CONCLUDING REFLECTIONS

CHANGING ROLES: THE SUPREME COURT AND THE STATE HIGH COURTS IN SAFEGUARDING RIGHTS

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You know what they say in show business: never follow an act with little kids, puppies, or chief justices. But here I go anyway. Before I proceed, however, for the benefit of our students I would like to acknowledge what appears to be an Albany Law School contingent sitting up in front in the audience. There is Court of Appeals Judge Victoria Graffeo; Presiding Justice of the Appellate Division, Third Department, Anthony Cardona; Appellate Division, First Department Justice Bernard Malone; and Appellate Division, Third Department Justice Anthony Carpinello. Judge and Justices, can I ask you to stand up and take a bow for our students? Thank you. And the four of them are seated next to Court of Appeals Judge Susan Read, who is an honorary Albany Law grad today.

I. STATE SUPREME COURTS IN THE FEDERAL SYSTEM

We have heard from some of the most eminent figures of the American judiciary today: Chief Judge Judith S. Kaye of New York, Chief Justice Shirley S. Abrahamson of Wisconsin, Chief Justice Christine Durham of Utah, and Chief Justice Jim Hannah of Arkansas. To be perfectly frank, let me tell you that I for one—and I am certainly not alone in this view—would much prefer that my rights and liberties were placed in their hands than in the majority of the current United States Supreme Court.

Indeed, Justices of the Supreme Court itself share that view. They believe that is actually how our federal system of government should work. Some of the Supreme Court Justices take that view

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because they believe that their own Court has in recent decades abdicated its ultimate responsibility of zealously safeguarding constitutional rights and liberties—i.e., that the Court has been failing to enforce rights and liberties as vigorously as it should. Consequently, in our federal system that duty must fall upon the state supreme courts.[1] It has always been there anyway as an essential role of the American judiciary as a whole, state as well as federal. But with the much less rights-protective posture of the current Supreme Court, the state supreme courts' role is especially critical.

Other Justices of the United States Supreme Court think it is entirely appropriate that the decision be left largely to the state supreme courts whether to protect the rights and liberties of their own citizens and that, if they choose to do so, they do so under their own state law. These Justices do not believe that the role of the United States Supreme Court is to be the zealous enforcer of rights and liberties. In fact, they view the Federal Constitution as a very limited, static document. They view the Bill of Rights and the Fourteenth Amendment in a minimalist, narrow fashion—as affording only the most undeniable, explicit guarantees.[2]

This characterization of these Justices—and the similar characterizations of these justices by others[3]—is not opinion. Years ago, I had the opportunity to spend some time with Chief Justice

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[1] *See, e.g.*, William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1987) (urging state supreme courts to protect fundamental rights and liberties under their own state constitutions in order to insure such protection at a time the U.S. Supreme Court was backpedaling under the Federal Constitution); Mass. v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J. concurring) (reminding the state's supreme court of its duty to enforce individual rights under it's own state constitution). *Cf.* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (declaring that the Supreme Court would exercise jurisdiction to review and reverse decisions of state courts that afforded greater protection of constitutional rights than the Supreme Court would have, but that the state courts remain free to provide that greater protection under their own state law where they make the state-law bases of their decisions clear).

[2] *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976) (arguing against an active role of the federal courts in construing constitutional protections and in favor of strict deference to the political branches and to the states, except where the Federal Constitution's protection is clear); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (supporting an interpretation of federal constitutional rights and liberties that limits them to the originally intended meaning of the specific language in the text).

[3] The literature is voluminous. Two recent works on the Court—one by a political conservative and the other by a political liberal—that examine its role today are illustrative. One views the exercise of restraint in construing constitutional rights favorably: KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002). The other decries the activist narrowing of civil rights and liberties: STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND THE STATE OF LIBERTY IN AMERICA (2000).

William H. Rehnquist. This was shortly following his ceremonial swearing-in at the Supreme Court as Chief Justice, which—interestingly, in the context of these remarks—happened to take place together with the swearing-in of Antonin Scalia as Associate Justice.[4] At that time, I asked the Chief Justice about several very recent cases in which the United States Supreme Court had reversed decisions of the New York Court of Appeals. The New York court—somewhat audaciously in light of the Supreme Court's increasing retrenchment on rights and liberties—had actually construed and enforced constitutional protections quite broadly. The United States Supreme Court reversed the New York decisions in each of those cases on the ground that the state high court had provided too expansive an interpretation of federal constitutional rights.[5] I said to the Chief Justice that there seem to be a growing number in our country who believe that the United States Supreme Court is no longer the moral conscience of the nation, that it is no longer being viewed as the primary guardian of our rights and liberties. He responded that no, the Court is not that, and it is not supposed to be.[6] He said that the New York Court of Appeals can do whatever it wants for the people of New York under its own law—like the other state supreme courts can for the people of their states—and that is the way it is supposed to be.[7]

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[4] The ceremonial swearing-in of the two took place on September 26, 1986.

[5] *See, e.g.*, New York v. Class, 475 U.S. 106 (1986), *rev'g* 63 N.Y.2d 491 (1984) (disagreeing with the New York court that a police officer's reaching into the passenger compartment of an automobile to read the vehicle identification number constituted a search for the purpose of federal constitutional search and seizure protections); New York v. P.J. Video, 475 U.S. 868 (1986), *rev'g* 65 N.Y.2d 566 (1985) (rejecting the New York court's holding that warrants to seize expressive materials required the support of particularly demanding probable cause); Arcara v. Cloud Books, Inc., 475 U.S. 697 (1986), *rev'g* 65 N.Y.2d 324 (1985) (overruling the New York court's decision that government actions that had the result of impinging on presumptively protected First Amendment activities—even in the absence of such an intent—were subject to the strict-scrutiny/compelling-interest test).

[6] He subsequently wrote that the notion of the Court as the conscience of the country is a "deception [that] has considerable potential for mischief." WILLIAM H. REHNQUIST, THE SUPREME COURT, REVISED AND UPDATED (2004). That sentiment is shared by Justice Scalia. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the nation?").

[7] Conversation with William H. Rehnquist, Chief Justice, U.S. Supreme Court, in Washington, D.C. (Mar. 20, 1987). With respect specifically to the New York Court of Appeals' decisions on remand from the Supreme Court reversals, with the state court adhering to its prior rulings but doing so as a matter of independent state constitutional law, Rehnquist noted with unmistakable displeasure and more than a hint of contempt that the New York high court was "free to do as it chooses" in expanding individual rights for New Yorkers, "but it ought to have some basis for what it's doing." *Id.*; *see* Arcara v. Cloud Books, Inc., 68 N.Y.2d 553 (1986); People v. P.J. Video, 68 N.Y. 2d 296 (1986); People v. Class, 67 N.Y.2d 431 (1986).

II. SUPREME COURT AS GUARDIAN

For most of us, that much less lofty and much less protective view of the United States Supreme Court—Chief Justice Rehnquist's view and that of a majority of the Justices for the last couple of decades—is much different than the view we traditionally have had. For most of us, growing up through grammar school and high school, through college and even law school, we thought of the United States Supreme Court as the foremost guardian of our fundamental rights and liberties as Americans.[8] When we thought of the Supreme Court that way, we were thinking of decisions of the Court that are landmarks, even if we did not always know their names. But they are cherished landmarks, and we knew about them as such. We knew of them and still cherish them because, in those decisions, the United States Supreme Court did function as a guardian, because the Court did safeguard our fundamental rights and liberties, and because the Court did so whether or not the decisions were popular, and whether or not the states or the states' own supreme courts chose to protect those rights and liberties themselves.

So many of these decisions are readily and generally familiar. Certainly, anyone who has studied constitutional law or the Supreme Court, in college or in law school, knows them. To those who work or teach in the field, they are part of our stock-in-trade. Indeed, for all Americans, they are an integral part of the heritage of freedom and liberty and justice in this country. A brief mention of just a few—in no particular order, but just as they come to mind while preparing these observations—will no doubt make the point. In each of these cases, the Supreme Court refused to leave protection of fundamental rights to the states, or to excuse the failure of states to vigorously enforce federal constitutional guarantees.

In *Griswold v. Connecticut*, [9] Ms.Griswold and Dr. Buxton complained to the Supreme Court that the state of Connecticut's criminal prohibition against the use of and advice about birth control was an infringement on constitutionally-protected privacy

[8] Indeed, the most eminent Supreme Court scholars viewed the Court that way and made that view abundantly clear in their classic texts from which many of us learned about the Court; even the titles of those texts bespeak the role ascribed to the Court. *See, e.g.*, Alpheus T. Mason, THE SUPREME COURT: PALLADIUM OF FREEDOM (1962); HENRY J. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (1st ed. 1967).

[9] 381 U.S. 479 (1965).

rights. The Court sided with Griswold and Buxton, invalidated the state statute, and gave meaning and effect to the fundamental right to personal privacy in intimate matters. In *Loving v. Virginia*,[10] the Lovings complained to the Justices that Virginia convicted and sentenced them for violating the state's criminal prohibition against interracial marriage. The Court invalidated the state's antimiscegenation statute and, thus, struck a blow against racial discrimination and invidious interference with the right to marry. In *Brown v. Board of Education*,[11] children living in the states of Kansas, South Carolina, Virginia, and Delaware complained about their racially segregated public schools. The Court outlawed segregation as a violation of constitutional equal protection and effectively put an end to the pernicious "separate but equal" doctrine and its practices, not only in education but in other areas of state governance, entitlements, and treatment of citizens as well. In *Sherbert v. Verner*,[12] Ms. Sherbert complained that South Carolina denied her unemployment compensation benefits when she was fired from her employment for refusing to violate her religion and work on Saturday, the Sabbath of her faith. The Court overruled South Carolina and declared to that state, as well as to all the others, that it could not interfere with the constitutionally-guaranteed free exercise of religion unless there was a genuinely compelling need to do so. In *Near v. Minnesota,*[13] the Supreme Court told Minnesota that it and all the states were prohibited by the Federal Constitution from violating freedom of the press, whether by outright or indirect censorship.

In *Rochin v. California,*[14] the Court declared that California's conduct in pumping a suspect's stomach without a warrant violated basic due process, and that the Constitution forbade that state and every other from treating criminal suspects with any such brutish conduct that "shocked the conscience." In *Miranda v. Arizona,*[15] the Court condemned police practices in Arizona and other states that routinely violated the constitutional privilege against compulsory self incrimination. In order to safeguard that right, the Court imposed the protective requirement of the now universally known pre-interrogation warnings, providing notice to suspects of their

[10] 388 U.S. 1 (1967).
[11] 347 U.S. 483 (1954).
[12] 374 U.S. 398 (1963).
[13] 283 U.S. 697 (1931).
[14] 342 U.S. 165 (1952).
[15] 384 U.S. 436 (1966).

rights to silence and to an attorney. In *Robinson v. California,*[16] the Court extended the federal constitutional prohibition against cruel and unusual punishment to the states. In *Duncan v. Louisiana,*[17] it was the right of the accused in criminal cases to a jury trial, notwithstanding the laws of Louisiana and other states that did not allow for one. In *Gideon v. Wainwright,*[18] it was the entitlement to counsel in criminal cases, despite the objections of Florida, Alabama, and North Carolina that such a right would impede efficient prosecutions and be overly burdensome on the public purse.

The catalogue of such landmarks goes on and on. But the point is that these, and many many others,[19] are the kinds of decisions that come to mind when we think of the United States Supreme Court as the guardian of our rights and liberties and, as the facade on its marble building proclaims, of "Equal Justice Under Law."

III. ROLE REVERSAL

Right or wrong, wise or foolish—and that is not the point here—the appellation of foremost guardian is no longer apropos for the Supreme Court. The dynamics have changed. Certainly, there continue to be cases where the Court does strike a blow for rights and liberties. But in the main, when the cases that the Court reviews from the states are surveyed, it becomes clear that there has been a striking change in the relationship between the Supreme Court and the high courts of the states.

No longer are the cases from the state courts predominantly, or even typically, those where the Supreme Court determines that the states have failed to protect rights and liberties sufficiently. By

[16] 370 U.S. 660 (1962).

[17] 391 U.S. 145 (1968).

[18] 372 U.S. 335 (1963).

[19] Understandably, readers may well question the failure to identify many obvious others, such as West Virginia State School Board of Education v. Barnette, 319 U.S. 624 (1943) (invalidating the state's mandatory flag salute in public schools as applied to Jehovah Witness students who objected on religious grounds); Mapp v. Ohio, 367 U.S. 643 (1961) (requiring state courts to exclude evidence obtained in violation of federal constitutional search and seizure protections); Malloy v. Hogan, 378 U.S. 1 (1964) (applying the federal constitutional prohibition against compulsory self-incrimination to the states); Benton v. Maryland, 395 U.S. 789 (1969) (applying the federal constitutional prohibition against double jeopardy to the states); Brandenburg v. Ohio, 395 U.S. 444 (1969) (effectively adopting the Brandeis-Holmes view of constitutional free speech and, thus, invalidating the state statute which criminalized advocacy speech beyond that which was likely to directly incite imminent lawless action); Wisconsin v. Yoder, 406 U.S. 205 (1972) (requiring an exemption from the state's compulsory school attendance requirements for the religiously-objecting Amish). But still, the catalogue of landmarks goes on and on.

contrast, the cases today are regularly those where the Court finds fault with the state courts for protecting rights and liberties too much. Again, just a few of those that come readily to mind are representative.

In *Oregon Employment Division v. Smith*,[20] for example, the United States Supreme Court ruled that the Oregon Supreme Court had protected freedom of religion too much. Constitutionally guaranteed free exercise is entitled only to some rational-basis, legitimate-purpose test, declared the nation's guardian of our rights. Oregon's high court was reversed for applying the more demanding strict-scrutiny, compelling interest test to the state's interference with religious liberty.[21] Similarly, in *Milkovich v. Loraine Journal Co.,*[22] the Supreme Court overruled the courts of Ohio for following an Ohio Supreme Court precedent that, according to the nation's court of last resort, protected freedom of the press too much.[23] Contrary to the position of Ohio's high court, the Supreme Court declared that constitutional protection of the press and journalists from defamation liability was restricted to statements of pure opinion; statements that mixed fact with opinion had no similar immunity under the Federal Constitution.

The turnabout in criminal cases has been even more pronounced. Indeed, it is broad and deep. In *Massachusetts v. Sheppard,*[24] for example, Massachusetts complained to the United States Supreme Court about its own supreme court. The Supreme Judicial Court of Massachusetts had refused to overlook a violation of search and seizure rights in a case in which the police were unaware that their search was unconstitutional. The United States Supreme Court overruled the Massachusetts high court for enforcing the protections against unreasonable searches and seizures too much: the state court should have excused the officers' "good-faith" mistake.[25] Likewise, in *Illinois v. Gates*,[26] Illinois complained about its

[20] 494 U.S. 872 (1990).

[21] Of course, the Oregon court had good reason to believe that free exercise of religion, like other fundamental constitutional rights, was entitled to such protective review. The Supreme Court itself, twenty-seven years earlier in *Sherbert v. Verner*, seemed to make that clear. *See supra* note 12 and accompanying text.

[22] 497 U.S. 1 (1990).

[23] Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986) (dismissing a defamation action against a reporter on the grounds that the plaintiff was a public figure and that the newspaper article in question was protected opinion under both the federal and Ohio state constitutions).

[24] 468 U.S. 981 (1984).

[25] *Id.* at 987–88.

[26] 462 U.S. 213 (1983).

supreme court. Here too the United States Supreme Court sided with the state against the state's high court on the ground that the state court was protecting search and seizure rights too much—i.e., the state court adhered to a more stringent test for probable cause than a distinctly flexible "commonsense," "totality of the circumstances" approach that the Supreme Court now preferred.[27] In both *New York v. Belton*[28] and *New York v. Class,*[29] the state of New York complained that the New York Court of Appeals had protected the privacy rights of drivers too much, and the United States Supreme Court agreed. In the first case, the state court would not permit a warrantless search of the entire passenger compartment of an automobile, including anything therein, anytime a driver was lawfully arrested for any offense. In the second, it required some justification for an officer to reach into the passenger compartment and clear the dashboard to inspect the vehicle identification number, deeming such conduct to be a search. The Supreme Court, by contrast, viewed the full automobile search in the first case to be automatically permissible upon the driver's arrest, regardless of any connection to the offense involved. In the second case, the Supreme Court simply did not view the police conduct as a search at all.

In *Arizona v. Fulminante,* [30] Arizona complained about its supreme court for reversing a conviction where the prosecution had introduced a coerced confession into evidence. The United States Supreme Court agreed that the Arizona court was enforcing the right against compulsory self-incrimination too rigorously and that, instead, it should have applied a harmless error analysis. In *Oregon v. Hass,*[31] Oregon complained about its supreme court for strictly enforcing *Miranda* rights by disallowing any prosecutorial use of a confession where the police had interrogated a suspect in disregard of his invocation of the right to an attorney. The United States Supreme Court agreed that the Oregon Supreme Court had protected the suspect's rights too much, and it held that prosecutors were free to use such unlawfully obtained confessions to impeach suspects who testify at their trials.

Again, the catalogue of such cases goes on and on.[32] A look at a

[27] *Id*. at 230.
[28] 453 U.S. 454 (1981).
[29] 475 U.S. 106 (1986).
[30] 499 U.S. 279 (1991).
[31] 420 U.S. 714 (1975).
[32] Among those best known and most illustrative of the changed dynamic are those

few very recent ones, from the Supreme Court's past term,[33] shows that this changed dynamic has continued under Chief Justice John Roberts. In *Kansas v. Marsh*,[34] the Kansas Supreme Court overturned a death sentence because the aggravating and mitigating factors in the case were equally balanced. The state of Kansas complained to the United States Supreme Court. The Court overruled the state's high court and held that the Federal Constitution did not require aggravating factors to outweigh the mitigating ones in order to justify a death penalty. In *Washington v. Recuenco,*[35] the Supreme Court agreed with the state of Washington that its high court was unnecessarily protective of the right to a jury trial. The state court had reversed a sentence that was unconstitutionally enhanced at trial on the basis of judge-determined aggravating factors, rather than by jury findings beyond a reasonable doubt. The state court was wrong, according to the Supreme Court, because the prosecution should have been permitted to prove that the conceded jury right violation was otherwise harmless.

In *Oregon v. Guzek*,[36] the state complained that its supreme court had given capital defendants the right to present innocence-related evidence at the sentencing that was not first introduced at the trial. The Supreme Court reinstated the capital sentence, holding that

involving search and seizure, or more accurately, what is not a "search" or not a "seizure." *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (agreeing with the state which challenged a precedent of the state's supreme court, applied by the state's intermediate court in this case to exclude evidence obtained from a warrantless police search of the defendant's trash which had been sealed in opaque garbage bags left at the curb; the Supreme Court ruling that such a search was not a "search" within the meaning of the Fourth Amendment and, thus, not subject to the constitutional prohibition against unreasonable searches); Florida v. Riley, 488 U.S. 445 (1989) (reversing a decision of the state supreme court, on appeal by the state, and holding, contrary to the state's high court, that the warrantless police inspection by means of a helicopter hovering above a residential backyard within the curtilage of the defendant's home was not a "search" within the meaning of the Fourth Amendment and, thus, not subject to the constitutional prohibition against unreasonable searches); California v. Hodari, 499 U.S. 621 (1991) (siding with the state, which appealed a decision of the state's intermediate court [the state supreme court had denied review] that had excluded evidence obtained as a result of a warrantless, probable cause-less chase and attempted stopping of the defendant; the Supreme Court holding that the police conduct was not subject to the constitutional prohibition against unreasonable seizures because it did not amount to a "seizure" within the meaning of the Fourth Amendment). Again, the catalogue of cases goes on and on.

[33] At the time these remarks were prepared, the Supreme Court's most immediate past term was October 2005, and some of the following cases were decided at the very end of that term in June, 2006.

[34] 126 S. Ct. 2516 (2006).

[35] 126 S. Ct. 2546 (2006).

[36] 546 U.S. 517 (2006).

the Federal Constitution provided no such entitlement to demonstrate "residual doubt" with new evidence. Finally, one last case comes from Chief Justice Durham's court. *Brigham City v. Stuart*,[37] involved a decision of Utah's high court requiring the exclusion of evidence obtained upon a warrantless entry into a private home. With Durham in the majority, the Utah court held that to be valid unless such an entry must have resulted from a genuine emergency, and not some other non-justifying motivations. The United States Supreme Court, however, agreed with the Attorney General of Utah, reversed the Supreme Court of Utah, and ruled that the actual motives of the police for entering a home without a warrant are irrelevant, as long as there is some scenario that fits within the concept of emergency and renders the entry otherwise "reasonable."

IV. FINAL POINTS: STATE COURTS, STATE DECISIONS, AND STATE CONSTITUTIONAL LAW IN THE CHANGED FEDERAL DYNAMIC

Whether any particular decision of the Supreme Court or the general change in dynamic is a good or bad thing is, once more, not the principal point here.[38] There are, however, a few lessons that need to be drawn. They are not mere opinion; they are fact.

First, despite the Supreme Court's frequently avowed deference to the states[39] and respect for state supreme courts,[40] the truth of the

[37] 126 S. Ct. 1943 (2006).

[38] It should, nevertheless, not be difficult to discern my own view, which I am pleased to make explicit in the interest of full disclosure. *See* William O. Douglas, *Law Reviews and Full Disclosure,* 40 WASH. L. REV. 227 (1965). That view is that the Supreme Court's relinquishment of its role as the foremost guardian and vigorous enforcer of constitutional rights and liberties, as well as its concomitant practice of expending its sharply reduced caseload on reviewing and reversing state supreme courts which have assumed that role, is at best unfortunate and indeed—to be brutally plain—deplorable.

[39] *See, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983) ("We sit as judges, not as legislators, and the wisdom of the decision . . . is best left to the States."); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (declaring the Religious Freedom Restoration Act of 1993, which prohibited infringements by the states on the free exercise of religion unless necessitated by a compelling government interest, to be an interference by the national government with the powers of the states that the Fourteenth Amendment does not authorize); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act of 1994 as an intrusion, unauthorized either by the Commerce Clause or the Fourteenth Amendment, on the police power to suppress crime that the Constitution denied to the national government and reposed in the states); United States v. Lopez, 514 U.S. 549 (1995) (same for the Gun Free Zones Act of 1990).

[40] *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040 (1983) (finding that "respect for the independence of state courts" is "precisely" the reason for avoiding review of state court decisions clearly based on state law).

matter is that the United States Supreme Court today has very little hesitation in reviewing a decision of a state supreme court, even where the state court has actually protected constitutional rights. More to the point, the Supreme Court today has no hesitation to overrule such rights-protective decisions of state courts.

Historically, the Supreme Court virtually never reviewed these decisions.[41] No constitutional right is at risk in such a state court decision. No constitutional right has been violated by such a state court decision. In fact, the only question on appeal before the United States Supreme Court is whether, in its view, the state court protected a right too much, or protected an asserted right that the Supreme Court does not believe is entitled to protection at all. These cases are hardly the type that a Supreme Court that has served as the national guardian of our rights and liberties—the ultimate protector of constitutional guarantees—would care to spend its sharply reduced caseload reviewing.[42]

Indeed, despite its avowed deference to states and states rights, what the United States Supreme Court really is doing in virtually all of these cases is injecting itself into an *intra*state squabble—i.e., a squabble between two branches of a state's government. These cases virtually all entail a disagreement by a state's executive or legislative branch with that state's judiciary. The criminal cases, for example, always involve a state's executive branch, the prosecution, protesting a decision of its own state court—typically the state's supreme court. These are disputes solely between state actors. They present no possibility of any violation of a Federal Constitutional right; the state court has taken care of that. The

[41] Justice Stevens noted the same in *Long*. *Id.* at 1069 (Stevens, J., dissenting) ("Until recently we had virtually no interest in cases of this type.").

[42] Justice Stevens has been a persistent critic of the Court's use of its docket to review such cases, including several times at the end of the Court's last term. *See* Washington v. Recuenco, 126 S. Ct. 2546, 2553 (2006) (Stevens, J., dissenting) ("[T]his is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution. Ironically, the issue in this case is not whether respondent's federal constitutional rights were violated-that is admitted-it is whether the Washington Supreme Court's chosen remedy for the violation is mandated by federal law."); Kansas v. Marsh, 126 S. Ct. 2516, 2540 (2006) (Stevens, J., dissenting) ("[T]he State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required."); Brigham City v. Stuart, 126 S. Ct. 1943, 1950 (2006) (Stevens, J., dissenting) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.").

state court has protected or redressed the right in issue. In fact, it is precisely this protection or redress by the state court that the state's other branch is complaining about and asking the United States Supreme Court to undo.

Number two, as previously discussed and as a corollary to the first point, the United States Supreme Court today does not view its role as primarily dedicated to vigorously enforcing fundamental constitutional rights. In fact, the Court today seems instead to be dedicated to insuring a minimal safety net. But more—or less—than that, the Court not only seems to view its role as insuring this minimal safety net, but also to be exercising that role by insuring that state supreme courts do not exceed the safety net. The Court is declaring emphatically and unambiguously to state courts: You have no authority to provide more protection for American Constitutional rights than the bare minimum. Protect local rights under local law all you want, the Court is saying, but not those rights and liberties and freedoms to which the nation as a whole is dedicated.

Number three, there is only one reason that rights-protective decisions of state courts are even subject to the United States Supreme Court's review: state courts are rendering these decisions in such a way that the Supreme Court can find at least a scintilla of federal law involved. This is critical, of course, because beginning in 1983 with *Michigan v. Long*,[43] whenever a state court allows even the possibility that it has answered a federal question or based its decision in any measure on federal law, the Supreme Court presumes jurisdiction over the case. The reason, in turn, that state courts often do leave some doubt—i.e., often do leave open the possibility of a federal question in their decisions—is that many state court judges and justices, as well as their law clerks and the lawyers who argue the cases in state courts, know virtually nothing about state constitutional law and adjudication. Most are unfamiliar, except in the most superficial way, with the relationship between state and federal constitutional law, and between the authority of state high courts and that of the United States Supreme Court.

Indeed, it is more typical than not for the lawyer's argument and

[43] 463 U.S. 1032, 1040–42 (1983) (reversing the traditional presumption against federal question and Supreme Court jurisdiction such that, henceforth, these would be presumed unless the state court made unambiguous through a plain statement that its decision was based on an adequate and independent state ground).

the state court's decision to do little more than add an innocuous citation or footnote to a state constitutional provision, or to refer to the state constitution once or twice, but not to develop an argument actually based upon it. The most common state constitutional "argument" that is presented, when one is presented at all, seems to be that the state court is free to provide greater rights under the state constitution than is provided under the federal. But this truism of an assertion is typically not followed by any well-developed rationale explaining why the state court should do so in the particular case. The federal constitutional arguments are apparently deemed sufficient to cover any questions of state law, as well as federal.

Finally, number four. On this point, those of us in legal education must take the blame. Most law schools and legal educators seem so paranoid about being labeled state-law schools and state-law scholars that, on the kinds of legal issues discussed here—those of constitutional law, criminal procedure, civil rights and liberties, and other areas of public law—they try to adopt a national posture, and they do this by emphasizing federal law and decisions of the United States—i.e., the Federal—Supreme Court. But, in truth, this is not a focus on national law. This is not a focus on American law. Most American law, most law in this nation, is decided in state courts. Most decisions on fundamental issues of public law—as well as on the fundamental issues of torts, contracts, and other areas of private law—are rendered by the supreme courts of this nation's states.

If legal education were to teach constitutional law, criminal procedure, civil rights and liberties, and other such areas of the law from a truly national perspective, the emphasis would not be placed so narrowly and lazily on federal law and the Federal Supreme Court. Rather, American Constitutional Law, American Criminal Procedure, American Civil Rights and Liberties, and other subjects of American public law would have a much broader focus that encompassed the variety of perspectives taken across America by the state high courts. Such focus, for example, would not limit due process to the decisions of the Federal Supreme Court. Rather, it would also explore the positions and insights of the Wisconsin Supreme Court, the Utah Supreme Court, the Arkansas Supreme Court, and the New York Court of Appeals, or those of other state high courts that had addressed the particular due process issues in question. The same would be true regarding the privilege against

self incrimination, the right to counsel, search and seizure protections, and indeed for all the rights of the accused. Likewise, for press, speech, and religious liberties, and for equality and other areas of civil rights and liberties, the focus would be more truly national. It would not be so limited and—to be sure—so misleading by considering federal case law so exclusively, or so overwhelmingly.

Unfortunately, however, this type of narrow, federal emphasis is precisely what has been adopted by most of legal education.[44] The focus may no longer be on the law of the home state. But law schools have nevertheless failed in the quest to be truly "national."

That being said, after today's symposium the students in the audience will not forget just how important it is, when practicing law and arguing cases in state courts, to develop state-law arguments. You will know not to limit your research and resulting arguments to federal case law. You will know that you must explore the decisions of the supreme court of the state in which you are practicing, and even the supreme courts of other states whose analysis and arguments support your position and might be persuasive. You should never forget this after today, having been urged not by one, but by four chief justices.

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In any event, I want to thank all of you for coming. I certainly want to thank our honored guests, Chief Judge Kaye to whom this symposium has been dedicated, Chief Justice Abrahamson, Chief Justice Durham, and Chief Justice Hannah, as well as all our honored guests in the audience. Thank you to our moderators, Dr. Luke Bierman and Professor Sandy Stevenson. Thanks finally to the *Albany Law Review*, and especially to Jerald Sharum, the Editor-in-Chief, and Paul Trumble, the Executive Editor for the *State Constitutional Commentary*, for putting together this marvelous event.

[44] For a related criticism of the scholarly focus on the opinions, voting, and jurisprudence of the Justices of the United States Supreme Court and almost universal disregard of the jurists on the state high courts, see Ken Gormley, *The Forgotten Supreme Court Justices,* 68 ALB. L. REV. 295 (2005).