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## Justice Brennan's Philosophy of Federalism, 20 J. Marshall L. Rev. 149 (1986)

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## JUSTICE BRENNAN'S PHILOSOPHY OF FEDERALISM

The power to make fundamental decisions affecting our social and economic welfare is shared under our federal form of government between the states and the national government.<sup>1</sup> The way that the states and the national government share in that power, however, is far from a static concept.<sup>2</sup> Rather, the concept of federalism is dynamic,<sup>3</sup> ever changing as opposed philosophies exert their pressures on it. Justice William J. Brennan, Jr., has had a strong impact on modern notions of federalism through his range of opinions over the three decades he has served on the Supreme Court.<sup>4</sup>

Justice Brennan's philosophy of federalism is reflected in his opinions concerning the relationship between state and federal courts and between state and federal legislatures.<sup>5</sup> Throughout these opinions, Justice Brennan has espoused the view that the states have an important role under our federal scheme.<sup>6</sup> The national government, in contrast, has only those powers that the states granted to it under the Constitution.<sup>7</sup> The national government's powers are therefore limited in number.<sup>8</sup> The only limits to the exercise of granted powers, however, are the Bill of Rights<sup>9</sup> and the necessary and proper clause.<sup>10</sup> Justice Brennan rejects the proposition that the

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1. A federal form of government distributes power between a central authority and a number of constituent territorial units (i.e., the states). BLACK'S LAW DICTIONARY 549 (5th ed. 1979).

2. Monaghan, *The Burger Court and "Our Federalism"*, 43 LAW & CONTEMP. PROBS. 39 (1980).

3. *Id.*

4. Justice Brennan was appointed to the Supreme Court in 1956 by President Eisenhower. For an excellent guide to information about Justice Brennan's career, see Robins, *A Bibliography of Associate Justice William J. Brennan, Jr.*, 12 SETON HALL L. REV. 430 (1982).

5. Professor Monaghan distinguishes between "substantive" federalism and "procedural" federalism. Monaghan, *supra* note 2, at 39. Substantive federalism refers to the power to decide the content of public policy, which is shared by the state and federal legislative and executive branches. *Id.* Procedural federalism refers to the relationship between federal courts and state courts. *Id.* Part one of this paper will discuss Justice Brennan's views on procedural federalism. Part two of this paper will discuss Justice Brennan's views on substantive federalism.

6. See Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 946-47 (1964) [hereinafter Brennan, *Some Aspects of Federalism*].

7. *National League of Cities v. Usery*, 426 U.S. 833, 862 (1976) (Brennan, J., dissenting).

8. *Id.* at 858-59. See also THE FEDERALIST No. 45 (J. Madison).

9. *National League of Cities*, 426 U.S. at 861.

10. *Id.* at 862-63.

retained sovereignty of the states<sup>11</sup> is a limit to those powers that the states surrendered to the national government in the Constitution.<sup>12</sup>

Not everyone shares Justice Brennan's view of federalism.<sup>13</sup> A few years ago, a majority<sup>14</sup> of the Supreme Court ruled that that retained sovereignty of the states was a limit on Congress' exercise of its power under the commerce clause.<sup>15</sup> Although that decision was recently reversed, the reversal<sup>16</sup> was only by a five to four majority.<sup>17</sup> The Constitution is approaching the 200th anniversary of its adoption, but the members of the Court and the citizens of this country are still divided about how that document allocates power between the states and the national government.

Increasingly, advocates of states' rights<sup>18</sup> have urged that the national government cut back in many areas.<sup>19</sup> They ask that Congress leave the states free from excessive legislation,<sup>20</sup> and that fed-

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11. *Id.* at 858.

12. *Id.*

13. On the present Supreme Court, Chief Justice Rehnquist and Justices Powell and O'Connor oppose Justice Brennan's views on federalism. See *Garcia v. San Antonio metropolitan Transit Auth.*, 105 S. Ct. 1005, 1021 (1985) (dissenting opinions). Former Chief Justice Burger also opposed Justice Brennan's position. *Id.* The view of the newest member of the Court, Justice Scalia, is presently unclear. See 55 U.S.L.W. 2225, 2226 (Oct. 28, 1986) (summary of Professor Tribe's remarks at Constitutional Law Conference).

14. Justice Rehnquist delivered the opinion of the Court, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. *National League of Cities*, 426 U.S. 833.

15. *Id.* at 852.

16. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985).

17. *Id.* Justice Blackmun, who switched his vote from the *National League of Cities* decision, wrote for the Court, joined by Justices Brennan, Marshall, White, and Stevens. *Id.*

18. President Reagan has frequently supported legislation that would shift a great deal of power from the national government to the states. For an example of his administration's proposals in the area of federal court-state court relations, see Smith, *New 'Federalism' Proposals Outlined By Smith*, 6 *ST. CT. J.* 25(3) (1982) [hereinafter Smith, *New Federalism*].

States' rights advocates also include in their number many state court judges and officials, and several legal scholars. See, e.g., Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 *LAW & SOC. ORDER* 557; Mosk, *Rediscovering the 10th Amendment*, 20 *JUDGES J.* 16(5) (1981); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 *WM. & MARY L. REV.* 801 (1981); Reynoldson, *Iowa's Chief Justice Discusses State-Federal Judicial Relations*, 6 *ST. CT. J.* 24(3) (1982).

19. One example is the use of the federal habeas corpus. See, e.g., O'Connor, *supra* note 18, at 802-06; Reynoldson, *supra* note 18, at 24; Smith, *New Federalism*, *supra* note 18, at 26-27.

20. An example of federal legislation that states' rights advocates feel is excessively intrusive is the statute in *National League of Cities v. Usery*, which set minimum wages and maximum hours for many state employees. 426 U.S. 833.

eral courts cut back their jurisdiction on many cases.<sup>21</sup> Their goal is increased efficiency in government.<sup>22</sup> Justice Brennan's contribution to the idea of federalism is to remind us that this is a nation of individuals with certain guaranteed liberties; we cannot guarantee those liberties if our primary goal is efficiency in government. Our country's founders<sup>23</sup> adopted a federal form of government, argues Justice Brennan, primarily because of their distrust of centralized power and the tyranny it can lead to.<sup>24</sup>

Justice Brennan recognizes that the division of power between the states and the national government helps assure individual liberties by giving individuals parallel forums to address alleged violations of their rights.<sup>25</sup> If one forum prejudices an individual's rights through a procedural error, the individual may seek redress in the other forum.<sup>26</sup> Justice Brennan's view of federalism would ensure that neither the power of the states nor the federal government is expanded at the expense of the other. Otherwise, individuals would be deprived of one of the parallel guardians of their rights.<sup>27</sup>

This comment will examine several Supreme Court decisions which reflect Justice Brennan's views on federalism.<sup>28</sup> The first part of this comment will examine decisions which affect the relationship between state courts and federal courts.<sup>29</sup> This includes state prisoners' use of federal writs of habeas corpus<sup>30</sup> to gain their release because of alleged constitutional violations. It also includes cases discussing the doctrines of intervention<sup>31</sup> and abstention,<sup>32</sup> which deal with the propriety of a federal court interfering with state court pro-

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21. See *supra* note 19.

22. See Smith, *New Federalism*, *supra* note 18, at 27.

23. There is much debate over how much deference should be given to the sometimes conflicting views of our founding fathers. For the view that the opinions of our founding fathers on matters of present constitutional questions should be given little weight, see L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 45-47 (1985).

24. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961) [hereinafter Brennan, *Federal Habeas Corpus*].

25. See Brennan, "How Goes The Supreme Court?", 36 MERCER L. REV. 781, 785 (1985) [hereinafter Brennan, *The Supreme Court*].

26. *Id.*

27. *Id.*

28. Federalism concerns play a part in a wide range of Supreme Court decisions. Only a few representative areas are discussed in this paper. For more expansive development of federalism issues in other contexts, see Howard, *The States And The Supreme Court*, 31 CATH. U. L. REV. 375 (1982) (discussing federalism concerns in federal civil rights actions, Eleventh Amendment defenses, federal habeas corpus actions, and the doctrines of abstention and intervention); Monaghan, *supra* note 2 (tenth amendment issues, abstention and intervention).

29. See *infra* notes 39-108 and accompanying text.

30. For background information on federal habeas corpus, see *infra* note 75.

31. For background information on intervention, see *infra* note 76.

32. For background information on abstention, see *infra* note 99.

ceedings.<sup>33</sup> The second part of this comment will examine decisions discussing the tenth amendment<sup>34</sup> and the retained powers of the States as external limitations on Congress' power under the commerce clause.<sup>35</sup> The third part of this comment discusses Justice Brennan's proposal that state constitutions be utilized to expand individual rights,<sup>36</sup> especially when the Supreme Court is reluctant to read those rights in the United States Constitution.<sup>37</sup> This comment concludes with a synthesis of Justice Brennan's view on federalism from these discussion,<sup>38</sup> and an evaluation of those views.

### STATE COURTS AND FEDERAL COURTS: PARALLEL GUARDIANS OF INDIVIDUAL RIGHTS

Perhaps the most common source of friction between the states and the national government<sup>39</sup> occurs when an individual sues a state in federal court for alleged constitution violations.<sup>40</sup> Justice Brennan's feels that the federal courts should be accessible to persons with these complaints,<sup>41</sup> because the federal courts have the power and the duty to uphold an individual's constitutional rights.<sup>42</sup> Many on the Supreme Court disagree,<sup>43</sup> believing that the individual

33. See *infra* notes 90-108 and accompanying text.

34. U.S. CONST. amend. X.

35. See *infra* notes 109-148 and accompanying text.

36. See *infra* note 153.

37. Justice Brennan has publicly criticized the majority of the Court for its "door-closing" decisions which deprive individuals of a federal forum for their Constitutional grievances. See Brennan, *Remarks of Associate Justice William J. Brennan, Jr., Seventy-Fifth Anniversary Dinner*, 36 RUTGERS L. REV. 725, 728 (1984).

38. See *infra* text accompanying notes 167-177.

39. In the year-ending June, 1981, for example, state prisoners had filed nearly 7,800 habeas corpus petitions in the federal courts. Smith, *New Federalism*, *supra* note 18, at 25.

40. Individuals may sue state officials in federal court to obtain injunctive or monetary relief for violations of their federal rights. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1986). However, the Eleventh Amendment bars some suits in federal court against state officials, depending on the nature of the relief sought. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment bars suit by individual seeking to impose liability payable out of a state treasury). For detailed analysis of the relationship between the Eleventh Amendment and federalism, see Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977); Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293 (1980). For Justice Brennan's view on the proper role of the Eleventh Amendment, see *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142, 3150 (1985) (Brennan, J., dissenting).

41. Brennan, *supra* note 25, at 785.

42. *Fay v. Noia*, 372 U.S. 391, 441 (1963).

43. Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor consistently have held that deference to state court proceedings should limit a federal court's ability to act. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (Justice Rehnquist writing for majority, joined by Chief Justice Burger and Justices Powell, Stewart, Blackmun and Stevens); *Stone v. Powell*, 428 U.S. 465 (1976) (Justice Powell writing for majority, joined by Chief Justice Burger and Justices Rehnquist, Stewart, Blackmun and Stevens). See also O'Connor, *supra* note 18 (Justice O'Connor's views).

should seek redress in the state courts to permit the states to rectify any errors on their own.<sup>44</sup> Those that hold the latter position believe that notions of comity,<sup>45</sup> or deference to the state courts, should be considered in deciding whether a federal court has the power to entertain such a suit.<sup>46</sup>

In contrast, Justice Brennan argues that notions of comity are irrelevant to the *existence* of the power of the federal courts,<sup>47</sup> which comes ultimately from the Constitution.<sup>48</sup> Comity, Justice Brennan believes, plays a role only in the discretionary *exercise* of a federal court's power.<sup>49</sup> In his view, notions of comity should prevent a federal court from acting only under extraordinary circumstances.<sup>50</sup>

*Fay v. Noia* is an early example of Justice Brennan's belief that federal courts should abstain from exercising their jurisdiction only in extraordinary circumstances.<sup>51</sup> Noia was convicted of felony murder in New York state court.<sup>52</sup> The only evidence against Noia was his confession, which Noia claimed was coerced in violation of the fourteenth amendment.<sup>53</sup> Noia did not appeal his conviction in the state courts.<sup>54</sup> Twenty years later, however, he sought his release by a writ of habeas corpus in the federal district court.<sup>55</sup> Noia's writ was denied for failure to exhaust his state remedies.<sup>56</sup> The federal court of appeals reversed,<sup>57</sup> and issued the writ. On appeal to the Supreme Court, the State of New York argued that the federal district court lacked the power to issue the writ because Noia had declined to appeal his conviction in the state courts.<sup>58</sup> In the majority opinion, Justice Brennan wrote that the federal district court's power to hear the case was based on the alleged constitutional violation, not upon the procedural history of the case in the state courts.<sup>59</sup>

44. O'Connor, *supra* note 18, at 802-03.

45. "Comity" refers to the respect and deference given by federal courts to state courts. See *Fay v. Noia*, 372 U.S. at 420.

46. *Wainwright v. Sykes*, 433 U.S. 72, 83 (1977).

47. *Fay v. Noia*, 372 U.S. at 426-27.

48. *Id.*

49. *Id.* at 438.

50. *Id.*

51. 372 U.S. 391 (1963).

52. *Id.* at 394.

53. *Id.* at 394-95.

54. *Id.* at 395. Noia failed to appeal for two reasons: first, he did not have the funds needed for appeal; second, he was afraid that if he was unsuccessful, he would receive the death sentence. *Id.* at 397 n.3.

55. *Id.* at 396.

56. *Id.*

57. *Id.* at 397.

58. *Id.*

59. *Id.* at 426-27.

Justice Brennan wrote that the overriding concern of the federal district court is the preservation of constitutional right of individuals, not notions of comity.<sup>60</sup> According to Justice Brennan, comity, concerns of federalism, and respect for state procedures are factors a federal district court may consider when deciding when to exercise its power, but they do not affect the raw judicial power of the court to do so.<sup>61</sup> For example, comity can cause a federal court to temporarily abstain from exercising its power to issue a writ of habeas corpus while a prisoner seeks state-provided relief.<sup>62</sup> Comity, though, does not divest the federal court of the power to act in that situation.

Recently, several members of the Supreme Court, many state court judges, and others have expressed concern that the widespread use of the writ of habeas corpus undermines orderly and efficient state administration of Justice.<sup>63</sup> The Reagan administration, for example, is concerned that the availability of federal habeas corpus puts in question the finality of any state conviction.<sup>64</sup> The Reagan administration points to cases like *Fay v. Noia*,<sup>65</sup> where a prisoner gained his release twenty years after his conviction, as examples of their concern. To preserve the values of federalism, they argue, we must greatly restrict the availability of federal habeas corpus.<sup>66</sup> This

60. *Id.* at 420.

61. *Id.* at 425.

62. *Id.* Justice Brennan wrote, "The same considerations of comity that led the court to refuse relief to one who had not yet availed himself of his same remedies likewise prompted the refusal of relief to one who had inexcusably failed to tender the federal questions to the State courts. Either situation poses a threat to the orderly administration of criminal justice that ought if possible be averted." *Id.*

63. *See, e.g.,* *Fay v. Noia*, 372 U.S. at 445 (Clark, J., dissenting) (the decision will mean a "rash of new applications . . . and 98% of them will be frivolous"); O'Connor, *supra* note 18, at 801 ("The labyrinth of judicial reviews of the various stages of a state criminal felony case would appear strange, indeed, to a rational person charged with devising an ideal criminal justice system."); Reynoldson, *supra* note 18, at 24 ("The first question I pose is why - in an era of crushing federal case loads, limited federal funds, and the welcomed resurrection of federalism - there is an unrelenting oversight of state judicial operation.").

64. Smith, *New Federalism*, *supra* note 18, at 25.

65. *Fay v. Noia*, 372 U.S. 391 (1963).

66. "Under current law, habeas corpus petitions can be brought at any time, without limitation. The practical effect of this approach is that petitions are sometimes brought many years, or even decades, after the conclusion of state proceedings." Smith, *New Federalism*, *supra* note 18, at 27. Former Attorney General Smith's proposal for a statute of limitations on federal habeas corpus, *id.*, would certainly alleviate practical problems to a state when a habeas corpus petition is filed many years after a conviction. A statute of limitations, however, would arbitrarily cut off even deserving claims. In order to safeguard the liberties of possibly wrongly - incarcerated individuals, it is better to continue the present policy of letting the federal court judge decide whether the prisoner's claim has any merit to it. *Cf.* Brennan, *Federal Habeas Corpus*, *supra* note 24, at 441-42. Our criminal justice system is founded on principles of preservation of individual liberties, not on concerns for efficiency. In addition, it is the prisoner who is incarcerated for many years who stands to lose the most if wrongly imprisoned; a statute of limitations would cut off relief

would show the proper deference to the capability of state court judges to uphold constitutional rights.<sup>67</sup>

Justice Brennan, as a former state court judge,<sup>68</sup> recognizes the difficulties that the use of federal habeas corpus can pose for the state courts.<sup>69</sup> In response, Justice Brennan suggests that the appropriate remedy is not to cut back on federal habeas corpus, but to improve state court criminal procedures.<sup>70</sup> Justice Brennan urges that the states improve their procedures to guarantee their citizens' constitutional rights will be upheld.<sup>71</sup> If state procedures made these guarantees, or even surpassed them, then there would be no need for federal habeas corpus.<sup>72</sup>

In habeas corpus cases, the federal court acts only after a state has convicted an individual in violation of his constitutional rights.<sup>73</sup> Sometimes, however, an individual petitions a federal court to enjoin a threatened state criminal prosecution in order to preserve his constitutional rights before conviction.<sup>74</sup> The federal court must decide whether to intervene or not to protect the individual.<sup>75</sup> The federalism concern under these circumstances is greater than in federal habeas corpus proceeding because intervention anticipates a state violation of an individual's rights.<sup>76</sup> Generally, the federal courts as-

from those who need it most.

67. Many commentators have criticized what they perceive as mistrust of state court judges to uphold the Constitution. *E.g.*, Aldisert, *supra* note 18, at 557-58; O'Connor, *supra* note 18, at 802-03; Reynoldson, *supra* note 18, at 26; Smith, *New Federalism*, *supra* note 39, at 27.

For the opinion that federal court judges do a better job in upholding Constitutional rights, see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

68. Justice Brennan has explained that, as a United States Supreme Court Justice, he has had to rule differently on some issues than he did as a New Jersey State Supreme Court Justice. Brennan, *The Roles of the State Supreme Court Justices and the United States Supreme Court Justice*, 56 N.Y. ST. B.J. 6 (1984).

69. Brennan, *Some Aspects of Federalism*, *supra* note 6.

70. *Id.* at 957-59; Brennan, *Federal Habeas Corpus*, *supra* note 24, 441.

71. Brennan, *Some Aspects of Federalism*, *supra* note 6, at 957; Brennan, *Federal Habeas Corpus*, *supra* note 24, at 441;

72. Brennan, *Some Aspects of Federalism*, *supra* note 6, at 957; Brennan, *Federal Habeas Corpus*, *supra* note 24, at 441.

73. In federal habeas corpus cases, the jurisdiction of the federal court is governed by federal statute. 28 U.S.C. § 2241 (1983). The history of the writ of habeas corpus goes back centuries into the English common law. *Fay v. Noia*, 372 U.S. at 402. "Its root principle," wrote Justice Brennan, "is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* For the history of the writ of habeas corpus in the federal courts, see *id.* at 399-415; Brennan, *Federal Habeas Corpus*, *supra* note 24, at 426-30.

74. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965). See *infra* notes 79-89 and accompanying text.

75. The federal court could intervene either by declaring the state criminal statute unconstitutional, or by directly enjoining state officials from prosecuting an individual. 42 U.S.C. § 1983.

76. Federal court jurisdiction to intervene in state court proceedings is given by



sume that the state courts will uphold the Constitution<sup>77</sup> and therefore normally refuse to interfere with state criminal proceedings until a right has actually been violated.<sup>78</sup>

Justice Brennan's majority opinion in *Dombrowski v. Pfister*<sup>79</sup> recognized an exception to this general rule. In *Dombrowski*, a Louisiana statute made certain subversive activities illegal.<sup>80</sup> The plaintiffs contended that the statute violated the Constitution on its face, because it was overbroad, and could be used to infringe upon the plaintiffs' first amendment guarantee of freedom of expression.<sup>81</sup> The plaintiffs also alleged that threats to enforce the statute were in bad faith, done merely to harass the plaintiffs and not to secure valid convictions.<sup>82</sup> Justice Brennan wrote that, in this situation, the federal court should not abstain from exercising its power because the state criminal procedure could not guarantee adequate vindication of the plaintiffs' constitutional rights.<sup>83</sup> The damage would be done prior to any conviction, and would be an irreparable injury to the plaintiffs.<sup>84</sup> The concerns of federalism are not as great here as the serious adverse effects on the individual rights.<sup>85</sup>

To Justice Brennan, in this case as in *Fay v. Noia*,<sup>86</sup> concerns of

the Civil Rights Act, 42 U.S.C. § 1983. Section 1983 actions were implemented by Congress following the Civil War to give individuals, especially in southern states, a federal forum to hear their grievances based on the Constitution. See *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

77. *Dombrowski v. Pfister*, 380 U.S. 479, 485-86.

78. *Id.*

79. 380 U.S. 479 (1965).

80. The statutes in question were the Louisiana Subversive Activities and Communist Control Law, LA. REV. STAT. §§ 14:358-74 (Cum. Supp. 1962), and the Communist Propaganda Control law, LA. REV. STAT. §§ 14:390-90.8 (Cum. Supp. 1962). These statutes made it a felony to assist in the formation of, or contribute to the support of any subversive organization. *Dombrowski*, 380 U.S. at 493 nn.9, 10. They also made it a felony to fail to register as members of a Communist-front organization. *Id.* at 492-93.

81. The plaintiffs were the Southern Conference Educational Fund, Inc., an organization active in promoting civil rights for Negroes in Louisiana, its Executive Director, Mr. Dombrowski, its Treasurer, Mr. Smith, and its attorney, Mr. Walter. *Dombrowski*, 380 U.S. at 478. The plaintiffs claimed that the mere threat of prosecution by the state was an infringement on their first amendment rights, U.S. CONST. amend. I, because it discouraged them from lawful political expression. *Dombrowski*, 480 U.S. at 482.

82. *Dombrowski*, 480 U.S. at 482.

83. *Id.* at 485.

84. *Id.* at 486.

85. *Id.* at 489.

86. 372 U.S. 391 (1963).

federalism did not affect the power of the federal courts to act, but only affected the proper exercise of the court's power.<sup>87</sup> Concerns of federalism and comity may make it wise for the federal courts to abstain from exercising the full extent of their power in some situation.<sup>88</sup> Yet, when the federalism concerns can be removed or shown to be minimal, then the federal court should exercise its power to preserve individual rights.<sup>89</sup>

Recently, those who opposed Justice Brennan's opinion in *Dombrowski* have succeeded in greatly curtailing federal intervention into state court proceedings.<sup>90</sup> In a line of decisions beginning with *Younger v. Harris*,<sup>91</sup> the Supreme Court has greatly restricted the intervention power of federal district courts.<sup>92</sup> These decisions em-

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87. *Dombrowski*, 380 U.S. at 483-85.

88. See *supra* note 78.

89. *Dombrowski*, 380 U.S. at 492.

90. The majority in *Dombrowski* included, besides Justice Brennan, Chief Justice Warren and Justices Douglas, Goldberg, and White. Justices Black and Stewart did not take part in this case. The dissenters were Justices Harlan and Clark. See Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 856-58 (1980). On the present Court, only Justice Brennan and Justice White remain. However, the opposition to *Dombrowski* in the dissent of Justice Harlan, 380 U.S. at 498, based on concerns of federalism, *id.*, is echoed by many of the present members of the Court. See, e.g., *Huffman v. Pursue*, 420 U.S. 592, 603-05 (1975) (opinion by Rehnquist, J., joined by Burger, C.J., and Powell, J.). One commentator has expressed the unorthodox view that *Dombrowski* was decided on the wrong grounds, and was actually restrictive of federal power, because it treated intervention as an exception to the general rule, instead of as the rule itself. Laycock, *Federal Interference With State Prosecutions: The Cases Dombrowski Forgot*, 46 U.CHI. L. REV. 636 (1979).

91. 401 U.S. 37 (1971).

92. In *Younger*, the Court held that intervention into pending state criminal action is improper except in "extraordinary circumstances." *Id.* at 43. The Court also held that the decision in *Dombrowski* "should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." *Id.* at 53. The Court did not go as far as saying that circumstances such as bad faith or harassment, present in *Dombrowski*, were prerequisites for *Dombrowski*-type relief. *Id.* at 54. Subsequent cases have made it clear, however, that unless a federal plaintiff alleges bad faith or harassment by state officials, then *Younger* dictates that the federal court should almost always abstain from interfering in the state court proceedings. E.g., *Huffman v. Pursue*, 420 U.S. 592, 601-02 (1975).

In *Huffman*, the Court began to apply the *Younger* abstention doctrine to civil cases. 420 U.S. at 604. The sheriff and prosecuting attorney of Allen County, Ohio, instituted civil proceedings against the operator of a theatre which showed pornographic films, in violation of a state public nuisance statute, OHIO REV. CODE ANN. § 3767.01 (1971). *Id.* at 598. The trial court found the operator liable and ordered the theatre closed for one year and the theatre's personal property sold. *Id.* Prior to judgment, *Pursue, Ltd.*, decided not to appeal the judgment in the state courts, but filed suit in federal court seeking to have the nuisance statute declared unconstitutional. *Id.* The district court granted limited injunctive relief. *Id.* at 599. The Supreme Court vacated that judgment and remanded with instructions to apply the *Younger* doctrine to this case, effectively forcing the district court to abstain. *Id.* at 612.

The majority in *Huffman* held that the same considerations of comity and federalism present in *Younger* were present here. *Id.* at 604. The court ruled that the plaintiff, *Pursue, Ltd.*, "should not be permitted the luxury of federal litigation of

phasize the importance of federalism concerns in prohibiting intervention in pending<sup>93</sup> criminal, and even civil,<sup>94</sup> state court cases. Justice Brennan dissented in almost all of these decisions,<sup>95</sup> especially in the decisions extending the *Younger* abstention doctrine to civil proceedings.<sup>96</sup>

When a state brings a civil or quasi-criminal action against an individual, the individual does not have the same procedural safeguards that are present in criminal proceedings.<sup>97</sup> Consequently, Justice Brennan argued the importance of a federal forum is much greater to an individual defending an allegedly unconstitutional state civil proceeding than to a state criminal defendant.<sup>98</sup> Abstention would be improper for a federal court under those circumstances.<sup>99</sup> Abstention, says Justice Brennan, is permissible "only in narrowly limited 'special circumstances'."<sup>100</sup>

These "special circumstances" include when a state criminal prosecution is pending, as in *Younger v. Harris*,<sup>101</sup> and where uncertainty involving interpretation of state law makes resolution of a constitutional issue premature.<sup>102</sup> While the *Younger* doctrine has its roots in federalism concerns,<sup>103</sup> the second form of abstention approved by Justice Brennan does not. Abstention in cases involving

issues presented by ongoing state proceedings, a luxury which . . . is quite costly in terms of the interests which *Younger* seeks to protect." *Id.* at 605-06. The *Huffman* Court did not, however, make a blanket application of *Younger* to all civil litigation. *Id.* at 607.

Later cases extended the *Younger* doctrine to other types of civil proceedings. In *Judice v. Vail*, 430 U.S. 327 (1977), the Court held that the *Younger* principles applied to federal review of state civil contempt proceedings. *Id.* at 335. In *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court extended *Younger* and *Huffman* to an action by the State of Illinois to recover welfare payments that had been allegedly obtained through fraud. *Id.* at 444. The underlying principle in these decisions is that the federal courts should refrain from any action until state court remedies are exhausted.

93. In *Steffel v. Thompson*, 415 U.S. 452 (1974), Justice Brennan, for a unanimous Court, wrote that the *Younger* doctrine of federal court abstention except in extraordinary circumstances applied only to pending state actions. *Id.* When no arrests have been made or charges filed, the concerns of federalism and comity upon which *Younger* was based are lacking. *Id.* at 462. Justice Brennan wrote that, in fact, "[i]n the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts to step aside plaintiff would turn federalism on its head." *Id.* at 472.

94. *See supra* note 92.

95. Justice Brennan concurred in the result only of *Younger*, 401 U.S. at 56.

96. *Trainor v. Hernandez*, 431 U.S. at 450 (Brennan, J., dissenting); *Judice v. Vail*, 430 U.S. at 341 (Brennan, J., dissenting); *Huffman v. Pursue, Ltd.*, 420 U.S. at 613 (Brennan, J., dissenting).

97. *Huffman*, 420 U.S. at 615-616 (Brennan, J., dissenting).

98. *Id.*

99. *Id.*

100. *Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 509 (1972).

101. 401 U.S. 37 (1971).

102. *Lake Carriers' Ass'n*, 406 U.S. at 510.

103. *Younger*, 401 U.S. at 44-45.

uncertain state law is based on the possibility that subsequent state court decisions on state law could reduce the federal decision to a mere advisory opinion.<sup>104</sup> Abstention until state law is clarified avoids this possibility and is therefore justified.<sup>105</sup>

Abstention on the grounds of federalism, however, is justified only in the "special circumstance" of a pending state criminal prosecution.<sup>106</sup> Only then are the concerns for federalism strong enough to justify a federal court from refusing to exercise its power and duty to preserve individual constitutional rights.<sup>107</sup> Because the reason for a federal system of government is to ensure individual liberties,<sup>108</sup> the values of federalism are served best by preserving both state and federal forums as guardians. Closing the federal courts to individuals seeking vindication of their rights is antithetical to the true reasons for federalism.

#### FEDERALISM AND THE TENTH AMENDMENT

While the conflicts between state courts and federal courts are the most common source of friction between the states and the national government,<sup>109</sup> the conflicts between state legislatures and Congress are the most dramatic. Under the Constitution, the states granted Congress a limited number of specified powers,<sup>110</sup> and the ability to carry out those powers,<sup>111</sup> while reserving all the powers not specifically given to the federal government for the states.<sup>112</sup> Some Supreme Court justices and many scholars have interpreted

104. *Lake Carriers' Ass'n*, 406 U.S. at 510-11.

105. *Id.* at 510.

106. *Younger*, 401 U.S. at 56-57 (Brennan, J., dissenting).

107. *Huffman*, 420 U.S. at 614 (Brennan, J., dissenting).

108. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all of our civil and political institutions." Brennan, *Federal Habeas Corpus*, *supra* note 24, at 442.

109. *See supra* note 39.

110. *National League of Cities v. Usery*, 426 U.S. 833, 859 (1976) (Brennan, J., dissenting (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819))).

111. "The Congress shall have Power. . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . ." U.S. CONST. art. I, sec. 8. The test of whether a law is "necessary and proper" to carry out a specified power of Congress was spelled out many years ago. *M'Culloch*, 17 U.S. (4 Wheat.) at 421. "Let the end [of the law] be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* This test gives wide discretion to Congress in the exercise of its enumerated powers. The last time the Supreme Court invalidated an act of Congress based on the commerce power, U.S. CONST. art. I, sec. 8, was fifty years ago. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

112. The tenth amendment reads simply: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

this reservation, expressed in the tenth amendment, to be nothing more than a truism: what has not been given has been retained.<sup>113</sup> Under this view, Congress can exercise only those powers granted to it, but the only limits on granted powers are the guarantees of the Bill of Rights.<sup>114</sup>

Others, however, have read the tenth amendment as much more than a truism.<sup>115</sup> They see it as a limit, in the name of federalism, even upon those powers granted to Congress.<sup>116</sup> They perceive the structure of our government to be an affirmative limitation on the powers of the national government. A decade ago, the Supreme Court adopted that theory and rejected the "truism" view of the tenth amendment,<sup>117</sup> only to overrule itself a year ago.<sup>118</sup> Justice Brennan is one of the justices who sees the tenth amendment as prohibiting Congress only from exercising non-granted powers, not as a limit on the exercise of granted powers.<sup>119</sup>

In *National League of Cities v. Usery*,<sup>120</sup> the Supreme Court held that a federal statute,<sup>121</sup> promulgated under the power of the Commerce Clause,<sup>122</sup> setting minimum wage and maximum hour levels for almost all state employees was unconstitutional.<sup>123</sup> The Court reasoned that the statute was invalid because it regulated the "States as States."<sup>124</sup> The Court found that concern for state sovereignty in a federal system was an affirmative limitation on Congress' otherwise valid exercise of power under the Commerce Clause.<sup>125</sup> The Court found an expression of this affirmative limitation in the tenth amendment.<sup>126</sup> In adopting the tenth amendment, ruled the Court, the framers of the constitution declared a "constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a fed-

113. This view was first expressed in *United States v. Darby*, 312 U.S. 100, 124 (1941). It has been repeated many times since. *E.g.*, *National League of Cities*, 426 U.S. at 862 (Brennan, J., dissenting).

114. *National League of Cities*, 426 U.S. at 858 (Brennan, J., dissenting).

115. *National League of Cities*, 426 U.S. at 842-43.

116. *Id.*

117. *Id.*

118. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985).

119. *National League of Cities*, 426 U.S. at 862 (Brennan, J., dissenting).

120. 426 U.S. 833 (1976).

121. The statutes in question were the 1974 amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1983).

122. "The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several states. . ." U.S. CONST. art. I, sec. 8, cl. 3.

123. *National League of Cities*, 426 U.S. at 836.

124. *Id.* at 854. A law regulates "States as States" when it "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . ." *Id.* at 852.

125. *Id.* at 841.

126. *Id.* at 842-43.

eral system."<sup>127</sup> The Court therefore held the statute invalid to the extent it "displace[d] the States' freedom to structure integral operations . . . of traditional governmental functions. . . ."<sup>128</sup>

Justice Brennan dissented from the Court's holding.<sup>129</sup> Justice Brennan argued that the guarantee of the integrity of the states and of their ability to function is found in the political process,<sup>130</sup> not in the Constitution. He rejected the concept of the tenth amendment as an affirmative limitation on Congress' powers, citing over 150 years of case law to support his position.<sup>131</sup> The states, wrote Justice Brennan, surrendered certain powers to Congress when they adopted the Constitution.<sup>132</sup> The only affirmative limitations on these powers are certain guarantees of the Bill of Rights.<sup>133</sup> Beyond these,<sup>134</sup> only discretion on the part of Congress, embodied in the political process, limits the federal power.<sup>135</sup>

The decision in *National League of Cities* caused a great stir in academic circles. Many scholars attacked the decision,<sup>136</sup> but others supported it.<sup>137</sup> In the cases that followed, the principles in *National League of Cities* were affirmed,<sup>138</sup> although the Court never again found a federal statute unconstitutional on those principles.<sup>139</sup> The test which the Court developed to determine whether a federal law

127. *Id.* at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

128. *National League of Cities*, 426 U.S. at 852.

129. *Id.* at 856 (Brennan, J., dissenting).

130. *Id.* at 857 (Brennan, J., dissenting).

131. Justice Brennan cited *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). He quoted from Chief Justice John Marshall's opinion in *Gibbons*:

The power over commerce . . . is vested in Congress so absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse.

*National League of Cities*, 426 U.S. at 857 (Brennan, J., dissenting) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 197).

132. *National League of Cities*, 426 U.S. at 859 (Brennan, J., dissenting).

133. *Id.* at 858. Of course, the means used to achieve legitimate ends must be appropriate ones under the necessary and proper clause. *Id.* at 861.

134. *Id.* at 861.

135. *Id.* at 857-58.

136. *E.g.*, Choper, *The Scope of National Power Vis-a-Vis The States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

137. *E.g.*, Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81.

138. See *FERC v. Mississippi*, 456 U.S. 742, 765-766 (1982); *United Transport Union v. Long Island R. Co.*, 455 U.S. 678, 686-87 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 286-88 (1981); Beschle, *Defining the Scope of State Sovereignty Under the Tenth Amendment: A Structural Approach*, 34 DE PAUL L. REV. 163, 169-73 (1984).

139. *E.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (extension of Age Discrimination in Employment Act of the States is upheld); Beschle, *supra* note 138, at 169-75.

regulated the "States as States"<sup>140</sup> proved too difficult to pass.<sup>141</sup>

*National League of Cities* was overruled last year by *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>142</sup> Justice Blackmun joined the four members of the minority in *National League of Cities* to form the majority in *Garcia*.<sup>143</sup> Justice Blackmun's opinion stated that the sole guarantee of state autonomy was the political process.<sup>144</sup> Each state is equally represented in the Senate, and proportionately represented in the House of Representatives.<sup>145</sup> The discretion of these representatives will adequately safeguard state sovereignty from excessive legislation.<sup>146</sup>

The dissenters<sup>147</sup> to *Garcia* reaffirmed their view that the tenth amendment acts as an affirmative limitation on Congressional power under the Commerce Clause.<sup>148</sup> Justice Rehnquist and Justice O'Connor both indicated a willingness to overrule *Garcia* and reaffirm *National League of Cities* should the opportunity present itself.<sup>149</sup> A change in the membership of the Court could create such an opportunity. A switch of a single vote would again result in a fundamental change in the way the Supreme Court views the relationship between a federal government power and concerns of federalism.

140. See *supra* note 124.

141. *Garcia*, 469 U.S. 528, 105 S. Ct. 1005, 101-15 (1985). The test was summarized in *Hodel*:

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

*Hodel*, 452 U.S. at 287-88 (citations omitted). See also Beschle, *supra* note 138, 175-85 (author proposed alternative test to identify "core" state sovereignty).

142. 469 U.S. 528, 105 S. Ct. 1005 (1985).

143. 469 U.S. 528, 105 S. Ct. at 1007; Stewart, *Court Flip-Flops on 10th Amendment*, 71 A.B.A.J. 114 (1985).

144. *Garcia*, 469 U.S. 528, 105 S. Ct. at 1018.

145. *Id.*

146. 105 S.Ct. at 1018-19.

147. Justices Powell, Rehnquist, and O'Connor each wrote dissenting opinions. *Garcia*, 105 S. Ct. at 1021 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); *id.* at 1033 (Rehnquist, J., dissenting); *id.* (O'Connor, J., dissenting, joined by Powell and Rehnquist, J.J.).

148. *Garcia*, 105 S. Ct. at 1022-23 (Powell, J., dissenting).

149. *Id.* at 1033 (Rehnquist, J., dissenting); *id.* at 1038 (O'Connor, J., dissenting).

FEDERALISM AND THE USE OF STATE CONSTITUTIONS TO PRESERVE  
INDIVIDUAL RIGHTS

As noted above,<sup>150</sup> Justice Brennan rejects the proposition that the values of federalism serve as external limits on the power of the national government. This does not mean that Justice Brennan believes that the states' role in our federal system is always subservient to the national government's role. To the contrary, Justice Brennan believes the states have a vital role in securing the goal of federalism: the preservation of individual rights.<sup>151</sup>

One area where Justice Brennan believes that the states are supreme is in the interpretation of their own laws and constitutions.<sup>152</sup> This view is implicit in Justice Brennan's opinion that abstention is proper to avoid the risk of advisory opinions,<sup>153</sup> where a state court may interpret its laws to be consistent with the Constitution. This view is made explicit in Justice Brennan's recent support of the movement to use state constitutions to guarantee rights that the Supreme court has refused to recognize under the United States Constitution.<sup>154</sup>

Justice Brennan's landmark essay on state constitutions generated a flurry of state court decisions.<sup>155</sup> State supreme courts seized upon Justice Brennan's invitation to interpret state constitutions more broadly than the United States Constitution. In several instances, state courts interpreted identically-phrased portions of state constitutions expressly at odds with Supreme Court holdings under the Constitution.<sup>156</sup> Generally, the state court holdings granted individuals greater liberties under state constitutions than the United States Constitution guaranteed, as interpreted by a majority of the Supreme Court.<sup>157</sup>

Civil libertarians were quick to seize upon this opportunity to make an end-run around what they perceived as unduly conservative pronouncements of the Burger (now Rehnquist) Court. The ACLU, for example, made a conscious strategic decision to reduce

150. See *supra* note 131 and accompanying text.

151. Brennan, *The Supreme Court*, *supra* note 25, at 874-85; Brennan, *Federal Habeas Corpus*, *supra* note 24, at 442; Brennan, *Extension of the Bill of Rights to the States*, 44 J. URB. L. 11, 23-24 (1966).

152. Brennan, *Some Aspects of Federalism*, *supra* note 6, at 946.

153. See *supra* note 104 and accompanying text.

154. *Michigan v. Mosley*, 423 U.S. 96, 120 (1976) (Brennan, J., dissenting); Brennan, *The Supreme Court*, *supra* note 25, at 783; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

155. See Lousin, *Justice Brennan: A Tribute To A Federal Judge Who Believes In States' Rights*, 20 J. MAR. L. REV. 1,2 (1986).

156. See Lousin, *supra* note 155, at 4 (discussing California decisions).

157. *People v. P.J. Video, Inc.*, 40 Crim. L. Rptr. (BNA) 2145 (N.Y. Ct. App. 1986).



the number of petitions for writ of certiorari filed with the Supreme Court and to increase the number of cases utilizing state constitutional law.<sup>158</sup> The ACLU sought to convince state supreme courts to interpret state constitutions in a manner more favorable to the interests of the ACLU.

The dangers in this strategy of bypassing the Supreme Court are the substantive risk of inconsistent constitutional rulings and the societal risk of lost respect for the Supreme Court. The first danger is already being realized. The number of decisions where state constitutions are interpreted at odds with the Constitution increases almost daily.<sup>159</sup> These decisions place in jeopardy the need for national uniformity in constitutional law.

The second danger of the strategy is that the general public will interpret the states' actions as a rejection of the Supreme Court's leadership and final authority on constitutional matters. The ACLU's strategy is an example of how a segment of society has already chosen to disregard Supreme Court pronouncements and to attempt to convince others that Supreme Court decisions should be disregarded as simply wrong. If this risk is left unchecked, it could undermine the credibility of the Supreme Court, in an era when the Court's reputation is already in decline.

Fortunately, however, not all state supreme courts have been quick to substitute their judgment for that of the Supreme Court's. Recognizing the need for uniformity, several courts have stated a reluctance to interpret state constitutions differently than Supreme Court pronouncements on the Constitution, based merely on dislike for the Supreme Court's decision.<sup>160</sup> Significantly, a few courts have adopted guidelines for determining in what situations they will interpret state provisions differently than federal.<sup>161</sup>

For example, the Supreme Court of Washington published a list of six criteria as guidelines for such a determination.<sup>162</sup> These guidelines assure that a different interpretation of similar provisions is based upon sound independent reasons, not mere disapproval of a

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158. Brennan, *The Supreme Court*, *supra* note 25, at 781-82.

159. *People v. P.J. Video, Inc.*, 40 Crim. L. Rptr. 2145.

160. *See People v. Class*, 39 Crim. L. Rptr. (BNA) 2241 (N.Y. Ct. App. 1986).

161. *State v. Gunwall*, 39 Crim. L. Rptr. (BNA) 2221 (Wash. 1986). The court listed the following six "neutral criteria":

- (1) textual language;
- (2) differences in the texts;
- (3) constitutional history;
- (4) pre-existing state law;
- (5) structural differences; and
- (6) matters of particular state or local concerns.

162. *Id.*

Supreme Court result.<sup>163</sup> All state supreme courts should follow this approach in order to assure respect for the Supreme Court as an institution, if not for the Court's decisions themselves.

Justice Brennan's support for the movement to expand the use of state constitutions was in response to Supreme Court decisions in the early 1970s which he characterized as "isolated and systematic violations of civil liberties."<sup>164</sup> Justice Brennan criticizes more harshly those Supreme Court decisions, such as in the area of habeas corpus,<sup>165</sup> which decline to decide at all the extent of constitutional rights.<sup>166</sup> Justice Brennan argues that Supreme Court decisions which defer to the state courts for a final decision on an individual's constitutional claims are mistaken application of the notions of comity and federalism.<sup>167</sup>

The Supreme Court's mistake, argues Justice Brennan, is in its understanding of the purpose of our federal structure.<sup>168</sup> Justice Brennan believes that the purpose of the federal structure is to provide "a double source of protection" for individual rights, thereby preserving individual liberty.<sup>169</sup> The Supreme Court, however, seems to believe that the federal structure was adopted to preserve states' rights, not individual rights.<sup>170</sup> This basic difference of opinion over the purpose of federalism lies at the heart of the two sides' disagreement over issues such as the proper scope of federal habeas corpus and the use of the tenth amendment as an external limit to Congressional power.

Both sides rely on the text of the Constitution<sup>171</sup> and upon the

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163. *Id.*

164. Brennan, *The Roles of the State Supreme Court Justice and the United States Supreme Court Justice*, 56 N.Y. ST. BAR J. 6, 8 (Oct. 1984). Justice Brennan was referring to cases such as *Stone v. Powell*, 428 U.S. 465 (1976), and *Hicks v. Miranda*, 422 U.S. 332 (1975). In *Stone*, the Court held that state prisoners could no longer be granted federal habeas corpus relief on grounds that evidence introduced at trial was obtained through an unconstitutional search and seizure. 428 U.S. at 494. The Court came to this conclusion because it reasoned that the exclusionary rule contributed little as a deterrent in the federal habeas corpus context, but cost society substantially. *Id.* at 495.

In *Hicks*, the Court applied the principles of *Younger v. Harris*, see *supra* notes 91-96, to the case when state criminal proceedings are begun against a federal plaintiff after the federal complaint is filed, but before substantive proceedings have begun in federal court. 422 U.S. at 349.

165. *E.g.*, *Stone v. Powell*, 428 U.S. 465 (1976).

166. Under the *Younger* doctrine, the federal district court must abstain from hearing the merits of a case until the state court remedies are exhausted. See *supra* notes 91-96.

167. *Stone v. Powell*, 428 U.S. at 504-06 (Brennan, J., dissenting).

168. *Id.*

169. Brennan, *supra* note 155, at 8.

170. *National League of Cities v. Usery*, 426 U.S. at 844-45.

171. See *supra* notes 113-16 for opposing interpretations of the words of the tenth amendment.

intent of the framers<sup>172</sup> of the Constitution as sources to support their view of federalism. These traditional sources of Constitutional interpretation, however, give us no clear answer as to which side is correct. As Justice Blackmun wrote in *Garcia*, "[T]he text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for '[b]ehind the words of the constitutional provisions are postulates which limit and control.'"<sup>173</sup> In search of these controlling postulates, both sides have relied on writings of the framers of the Constitution.

The framers of the Constitution themselves, however, had differing views about the purpose for the federal structure.<sup>174</sup> Each side to the debate can point to sections of *The Federalist Papers*, from example, in support of their positions.<sup>175</sup> Apparently, the framers were concerned about both states' rights and individual rights, and in balancing these competing interests, left us no definitive answers to modern problems of federalism.

The answer to what is the purpose of federalism must come not from divining the framers intentions but as a policy decision. Do we want to secure states' rights by giving them an express constitutional bases, or should we instead let the political process alone protect the states' interest? Justice Brennan's answer has been to let the political process secure the states' interest,<sup>176</sup> and keep the constitutional guarantees for individuals, whose rights are more easily trampled than those of the states.<sup>177</sup> The alternative, subrogating individual interest to interest of federalism, is not acceptable.

172. Professor Tribe argues that, as a general proposition, the intent of the Framers of the Constitution is not much help to deciding modern Constitutional debates. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 45-47 (1985). First, it is often difficult to ascertain a single intent of a group of diverse persons. *Id.* at 46. And second, the views of men who lived two hundred years ago are often irrelevant to the problems of today. The former difficulty is relevant to federalism, but the latter is not.

173. *Garcia*, 105 S. Ct. at 1016 (citations omitted).

174. Compare the words of James Madison in THE FEDERALIST No. 39 with the words of Alexander Hamilton in THE FEDERALIST No. 31. Hamilton wrote:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, . . . free from every other control, but a regard to the public good and to the sense of the people.

THE FEDERALIST No. 31, p. 195 (J. Cooke ed. 1961). Madison wrote that "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." THE FEDERALIST No. 39.

175. *E.g.*, *Garcia*, 195 S. Ct. at 1028-29 (Powell, J., dissenting; refers to The Federalist Nos. 45, 46); *National League of Cities*, 426 U.S. at 857, n.1 (Brennan, J., dissenting) (quoting THE FEDERALIST No. 31).

176. *National League of Cities*, 426 U.S. at 857 (Brennan, J., dissenting).

177. Brennan, *The Supreme Court*, *supra* note 25, at 785.

## CONCLUSION

There are several reasons why it is appropriate to discuss Justice Brennan's views on federalism today. First, the controversy over the proper roles between state and federal governments in areas such as habeas corpus proceedings is as lively as ever. Second, Justice Brennan has served on the court for thirty terms now.<sup>178</sup> It is very likely that Justice Brennan's career on the Supreme Court is near an end, and it is fitting that some testimonial to that career be given. Third, and most important to our nation, is the effect his eventual replacement will have on the way the Supreme court weighs federalism concerns in the future. Presently there is a split on the Court over the role states' rights should play as limits on federal power.<sup>179</sup> Professor Laurence Tribe of Harvard Law School has given us convincing evidence of the great impact a single new justice can have on a Court when there is a split over an issue.<sup>180</sup> An appointment to the court holding strong views one way or another will have lasting effect on this nation.<sup>181</sup>

Justice Brennan adopted a view of federalism early in his career which saw the division of power between state and national governments as a mainstay of the founding fathers' designs to secure individual liberties.<sup>182</sup> Parallel systems of justice give a double guarantee that constitutional protections will be upheld.<sup>183</sup> Justice Brennan in no way denigrates the role state courts play in upholding constitutional rights.<sup>184</sup> He recognizes that often they lead the way in the expansion of individual liberties.<sup>185</sup> He also maintains, however, that the federal courts, the Supreme Court in particular, have the power and the duty to uphold constitutional rights.<sup>186</sup> They would be derelict in their duty if they abdicated this constitutionally-mandated role to the state courts.<sup>187</sup> The strength of our freedom comes from two guardians of justice. To dispose of either would be a serious mistake.<sup>188</sup> Perhaps Justice Brennan's approach to federalism won't

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178. The longevity record for Supreme Court justices is thirty-four years, held by Justice Brennan's late colleague, William O. Douglas. See W. O. DOUGLAS, *THE COURT YEARS IX* (Vintage Books ed. 1981).

179. Compare, for example, the majority opinion and the dissents in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

180. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 31-40 (1985); Tribe, *What Difference Can A Justice or Two Make?*, 71 A.B.A.J. 60 (1985).

181. See *supra* note 170.

182. Brennan, *The Supreme Court*, *supra* note 25, at 784.

183. *Id.*

184. See *supra* note 152.

185. Brennan, *Some Aspects of Federalism*, *supra* note 6, at 947.

186. *Id.* at 947-48.

187. *Id.*

188. Brennan, *The Supreme Court*, *supra* note 25, at 784.

solve nagging problems such as overcrowded court dockets,<sup>189</sup> but it is the approach that provides the best guarantee of preserving individual rights. Hopefully, the Supreme Court will someday soon end a lingering controversy and adopt unanimously Justice Brennan's philosophy of federalism.

*Charles J. Corrigan*

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189. *See supra* note 63 and accompanying text.