

FEDERALISM, UNTAMED

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I. INTRODUCTION

Do you rankle at those amorphous rhapsodies about “Our Federalism” indulged in by judges who relegate civil rights litigants to state courts?¹ Why would anyone see cases in which state officials stand charged of violating the rights of individuals as presenting an occasion for deference to the states? If federal rights take precedence over state policies and practices, is it not perverse to prefer adjudication in the courts that have the strongest bias in favor of state interests? If jurisdiction is a duty and declining jurisdiction consequently a dubious business, shouldn't we reject judge-made doctrine and statutory interpretation that restrict access to federal court? And *1208 when the cases excluded involve matters of individual rights, shouldn't our disapproval become active condemnation?

If we address the Supreme Court's federalism-based jurisdictional doctrine with questions of this kind, we will probably tend to conclude that the Court has turned the proper hierarchy of values upside down, either through inept reasoning or active hostility to rights. In this essay, I turn away from that perspective and posit a theory that harmonizes the Court's federalism with the notion that federal rights take precedence over state policies and practices. I suggest that the Court's supposedly deferential moves in the name of federalism are little more than a strategy to exploit the state courts, conscripting them into a national agenda. That is, the Court's federalism is in reality quite tame. While individual rights frequently receive something decidedly less than expansive vindication, this federalism nevertheless constrains the state courts in a system structured according to national interests and policies.

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¹ The expression “Our Federalism” appears most conspicuously in *Younger v. Harris*, 401 U.S. 37, 44 (1971) (declining jurisdiction to adjudicate a federal constitutional claim that originated as a defense within a state criminal case). See also *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941) (declining jurisdiction over federal case raising constitutional claim but potentially resolvable on a state law ground).

I then take on my own “tamed federalism” theory. I concede that the theory does not fully represent all of the Court’s reasoning and motivation, but suggest that the theory still offers a satisfying organizational framework for understanding jurisdictional doctrine. The question becomes whether we *should* embrace tamed federalism and what would *untamed* federalism look like? Our first impulse may be to reject any notion of untamed federalism out of hand, on the ground that it must necessarily and intolerably lead to the diminishment of individual rights in the shadow of overweening state interests. My purpose here, however, is to resist that impulse and to explore the risky positive values of untamed federalism. Is there something in state diversity and autonomy that we may find as compelling as the enforcement of individual rights?

Or should we also resist this last question, with its loaded structure? I will suggest that it is impossible to disentangle the production of human culture at the local level from the meaning that any court can ascribe to individual rights. Though we concentrate our attentions for the most part on the Supreme Court’s linguistic formulations of rights, these formulations only coalesce within a legal and political discourse that includes the voices of state judges. Moreover, autonomy and diversity will inevitably emerge after each of the Supreme Court’s attempts to carve the meaning of a right in stone. Efforts to constrain and tame federalism are inherently futile: concepts of federal supremacy and the uniformity of individual rights represent a fantasy of control. This Essay concludes with a plea for the abandonment *1209 of that fantasy and a new search for a realistic, normative role for state courts in the discourse concerning the meaning of rights.

II. TAMED FEDERALISM

Numerous jurisdictional doctrines overtly premised on deferential-sounding federalism translate into a scheme of maximizing the enforcement of federal law.² Many other jurisdictional doctrinal twists withhold deference for the same federal end.³ Notwithstanding the invocations of respect for state interests, as a general rule the Supreme Court has shaped jurisdictional doctrine around federal interests: it uses the state courts as an abundant resource capable of handling large quantities of work, and it preserves access to federal courts whenever it perceives the state courts as inadequate.⁴ The simple realities of numbers defeat the notion that federal courts must address all questions of federal rights. There are approximately fifteen trial-level state judges for

² See generally Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991) (expounding this thesis in much greater length).

³ Id.

⁴ The clearest example is the doctrinal structure dealing with state law based criminal cases that will frequently present issues of federal law, arising under the Fourth, Fifth, and Sixth Amendments. To permit these numerous cases to move routinely to federal court, for example, by allowing the state court defendant to restate the federal issue as an affirmative claim under 42 U.S.C. § 1983, would overwhelm federal courts, and the Younger doctrine prevents this problem. Younger preserves access to federal court for the rare case in which the federal courts are willing to characterize the state courts as inadequate at the outset. See *Younger*, 401 U.S. 37, discussed in Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. at 978. After the state court has had its opportunity to handle the federal issue, it becomes possible for the Supreme Court to act, though this form of review will be exceedingly rare and dependent on the Court’s own determination of the importance of the issue. And, it becomes possible to gain access to a lower federal court for habeas corpus review, subject to a rightly constrained doctrinal system. See, for example, *Coleman v. Thompson*, 501 U.S. 722, 757 (1991) (denying habeas review if petitioner defaulted in asserting federal claim without cause in state court and reading a summary state court opinion as a finding of default); *Butler v. McKellar*, 494 U.S. 407, 412-17 (1990) (denying habeas petitioner access to federal court to assert “new rule” of constitutional law, with rare exceptions, and defining “new rule” very broadly).

each federal district judge: to charge the whole enterprise of federal rights enforcement to the federal courts would sacrifice the immense judicial resource offered by the state courts. Despite any nagging mistrust of state courts, to exclude them from rights-enforcement would amount to a dysfunctional failure to delegate.

Of course, different minds and different justices disagree about exactly when state courts are inadequate – when the shift from deference to nondeference kicks in – and many of the doctrines shaped according to **1210* to federal interests thus remain controversial.⁵ By and large, however, the Supreme Court does not allow countervailing state interests and state policies to stand in the way of anything that seems to need to be done in the service of federal policies. The real questions in federal jurisdiction have less to do with hesitancy to intrude on the work of state courts than with eagerness to impose work on them. In making jurisdictional doctrine, the federal courts are, after all, designing their own workload. This is the real self-interest at stake for the life-tenured, salary-protected federal judge.

At the bottom of, say, the domestic relations exception to diversity jurisdiction lies a sense that this work is insignificant docket-clutter beneath the dignity of the federal judge. State judges receive this work not because of respect for the integrity of the state's judicial system, but because federal judges have turned up their noses at it.⁶ If the Supreme Court has structured habeas corpus to prevent federal court review of all but the most flagrant violations of federal law, it has shaped the federal workload to include only the righting of (what it sees as) dramatic injustice, more modest state-court-work-checking being unworthy of the attention of the federal judge.⁷

A more activist, rights-enforcing Supreme Court justice would view habeas corpus petitions as far more important – undeserving of stigmatization as mere nit-picking – and would reject the Court's new law of habeas corpus.⁸ But this does not change the theory: federal jurisdictional doctrine takes the perspective of the federal judge, who takes what are perceived as the choice work assignments and relegates the rest to the state courts. The state courts are underlings, not **1211* equal partners.⁹ Despite the language of deference, they are objects of exploitation.

⁵ Certainly the doctrinal structure outlined in the previous footnote is highly controversial. Many commentators condemn the Younger doctrine and the recent developments in habeas corpus doctrine.

⁶ See, for example, *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992) (reaffirming the longstanding exception and limiting it to cases involving divorce, alimony, and child custody). The *Ankenbrandt* opinion justified the exception in terms of the states' traditional interest in these areas, not, as I assert in the text, the federal courts' lack of interest. As has been widely noted, there does not seem to be any more reason to observe state interests for these cases as opposed to say, the various torts and contracts claims heard under diversity jurisdiction. See, for example, Erwin Chemerinsky, *FEDERAL JURISDICTION* 288-89 (Little, Brown, 2d ed. 1994). The lack of any grounding in state interests for distinguishing these cases suggests the accuracy of the contention that federal, not state, interests are at work.

⁷ See *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* Court, in cutting off habeas review where petitioners relied on "new rules" of constitutional law, created an exception for rules that significantly increase "the likelihood of an accurate conviction" and that also "implicate[s] the fundamental fairness of the trial." *Id.* at 313. In practice, a combination of the *Teague* rule and this exception empowers the federal courts to shape their workload to screen out the minor and include the major (more precisely: the recent Court's conception of what is minor and what is major).

⁸ See, for example, *Butler*, 494 U.S. at 431-32 (1990) (Brennan, J., dissenting).

⁹ The position of state courts defined by jurisdictional doctrine tracks the positions of the states themselves under the Tenth Amendment. While there is some indication that the Court may immunize the states' governments from extremely intrusive demands of federal law, see *New York v. United States*, 112 S. Ct. 2408 (1992), essentially the state may regulate only in areas Congress has not chosen to preempt. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985). Even where Congress has

One can explain the language of deference. First, it distracts attention from the federal courts' rejection of the work they shunt to the state courts. And second, it works as encouragement. To enlist the state courts in the enterprise of enforcing the rights guaranteed by federal law one says nice things to them about their capacities: the "Myth of Parity"¹⁰ as incentive, not truth.

When I ask my son John to mow the lawn, he tends to point out that he can't help leaving lines of uncut grass between each strip he mows and that I will criticize him for these failings afterwards. Common sense counsels that I should tell him he certainly can do a fine job of mowing the lawn and provide a little diplomatic instruction about overlapping the strips as he works. I do not mention that I can do better and that I'll need to check for uncut lines afterwards, because I want to maximize the likelihood of getting him to do some of the work now. I'm also hoping that experience will lead to improvement over time. My words have very little to do with my opinion of his present capacity.

This is a homely analogy, and the violation of rights ought to stir deeper passions than uncut blades of grass. Mowing the lawn incites less anxiety than mowing the law. Nevertheless, one must acknowledge the potential benefits of increasing the number of hands working on a task. That some are stronger, more dedicated, or more skilled does not argue for giving the less skilled a pass. The less skilled may improve through practice, the more skilled may correct the flaws in the work of the less skilled, and, aside from the end result, members of a community have responsibilities and should not be permitted to sit by when there is work to be done. If the lawn needs **1212* mowing, twelve-year-old children should not be heard to invoke incompetence, and we rightly shake our heads at parents who attempt to accomplish everything on their own while their children lie about.

Similarly, state courts may gain experience enforcing rights if they are given this task to do. If they miss some spots, then federal jurisdiction ought to provide a second pass. And, since state courts are part of the federal system, constitutionally responsible for the enforcement of federal rights, we should not accept the contention that they may ignore federal rights on the theory that the federal courts do a better job. Their participation is part of their membership in the whole.

Any number of doctrines – *Younger*,¹¹ habeas,¹² the Eleventh Amendment,¹³ the definition of "arising under" jurisdiction,¹⁴ the permutations of Section 1983¹⁵ – represent

not acted at all, the force of the commerce power alone has led the Court to restrict the states' power to legislate in areas marked by federal interest. See, for example, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669-71 (1981) (employing a dormant Commerce Clause analysis to invalidate an Iowa statute).

¹⁰ See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). In his classic, oft-cited article describing the preferability of federal court, Professor Neuborne debunks the "myth" that the state courts are equally good. Many commentators agree and criticize the Court for presuming the parity of state courts. My point is that the Court has a federal-interest-based motivation to invoke the myth.

¹¹ See note 4.

¹² *Id.*

decisions to exploit the states in the enterprise of enforcing federal law. With this interpretation in mind, the rhetoric of deference reads as cheerleading, encouragement, wheedling a decent performance out of the state courts whose performance *1213 is genuinely needed. Federal courts, in the absence of an expansion that would transform the very qualities that make them different from the state courts,¹⁶ cannot intervene in every ongoing state court prosecution and adjudicate each issue of federal law as it arises. Nor can they exhaustively check every state criminal prosecution afterwards for each violation of federal rights. The Supreme Court certainly cannot review each determination of federal law. Full enforcement of federal law thus demands the participation of the state courts, and doctrines of jurisdictional federalism are roughly designed to secure it.

If I overstate the extent to which the Court has constrained and tamed federalism, I think I am at least correct that there is a decided trend in this direction in much of the doctrine. One can fairly successfully mine the case law, extract this theory as the preferred meaning of judicial federalism, and accordingly condemn nonconforming doctrine. This is the theory by which judicial federalism can have the wide scope of operation the Court seems to think it deserves and still not pose a threat to national interests. One might ask profitably at this point whether we ought to agree with the majority of the Court that federalism ought to continue to mean something,¹⁷ but instead I want to ask a quite different question. Assuming we embrace federalism, do we want tamed federalism – or does purging the risk out of federalism inherently drive out its desirable effects?

¹³ See *Edelman v. Jordan*, 415 U.S. 651 (1974). *Edelman* allows rights claimants to take advantage of the legal fiction established in *Ex Parte Young*, 209 U.S. 123 (1908), when they seek prospective relief, but not when they seek retrospective relief. Initially, this meant that plaintiffs could go to federal court for the announcement of what their rights are and for the future-looking injunction, but the tedious administrative work of parceling out past damages to individual claimants would be the state courts' job. See Norman B. Lichtenstein, *Retroactive Relief in the Federal Courts Since Edelman v. Jordan: A Trip Through the Twilight Zone*, 32 CASE W. RES. L. REV. 364, 375 n.73 (1982) (noting that plaintiffs in *Edelman* received their retrospective payments in state court). In later case law, however, the Court cut off the state court path to retrospective relief. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

¹⁴ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 813-14 (1986). In *Merrell Dow*, the Court declined to define § 1331 jurisdiction to cover all cases in which federal law is a necessary element of a state law cause of action. The Court justified this interpretation, over a strong dissenting opinion written by Justice Brennan, by citing the lack of federal interest in the case at hand (a products liability personal injury case).

¹⁵ For example, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court forced prisoners litigating about prison disciplinary procedures, and relying on federal law to use habeas corpus, even though their claim fit literally into 42 U.S.C. § 1983, thus forcing them to present the claim to a state court rather than going directly to federal court. Notably, the Court wrote:

The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Id. at 492. Despite protestations about the state's interest and expertise in hearing these claims and the need for "comity," this language suggests that prison litigation is simply too lowly and inconsequential to justify consuming the time of a federal judge.

¹⁶ See Jon O. Newman and Stephen Reinhardt, *Are 1,000 Federal Judges Enough?*, N.Y. TIMES A17 (May 17, 1993) (reporting the debate on the issue of increasing the federal judiciary). See generally William H. Rehnquist, *Seen in A Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1.

¹⁷ I think it is apparent that federalism will continue to mean something, in part because judges assume so. Aside from the question of the extent to which the Constitution demands an independent role for the states as a counterbalance to national power, purely functional considerations justify it. In the particular case of judicial power, there are simply not enough federal courts to handle all issues of federal law. A dramatic increase in the number of federal courts does not appear likely to occur, and in any event, such an increase would change the character of the federal courts, arguably making them more like the state courts and undercutting the reasons for the increase.

III. UNTAMED FEDERALISM

Let me return to my homely grass-cutting scenario. I only wanted John to carry out a job I would otherwise have done, to do it the way that I would do it, and to follow specifications I had drawn up. I tell John to cut the grass when I think it's gotten too long. I expect John to use the hand mower because I disapprove of power **1214* mowers. Similarly, tamed federalism simply forces the states to carry out a dictated national agenda. Indeed, this may suggest another reason for the deferential talk in the case law: the language of separateness, sovereignty, and deference conceals the essential inferiority of the state courts' position. State courts merely perform work, as lowly functionaries of the federal government, and if they are left alone to do their work it is only because separate functioning is seen as an effective strategy for getting work done.

Suppose John questions my lawn agenda and suggests that we abandon cutting altogether and allow the grass to reach its natural length. Maybe those purplish seed plumes will prove esthetically pleasing. Note that John would not be simply disengaging from the project of looking after the yard and doing the work badly. He would be participating on an unexpectedly vital level, asserting a creative role. I could insist on controlling the homeowner agenda, trusting John to mow the lawn by himself, but recognizing no valid independence beyond following my instructions – tamed federalism. On the other hand, I could actually entertain the notion that I do not have sole possession of some sort of ultimate knowledge of the one true method of lawn care. Despite my deep belief that I know better, I might benefit from crediting his opinion on the subject. I am not saying I would welcome endless argument, allow clever words as an escape from work, or refrain from imposing a controversy-ending judgment at some point. But I am saying that listening to his different perspective and perhaps even trying things his way for a while might lead to a better policy and might enhance the quality of his participation in the general project of householding.

A less-tamed federalism would seek independent contributions from the states to the creative process of law- and policy-making. It would tolerate divergence for the sake of the vitality provided by counterpoint agendas. Instead of attempting to discipline the state judges into casting aside local passions and prejudices and emulating the federal judges in the national mission, it would actually value the state judges' opinions – as expressed in the contextualized voice of the local culture. It would be the very thing federal court primatists fear. It would be what the theory set forth in the previous section discounts as unimportant in current doctrine and seeks to control.

How could one ever view this as desirable? Let's reexamine the language we conventionally use. The local culture gives rise to "passions" and "prejudices," while federal law embodies and protects "treasured, enduring rights." Is this really the case? Where does our sense of the content of the treasured federal rights come from? I want **1215* to suggest that it must arise and grow over time within diverse and dispersed local cultures.

Over the course of this century, jurisprudence has abandoned the belief that there is one true law. Whether the rubric is legal realism, legal process, a “living Constitution,” critical legal studies, post-modernism, or law as narrative, almost no serious legal thinker conceptualizes rights as preexisting tangible objects. Even textualists and originalists of any sophistication recognize the complexity and uncertainty inherent in the enterprise of defining rights. The rhetoric of rights often leads us into speaking about them as if they were tangible objects – judges thus “withhold” rights, as though they were perversely hoarding them in the backroom, or judges “cut” them back, as though they could mow rights like grass. Indeed, we often sense that we need to speak about rights as if they were real, tangible objects in order to prevent judicial decisions of which we disapprove: Justice Brennan steadfastly conveyed this vision of rights as he argued well and passionately for extensive protections for the individual.¹⁸ But the idea of uniform rights is an artifact of a mindset few of us retain.

We still talk about uniformity. We still teach *Martin v. Hunter’s Lessee*¹⁹ and justify federal supervision of the state courts’ use of federal law as though, like Justice Story, we thought disuniformity were “evil” and “truly deplorable.”²⁰ Even though our century’s jurisprudence ought to lead to the realization that the law will inevitably fail to cohere into unified meaning, we still profess to be “shocked, shocked”²¹ to find that the law varies from place to place. It seems odd that we draw upon Story’s mindset when we so conveniently sneer at his *Swift v. Tyson* whenever we teach the *Erie* doctrine.²² Yet the idea is the same: Story relied on the federal courts to unify the law and to whip the ignorant state judges into line.²³ *1216

Uniformity is an idea we respond to. When I teach *Erie*, I linger on *Swift*, I translate Story’s Latin phrase²⁴ for the students: “There will not be one law at Rome, another at Athens; one law now, another hereafter; but one eternal and immortal law shall bind together all nations throughout all time.” And I confess that every time I say that in class, I get a warm, tingly chill! I think it is poignantly beautiful even if it is a delusion – I feel the same way about many of Justice Brennan’s opinions.

¹⁸ See, for example, *Teague*, 489 U.S. at 326-45 (1989) (Brennan, J., dissenting).

¹⁹ 14 U.S. (1 Wheat.) 304 (1816).

²⁰ *Id.* at 348.

²¹ The reference is to the movie “Casablanca,” where Police Perfect Captain Louis Renault, upon instructions to close Rick’s Café Américain, feigns that he is “shocked, shocked, to find that there is gambling going on in here,” seconds before his own winnings are delivered to him.

²² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

²³ *Erie* is so familiar to us now and *Swift* so notoriously overruled that we may have lost sight of Story’s original vision, which included the value of uniformity so important in *Martin*. Story expressed the hope in *Swift* that federal court independence in determining the principles of “general law” would lead to a uniform, enlightened common law, particularly in commercial law cases like *Swift*. He thought (revealing that he may really have believed in the superiority of federal judges after all) that the federal courts would figure out the best version of the law and the state courts, seeing the light, would all sign on to this version. Unfortunately, the states failed to behave in expected sheeplike fashion and the law became even more disuniform than it would have been with each state varying, for the states and the federal courts ended up varying, often within a single state, leading to “deplorable mischiefs” that inspired the *Erie* Court to overrule *Swift*. Federal courts are no longer seen as a remedy for the “evil” of state-to-state diversity in the common law. *Erie* leaves us with the modest goal of avoiding intrastate disuniformity. The federal courts must slavishly follow state court interpretations of common law, superior capacity to discern better rules notwithstanding.

²⁴ *Swift*, 41 U.S. at 19 (“*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*” (quoting Cicero)).

There is something important in this warm feeling that uniformity generates. It is not that the true, uniform rights really are there as tangible objects though. It is that we respond on a deep level to the project of seeking the good. But that project occurs by a far sloppier method than either Story or Brennan concedes in his opinions.²⁵ The Supreme Court's capacity to give meaning to the rights outlined in the text of the Constitution needs the support of local cultures that believe in those rights and their importance and local judges who inject that belief into their legal decisions.

Human beings produce values on many different levels – individuals, families, religious organizations, small communities, interest groups. Among the strongest, most enduring conglomerations of human beings producing values in our country are the states. The states are not simply small subdivisions of the nation; they have **1217* decided cultures, traditions, and histories – longer than the nation's.²⁶ Much of what they have stood for is pernicious (one can say that of the nation as well), but much of what is good also emerged from the states. Local culture leaches into the legal process through state judges. This is what we may fear, but is it not a complex process through which a vast assortment of values is tried out? Is it not a process through which we have the opportunity to view and contemplate new formulations of law, some of which may be good? The feared “passions and prejudices” of the states also become the rights we treasure. I live in a state that harbored a strong passion against slavery, whose supreme court stood up to the national government in 1858.²⁷ That same state court was a pioneer in the creation of criminal procedural rights in the nineteenth century.²⁸ When federal law later affirms these rights, is that move not supported by the legal culture generated in some of the states?

The Warren Court's landmark decisions in the area of constitutional criminal procedure did not come out of the blue, but followed the decisions that some state courts had already made: the Supreme Court simply built the constitutional floor that brought the lagging states up to an acceptable level. *Roe v. Wade*, startling though it was at the time, took place against a backdrop of state legislative consideration of the subject and

²⁵ Swift v. Tyson could be read not as an effort to unify the law through the use of the superior federal courts' power to ascertain what the true common law is, but as an attempt to increase the number of divergent voices speaking about the law. In liberating federal courts from the obligation to follow state court common law precedent, Swift increased the potential for different versions of the law. This is not, however, the standard interpretation of Swift. Generally, Swift is presented as an effort to facilitate a process of arriving at a uniform set of rules, particularly with respect to commercial law: Story anticipated that the common law process, handled skillfully, would produce a sort of Uniform Commercial Code. See, for example, R. Kent Newmyer, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 332-43 (U. of N.C., 1985). Story incorrectly predicted that state courts would follow along after the persuasive decisions the federal courts were expected to issue. The failure of this prediction is one of the pragmatic reasons for Erie.

²⁶ Professor Briffault makes a strong argument that the values of federalism equate with the values of small subdivisions of power and thus include cities as well as states. Richard Briffault, "What About the 'Is'm'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1309-17 (1994) (discussing the rise of local federalism and the role of local governments). There is much to this position, however I would emphasize that it is not mere smallness that contributes value, but the existence of thriving cultures and traditions. In this respect, many cities do equate with states. I live in a city (Madison), as well as a state (Wisconsin), that draws a sense of allegiance from its inhabitants. Local places have meanings far deeper and more vital than administrative efficiency or even closeness to the electorate. They offer a shared (though always contestable and changing) tradition that binds (and divides) their inhabitants and provides a fertile ground that may produce ideas about government that may differ from the ideas that arise elsewhere.

²⁷ See *Ableman v. Booth*, 62 U.S. 506 (1858) (reversing Wisconsin Supreme Court decision which found the Fugitive Slave Law unconstitutional).

²⁸ See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144-47 (1985).

concurrent public debate.²⁹ We may still argue about whether the Court ought to have waited longer,³⁰ allowed more debate and social ferment to have taken place at the local level *1218 before federalizing the right to choose an abortion, but the fact remains that the Court did not act and perhaps could not have acted without preliminary developments at the state level. Justice Ruth Bader Ginsburg has eloquently questioned the sweeping approach taken in *Roe* and suggested that the issue of abortion could have been approached more modestly and to better effect if the Court had “merely struck down the extreme Texas law and [gone] no further on that day.”³¹ Perhaps the Supreme Court’s attempt to resolve too much, too soon and to foreclose local consideration of the issues contributed to the instability of the right that exists today.

In *Bowers v. Hardwick*,³² the Court could not see protection for homosexual behavior in the Fourteenth Amendment, though the paths of reason toward that outcome seem obvious to many commentators. Justice White’s opinion dwells on the social context of hatred and stigmatization.³³ Many observers would like to see the Court rise above these local passions and prejudices, and, of course, theoretically it can. But in practice, it often cannot. Justice Powell, whose fifth vote produced the outcome in *Bowers*, later admitted that he was probably wrong.³⁴ It is interesting that this insight came to him after *1219 he left the Court. In practice, as a judge, perhaps he could not extricate himself from the

²⁹ See David J. Garrow, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 270-334 (Macmillan, 1994). There was a great deal of debate in the popular and medical press. *Id.*

³⁰ The legal debate centering on the right of privacy (as opposed to the advisability of legislative change) was fairly new. There was little significant fermentation of the privacy issue within the state courts. See *id.* at 335-472.

³¹ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (James Madison Lecture on Constitutional Law). In the words of Justice Ginsburg:

In most of the post-1970 gender-classification cases, unlike *Roe*, the Court ... approved the direction of change through a temperate brand of decisionmaking, one that was not extravagant or divisive. *Roe*, on the other hand, halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.

Id. at 1208.

Here, Justice Ginsburg regrets that *Roe* short-circuited salutary efforts in the state legislatures. Elsewhere in her article she notes the importance of judicial restraint in resolving issues and the need to allow room for “dialogue” with other voices. Noting that federal judges are dependent on the political branches, she writes:

Mindful of that reality, the effective judge ... strives to persuade, and not to pontificate. She speaks in “a moderate and restrained” voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues.

Id. at 1186.

³² 478 U.S. 186 (1986).

³³ *Id.* at 190. Justice White articulated the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” *Id.* Note that his sense of the meaning of the Constitution drew on the existing practices in the states. Justice Blackmun writing in dissent did not contradict the sense that “history and tradition” provide the source for the right of privacy, he simply located the issue at a higher level of abstraction (“sexual intimacy”). *Id.* at 205 (Blackmun, J., dissenting).

³⁴ Garrow, *LIBERTY AND SEXUALITY* at 667 (cited in note 29). Powell asserted that *Bowers* was “not a major case,” and that “one of the reasons I voted the way I did was the case was a frivolous case” which litigants used “just to see what the Court would do.” *Id.* This astounding comment about what most Court observers see as an extremely important case reveals a problem with pushing courts to decide cases presented only in an abstract setting (as in *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), the case discussed in the Part IV). The judges, in their isolation from real world experiences may issue a blithe, ill-considered opinion. Only later, after witnessing the public response or the harm wrought by the decision, does the judge realize the importance of the case and upon further thought view the decision as wrong. Compare note 50 (indicating that the overruling of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), was a response to harsh treatment of Jehovah’s Witnesses that followed). Allowing the question to develop in a concrete context before issuing the decision, admittedly delaying the announcement of a particular rule, could avoid this dysfunctional exercise of judicial power. This said, it should nevertheless be noted that the Supreme Court has also gone to the opposite extreme, exaggerating the need for a concrete context far beyond what is required for competent judicial decision making. Compare *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (emphasizing effect of the requested remedy on the individual plaintiff) and *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (same) with *Baker v. Carr*, 369 U.S. 186 (1962) (emphasizing importance of concrete context to quality of judicial decision making).

constraints of the culture he had the power to affect. As a private citizen, straightforward reasoning from principle may become more accessible. (This may be why we law professors have such an easy time perceiving flaws in the Court's opinions.) In the years since *Bowers*, state courts have begun to extend the protection the Supreme Court withheld.³⁵ They rely, as they must, on provisions in their state constitutions, and as they do they create the new context within which the United States Supreme Court will some day reexamine the question.

The Court has not yet outlawed the death penalty in part because not enough states have rejected it under their own constitutions.³⁶ While one may assert that the Court ought to forge ahead on its own and define "cruel and unusual punishment" at the federal level, and that it indeed has the power to do so without waiting for the states to act first, it holds back, waiting for this development.

The power of the Supreme Court to make its grandiose moves that drag all the states up to a uniform standard perhaps only comes into being because other courts have had a place to say different things about the law. Whatever the present condition of the Supreme Court case law, are there not always other courts, many of them state courts, spinning out new strands of legal culture that will some day form patterns perceptible to a Supreme Court that will then announce a new right? The right does not fall from the sky or emerge through the pure force of judicial wisdom; it forms from a culture that must **1220* begin somewhere. It is absurd to think that nine cloistered, insulated, well-established human beings should or could generate this culture. (Justice Powell, working on *Bowers v. Hardwick*, told his law clerks that he had never met a homosexual!)³⁷ This is not to say that worthless or actively bad patterns do not also form at the local level, only that the lawsaying vitality that produces what is good must exist within this seething complexity.

Pronouncements from on high that bear no relation to life as lived by real human beings are not just hard to take, they are impossible to make. The Supreme Court cannot merely announce rights in its supreme wisdom. It must draw from what has gone before in shaping those rights; it can only be an intermediary. Other courts do not merely carry out the Supreme Court's dictated agenda, they express and constantly change the mix of ideas that makes it possible for the Supreme Court to speak at all.

The fact that some states reflect repellent values is scarcely a reason to withdraw regard for the states. For values to be repellent, someone must be repelled: there must exist other small communities capable of generating competing values. Indeed, there will always be small communities – I think I live in one – that generate values that may be quite positive, but will never become widespread enough to move the intermediary federal government to lurch forward and impose these values on all of the states. Nor is

³⁵ See, for example, *Texas v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992) (voiding Texas law banning same-sex only sodomy); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (voiding Kentucky law banning same-sex only sodomy).

³⁶ See *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (surveying state laws in determining whether application of death penalty for rape is "cruel and unusual punishment"); *Edmund v. Florida*, 458 U.S. 782, 797 (1982) (surveying state laws in determining that death penalty in felony murder cases is unconstitutional).

³⁷ Garrow, *LIBERTY AND SEXUALITY* at 658-59 (cited in note 29).

there any point where this process is complete. There is an endless production of culture in which the federal government plays a role.

To what extent then do we want to control lawsaying at the local level? To what extent do we want to tame federalism? I only want to state that *this* is the central question, not to argue for maximum freedom in complexity. As we vary in degree of risk-adversity and optimism, we make different decisions about how much control of local diversity we want.

IV. THE MARKETPLACE OF FIRST AMENDMENT IDEAS

Consider the First Amendment pornography debate as played out in the Seventh Circuit case of *American Booksellers Association v. Hudnut*.³⁸ The local democratic process in Indianapolis led to the adoption of the innovative and highly controversial anti-pornography *1221 ordinance promoted by Professor Catharine A. MacKinnon.³⁹ Using an assertedly feminist approach, MacKinnon challenged the existing Supreme Court conception of obscenity regulable under First Amendment doctrine. Instead of tracking the definition propounded in *Miller v. California*,⁴⁰ and barring “patently offensive” material that “appeal[s] to prurient interest” and has “no serious literary, artistic, political, or scientific value,” the ordinance attacked “pornography,”⁴¹ which it defined as sexually explicit material depicting the “subordination” of women. The ordinance reflected a fundamental shift in the reasoning behind the regulation of sexually graphic materials. The Supreme Court’s doctrine rested on ideas about the “obscene”: the problem of shocking those who do not wish to consume the material and arousing disfavored feelings in those who do. The Indianapolis ordinance, though it would regulate much of the same sort of material, addressed the very different problem of violence against women believed to result from the availability of material that shows women as objects of sexualized power.

This is a significant decision point: should this fundamental shift be adopted generally, as a matter of First Amendment law? More accurately: should a particular locality be tolerated, at least temporarily, as it asserts a revisualized version of First Amendment law and attempts a new approach to regulation? One might have allowed the city some time to work within the ordinance: see what lawsuits might arise. The statute did not authorize public enforcement, but instead gave a cause of action to those who could show they suffered an injury causally related to the use of pornography. One might have waited to see which specific materials would become the subject of lawsuits, how the litigants would interpret the terms of the ordinance, and even, perhaps whether the rate of sexual assault in Indianapolis would decline. One might have chosen to see how

³⁸ 771 F.2d 323 (7th Cir. 1985), aff’d 475 U.S. 1001 (1986).

³⁹ See generally Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). Note that it was a city, not a state, that enacted the legislation, however, it would have been a state court that would have addressed the question in the first instance if the federal courts had not acted.

⁴⁰ 413 U.S. 15 (1973).

⁴¹ *Hudnut*, 771 F.2d at 324.

the local state courts would have framed these issues and assessed the harms within the meaning of the statute.

Instead, a federal court entertained a suit by an association of bookstores before the ordinance even went into effect. Addressing the ripeness issue, Judge Easterbrook wrote:

**1222* [T]he dispute may be resolved without reference to the administration of the statute. We gain nothing by waiting. Time would take a toll, however, on the speech of the parties subject to the act. They must take special care not to release material that might be deemed pornographic, for that material could lead to awards of damages. Deferred adjudication would produce tempered speech without assisting in resolution of the controversy.⁴²

Expressing a firm commitment to rights and providing fast relief for rights claimants, Judge Easterbrook took the conventional activist position. In doing so, however, he excluded the voices of those who believed in the values embodied in the ordinance, and we lost the opportunity to explore a fundamental controversy about what rights should be. Indeed, the judge did not merely cut short the process on the ground that it was not worth the risk to gain the expanding dialogue about the meaning of rights, he denied that anything *could* occur: “We gain *nothing* by waiting.”

Judge Easterbrook went on to hold that the statute violated the First Amendment. Despite the momentous dangers posed by pornography – and Judge Easterbrook did not slight those dangers or discount the causal connection between pornography and violence against women⁴³ – the First Amendment doggedly favors speech and more speech, speech across the broad range of possibility, all the way to the most pernicious. According to Judge Easterbrook, other governments – totalitarian governments – rely on suppression, the promotion of “dogma” and “stasis” to “enslave” individuals.⁴⁴ But our government liberates thought, which facilitates the ongoing process of change. He wrote:

Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.⁴⁵

There is irony here. Judge Easterbrook structured *jurisdictional* doctrine to cut short dialogue about the meaning of the First Amendment. He ensured that the state court judges would not have their say. There could be only one true meaning of the First Amendment and all alternative voices needed to be suppressed at the earliest possible moment. There would be no marketplace of ideas about the meaning of the First Amendment. **1223*

⁴² Id. at 327.

⁴³ Id. at 325.

⁴⁴ Id. at 327.

⁴⁵ Id. at 332.

Perhaps we should not risk it. Judge Easterbrook regretfully accepted the inevitable consequence of many serious harms as he stood on First Amendment principles: these harms would have to be borne. *No* decision could avoid all harm. Then why not endure a period of uncertainty and debate? If an intense process of debating the meaning of the First Amendment had been allowed to unfold through a series of state court cases and not precluded by the federal Court's preemptive strike, we might very well have ended with a stronger and more widely shared commitment to freedom of speech.

The grand First Amendment values that galvanized the generation that lived through the suppression of books like *Ulysses* and *Lady Chatterley's Lover* and with the abuses of McCarthyism have calcified into smug truisms that elite judges dispense with officious constitutional correctness. The First Amendment can become a desiccated and abstracted string of words, which, because of the power of judges, fails to yield to the intense experience of harms about which a new generation feels deep passion. If First Amendment values are to survive, perhaps they must be released from the authoritarian grip of the omniscient federal judge. I understand the argument, embraced by Judge Easterbrook, that would place First Amendment rights above the fray of a dynamic culture, but the attempt to isolate and abstract these rights may itself undermine them. As people lose touch with the passionate experiences that led to the creation and fortification of a right, they begin to see it as an imposition from callous side-liners who do not face the abuses and dangers of real life as experienced by ordinary people.

In a fairly short space of time, the character of the federal judiciary can shift. To what extent will the meaning of constitutional law be affected by the persons appointed by President Bush, rather than Michael Dukakis, the candidate he defeated? Within that presidential election, there was a debate about rights that appeared pivotal as the polls moved Bush into a lead which he maintained through the election. The issue was the constitutionality under the First Amendment of requiring public school teachers to lead students in the daily recitation of the Pledge of Allegiance. Dukakis relied on a passionless announcement that the requirement violated the First Amendment.⁴⁶ *1224 He exhibited the robotic I-am-compelled stance typical of many judicial opinions, even though the Supreme Court case he relied on, *West Virginia State Bd. of Educ. v. Barnette*,⁴⁷ did not cover the situation presented by the law he vetoed. In *Barnette*, the Court recognized the First Amendment right of *students* to decline to recite the Pledge.⁴⁸ Teachers present an importantly different situation: they are not compelled to take their jobs as children are compelled to attend school, and they experience numerous constraints and compulsions in their classroom speech.⁴⁹ Moreover, when Justice Jackson

⁴⁶ Dukakis relied on an advisory opinion from the Massachusetts Supreme Court. See *Opinion of the Justices to the Governor*, 372 Mass. 874, 363 N.E.2d 251 (1977). An advisory opinion is, of course, the ultimate in judicial abstraction and is forbidden in federal courts. The United States Supreme Court could not review this advisory opinion – at least not without some substantial torque on justiciability doctrine. But see *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (interpreting standing doctrine to make it possible to review a state court judgment in a case that could not have been brought in the first instance in federal court because of lack of standing). The legislature passed the law over the veto, only to be met with an executive department refusal to enforce it, see *Op. Mass. Atty. Gen. No. 34 (1976/1977)* (holding the statute void under the First Amendment), which ensured that the law would never be tested in a more concrete context, since the law never produced a real case with an actual teacher refusing to comply.

⁴⁷ 319 U.S. 624 (1943).

⁴⁸ *Id.* at 642.

⁴⁹ See *Opinion of the Justices to the Governor*, 363 N.E.2d at 254.

announced the right in *Barnette* he wrote in an eloquently passionate style capable of engaging the hearts of the general public. Jackson's words are powerful not because of their technical correctness, but because they reach out to the general public and offer words that explain the exigencies of law within an image of common values:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.⁵⁰

While the students' refusal to recite the Pledge would easily have appeared pernicious to Americans dedicated to winning the war at that time, Jackson wisely shaped his opinion to show how the First Amendment embodied the values that the nation was fighting to preserve.⁵¹ Michael Dukakis did nothing to relieve the public sense that the law was a cold imposition, alien to deep human feeling; not a product of communal values, but a technical legalism that governed *1225 without regard to sentiment.⁵² It was George Bush who stirred public emotion and tapped the vitality of communal values,⁵³ who won the election and, consequently, the power to appoint federal judges.

It was also during the period of this presidential campaign that the Senate rejected President Reagan's nomination of Robert Bork as Supreme Court Justice. The rejection of Bork grew out of his failure to embrace the right of privacy, which he explained in coolly academic terms, emphasizing the compulsions of history and text.⁵⁴ Bork's aversion to passion in legal interpretation is reflected in the title of the book he wrote after his defeat: *The Tempting of America: The Political Seduction of the Law*.⁵⁵ Bork's primary opponent was the chairman of the Senate Judiciary Committee, Joseph Biden. Biden, whose mediocre performance as a law student was receiving a good deal of publicity at the time (his presidential candidacy collapsed in part because of an accusation of plagiarism in law school), stood up to the reputedly brilliant professor.⁵⁶ He countered Bork's academic presentation with the simple and stunning image of police in bedrooms.⁵⁷ Since the Bork defeat, no Supreme Court nominee has disaffirmed the right of privacy,⁵⁸ and, of course, the right of privacy endures in the case law. Thus, George Bush may have won the election and hence the power to make Supreme Court

⁵⁰ *Barnette*, 319 U.S. at 642. *Barnette* overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), a decision with only one dissenting opinion, a mere three years after it was issued. What had changed? The most obvious change was the knowledge of the real experience of Jehovah's Witnesses, who had been subject to widespread harassment and physical assaults, as well as thousands of school expulsions. See David Whitman, *Behind the Pledge Flap: The Nasty History of Our Oath of Allegiance*, WASHINGTON POST C1 (September 18, 1988).

⁵¹ Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 977-79 (1992).

⁵² *Id.* at 993-94.

⁵³ *Id.* at 994.

⁵⁴ See Richard Benjamin Cramer, *WHAT IT TAKES: THE WAY TO THE WHITE HOUSE* 644 (Random House, 1992).

⁵⁵ (Free, 1990).

⁵⁶ See Cramer, *WHAT IT TAKES* at 626-63 (cited in note 54).

⁵⁷ *Id.* at 644.

⁵⁸ See, for example, Garfow, *LIBERTY AND SEXUALITY* at 672 (cited in note 29) (noting that Justice Kennedy explicitly affirmed the right in his confirmation hearing), 689 (noting that Justice Thomas refrained from expressing an opinion on *Roe*).

appointments, but the Bork debacle implicitly constrained his choice: he would have to put forward candidates who would not offend the people's sensibilities about rights.⁵⁹

The federal judiciary is subject to the shifting patterns of presidential elections and confirmation hearings, which reflect public sensibilities about the meaning of the Constitution,⁶⁰ including love of or hostility toward rights. It is thus a delusion to think the First *1226 Amendment can be preserved through absolutism and federal control. If rights are to be preserved it is crucial to continue to engage the public in the discourse about rights. The First Amendment is in particular danger of losing public support, in part because of the arrogance of those who administer it with clinical dispassion and thwart those who are fervently engaged in a struggle against what they perceive as profound harms.⁶¹ It is not possible to remove the First Amendment from this political fray. Relaxation of ripeness doctrine in *Hudnut* permitted consideration of the pornography ordinance by a federal court at an early, abstract stage, where First Amendment law could be articulated in a cool, unemotional setting. The judges could peruse empirical studies about the harms of pornography, without having to turn away any real person litigating about a real harm. Is this the best way to protect the treasured values of the First Amendment?

Without the federal court decision, a period of uncertainty would have ensued in one locality. Purveyors of graphically sexual materials would need to worry about potential civil liability. Public debate about the relationship between pornography and sexual assault, about the importance of free speech as opposed to other values, and about the meaning of subordination and discrimination would go on. Eventually, there would be a lawsuit, based on the state law cause of action, which presumably would have to be heard in state court.⁶²

At this point the state court, in this more concrete context, would have the first say in analyzing the constitutional question, subject to the ultimate review of the United States Supreme Court. In all likelihood, the Supreme Court would still have invalidated the ordinance. But it might also have shifted its standard for regulating sexually graphic materials, to accord with a better view of why this regulation is permissible, expressing a more compelling understanding of the harms of subordination and discrimination, rather than the oddly puritanical concern for shocked sensibilities and unaccepted *1227 lust. Even aside from whether the ultimate statement of law would differ, the longer process, more in touch with actually injured persons and local institutions, might have produced

⁵⁹ Note, for example, the warning issued by Senator Daniel Patrick Moynihan as he voted against Robert Bork: "I cannot support anyone for a Supreme Court appointment who would not recognize [the right of privacy]." *Id.* at 671.

⁶⁰ The Senators voting in the Bork confirmation knew the public's position from a Louis Harris poll, which showed 68% of respondents reported themselves "worried" in response to a statement that the Constitution does not protect a married couple's right to use birth control and only 27% "not worried." *Id.* at 670.

⁶¹ A parallel struggle has occurred in the wake of *Roe v. Wade*, 410 U.S. 113 (1973). Persons who deeply and passionately oppose abortion make great efforts to influence elections and the subsequent judicial appointments. If the public sentiment against abortion had been stronger, we would by now have a majority of the Supreme Court committed to the right of a fetus to be carried to term. There is nothing that any court sitting now can do to ensure that this will not happen. Absolutism about rights will not necessarily preserve them: it may spur on the political process that leads to the installation of judges who will deny them.

⁶² There would be no basis for federal question jurisdiction, 28 U.S.C. § 1331, the First Amendment providing only a defense to the state law claim. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-54 (1908). There might conceivably be diversity jurisdiction, depending on the citizenship of the parties. 28 U.S.C. § 1332 (1988).

the deeper sense of public commitment to First Amendment rights that is necessary for their endurance.

IV. CONCLUSION

Certainly, there is risk in abandoning control and embracing an open-ended debate about rights. But in the interest of slapping down the truly bad states, we may lose a salutary process. We may still choose to make this sacrifice – we may prefer our federalism tamed – but we ought at least to see that this is a choice that we make. Yet even if we decide we want our federalism tamed, and we try to constrain the state courts to the modest role of carrying out the federal agenda, we should see that it is impossible to neaten up the lawsaying process into final uniformity. While single pronouncements, applicable to everyone, may issue from the top of the pyramid and exercise a powerful force on all decision makers who follow, a multiplicity of voices will always reemerge, reinvigorating the process with divergent impulses, interpreting and misinterpreting what has gone before, soaking up the local passions and prejudices, ideas and inspirations, and inevitably putting an uncontrolled, unpredictable spin on what is to come.