

Spring 1996

The Federalism Pendulum

Ronald J. Bacigal

University of Richmond, rbacigal@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Civil Procedure Commons](#), and the [Legal History Commons](#)

Recommended Citation

Ronald J. Bacigal, *The Federalism Pendulum*, *Symposium on Federalism and the Criminal Justice System*, 98 W. Va. L. Rev. 771 (1996).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE FEDERALISM PENDULUM

RONALD J. BACIGAL*

I. INTRODUCTION	771
II. IN THE BEGINNING	772
III. DUE PROCESS AND INCORPORATION OF THE BILL OF RIGHTS	774
IV. THE WARREN COURT	777
V. THE BURGER AND REHNQUIST COURTS	783
VI. CONCLUSION	787

I. INTRODUCTION

In the long run we will all be dead, thus accounting for a common proclivity to focus on the short run. We must, however, guard against the tendency to view present conditions as eternal. So long as we live in a dual sovereignty consisting of federal and state governments, the tension between state and federal power can never be resolved in any definitive manner. At best, some sort of temporary balance must be struck, and the demarcation line of that balance swings to and fro like a pendulum. One purpose in adopting the Constitution and the Bill of Rights was to put in place a system whereby their meaning would be embodied in the shifting outcome of the continuing struggle between various decision makers.

Although this symposium appropriately focuses on current conditions, it behooves us to remember the words of the 81-year-old Benjamin Franklin when urging the adoption of our Constitution:

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having

* Professor of Law, T. C. Williams School of Law, University of Richmond. B.S. 1964, Concord College; LL.B. 1967, Washington and Lee University School of Law.

lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise . . .¹

Following Franklin's example, this essay takes a protracted view of the federalization of criminal procedure. It is important to review how the federalism pendulum has swung over the years to reflect concepts of what the Constitution was meant to mean, what it has come to mean, and what it ought to mean.

II. IN THE BEGINNING

Federalism is identifying the rules of the game under which the process of decision-making and exercise of government power will proceed. By adopting a constitution and a bill of rights, a political community defines its boundaries and establishes the system from which legitimate outcomes derive. It is not surprising then that the debate over ratification of the Bill of Rights focused on "what kind of government Americans wanted, not what rights this government should protect."²

In the beginning were the states, whose constitutions provided the model for the federal Bill of Rights. "[T]he drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions,"³ and James Madison undertook a comprehensive comparison of the provisions of state constitutions with those of the federal Constitution.⁴ A federal Bill of Rights patterned on state provisions was the mandatory price federalists paid to gain support from anti-federalists who feared the potential tyranny of a strong central government.

1. Sol Wachtler, *Our Constitutions — Alive and Well*, 61 ST. JOHN'S L. REV. 381, 381 n.2 (1987) [hereinafter Wachtler] (quoting 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 641-43 (1966)).

2. Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 117 (1992) (addressing the plenary session at the Conference for the Federal Judiciary in Honor of the Bicentennial of the Bill of Rights (Oct. 21, 1991)).

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

4. THE FEDERALIST No. 47, at 323 (James Madison) (J. Cooke ed., 1961).

In light of their perceived oppression at the hands of the English monarchy, anti-federalists and many other Americans in the 1780s associated a strong central government with tyranny and a strong state government with freedom. Individual freedom could be protected not only by the local legislature, but by the local courts as well. Although twentieth century lawyers rush to constitutionalize and codify criminal procedure, antebellum lawyers did not start their analysis with the Constitution or latest Supreme Court decision.⁵ The grand tradition in the states was common law decision-making: reasoning by analogy from established precedent. The Constitution, Declaration of Independence, Magna Carta, the English Bill of Rights, and similar manifestos of human rights could be seen as merely declaratory of rights already in existence and subject to protection by common law.⁶ In short, the framers saw no need to extend the Bill of Rights to the states because the states were seen as protectors of, rather than threats to, individual rights. Such at least was the conventional wisdom which led Chief Justice Marshall to declare that the Bill of Rights “is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”⁷

In the beginning and for the first one hundred years of the nation’s existence, the federalism pendulum was motionless, serving as a fixed demarcation line dividing two separate spheres within which each government regulated its criminal justice system independently of the other. The Bill of Rights limited the powers of the federal government, while individual state constitutions regulated the use of state power. The Fourteenth Amendment would end this equilibrium and set the pendulum in motion.

5. It was not until the 1960s that the Supreme Court forged “a national human rights law and new legal framework for society, with the federal Constitution and the Supreme Court at its center.” Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 736 (1992).

6. *Id.* See also H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 117 (1993) (explaining that constitutionalism was a tradition of common law reasoning rather than of political theorizing).

7. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833).

III. DUE PROCESS AND INCORPORATION OF THE BILL OF RIGHTS

The institution of slavery demonstrated that the states could not be trusted to safeguard the liberty of all citizens. Slavery and the repression that it bred was almost exclusively a creature of state law. Efforts to preserve slavery

led slave states to violate virtually every "right" and "freedom" declared in the Bill — not just rights and freedoms of slaves, but of free men and women too. Simply put, slavery required repression. Speech and writing critical of slavery — even if plainly religious or political in inspiration — was incendiary and had to be suppressed in Southern states, lest slaves overhear and get ideas.⁸

In the aftermath of the Civil War the former confederate states could not be trusted to respect individual rights of the newly freed slaves. When state government was seen as a threat to, not as a protector of individual rights, the Fourteenth Amendment was adopted as a powerful brake on runaway state government. The Amendment mandated that no state may "deprive any person of life, liberty, or property, without due process of law."⁹

With the adoption of the Fourteenth Amendment the Supreme Court embarked upon the "incorporation" debate over a number of integrated questions. Does the Fourteenth Amendment incorporate the Bill of Rights, making the Bill's restrictions on federal power applicable against the states? Are only some of the provisions of the first ten amendments incorporated into the Fourteenth Amendment? Is the Fourteenth Amendment's concept of due process independent of the Bill of Rights and thus a "blank check" to be filled in by the judiciary?¹⁰ In the area of criminal procedure the Supreme Court would not confront these issues until the early twentieth century and would not resolve many of the questions until the heyday of the Warren Court.

8. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1216 (1992) (citations omitted).

9. U.S. CONST. amend. XIV.

10. Due process is "the least frozen concept of our law — the least confined to history and the most absorptive of powerful social standards of a progressive society." Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

In the decade preceding the Warren Court, Justice Frankfurter was the leading proponent of the view that “[t]he Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century,”¹¹ thus the amendment incorporated none of the specific provisions of the Bill of Rights. Instead, “the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights . . . due process of law has its own independent function.”¹² In two dramatic cases, Justice Frankfurter instructed the Court as to how to identify the civilized standards embodied within due process.

In *Louisiana ex rel. Francis*,¹³ Frankfurter provided the crucial vote and authored a concurring opinion for an otherwise equally divided Court. The defendant in *Francis* had been placed in the electric chair and the executioner threw the switch, but because of some mechanical difficulty, death did not result.¹⁴ The defendant was removed from the electric chair, returned to prison and rescheduled for execution.¹⁵ The defendant then claimed that a second attempt at execution would violate the Fifth Amendment’s protection against double jeopardy and the Eighth Amendment’s prohibition of cruel and unusual punishment.¹⁶

Four Justices assumed, but did not decide, that the Fifth and Eighth Amendments were incorporated into the Fourteenth Amendment’s Due Process Clause and thereby made applicable to Louisiana.¹⁷ Nonetheless, these Justices found no constitutional violation because the state did not intend to be cruel, nor did the state plan to torture Francis.¹⁸ The Justices lamented the unfortunate circumstances of the case, but suggested that “[a]ccidents happen for which

11. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947).

12. *Id.*

13. 329 U.S. 459 (1947).

14. *Id.* at 460.

15. *Id.* at 461.

16. *Id.*

17. *Id.* at 462-64.

18. *Francis*, 329 U.S. at 464.

no man is to blame."¹⁹ The four dissenters, however, insisted that "[t]he intent of the executioner cannot lessen the torture or excuse the result,"²⁰ and that this "death by installments" was cruel and unusual punishment.²¹

Frankfurter expressed his "personal feeling of revulsion against a State's insistence on its pound of flesh," and conceded that he was "[s]trongly drawn" to some of the sentiments expressed by the dissent.²² He felt compelled, however, to put aside personal feelings because "great tolerance toward a State's conduct is demanded of this Court."²³ For Frankfurter, the Due Process Clause entitled the Court to rein in a state acting "in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided."²⁴ Presumably, a four to four vote by the other members of the Court was a paradigm of fair division, thus causing Frankfurter to defer to the state's judgment.

Five years after the *Francis* decision, however, Frankfurter would find a clear violation of due process even though Justice Douglas informed him that opinion on the matter was not fairly divided, in fact the vast majority of the states approved what Frankfurter now condemned. In *Rochin v. California*²⁵ the police illegally forced their way into Rochin's bedroom where they saw him seize two capsules from a night stand and put them in his mouth. Three officers "jumped upon him" and unsuccessfully attempted to extract the capsules.²⁶ Rochin was handcuffed and taken to a hospital where a doctor forced an emetic solution through a tube into Rochin's stomach.²⁷ This "stomach pumping" produced vomiting, and two capsules containing morphine were found in the vomited matter.²⁸

19. *Id.* at 462.

20. *Id.* at 477 (Burton, J., dissenting).

21. *Id.* at 472-81 (Burton, J., dissenting).

22. *Id.* at 471 (Frankfurter, J., concurring).

23. *Francis*, 329 U.S. at 470 (Frankfurter, J., concurring).

24. *Id.* at 469-70 (Frankfurter, J., concurring).

25. 342 U.S. 165 (1952).

26. *Id.* at 166.

27. *Id.*

28. *Id.*

Frankfurter again paid homage to judicial restraint and the Court's duty to "exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes."²⁹ That narrow scrutiny required the Court to give the states free rein so long as convictions were not "brought about by methods that offend 'a sense of justice.'"³⁰ In an eloquent passage, Frankfurter explained why the state had violated standards of fundamental justice:

[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.³¹

In Frankfurter's talented hands due process was flexible enough to sanction "execution by installments" while condemning the rudeness with which the police forced a defendant to vomit. The Warren Court would both disdain Frankfurter's approach and utilize it in slightly different form.

IV. THE WARREN COURT

Frankfurter had swung the federalism pendulum toward the position that the Due Process Clause incorporated none of the specific provisions of the Bill of Rights. Instead, each particular case had to be examined to determine whether the right alleged is one implicit in the concept of ordered liberty. Frankfurter's chief antagonist on the Court was Justice Black, who sought to swing the pendulum from no incorporation to total incorporation of the Bill of Rights. In *Rochin*, Black argued that the Fifth Amendment was applicable to the states and that

29. *Id.* at 168 (quoting *Malinski v. New York*, 324 U.S. 401, 412, 418 (1945)).

30. *Rochin*, 342 U.S. at 173.

31. *Id.* at 172.

California had violated the Amendment by forcibly taking incriminating evidence from the defendant.³² Black derided Frankfurter's "nebulous standards" of civilized justice as a chancellor's foot veto over law enforcement practices of which the Court did not approve.³³ Black maintained that total incorporation provided the content of due process and more importantly "keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not."³⁴

Had either Black's total incorporation or Frankfurter's no incorporation approach been adopted by the full Court, that aspect of the federalism pendulum would have been frozen in place. The Court, however, ultimately adopted a process of selective incorporation,³⁵ thereby insuring some elbow room for future movement should the pendulum need to be adjusted to accommodate additional rights found to be embodied in due process.

Although the incorporation debate was a major focus of the Warren Court, it is not the defining characteristic of the Court's approach to the federalization of criminal procedure. In the long run, the concept of total, selective, or no incorporation, proved to be little more than different verbal formulae used to achieve the same results. Because most language in the Bill of Rights is as general and nebulous as is the phrase "due process," dwelling on the literal language of the Bill of Rights simply shifts the focus of broad judicial inquiry from "due process" to such equally general terms as "unreasonable searches."

Consider *Schmerber v. California*³⁶ where the state extracted a blood sample from an unconscious defendant suspected of drunk driving. The Supreme Court ruled: (1) extraction of the blood did not offend that sense of justice spoken of in *Rochin*;³⁷ (2) the privilege

32. *Id.* at 174-77 (Black, J., concurring).

33. *Id.*

34. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring).

35. The Court picks and chooses those rights it considers "of the very essence of a scheme of ordered liberty." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 538 (1986) [hereinafter Brennan] (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

36. 384 U.S. 757 (1966).

37. *Id.* at 771.

against self-incrimination, now binding on the states, only protected “evidence of a testimonial or communicative nature,” which the blood sample was not;³⁸ and (3) the protection against unreasonable search and seizure, also now binding on the states, was satisfied because the procedures used to take the blood were constitutionally “reasonable.”³⁹ In *Schmerber*, testing the state’s exercise of power under the Fourth, Fifth, and Fourteenth Amendments produced the same result.⁴⁰

At the other end of the spectrum, *Winston v. Lee*⁴¹ demonstrated that substantive due process retains some vitality. In *Winston*, the police sought a court order requiring a robbery suspect to undergo surgery for removal of a bullet lodged in his shoulder, in hopes that a ballistics test would link the bullet to the victim’s gun.⁴² The defendant maintained that compulsory surgery would violate his Fourth Amendment right to be free of unreasonable searches and seizures.⁴³ The Supreme Court conceded that by seeking a court order based on probable cause, the state had complied with the procedural requirements of the Fourth Amendment.⁴⁴ This determination might have disposed of the case in light of the Court’s earlier suggestions that no area of individual privacy was beyond the reach of a procedurally proper warrant.⁴⁵ Nonetheless, the Court barred state ordered surgery because it would violate the Fourth Amendment’s substantive requirement of reasonableness; a requirement unrelated to the amendment’s procedural requirements.⁴⁶ The effect of *Winston* was that although all of the procedures of the Fourth Amendment warrant clause might be satisfied, a search could still be invalidated because of the substantive right of privacy embodied in the amendment’s reasonableness clause.⁴⁷

38. *Id.* at 761.

39. *Id.* at 771.

40. *See also* *United States v. Payner*, 447 U.S. 727, 736 (1980) (holding that the relevant interests do not change when a court analyzes police misconduct under the Fourth Amendment, Due Process Clause, or the court’s supervisory power).

41. 470 U.S. 753 (1985).

42. *Id.* at 756.

43. *Id.*

44. *Id.* at 763.

45. *See, e.g., Andresen v. Maryland*, 427 U.S. 463 (1976).

46. *Winston*, 470 U.S. at 767.

47. *See* Ronald J. Bacigal, *Dodging a Bullet, But Opening Old Wounds in Fourth*

Winston's protection of substantive privacy rights under the Fourth Amendment's rubric of reasonableness sounds very much like substantive due process under the Fourteenth Amendment. In fact, much of the language in *Winston* echoes the due process language of *Rochin*.⁴⁸ Like Justice Frankfurter, Justice Brennan indicated that the state had shocked the Court's collective conscience:

[T]he Commonwealth proposes to take control of respondent's body, to "drug this citizen — not yet convicted of a criminal offense — with narcotics and barbiturates into a state of unconsciousness," . . . and then to search beneath his skin for evidence of a crime.⁴⁹

Due process and similarly sweeping concepts of unreasonable searches and seizures have proved to be equally facile tools for assessing the constitutional propriety of state law enforcement practices. Thus the great incorporation debate has ended (or limps along) with a mere whimper. In the long run, the most significant feature of the Warren Court was not the controversy over whether to employ no, total, or selective incorporation as the tool for reviewing state law enforcement practices. The defining characteristic of the Warren Court was its willingness to push the federalism pendulum to increase federal review of the previously neglected area of pretrial police procedures.

In the 1950s and '60s the Warren Court faced a serious discrepancy between legal theory and the reality of modern law enforcement. On paper, the Bill of Rights and state constitutions enumerated the individual's protections against government power, but "at night on the streets, and in the darker corners of station-houses, lawlessness was more of a reality than constitutional delicacy."⁵⁰ The "third-degree" and other questionable police tactics (if not actual police brutality) increasingly came to the Court's attention. Professor Kamisar graphical-

Amendment Jurisprudence, 16 SETON HALL L. REV. 597 (1986).

48. The lower court in *Winston* concluded that the proposed surgery was "condemned by *Rochin*." *Lee v. Winston*, 717 F.2d 888, 900 (4th Cir. 1983).

49. *Winston*, 470 U.S. at 765 (quoting *Lee v. Winston*, 717 F.2d 888, 901 (4th Cir. 1983) (citations omitted)).

50. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 ALB. L. REV. 265, 275 (1989) [hereinafter Friedman].

ly portrayed the courtroom as the showcase “mansion” of criminal procedure while the police station was a lowly “gatehouse”:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there’s the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

In this “gatehouse” of American criminal procedure . . . the enemy of the state is a depersonalized “subject” to be “sized up” and subjected to “interrogation tactics and techniques most appropriate for the occasion;” he is “game” to be stalked and cornered. Here, ideals are checked at the door, “realities” faced, and the prestige of law enforcement vindicated.⁵¹

Professor Kamisar queried “why the Constitution requires so much in the courtroom and means so little in the police station.”⁵² The Warren Court would answer that query by examining entrenched police practices and subjecting them to constitutional scrutiny.

At the heart of the Warren Court’s approach to criminal procedure was the belief that the states could not be trusted to protect the rights of criminal defendants.⁵³ This belief was triggered by a shift in popular perceptions about government power.⁵⁴ In the eighteenth century, fear of an overbearing and oppressive government was a pervasive influence on the original Bill of Rights, but by the twentieth century fear of tyranny was replaced by fear of the criminal.⁵⁵ In response to this widespread fear the police and the state courts adopted a “get tough on crime” stance as the criminal justice system increasingly focused on ways to control and eliminate crime, rather than on ways to

51. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 3, 19-20 (1965).

52. *Id.* at 21.

53. In the landmark case of *Gideon v. Wainwright*, Justice Harlan expressed dissatisfaction with many state courts’ discharge of their “front-line responsibility for the enforcement of constitutional rights.” *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

54. The O. J. Simpson trial in general, and the detective Fuhrman tapes in particular, may alter the public perception of controlling police power.

55. Friedman, *supra* note 50, at 272.

protect the accused. The Warren Court would buck popular consensus by swinging the federalism pendulum in favor of extending federal constitutional protections to those suspected of criminal activity. *Mapp v. Ohio*,⁵⁶ which extended the Fourth Amendment exclusionary rule to the states, and *Miranda v. Arizona*,⁵⁷ which required the now famous warnings, must rank among the most unpopular decisions in Supreme Court history.

In the present day it has become fashionable to characterize the Warren Court's constitutionalization of criminal procedure as an undemocratic exercise of judicial arrogance. Democratic theory, however, presumes shifting coalitions where minorities may come together and become majorities or at least substantial minorities who can gain the ear of the legislature. In practice, criminal defendants find themselves permanently in a minority status before the legislature and feared by the majority of law abiding citizens. Majoritarian decision-making may be generally a good thing, but sometimes it needs correction by the courts, particularly when there are reasons to think that some minority voices have been unable to be heard fairly. The judicial activism of the Warren Court has been defended on grounds that the oppressed can at least get into court to argue against their oppression, unlike the difficulties encountered when attempting to mount an effective political movement that would similarly argue against their oppression.⁵⁸

In the long run, however, the Warren Court's legal or political justifications for its activism are less significant than its efforts to inject humane principles into criminal procedure.⁵⁹ The Court's humanitarian approach to criminal procedure is best captured in folklore recounting oral arguments before the Warren Court. In a typical case, government counsel might defend a police practice by invoking lofty jurisprudential arguments, often involving federalism issues. An impatient Chief Justice would interrupt: "Yes, yes. But is it fair?"⁶⁰ That

56. 367 U.S. 643 (1961).

57. 384 U.S. 436 (1966).

58. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

59. "But the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'" *Rochin*, 342 U.S. at 174 (quoting *Davis v. Mills*, 194 U.S. 451, 457 (1904)).

60. Justice Brennan referred to the Warren era as "a time in which the Court played

pithy question embodies all that was good and bad about the Warren Court's activism. Less brusque but no less revealing was Chief Justice Warren's retirement address where he noted that minorities sometimes could look to no one but the judiciary.⁶¹ He explained that, "we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences."⁶² Though one wonders if the words stuck in his throat, President Nixon appeared at the retirement ceremony and praised Warren's fairness and his humanity.⁶³ As an expression of humanity and fairness, the Warren Court pushed the federalism pendulum to extend federal constitutional protection of individual rights.

V. THE BURGER AND REHNQUIST COURTS

Whether one criticizes or defends the Warren Court's activist bent, the federalism pendulum has once again swung, and the Burger and Rehnquist Courts have engineered a retreat from federal supervision of "fundamental fairness." In *United States v. Payner*,⁶⁴ the lower court held that "the Due Process Clause of the Fifth Amendment and the inherent supervisory power of the federal courts required it to exclude evidence tainted by the Government's 'knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights."⁶⁵ The Supreme Court quickly disposed of this remnant of Frankfurter's approach to due process. The Court stated that even if government

'the role of keeper of the nation's conscience.'" Brennan, *supra* note 35, at 547 (citations omitted). The Warren Court reflected a twentieth century phenomenon, an "unspoken norm that large power-centers (governmental or otherwise) should act fairly, insofar as they make major impacts on people's lives." Friedman, *supra* note 50, at 274.

61. Retirement of Mr. Chief Justice Warren, 395 U.S. vii, xi (1969).

62. *Id.*

63. *Id.* at viii. President Nixon employed a Will Rogers quote to describe Chief Justice Warren — "It is great to be great. It is greater to be human." *Id.*

64. 447 U.S. 727 (1980).

65. *Id.* at 731 (quoting *United States v. Payner*, 434 F. Supp. 113, 129 (1977)). The District Court found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties" *Id.* at 730 (quoting *Payner*, 434 F. Supp. at 132-33).

conduct is so outrageous as to offend fundamental "canons of decency and fairness" according to *Rochin*, "the fact remains that '[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant.'"⁶⁶ In the absence of a specific violation of the particular defendant's Fourth Amendment rights, the overall propriety of the government's search and seizure activity was no longer subject to review under the Due Process Clause.

In addition to discounting the majestic generalities of Due Process, the Burger Court resurrected faith in the states as protectors of individual freedom. *Stone v. Powell*⁶⁷ rejected any argument that the Warren Court's expansion of federal power had been justified by the state courts' hostility to the Bill of Rights:

Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. . . . In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse."⁶⁸

Stone v. Powell announced that henceforth federal habeas corpus would not be used to review Fourth Amendment claims so long as the "State has provided an opportunity for full and fair litigation" of the claim.⁶⁹ The Court's retreat from habeas review was based on its decision to "forgo the exercise" of this power in the interest of "comity and concerns for the orderly administration of criminal justice"⁷⁰ and to diminish "federal-state friction."⁷¹ The dissent, however, turned the tables on the majority by characterizing the holding as "a manifestation

66. *Id.* at 737 n.9 (quoting *Rochin*, 342 U.S. at 169; *Hampton v. United States*, 425 U.S. 484, 490 (1976)).

67. 428 U.S. 465 (1976).

68. *Id.* at 494 n.35 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)).

69. *Id.* at 494.

70. *Id.* at 478 n.11.

71. *Id.* at 523 (Brennan, J., dissenting).

of this Court's mistrust for *federal* judges" who might too actively set aside state court determinations.⁷²

Stone v. Powell was merely the first step in the Supreme Court's generally successful efforts to rein in federal judges reared on the Warren Court's judicial activism and distrust of state courts. In a dramatic turnabout from the perception of the Warren Court as the bulwark standing between citizens and state governmental incursions on their liberties, there has been an emerging perception that state courts are a more hospitable forum than are their federal counterparts for those who seek expanded protection of human rights and civil liberties. Today, it is the state courts that are expressing dissatisfaction with the Supreme Court's role in the enforcement of constitutional rights.

Unlike other critics of the Supreme Court, state courts have the power to do something about their discontent with the current status of human rights litigation. As coequal guardians of civil rights and liberties, state courts are free to surpass the minimum guarantees embodied in the federal Bill of Rights. Although the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, federalism permits diversity. *Michigan v. Long*⁷³ recognized that if a state court plainly declares that its increased protection of individual rights rests on state law, the U. S. Supreme Court will honor that statement and will not review the state court decision.

To its critics, the Warren Court engineered a permanent redistribution of power from the states to the federal government, thereby stifling federalism's invitation to states to "serve as a laboratory; and try novel social and economic experiments."⁷⁴ But a pendulum does not allow for "permanent" shifts. The Burger and Rehnquist Courts have dismantled the Warren Court's federalization of the criminal justice system and once again shifted power back to the states. *Michigan v. Long* marks the path for states to escape federal review and remain the

72. *Powell*, 428 U.S. at 530 (Brennan, J., dissenting).

73. 463 U.S. 1032 (1983).

74. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

ultimate arbiters of state law. In the short run, the state laboratories are once again open for business.

Under the new federalism the political forces within each state laboratory are free to wield their influence upon the state judiciary. As Chief Justice Burger suggested, "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to insure rational law enforcement."⁷⁵ With each new state court decision, "liberals" presumably will rise to defend or attack the decision, while "conservatives" will respond accordingly. Because of popular election or retention elections by the legislature, most state court judges are subject to greater political accountability than are their federal counterparts. Should state judges prove to be unresponsive to political pressures, expressions of the popular will can take the form of constitutional amendment, a much less cumbersome process at the state level.

There is, however, another side to the new federalism which permits state judges to insulate themselves from almost all accountability. If so disposed, a state court could base its decision on both independent state grounds and upon federal grounds, thereby using each sovereign to trump the other. That is, by invoking the state constitution the state court insulates its decision from federal judicial review. By simultaneously invoking the federal constitution the state court blocks accountability to the state political system. This form of unreviewable judicial power is an anathema to the proponents of the new federalism, but the jury is still out on whether the Supreme Court will permit state judges to manipulate federalism concepts to remove themselves from accountability to both federal and state authorities.

It is too early in the game to make a long run assessment of the latest shift in federal/state power or to measure the true colors of the new federalism espoused by the Supreme Court. Should the Court lose patience with the results from the state laboratories, the door to experimentation could slam shut. Scarcely twelve years passed between the Court's encouragement of federalism and diversity in *Wolf v. Colorado*⁷⁶, and *Mapp v. Ohio*⁷⁷ when the Fourth Amendment exclusionary

75. *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

76. 338 U.S. 25 (1949).

rule was imposed on the states. Only time will tell whether the federalism pendulum will continue in its present direction toward increased state power, or whether the inevitable rebound is near at hand. The federalization of criminal procedure is governed by changes in society and by shifting political winds. Those winds will surely shift again; only the timing is in question.

VI. CONCLUSION

This essay began with a promise to take a protracted view of the federalization of criminal procedure. What we gain from a broadened perspective is an appreciation of federalism as an ongoing process rather than a substantive result that we may or may not favor. Those who focus on process can delight in the federalism debate as a means of continually participating in a modern-day constitutional convention redefining the structure and relationship of our federal and state governments.⁷⁸

Those who favor results over process may hope to see the federalism debate come to a conclusion after some two hundred years. (Even the O. J. Simpson trial finally ended). It might be comforting to resolve this debate if we could believe that the federalism pendulum had stopped swinging because it found the exactly correct balancing point between federal and state power. However, even assuming that there is some exactly correct balancing point,

we make a serious mistake to accept the belief that the past has done its work for the present, and that our liberty, which is the cornerstone of democracy, is guaranteed. The truth is that one generation can never protect the rights of another, and although all of our great documents: the Declaration of Independence, the Constitution, and the Bill of Rights, are ideal reflections of our finest aspirations, they are not self-fulfilling chariots of justice. For all their beauty, they are only words, dependent on each

77. 367 U.S. 643 (1961).

78. The debate between modern-day Federalists and Anti-federalists is increasingly strident. Both sides need to remember that federal and state governments "not only peacefully co-exist, but depend on each other, in varying degrees, to do their work. The essence of the relationship is interdependence." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

generation to give them a meaning and content for its own time and place.⁷⁹

In the long run we will all be dead, but the Constitution and the Bill of Rights will be given new life by those who follow us and who must continue to fine tune the mechanism that controls the federalism pendulum.

79. Wachtler, *supra* note 1, at 387 (citations omitted).