad systemic level. I have not focused on the federal suit to desegregate the schools or to reapportion the state legislature or to reform jails, hospitals, and police departments.

Further, I am aware that there may be periods when a highly interventionist position is necessary and justified. Allocations of power between the federal and state courts have always been sensitive to particular historical circumstances. When mistrust of the state courts is justified and endemic, federal supervision must be strengthened.⁶⁷ All I ask is that we remember that mistrust is not necessarily the correct permanent attitude.

Finally, it should be clear that I intend to cast no doubt on the need for federal *appellate* review of state court judgments on questions of federal law. Provision must be made for uniform and authoritative pronouncements of federal law. Serious questions can, of course, be raised about whether the appellate jurisdiction of the

66. I am indebted to my colleague Professor Charles Fried for calling my attention to the relevance of the considerations addressed in the last two paragraphs. The most elegant exposition of the alternative account of lawmaking to which I refer continues to be Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

67. In addition, more intensive federal court supervision, particularly of the sort permitted on habeas corpus, may be particularly appropriate during periods when the relevant rules of federal constitutional law are themselves undergoing rapid change and development. When these rules are stable and clearly defined, their application may be left to the state courts with reasonable confidence that the Supreme Court's appellate jurisdiction will provide sufficient oversight.

United States Supreme Court constitutes sufficient appellate capacity to perform this function;⁶⁸ and I myself have been sympathetic to proposals that a new national court of appeals, with jurisdiction to review decisions of state courts on issues of federal law, be created.⁶⁹ But that is a question for another day.

My purpose today has been a narrower one: to demonstrate that

68. See, e.g., Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977).

I appreciate that there is an analytical uneasiness about a position which draws a sharp distinction between federal appellate review, on the one hand, and collateral relitigation of federal questions already considered in the state courts, on the other. Thus it is a fair question to ask: why can't federal habeas corpus simply be characterized as an alternate form of federal appellate review, justified precisely because direct Supreme Court review of state court judgments does not provide sufficient appellate capacity?

The difficulty, it seems to me, is that providing an opportunity for collateral attack along the lines of *Brown v. Allen* is not a good way of achieving the purposes of appellate review; there is a mismatch between the habeas corpus regime, on the one hand, and the ends to be achieved by providing federal appellate review of state court judgments, on the other. *First*, it is a major function of appellate review to permit higher authority to correct error. But what is troublesome about habeas corpus is, precisely, the characterization of the federal district court as constituting higher authority than the state supreme court; that problem is not solved by calling it appellate review. *Second*, another major function of appellate review is to provide a method for unifying the conflicting views of lower courts—for stabilizing the law and creating equality in the administration of justice. But federal habeas corpus does not rationally serve these ends. There is no reason to think that the federal district courts will achieve more uniform results with respect to questions of federal constitutional law than the supreme courts of the fifty states. Review by the courts of appeals does, of course, create some centripetal force. But it is notorious that, with twelve circuits and increasing numbers of judges on them, the prospects of inter- and intracircuit conflicts are substantial and increasing. *Third*—and both of the previous points are relevant here—allowing collateral attack not only does not alleviate—in a way it exacerbates—the problem of a logjam at the Supreme Court level. This is because it allows state court litigants a second shot at seeking Supreme Court review; a federal question in a state criminal case now routinely generates two petitions for certiorari rather than one—one from the state supreme court and a second from the habeas case. *Finally*, if what we are interested in is increased appellate capacity, it seems to me doubtful that we would be so free in allowing trial de novo of the facts (as permitted by *Townsend v. Sain*, 372 U.S. 293 (1963)).

Obviously the point is not that there is a sharp logical distinction between federal appellate review and federal collateral relitigation. Nor am I asserting that it is inconceivable for the federal district courts to play a role in the appellate supervision of state courts adjudicating federal questions. My submission is that the current call for additional appellate capacity derives from the judgment that the Supreme Court cannot, all by itself, satisfy the nation's need for uniform, authoritative, nationwide, federal lawmaking. And that need cannot be satisfied by providing for collateral attack in the district courts on state court judgments.

69. See HART & WECHSLER 1981 SUPP. 2-6 for a review of recent proposals to expand the federal appellate capacity.

the state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles. The continuation of this role is particularly important in the many situations when the state court is part of the enforcement system, and the federal question is relevant to whether the state court should participate in or authorize enforcement. It is in this context that federal intervention is most dubious and should, I submit, be justified by institutional principles transcending generalized claims of superior federal-court competence and sensitivity. Beyond this, the state courts are and should be seen as a valuable and enriching resource when they participate in the great task of federal constitutional lawmaking.