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STATE COURTS AND FEDERALISM IN THE 1980's: COMMENT

RUGGERO J. ALDISERT*

Each of the four highly analytical, uniformly thoughtful and stimulating papers that are the subject of these comments deserves an exhaustive commentary. My role is not to respond in kind by setting forth an essay of my own, but to react informally to the intellectual feast so temptingly displayed in the preceding pages. My reaction is, of necessity, personal and unabashedly influenced by my experience, and, therefore, these contentions are intuitive rather than conclusive. Moreover, my reaction is probably atypical because it is colored (or shall I say jaundiced?) by twenty years in the state and federal judiciary and about a dozen years of intimate involvement in continuing education programs for state and federal appellate judges.

My experience prevents me from looking upon state and federal courts as inanimate institutions, or state and federal judges as faceless dancers in a bloodless ballet. I came to know most of the federal appellate judges through the Federal Judicial Center educational programs, which I chaired from 1974 to 1979. Moreover, about half of the present judges of the highest courts of the states and the Canadian provinces, a number of United States circuit judges, and one Supreme Court Justice have been my students at the Senior Appellate Judges Seminar sponsored by the Institute of Judicial Administration at New York University School of Law. I have heard the discussions of these state and federal judges around the seminar table, and I have read their opinions in the law reports. More importantly, I have learned to know them as men and women who are more than cardboard figures in black robes, and more than statistics on a chart. My perspective, then, on the judges of the state and federal courts probably differs both from that of the authors whose papers are my topic and from most of

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my audience.

In this response to the papers, I will focus on what I consider to be a disturbing bias toward litigating federal issues in federal court instead of state court. In my view, the preeminence of this preference in academia, in Congress, and among some judges and members of the bar has extracted from our society a heavy toll. Several aspects of that price deserve critical attention. First, the assumptions of those who prefer federal court have caused a completely unwarranted perception that state courts lack competence to deal with federal issues. There simply is no evidence that the state courts today are incapable of dealing with most of these disputes; to the contrary, there is considerable reason to believe that the state judiciary is as qualified as the federal courts. A second item of that price is the serious dilution of federal appellate court resources caused by Congress' indiscriminate dumping of relatively trivial matters on the courts of appeals' dockets. The deluge of petitions seeking judicial review of routine administrative action is but a single example of how our attention has been drained from the truly significant cases. Federal appellate courts also have been inundated with litigation redundant to full and fair state court proceedings, a practice contrary to accepted principles of the finality of judgments. Yet another cost of excessive federal court litigation is the very real and immediate financial burden of the litigation itself, brought about chiefly by the liberal, perhaps better described as indulgent, policy of notice pleading. Notice pleading, when combined with abuse of discovery, has become a new weapon of economic coercion to force the surrender of those with truly meritorious claims or defenses. These comments, therefore, are chiefly a response to the papers in particular and to a certain "party line" in general.

My first observation is, however, that if one views judges, in Professor Cover's formulation, as primarily enforcers of and apologists for a social order,¹ then the social order is in good hands whether one looks to the state or federal courts. My own evaluation of both state supreme court and federal circuit judges is that most meet Professor Bator's test of "[c]onscientiousness, dedication, idealism,

1. Cover, *Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, pp. 639-82 *supra*.

openness, enthusiasm, [and] willingness to listen and to learn—all the mysterious components of the subtle art of judging well.”²

I am not blind to the differences between United States circuit judges and state supreme court justices. Perhaps some of the former are more eloquent stylists in speech and print, with credentials from more prestigious law schools, and with more combined experience in what I call ABA-type law firms.³ I am not yet convinced, however, that the Ivy League-Chicago-Stanford axis has a monopoly on acceptable jurisprudential temperament.

Nor do I believe that political experience, perhaps collectively greater among state judges, handicaps judging even federal constitutional issues. Indeed, when a judge is confronted with complex constitutional disputes about what, where, and by whom a societal decision should be made, questions that underlie a host of fourteenth amendment suits brought under 42 U.S.C. § 1983,⁴ a first-hand knowledge of the intimacies, superstitions, and realities of political life may stand the judge in better stead than exclusive reliance on scholarly, but often naive, treatises.

THE SUPERIOR COMPETENCE OF THE FEDERAL JUDICIARY TO MEET FEDERAL ISSUES

Professor Neuborne and I agree that if most plaintiff's lawyers, especially civil rights advocates, had their “druthers,” the needle in the forum compass constantly would be “jammed in the ‘federal’ position.”⁵ Professor Bator has assigned the general reasons for this phenomenon:

The federal courts are to be preferred because . . . federal judges are more competent and expert in adjudicating issues of federal law; are more independent in resisting popular and political pressure; and are likely, through institutional perspective, to be more sensitive to claims of federal right and more zealous and even conscientious in upholding them against assertions of

2. Bator, *The State Courts and Federal Constitutional Litigation*, pp. 605-37 *supra*.

3. These are large firms that have many corporate clients. The rarefied world in which such firms operate generally would not expose their members to the brute facts of everyday life, such as interviewing a client in the holding tank of a big city jail in the middle of the night.

4. 42 U.S.C. § 1983 (1976).

5. Neuborne, *Toward Procedural Parity in Constitutional Litigation*, pp. 725-87 *supra*.

state power, than are state judges.⁶

Professor Bator then summarizes the bases of these assumptions, such as how better pay, higher prestige, and the security of life tenure attract better lawyers to the federal bench. The federal courts' insulation from majoritarian pressures and their distance from the "grind of legal administration," as compared to the position of the state courts, are of especial importance to his thesis. Without necessarily endorsing the concept, he notes the assumption that federal judges have a built-in institutional bias in favor of federal rights while state judges are more likely to be grudging in their protection of federal claims when those claims conflict with local authority. Those embracing this view believe that federal courts have more experience and, therefore, are more skilled in deciding federal questions.⁷ Professor Bator emphasizes that these contentions are intuitive, "rest[ing] on human insight rather than on expressed evidence or scientific measurement."⁸

My own intuition, seasoned by first-hand experience, suggests that federal judges should be more competent, but they are not necessarily so; they should have more experience and expertise in federal constitutional questions than their state court counterparts, but they do not always; they should have institutional preferences, but these are not apparent.

Turning first to experience in federal constitutional issues, the favorite apologia for committing section 1983 cases, including state prisoner actions, to the federal courts, I contend that when it comes to the high profile issues of due process and equal protection, the state courts' experience outstrips that of the federal courts by a wide, wide margin. Virtually every criminal case today implicates fourth, fifth, or sixth amendment claims applied to the states through the fourteenth amendment, or the fourteenth amendment itself: *Miranda* warnings, search and seizure, speedy trial, severance, competency of counsel, and due process, to name only a few recurring issues. Consider, for example, the number of cases raising constitutional issues articulated by the Supreme

6. Bator, *supra* note 2, at 607.

7. *Id.* at 607, 623.

8. *Id.* at 623.

Court in recent years⁹ that are processed each day in the criminal courts of any large city. Consider also the direct and collateral appeals on these same issues before the state appellate courts. In 1980, Pennsylvania judges alone processed 61,681 indictable offenses,¹⁰ while the entire federal judiciary processed only 27,968.¹¹ By sheer number of criminal cases, the state trial and appellate judges have experience that greatly overwhelms that of the federal judiciary.¹²

In addition to volume of cases, general state court jurisdiction, as compared to limited federal jurisdiction, gives state judges the opportunity to pass on federal constitutional claims in traditional state court litigation that rarely occur in proceedings initiated in federal court: municipal zoning, family law and child custody suits, pendent constitutional issues accompanying substantive appeals in civil service disputes, workmen's and unemployment compensation proceedings, and tax assessment matters. In addition, a growing number of civil rights cases are being brought initially in state courts under section 1983.¹³

Aside from racial segregation, school prayer, and a very few other cases, most law suits implicating "unpopular constitutional

9. A brief list of the significant recurring issues would include: *Bruton v. United States*, 391 U.S. 123 (1968) (limited use of codefendant's confession); *United States v. Wade*, 388 U.S. 218 (1967) (right to counsel during postindictment lineup identification); *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to counsel during custodial interrogation); *Brady v. Maryland*, 373 U.S. 83 (1963) (right to exculpatory information in possession of prosecutor); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to court-appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (search and seizure).

10. Letter from John B. Kennedy, Statistician for the Administrative Office of Pennsylvania Courts, to Ruggero J. Aldisert (March 12, 1981).

11. [1980] DIR. AD. OFF. U. S. COURTS ANN. REP., Table 43, at 96.

12. For extended discussions of this view, see Aldisert, *On Being Civil to Younger*, 11 CONN. L. REV. 181, 216-17 (1979), and Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & SOC. ORDER (now ARIZ. ST. L.J.) 557.

13. For a compendium of § 1983 cases brought in state courts, see THE FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 107-14 (1980). By October 1, 1979, there were 19 states giving explicit state appellate recognition to § 1983 as a federal remedy cognizable in a state court; four states extended implicit state appellate recognition; nine states avoided the issue of state court jurisdiction, either by contending the plaintiff had an adequate remedy under state law or holding that a legally sufficient claim under § 1983 had not been asserted or proved; and in 18 states there were no appellate decisions relevant to state court jurisdiction.

principles" originate and remain in the state courts. Obscenity and defamation cases come immediately to mind. Such locally unpopular causes arise, for instance, when local police attempt to close a pornography shop, when a state tort defamation complaint implicates a first amendment issue, or when a state judge clears a courtroom because the testimony is not for tender ears. Because the federal issues arise as defenses to an ongoing proceeding and not as elements of the claim, state courts are virtually always the only available forum.¹⁴

Next, I turn to the familiar buzz-word "expertise," and for a moment limit consideration to federal nonconstitutional issues. The familiar line goes like this: Let *FJ* stand for federal judge, *FI* stand for federal statutory issue, and *E* for expertise. *FJ* + *FI* always result in *E*. I agree completely, but that is as far as the formula goes. The professional literature is sterile when it comes to evaluating the *E* in this formula. A brief review of the Third Circuit's caseload, which I take to be reasonably typical of the other federal circuit courts of appeals, will assist in understanding my perspective. The Third Circuit, like the other circuit courts, is required to consider all appeals from final judgments of district courts,¹⁵ final decisions of the Tax Court,¹⁶ and final orders of administrative agencies.¹⁷ In addition, the circuit courts are the enforcement courts for orders of the National Labor Relations Board¹⁸ and a number of other agencies.

This jurisprudential menu reminds me of Army Tropical Ration B, which the United States Marine Corps forced on us in the Pacific Islands during World War II. The menu ran for ten days and then repeated itself, and of the thirty meals, the main ingredient in twenty of them was Spam. We had it fried for breakfast, baked at noon, and served cold in the evening. We had it boiled, broiled,

14. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). See generally *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

15. 28 U.S.C. §§ 1291, 1292 (1976). The sole exceptions are appeals from denial of habeas corpus. The district judge or a circuit judge must grant a certificate of probable cause for the court to entertain the appeal. FED. R. APP. P. 22(b). Nevertheless, once the certificate is issued the court of appeals must decide the appeal.

16. 26 U.S.C. § 7482(a) (1976).

17. E.g., 15 U.S.C. § 45(c) (1976) (FTC unfair competition orders).

18. 29 U.S.C. § 160(e) (1976).

and breaded. We had it with canned pineapple, and sometimes with raisins (when my men were not fermenting the raisins for Dugan's Dew, a kind of Central Pacific Jack Daniels), but there it was, the same old Spam. We island hoppers became experts on it. We United States circuit judges are also experts on the jurisprudential Spam of federal nonconstitutional issues force-fed our way.

Seven or eight of the thirty cases a panel must decide each sitting turn solely on whether there is substantial evidence in the record as a whole or an abuse of discretion by an agency charged with administering the Social Security Act, the Occupational Safety and Health Act, the Immigration and Naturalization Act, the Longshoremen and Harbor Workers' Compensation Act, or the National Labor Relations Act. The cases certainly give the federal appellate court experience, and federal judges, before long, develop expertise in deciding them. The difference between the expertise required for judicial proceedings under the federal Administrative Procedure Act and that required of our state court brothers and sisters in the twenty-eight states using the Model State Administrative Procedure Act, however, is almost imperceptible: the reviewing court should hold unlawful and set aside agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence."¹⁹

Another four or five cases in our regular allotment are criminal cases from the limited spectrum of federal prosecutions: narcotics, bank robberies, white collar crime (RICO), and state official corruption. The mine-run of these cases presents a familiar list of contentions: insufficiency of evidence, failure to sever counts, improper admission of evidence, and the improper application of the coconspirator exception to the hearsay rule. Again, one hardly can argue that these cases lend themselves to development of unique federal court expertise.

Then come the Title VII employment discrimination cases. Almost without exception, each sitting's list now has at least one appeal by someone who has lost before the EEOC, lost in a district court, and now has conjured up myriad notions of why he or she

19. Compare 5 U.S.C. § 706(2)(A), (E) (1976) with MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15 (1961).

was fired or not promoted. Additionally, there are two or three *pro se* civil appeals by litigants who either could not get even a community services lawyer to handle their frivolous complaints in the district court, or having lost with a lawyer want to try again on their own. Finally, the list will include four or five miscellaneous appeals in which, as Cardozo would say, "The law and its application alike are plain."²⁰

The regular panel allotment leaves about nine or ten cases that present issues belonging in the United States courts of appeals: cases in which the rule of law is certain, and the application alone doubtful, or cases in which the rule itself is uncertain—that much-welcomed case "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."²¹ It is out of these rare cases, then, that federal courts must acquire the credentials to justify the arguments in favor of federal court expertise on federal issues.

Although not all federal circuit judges share my views, I suggest that most will agree with my characterization of the dreariness presented by the courts of appeals' docket. Some federal judges are leaving their posts because of disenchantment with salaries, but my good friend Griffin Bell, one of the truly great judges and lawyers of our time, left the Fifth Circuit because he simply became fed up with the mundane quality of most of the matters presented to United States circuit judges. The idiom "make a federal case of it" is now passé because it no longer can be said that "a federal case" describes litigation involving substantial sums or complicated legal issues.²² In my view the federal court has become a "nickel and dime" court. The average civil case that I processed as a judge on the Allegheny County Court of Common Pleas from 1961 to 1968, a court of general jurisdiction, involved more money than the median of civil money damage cases I have reviewed during my thirteen years as a United States circuit judge.²³

20. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921). See also B. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924).

21. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921).

22. See Address by Chief Justice Warren E. Burger to American Bar Ass'n, Washington, D.C. (Aug. 9, 1976).

23. This includes 5,000 settlement hearings over which I presided in a special calendar control program. See Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 *JUD.* 202 (pt.

Even though the judges on our court must now decide cases at a rate of more than one per day,²⁴ most of us are able to contend with this onslaught because the number presenting genuinely arguable issues has not increased in proportion to the total number of filings. A veteran circuit judge can quickly analyze the issues in most briefs and come to a decision. Nevertheless, if the federal courts are to live up to their reputation as "the elite," someone must soon devise a garbage-detector to filter the mess that is now descending upon us.

Meanwhile, the state supreme courts, our much maligned partners in the federal-state judicial fraternity, are getting the truly significant cases—both in the common law tradition and in the context of federal and state constitutional law. As certiorari courts, they can pick and choose the arguable, vital issues largely ignored by law reviews. They can allow new approaches to problems to germinate and develop in the lower courts without being forced to pronounce their judgments on them prematurely. They are feasting on *gnocchi al pesto* and *abbacchio al forno*, while we federal circuit judges stick to our Spam, now and then a Big Mac, and occasionally a rare delicacy. It is that rare delicacy, in the final analysis, that makes the job worthwhile.

I am presenting a dark picture to make a deliberate point:

I) (1968); 51 JUD. 247 (pt. II) (1968); 51 JUD. 298 (pt. III) (1968). An analysis of civil cases commenced in the United States district courts for the year ending June 30, 1978, reveals the following profile: tort 19%, contracts 29%, real property 6%, and statutory actions 45%. Among the total civil caseload, statutory actions represent the following proportions: state prisoner petitions 12%, federal prisoner complaints 2%, nonprisoner civil rights claims 7%, social security 5%, labor laws 5%, copyright, patent, and trademark 2%, antitrust 1%, and tax 2%. Most contract actions are maritime in origin; motor vehicle and other personal injury cases make up the bulk of the tort cases. See [1980] DIR. AD. OFF. U. S. COURTS ANN. REP. 61-62.

For the year ending June 30, 1980, courts of appeals cases show a slightly different mix: roughly, 77% civil cases and 23% criminal. Among the civil cases, further analysis reveals: administrative reviews, including labor cases, 13%, torts 8%, contracts 8%, civil rights act 11%, social security 3%, and prisoner petitions 17%, including 12% state prisoner complaints. Diversity cases make up 13% of the appellate civil caseload. *Id.* at 45-51.

24. Last year, each active judge was assigned 309 fully briefed cases. If one subtracts 110 weekend days, this leaves 255 working days for each active judge to consider over one fully briefed case per day, besides writing opinions, doing research, discussing cases with law clerks, travelling, conferring with other judges, listening to oral arguments, thinking, ruminating, attending to correspondence, and handling an average of about 200 additional motions—all without taking one day off for vacation.

whatever has been the theoretical basis for federal court jurisdiction, Congress has now dumped a heap of offal on those courts that increasingly drains their attention. Federal circuit court jurisdiction now includes too many cases that do not belong in the same tribunal charged with adding an important gloss to the greatest legal document in the history of the world, the United States Constitution, and also charged with adjudicating and defining critical rights and liberties of our people. The same judges who have the responsibility for defining the true public policy of the Civil Rights Act of 1964, our antitrust policy under the Sherman and Clayton Acts, our national labor policy under section 301 of Taft-Hartley, and the critical financial consequences of the federal securities acts, should not be troubled over a suit concerning the sale of a used car brought under the Odometer Tinkering Act or the small claims brought under the Truth in Lending Act. Federal judges, again speaking theoretically, should be the experts manning the big guns in the litigation battlefield. Instead, we are wasting, if not exhausting, our energies, running around with cans of insect repellent. The reality is that United States circuit judges have become experts, but they are experts who stand alongside a conveyor belt that moves every day of the year and who examine everything that passes by, spending much valuable time deciding what conveyed material should be rejected outright without argument or opinion, what requires a moderate amount of concentrated attention, and what demands close inspection, much care, and bright polish. The time is long overdue for those who sincerely believe that federal judges are in fact the elite, experts in a rare craft—and now I speak especially to the law professoriate, the ACLU, the corporations, the institutional litigants, and others who really care about such things—to do something about taking us off the assembly line and putting us back into the craftsman's shop.

"BETTER" TYPE OF DECISION

I now turn to the question of where the "better" type of decision lies. On federal issues, the "party line" places its preference on federal court. Professor Neuborne defines "better":

My definition, which I hope is widely shared, views the better forum as the one more likely to assign a very high value to the protection of the individual, even the unreasonable or dangerous

individual, against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement. Such a definition of "better" is based on an assumption that it is socially desirable to route controversies involving asserted constitutional rights of individuals to those judicial forums most likely to resolve them in favor of the individual.²⁵

At the risk of overstatement, I suspect that Professor Neuborne's view is shared by *most* constitutional law scholars.²⁶ I think it is an appropriate viewpoint for the ACLU advocate, or even a law professor, to take; but any judge who wants to bear the title of judge, and not advocate, is compelled to apply closer analysis.

Judging constitutional law cases is made difficult because the predominant academic literature applauds only dogma that extends individual rights and liberties. A court decision that comes down with no such extension or comes down flatly in favor of society against an individual either receives no kudos or becomes the subject of vehement criticism.²⁷ I recognize fully that one institutional role of the courts is to interpose themselves between the individual and the brute force of the majority, but I am not at all certain that judges should be worshipped for deciding in favor of the individual in every case. Judges who do so are advocates and not judges. The nature of today's legal climate is that both the professional and the lay public pick up sides in constitutional adjudication, assigning the name "liberal" or "conservative" (whatever these mean in terms of today's convoluted issues implicating competing individual, public, and social interests) to each judge.²⁸

25. Neuborne, *supra* note 5, at 727.

26. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 4 (1977).

27. In this regard I am encouraged by the thoughtful analysis of Professor Bator in which he reminds us that when a court rejects one constitutional claim, it is often implicitly upholding another, for example, separation of powers, or federalism. Bator, *supra* note 2, at 633.

28. I associate myself completely with Chief Judge Frank M. Coffin of the United States Court of Appeals for the First Circuit, who, in a recently published valuable book, has observed:

All that I think can be justly said about the utility of applying overworked labels to judges is that they are appropriate to some judges on some issues some of the time. But to use them as generic descriptions characterizing judges on supposedly major points of difference exaggerates the extent to which they may fairly apply. They also carry such emotional freight that they more often

They are wont to criticize judges who decide one way in one case, another way in another, and to describe them as "swing" or "wishy washy" or "inconsistent." They seemingly forget that the appellate judge's task is to decide the particular case on the particular record and the particular issues raised by the particular adversaries. At one time, a judge with preconceived notions, unreceptive to arguments before him, was considered a bad judge. Now he or she is a bad judge only if he or she does not thrust, at every turn, regardless of the record presented, the federal court into new facets of the daily lives of state and local agencies or private individuals.

There is a basic difference between the competence to interpret and articulate constitutional principles and blatant advocacy of particular points of view. I have explained elsewhere that this is an important distinction,²⁹ one often not recognized. As for myself, I do not know which is the better forum—state or federal—for de-

terminate than advance thought.

F. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 201 (1980).

29. See Aldisert, *On Being Civil to Younger*, 11 CONN. L. REV. 181, 224 (1979).

If the result-expectation is a narrow view of individual rights under the due process and equal protection clauses — "strict constructionism" — that is one thing. If what is sought is an expansion of settled constitutional doctrine for a more liberal set of individual rights, then that is something else. The argument is widely asserted that an individual has an interest in a *federal* ruling upon his claim of a federal constitutional right. The argument continues in 1979, as it went forward in the early sixties and led to *Fay v. Noia*, that review of the highest state court comes late, and review is seldom granted. But this argument is based on the assumption, not empirically supported, that the federal district courts and the courts of appeals will vindicate individual rights more perspicaciously than will their state counterparts. This *has* to be an assumption, because there is yet to be a study showing a significant statistical difference between the result of Supreme Court review of individual rights-constitutional decisions emanating from federal courts of appeals and those emanating from the highest state courts. In any event, I am not sure that one can say with certainty that the federal house is peopled with adherents to one point of view, and the state house with people of another. I simply do not know. But I do know that drawing the line between individual liberties and rights, on the one hand, and those of government action for the larger good, is still the perpetual question of constitutional law. And about two thousand years before the Constitution, the same problem bothered an ancient social order which spoke through Heraclitus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."

Id. (footnote omitted).

ciding federal constitutional issues, and I really do not think that today there is one right answer to the question of individual versus collective rights. Instead I cast my lot with what Chief Justice Harlan Fiske Stone wrote in 1936:

Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage, is the perpetual question of constitutional law. It is necessarily a question of degree which may vary with time and place. While these are variations in the nature of the subject matter of judicial inquiry, they involve no necessary variation of the methods by which the common law has been accustomed to solve its problems. Its method of marking out, as cases arise, step by step, the line between the permitted and the forbidden, by the process of appraisal and comparison of the experiences of the past and of the present, is as applicable to the field of public law as of private. Courts called upon to rule on questions of constitutional power have thus found ready at hand a common law technique suitable to the occasion.³⁰

The essential truth of Justice Stone's observations is that constitutional adjudication, like traditional common law adjudication, must be undertaken with care and deliberation over the consequences of each step. Each new case implicates its own peculiar set of principles that incline the decision in one direction and countervailing principles that incline in the other. The delicate balancing required to resolve these conflicts is not a place for the application of rigid, mechanical formulae.³¹

30. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 22-23 (1936).

31. What Cardozo described in the context of negligence as the essence of every judicial function also has special relevance to constitutional adjudication:

In problems such as these, the need is fairly obvious for a balancing of social interests and a choice proportioned to the value. . . . Involved at every turn is the equilibration of social interests. . . . Back of the answers is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgments of the community. . . . Constant and inevitable, even when half concealed, is the relation between the legality of the act and its value to society. We are balancing and compromising and adjusting every moment that we judge.

B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 72-75 (1928).

Without suggesting that every constitutional issue implicates *Interessenjurisprudenz*,³² I am satisfied that the test of a good opinion is what I call the Harry Jones/Roscoe Pound test:

When one asked Pound whether a recent Supreme Court decision was a "good" decision or a "bad" one, [he] . . . had a way of answering not in terms of the correctness or incorrectness of the Court's application of constitutional precedents or doctrine but in terms of how thoughtfully and disinterestedly the Court had weighed the conflicting social interests involved in the case and how fair and durable its adjustment of the interest-conflicts promised to be.³³

This observation meshes with my own that there is never one right answer to the troublesome issue of when, given federal subject matter jurisdiction, the federal courts should intervene in the state's executive, legislative, or judicial decisional processes. There is "extreme uncertainty" in these areas, as Professor Field's essay recognizes.³⁴ To advocate a position of constant federal intervention may be a tribute to strongly held convictions, probably applauded in many quarters, but I perceive that a line divides advocating a position by rote, a sort of mechanical jurisprudence, and judging each case impartially on the particular facts and particular issues. The line may be imperceptible at times, but I think judges always should recognize that it is a line never to be crossed.

DIACHRONIC REDUNDANCY

Much has been said in the papers and elsewhere of the federal court's inquiry into "detention simpliciter," which is tantamount to a federal district court's review of federal constitutional issues in criminal cases that have already been decided by a state court system, often after denial of certiorari by the United States Supreme Court. This is probably the only area in modern law in which principles of *res judicata* have been all but ignored. The Supreme Court, to solve a special situation, has contrived a new notion, a

32. Compare Antieau, *The Jurisprudence of Interests as a Method of Constitutional Adjudication*, 27 CASE W. RES. L. REV. 823 (1977), with Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

33. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1029 (1974).

34. Field, *The Uncertain Nature of Federal Jurisdiction*, pp. 683-724 *supra*.

jurisprudential mutation described by Professor Cover with the most charming term, "diachronic redundancy." This term means simply that the same issues, and especially the same facts, are decided by state and federal courts in sequence. I am impelled to set forth some personal observations on this phenomenon.

My criticism of diachronic redundancy flows from the decisional process in *Fay v. Noia*,³⁵ the case from which the doctrine arose. Intellectually honest judges will always equate the publicly stated reason for their decisions with their true motivations in reaching them. *Fay v. Noia* is a classic example of a Supreme Court opinion that did not express publicly the true motivation for its decision.³⁶ A distrust of state court fact-finding and a lack of confidence that state courts would vindicate the constitutional rights of unpopular litigants, namely those convicted of crime, were the unexpressed motivations for the decision. These reasons were not expressed until fourteen years later in an oblique footnote in *Stone v. Powell*.³⁷

35. 372 U.S. 391 (1963).

36. See R. ALDISERT, *THE JUDICIAL PROCESS* 422-28 (1976). There I emphasize the distinction between making a decision (the process of discovery) and the public explanation of it (the process of justification).

37. 428 U.S. 465, 493 n.35 (1976).

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. 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. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344, 4 L. Ed. 97 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. 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."

Id. (quoting Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76

The reason for the absolute necessity of coalescing the true motivation for a judicial decision with the publicly stated reasons for it should be obvious. If for no other reason, there must be predictability (or to use Karl Llewellyn's term, reckonability) in the law, or the law will be seen as capricious and unworthy of respect. If we consider Justice Holmes' definition of the law as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious,"³⁸ it should be clear that lawyers cannot "predict" if the publicly stated reasons given to justify a court's decision do not square with the true reasons for reaching it.

Notwithstanding the questionable legitimacy of the birth of the doctrine of diachronic redundancy in state-initiated criminal cases, it has been with us long enough to be more or less permanent. Because it has come about as somewhat the product of a shotgun marriage, it is better not to try to fashion or impose any lofty precepts to justify it. Although I doubt that diachronic redundancy would ever pass muster as a neutral principle,³⁹ recent events have mitigated the abrasive force characteristic of the doctrine as applied during the 1960's, both in terms of the volume of cases and of the intensity of disruption in federal-state relations. The increase in the number of state prisoner habeas corpus cases has dropped considerably on the federal dockets.⁴⁰ Several facts explain this decline. In the twenty years since *Fay v. Noia*, there has been a substantial turnover on the state court benches, with newer state

HARV. L. REV. 441, 509 (1963)).

Mr. Justice Brennan, author of the Court's opinion in *Fay v. Noia*, confirmed the real motivations for the decision in his *Stone* dissent. There he noted: "Enforcement of federal constitutional rights that redress constitutional violations directed against the 'guilty' is a particular function of federal habeas review, lest judges trying the 'morally unworthy' be tempted not to execute the supreme law of the land." *Id.* at 525 (Brennan, J., dissenting). Popularly elected state judges, in his view, have difficulty resisting political pressures while federal judges, with lifetime tenure, are immunized from such influences. Finally, Justice Brennan maintained that the federal habeas statutes reflect congressional judgment that federal review is a salutary safeguard against any detention of an individual in violation of federal law. *Id.*

38. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

39. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

40. In 1970 there were 1319 habeas corpus appeals involving state prisoners, 76 of which were filed in the Third Circuit. [1970] DIR. AD. OFF. U. S. COURTS ANN. REP. 253. By 1980, those figures dropped to 1020 and 34, respectively. See [1980] DIR. AD. OFF. U. S. COURTS ANN. REP. A-12.

judges who recognize the likelihood of federal review. In addition, reforms in the jury system throughout the United States have greatly improved fact-finding procedures in state criminal courts, and state postconviction procedures now are virtually uniformly available. The Supreme Court's decision in *Stone v. Powell* dovetails with this trend as well, further filtering the cases cognizable in federal court.

Professor Cover acknowledges that "one should not introduce . . . complexity [through redundant adjudication] unless the differences between the jurisdictions are salient dimensions of their fact discernment capacities."⁴¹ In other words, the critical inquiry in Professor Cover's analysis is not the relative competence of the state and federal systems in providing answers to pure legal questions, but their relative competence in finding the predicate facts to constitutional claims. I doubt many critics are capable of engaging in a sophisticated grading exercise on the relative ability of the two court systems to give "better" answers on constitutional law questions arising in criminal prosecutions on either factual or legal grounds. As the rare bird who knows so many of the men and women in both judicial systems, even I, not often regarded as a timid soul, hesitate to take a crack at this one because, like Professor Cover, I believe that "[w]ith convergence of recruitment strategies and with homogenization of professional education, the differences may well be disappearing."⁴²

As state habeas corpus cases decline in federal courts, section 1983 actions dominate constitutional developments in the law.⁴³ Our panelists have observed that *Allen v. McCurry*⁴⁴ will prevent the spread of diachronic redundancy here, and indeed that case seems to moot, for the moment, Professor Cover's inquiry by assuming equal fact-finding competence within both systems. This

41. Address by Robert M. Cover, Symposium on State Courts & Federalism in the 1980's (Jan. 23, 1981). See also Cover, *supra* note 1, at 656-57.

42. Address by Robert M. Cover, *supra* note 41.

43. 42 U.S.C. § 1983 (1976). The proliferation of § 1983 actions by prisoners accounts for the record number of state prisoner petitions filed in federal courts last year. In district courts, 12,397 civil rights petitions were filed by state prisoners, up 10.7% from 1979, [1980] DIR. AD. OFF. U. S. COURTS ANN. REP. 60, while in the circuit courts there were 1,578 state prisoner civil rights appeals, up 45% from 1979. *Id.* at A-12; [1979] DIR. AD. OFF. U. S. ANN. REP. A-10.

44. 101 S. Ct. 411 (1980).

assumption obviates redundancy as a means of eliminating factual error. The new wave in federal-state relations was neatly summed up by Professor Bator:

[T]he state court will be allowed to adjudicate, and to do so dispositively, if—but only if—there was or will be a “full and fair opportunity” to litigate the constitutional question in the state court. . . . [I]f it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim.⁴⁵

From my perspective, the limit this precept places on potential federal litigants is a welcome step toward the goals of rehabilitating the reputation of state courts and conserving federal judicial resources without dilution of crucial constitutional rights.

FEDERAL INTERVENTION IN STATE COURT PROCEEDINGS

Like Professor Field, I am keenly interested in *Dombrowski v. Pfister*⁴⁶ and *Younger v. Harris*.⁴⁷ Her thoughtful and important paper deserves more serious attention than can be allocated here. My views, however, run somewhat counter to hers. I defend the notion that there should be a minimum of interference by the federal courts in state court proceedings, a position she calls the *Dombrowski-Younger* doctrine. My difference with Professor Field begins with her major premise: the *Dombrowski-Younger* doctrine “has no authority behind it—no statutory authority and no identifiable legitimate policy.”⁴⁸ I maintain that history, legislation, and the very structure of the federal system all provide ample authority and policy support for the doctrine.

A departed colleague, Judge Abraham L. Freedman, was fond of stating at conference: “How you end up on this question depends on how you go in.” I think Professor Field and I have different beginning points. I start with the Anti-Injunction Act.⁴⁹ This stat-

45. Bator, *supra* note 2, at 626.

46. 380 U.S. 479 (1965).

47. 401 U.S. 37 (1971).

48. Field, *supra* note 34, at 718.

49. 28 U.S.C. § 2283 (1976). The act states: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of

ute alone is evidence of a formidable public policy enacted by the Congress. Professor Field apparently starts with section 1983 and assumes that it was designed in 1871 to be a specific, no-strings-attached exception to the Anti-Injunction Act. If this premise is valid, I suppose the Field thesis is valid. I perceive some differences between the weight to be given the public policy statement of the legislatively declared Anti-Injunction Act and the judicially declared exception to it in *Mitchum v. Foster*,⁵⁰ an exception that has many strings attached to it.

We must interpret the power of the federal courts to issue an injunction only in the context of how that power is derived from section 1983 as an "expressly authorized" exception to the anti-injunction statute. In my judgment, *Mitchum v. Foster* is every bit as important as *Younger* because *Mitchum* provided the first clear indications of the relationship between comity, federalism, and civil rights. *Mitchum* now serves as the fountainhead of federal court subject matter jurisdiction for enjoining state civil cases.

Lest the exception be allowed to swallow the rule, the Court in *Mitchum* was careful to qualify the application of section 1983 when utilized as an "expressly authorized" exception to the Anti-Injunction Act. In emphasizing the limitations of its holding, the Court traced the history of judicially created exceptions, stating that "federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights."⁵¹ Although holding that section 1983 is such an exception, the Court announced a discrete qualification:

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris* . . . and its companion cases. They are principles that have been em-

Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

50. 407 U.S. 225 (1972).

51. *Id.* at 242 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Truax v. Raich*, 239 U.S. 33 (1915); *Ex parte Young*, 209 U.S. 123 (1908)).

phasized by this Court many times in the past.⁵²

Three justices joined in a special concurrence to underscore this point.⁵³

The Court recognized that there had to be some limitation of the section 1983 exception. Therefore, notwithstanding its recognition of statutory authority for federal injunctions of state court proceedings, the Court emphasized without qualification that the federal courts are to be restrained in this role by principles of equity, comity, and federalism. Moreover, in justifying the conclusion that section 1983 was an "expressly authorized" exception, the Court did not distinguish between civil and criminal cases. "In short, if a § 1983 action is not an 'expressly authorized' statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be."⁵⁴

In my view, *Younger* not only preserves state-federal relations, but also achieves the goals of sound common law adjudication. Those goals include conservation of judicial resources, avoidance of conflicting judgments, and clarity of jurisdictional limits. In addition, the doctrine recognizes the traditional restraints on a court of equity. A correct reading of *Mitchum* must account for all of these traditional items of our common law heritage as well as the policy of "Our Federalism." My reading of the *Dombrowski-Younger* doctrine is that it is firmly rooted both in legal authority and identifiable public policy.

52. *Id.* at 243 (citations omitted).

53. *Id.* (Burger, C.J., White, J., & Blackmun, J., concurring). We have been reminded by Judge Henry J. Friendly:

When § 1983 authorized a "suit in equity," this carried the gloss that centuries had put upon that phrase. Notable in that connection was the historic principle embodied in § 16 of the First Judiciary Act, 1 Stat. 82 (1789), and later in Rev. Stat. § 723 and 28 U.S.C. § 384 (1940 ed.), that suits in equity shall not be sustained in courts of the United States "in any case where a plain, adequate and complete remedy may be had at law."

Gras v. Stevens, 415 F. Supp. 1148, 1153 (S.D.N.Y. 1976) (three-judge court) (footnote omitted).

54. 407 U.S. at 229.

FEDERAL AND STATE RULES OF CIVIL PROCEDURES

Professor Neuborne intimates that a federal forum is to be preferred, in part, because the Federal Rules of Civil Procedure are superior to those employed in the several states. His argument is weakened, of course, by his admission that the Federal Rules of Civil Procedure have been adopted in many states.⁵⁵ Perhaps if one parses it, his criticism of state procedure is limited to those states, such as New York, who in their benighted way have failed to swallow the federal rules whole or at least substantially whole. I am satisfied that Professor Neuborne has convincingly exposed the problems of New York practice. The next step is to evaluate the rules of the other states not conforming to the federal rules. In the interim, I wish to be included among the minority who are not convinced that the Federal Rules of Civil Procedure are the greatest advance since the Code of Hammurabi.

My chief complaint is that the failure to require identification of facts and issues in federal pleadings has allowed the litigants to inflict punitive expenses on each other in interminable discovery wars. As a result, the federal courts today are courts for those poor enough to receive publicly supported counsel or substantial institutional counsel like the ACLU, and those rich enough (mostly large corporations) to pick up their own tab. The average person, plaintiff or defendant, simply cannot bear the expense of modern federal court discovery. Both plaintiffs and defendants abuse discovery as a means of coercing settlements. I adhere to the views I expressed in 1977 that litigants are "over-discovered, over-interrogated and over-deposed; they too are consequently overcharged, over-expensed and overwrought."⁵⁶ Whatever salutary purpose the pleading rules served almost a half century ago to meet then acute and pervasive problems, their abuse today should call for a basic reexamination of notice ("I've got a secret")

55. See Neuborne, *supra* note 5, at 734 & n.25. As of 1977, approximately 25 states either had state rules very similar to or had adopted the Federal Rules of Civil Procedure, and 15-20 states had adopted various portions thereof. For a more detailed discussion of each state, see C. WRIGHT & F. ELLIOT, *FEDERAL PRACTICE AND PROCEDURE* § 39-9.53 (Interim Pamphlet 1977).

56. Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. PITT. L. REV. 437, 470 (1977) (footnote omitted).

pleadings.⁵⁷

I have no quarrel with our discovery rules and advocate no basic changes, but discovery was instituted as an aid for trial, not as a basic method to learn the predicate of the claim or defense. I have never been persuaded by any argument that a claimant or defendant should not be required at the pleading stage to allege material facts. I am advocating neither a return to the ancient pleading of common law vintage, nor a disgorging of evidence, but a simple statement of specific material facts that make up the claim or defense. For the parties to indulge in expensive and exhaustive discovery to learn what the case is all about as a prelude to pretrial is ridiculous.

Unfortunately there is little innovation ongoing in the states in the field of procedural rules. I am dismayed by this stagnation because the states should be the laboratories of experimentation in the federal system, in which ever improving procedural techniques are to be conceived and nurtured.⁵⁸ At the risk of being accused of undue cynicism, I find other, pragmatic reasons for inertia. First, academia shows little interest in procedural reforms. For example, standard law school fare on "Civil Procedure" is in fact "Federal

57. At least three Justices of the United States Supreme Court share my concerns about the costs of federal court litigation. See Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 997-1001 (1980) (dissenting statement of Powell, J., with whom Stewart and Rehnquist, JJ., joined). Justice Powell observed:

Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

Id. at 1000 (footnote omitted). See also *Delta Airlines, Inc. v. August*, 49 U.S.L.W. 4241, 4245 n.1 (1981) (Powell, J., concurring).

58. Justice Powell, concurring in *Johnson v. Louisiana*, 406 U.S. 356 (1972), observed:

In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives.

Id. at 376 (Powell, J., concurring).

Civil Procedure.”⁵⁹ Once expertise is established in that area, apparently there is little incentive to think of innovations. Moreover, the lawyers cannot afford to suggest changes because discovery procedures today lie at the heart of law office economics. The brute fact is that the office expenses in some firms are paid by letting the meter run on discovery matters. Efforts at major pleading reform would be equivalent to self-inflicted wounds. At bottom, if there is to be any reform, it will have to come from the state courts themselves.

I see no real movement in the federal judiciary to solve this serious problem. The apparatus for promulgating or amending federal procedural rules is simply too unwieldy to produce major changes. The route requires drafting by the advisory committee, submission to the standing committee, a distribution to the bench and bar for comment, a submission to the full Judicial Conference of the United States, thence to the United States Supreme Court, and finally to Congress. By its very nature, this formidable *apparat* seems to petrify existing practice rather than to allow adjustment to changing needs.⁶⁰

In addition to the expense and burdens, I have a basic problem with the theory behind the federal rules. I always have perceived the civil court, state or federal, as a public institution designed to resolve disputes between parties *after* the parties have failed to settle amicably. The federal rules seem based on a completely different philosophy: the courts as a public institution are to be used as a device to discover whether a party does in fact have a claim to assert.⁶¹

At a minimum I would require all complaints to set forth a statement of material facts forming the basis of the claims against

59. See *Neuborne*, *supra* note 5, at 734-35.

60. See *Hargenrader v. Califano*, 575 F.2d 434, 438 (3d Cir. 1978) (Aldisert, J., dissenting).

61. See, e.g., *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977).

The original complaints were filed in 1971, the *Bogosian* complaint was amended in 1972, and both complaints were amended in 1973. Now, six years after the action was commenced, the majority remarks that it is “unwilling to speculate at this stage as to the plaintiffs’ theory.” In my view, this case has long since passed the stage where anyone concerned — parties, lawyers, or judges — should have to speculate as to the theory of the litigation.

Id. at 457 (Aldisert, J., dissenting).

the defendant; I also would require the answer to set forth material facts.⁶² These basic steps have already proven to be useful in dealing with the troublesome area of *pro se* prisoner cases.⁶³ If we are to preserve justice for the great mass of society as well as the few, these basic steps, and many more, must be undertaken without delay.

CONCLUSION

To summarize what I have said in these remarks is to attempt, probably unsuccessfully, to bring order out of a rambling commentary on four well organized presentations. My bottom line is that the federal judiciary should be above the trivia now burdening it, and it should again become a forum of adjudication in the common law tradition, articulating norms of a truly public and truly federal policy. This is extremely important and necessary in those critical areas where Congress has not expressed clearly such a policy.

62. With a touch of provincialism, I prefer Pennsylvania Rule 1019(a): "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." P.A. R. Civ. Pro. 1019(a).

63. Faced with serious problems from the deluge of *pro se* prisoner confinement cases, a special committee of the Federal Judicial Center drafted recommended procedures for these cases that often reflect the quintessence of claims of human rights and liberties, yet present serious problems because claimants usually are not represented by counsel. The committee noted that there are reasons for giving special attention to prisoner conditions-of-confinement cases. With the volume of cases, the committee recognized that the meritorious cases, often raising constitutional questions of great importance, might be overlooked. The procedures were meant to preserve the vital impact prisoner litigation has had on prison management without burdening the courts with the frivolous case. THE FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 7, 11 (1980). The committee proposed a specially designed form for use by *pro se* prisoner-plaintiffs that elicits factual information necessary to preserve meritorious cases. The form advises:

IV. Statement of Claim

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments, or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.

....

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

When a consensus has not been reached by Congress, it falls upon the federal judiciary to declare judicially what the second branch failed to do legislatively. Classic examples of filling the legislative void come to mind—the Civil Rights Act of 1964, to cite a recent example, the amendment to our National Labor Relations Act, an example of some years past, the Securities and Securities Exchange Acts of 1933 and 1934, and the Sherman and Clayton Acts of a much earlier vintage. Congress has not seen fit to change drastically the body of law promulgated in these fields over the years by the federal judiciary, nor has there been much movement to alter the judicial process by which these declarations of public policy have emerged. Other disciplines, admiralty and bankruptcy, traditionally and constitutionally have belonged on the federal turf. Because these cases have great impact on national, and not purely local affairs, they should continue to occupy the priorities of the federal judiciary.

The federal judiciary, as well as its state counterparts, should continue to be expert in matters of federal constitutional law. Because issues of due process and equal protection dominate state criminal dockets and accompany so many claims in state civil litigation, it is foolhardy to suggest that only federal judges need to be experts in federal constitutional law. I therefore cannot agree that “federal courts should adjudicate issues of federal law; state courts should adjudicate issues of state law.”⁶⁴ Moreover, I am loath to accept the notion that federal courts should intervene in or preempt state court proceedings, criminal or civil, simply because federal constitutional rights are implicated in the state proceeding.

An encouraging development, in my view, is the rapidly growing acceptance of section 1983 actions by state forums. In many respects, simply because there is firsthand understanding of state decisional processes in the executive and the legislative branches, there may be a more realistic accommodation of fourteenth amendment concerns in those courts than in a court where the common view is “lips that touch politics shall never touch mine.” Unless we are ready to settle for public policy determinations by philosopher kings, the “art of the possible” is the *sine qua non* of any *remedy* even fashioned in a fourteenth amendment case.

64. See Bator, *supra* note 2, at 607 (attributing this statement to Charles Allan Wright).

I am quick to recognize that not all cases come from the same mold, and sometimes the preference has to go to the federal courts simply because state judges deliberately do not or, because of majoritarian pressures, are unable to meet the problems. Heading this category, of course, are race discrimination cases, and close behind are the often interrelated cases of brutality by state and local police and corrections officials. To me, section 1983, although over-used in many cases, has been the single most important instrument to give fiber and sinew to the lofty statement of moral values set forth in our Constitution. That I invite the *state* courts to use it more is not to suggest that the *federal* courts use it less. This single statute, more than any other, vindicates what Eugene V. Rostow described as the root idea of the Constitution: man can be free because the state is not.⁶⁵

To me, the dominant problem no longer is dictating which cases belong in which court. What is critical today is a recognition that both state and federal courts have the responsibility of interpreting federal law where subject matter jurisdiction exists. What is equally critical is for the federal courts to be a kind of supercourt in matters of national policy, a sort of All-Pro team. Then, some sector of the community should take steps to make an intelligent and forceful presentation to Congress that statutory federal court subject matter jurisdiction be reexamined in order to remove from the courts of appeals, and from the district courts, matters that do not belong before any article III court.

65. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).