The Warren Court’s history of expanding constitutional rights is well known. Less familiar are the many twists of jurisdictional doctrine that accompanied its rights-expanding agenda: the Warren Court supported its innovations in constitutional rights with rules that increased access to the federal courts. Similarly, the Burger and Rehnquist Courts have taken a much more constrained view of constitutional rights, and, less noticeably, they have cut off many of the jurisdictional paths opened by the Warren Court. Those who try to keep track of changes in constitutional law but do not follow developments in the notoriously hard-to-follow field of jurisdiction can never construct a complete picture of the Court’s work.

Yet what does all this mean? Why is there any connection between the scope of enforceable rights and which courts enforce those rights? Courts are courts, one might think. Whether they are part of the national government or the state governments, they are all bound by the U.S. Constitution to enforce federal law and to regard federal law as hierarchically superior to any other law or policy. One might fairly wonder why we have federal courts at all. There is no obvious impediment to the state courts’ handling all the judicial work that might arise in the nation. One might contend that we need some institution capable of making a decision that will bind all courts, but that argument refers only to the need for a Supreme Court. It *1068 says nothing about why we ought to have a system of lower courts and intermediate appellate courts parallel to the state court systems. And indeed, the framers of the U.S. Constitution, as a group, did not get much further than this. They provided for one Supreme Court but could not resolve whether there ought to be any other courts. The text of the Constitution simply empowers Congress to decide whether to create lower federal courts. Under the Supreme Court’s interpretation, that grant of power to Congress also implies a power to decide just how much jurisdiction those courts ought to have.

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1 Professor of Law, the University of Wisconsin Law School
3 See U.S. Const., Art. III § 1.
4 See Sheldon v. Sill, 49 U.S. 441 (1850). Whether there are any limits to Congress’s power to restrict the jurisdiction of the lower federal courts is one of the classic topics for debate in the field of federal courts law. Scholars tend to consider whether Congress could use its power over federal court jurisdiction to achieve substantive ends. For example, could Congress remove cases involving abortion rights or school desegregation? Since Sheldon v. Sill dealt with a statute that removed the sort of cases that entail no federal interest and would only burden the federal courts, one can minimize its broad statements and argue for a different constitutional interpretation for congressional cutbacks designed specifically to undercut the judicial role in enforcing rights. Scholarly theories abound in this area. See, e.g., Erwin Chemerinsky, FEDERAL JURISDICTION 186-202 (2d ed. Boston: Little, Brown, 1994); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. REV. 205 (1985); Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. Y.L. REV. 1 (1990); Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L.
Over the years, we have acquired a sense that the federal courts have a special role to play. But if we try to talk about what that role is, we may quickly find ourselves embarrassed by the lack of any real foundation to our beliefs. We may tend to think of the federal courts in connection with the grand enterprise of enforcing federal constitutional rights. Yet, while the Constitution provides us with a reassuring, if ambiguous, list of those rights, it says nothing about the role of the lower federal courts except that they may exist and Congress will decide. This suggests that the role of the federal courts is wholly contingent on a wavering set of political preferences.

Larry Yackle, like many federal courts academics, thinks that the position the Warren Court wavered into in the 1950s and 1960s was more than a temporary preference: There should be no further wavering in response to future conditions because that Court got it right. Even if the original Constitution assigned no specific role to the federal courts, a long history of experience in dealing with the behavior of the state and federal courts and in devising and expanding individual rights produced an elaborate problem, which the Warren Court solved. In this view, rights are important, rights should be given generous scope, and rights, to have this generous scope, require sympathetic courts applying them on a case-by-case basis. The federal courts, it is believed, have the requisite sympathy with federal rights. Accordingly, jurisdictional doctrine should ensure maximum access to federal courts for the enforcement of federal rights.

THE RIGHTS-JURISDICTION CONNECTION

The favorite citation connecting expansive rights enforcement and access to federal courts is Burt Neuborne’s 1977 article, The Myth of Parity. There, Neuborne enumerated his reasons for preferring to file his cases in federal court. Neuborne wrote from his perspective as a lawyer for the ACLU, litigating at a particular time in history. Although some of the points he made referred to permanent structural differences in the federal courts – federal judges have life tenure and salary protection – Neuborne did not pose as a neutral, timeless observer. Rather he openly spoke of the advantages he sought for his clients and the contingency of his preference for federal court. *1070

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3 Neuborne wrote that federal judges tended to be better than state judges, because fewer slots needed to be filled and the pay, prestige, and working conditions tend to be higher. Better judges, he wrote, are particularly important to those who assert constitutional rights because they must challenge popularly supported laws and policies and must often make arguments that are difficult to comprehend. He conceded, however, that the more competent judge may be more likely to constrain rights, particularly when the Supreme Court has been constraining rights. So the advantage can turn to disadvantage. Neuborne contended that federal judges have a “tradition of constitutional enforcement” that gives them an “elan and sense of mission” and makes them “more likely to enforce federal rights vigorously” than state trial judges. He saw the federal judges as having a closer tie to the U.S. Supreme Court than state judges that makes them more likely to go beyond “clearly established law” and “anticipate” future Supreme Court expansions of federal rights. But he also recognized that this sensitivity to the Supreme Court can cut against the rights claimant during periods when the Court is not expanding rights. He ascribed an “ibis tower syndrome” to federal judges, and theorized that their distance from the “distasteful and troubling fact patterns” that arise in the criminal, family, and other civil cases handled.
Almost 20 years have passed since Neuborne explained his preference, and profound changes have taken place during this period. Many federal judges have retired, and many new judges appointed by conservative presidents have taken their places. These judges no longer experience the initial fervor of the rights-expanding enterprise that existed during the Warren era. They have had to deal with the complexities of enforcing remedies over long periods of time, of facing the difficulties of conflicting rights, and of hearing an endless stream of arguments aimed at transforming major and minor complaints into constitutional rights. They have lived in a society that has questioned the role of judges and the “culture of complaint.”

They have watched the optimistic and abstract pronouncements of rights play out on the pessimism-inducing stage of real life. The judges in the federal courts are not the same judges who shaped Neuborne’s choice.

Nor are the state judges the same. They too have experienced decades of political and social change: To what extent does their bias and prejudice exceed that of the federal judges? Neuborne relied on the federal judges’ responsiveness to the U.S. Supreme Court. He wrote not long after the Supreme Court had gone through a whirlwind period of using the Fourteenth Amendment to impose many new rights on the states. At the time, rights claimants had a compelling motivation to bypass state courts, which lacked the federal courts’ spirit of cooperation with the Supreme Court. By now, the states have had a long time to absorb the lessons of the Warren era, and incorporating new developments in federal law is scarcely the hard and unfamiliar work it once was. Moreover, the Supreme Court, to which the federal courts supposedly respond with special allegiance, now moves in the direction of constraining rights.

One would think, then, that the Myth of Parity exercise would need to be wholly redone in response to changed conditions. Indeed, one might also question whether the subjective observations of a lawyer for a particular subcategory of litigants ought ever to have had great persuasive pull. Yet Larry Yackle offers Neuborne’s article as “a rigorous examination of the alleged parity between the federal and state courts,” which demonstrates that federal courts “are more likely to decide in the individual’s favor” (at 42). The Myth of Parity has itself attained mythic status. This new myth of the regularly by state judges increases the likelihood that they will “liberally and assiduously perform their function of enunciating constitutional norms.” He also predicted that their membership in a “successful, homogeneous socioeducational class” would make them more sensitive to rights. They are, he assumed, more likely to believe in the “libertarian tradition” that underlies constitutional claims and less likely to trust the defendant state officials who come from a social class that does not share that tradition. These predictions about federal court behavior may come true, but it is by no means certain. Distance and upper-class status might also produce restraint and deference to the choices of the majority, if not apathy or insensitivity to rights. Moreover, the “libertarian tradition” supposedly popular with ivory tower successful judges may favor the First Amendment rights pressed by Neuborne’s organization (the ACLU), but it seems questionable whether this generous attitude will extend to other sorts of constitutional rights, such as those affecting poor and dependent persons.


7 “The individual” is a fascinating abstraction. This favorite of the Warren Court devotee has also changed over the years. The image of the victim of racial discrimination or the mistreated accused may keep us from seeing that “the individual” seeking relief in federal court may be the white male challenging affirmative action as reverse discrimination, the right-to-life ideologue attacking the funding of abortion for the poor, or the abusive parent attempting to undermine a state’s efforts to protect children. In short, the Government vs. Individual concept inaccurately implies a good guys/bad guys scenario. If the myth of the rights-enforcing federal judge is true, a too early examination of an issue by the federal courts may give excessive weight to the concerns plaintiffs package as rights and may undervalue the state’s policies – policies that may greatly benefit individuals. The state court’s presumable affiliation with the policies of state government could aid in the full development of the issues, making the state’s potentially salutary programs
courageous, rights-enforcing federal judge has a tenacious hold on academics. Various authors have, with inconclusive results, revisited the parity question. Attempts at empirical research that fail to support the myth of the rights-enforcing federal judge attract vigorous waves of criticism. Deepseated beliefs cling fast.

Those who believe in the myth of the rights-enforcing federal judge and who demonize the state judges find the work of the Burger and Rehnquist Courts an outrage, premised on hostility to constitutional rights. And, certainly, there are places where the doctrine can inspire outrage. For example, the Court added a twist to standing doctrine in *Los Angeles v. Lyons*\(^\text{10}\) that prevented a man whom the police had choked nearly to death from suing for an injunction barring the Los Angeles police department from continuing to use a dangerous chokehold. The chokeholds had already resulted in sixteen deaths, occurring with a glaring racial disproportion: twelve of the victims were African American. The Court held that Lyons lacked a sufficient personal stake in the outcome. He could sue for damages, but since his injury occurred in the past, he could not also seek the future-looking injunction. His inability to seek that injunction also meant that no one else could. Who could assert a more concrete interest in avoiding the chokehold than Lyons? And who could sue to stop any sort of police brutality? No matter how widespread a practice might be, who could come forward and say with certainty that they would have an encounter with the police? Federal judicial response to police brutality would have to take place in the form of intermittent damages suits. A city willing to pay for the privilege of brutalizing its citizens could continue its practices indefinitely – at least as far as federal courts are concerned. Unlike redefinitions of rights, jurisdictional changes only affect the ability of rights claimants to proceed in federal court. It remains possible for litigants like Lyons to shift to state court. Nothing in federal standing doctrine prevents the California courts from hearing Lyons’s federal law claim. Yet this is the central problem Yackle raises: Can we trust state courts to deal vigorously with the police?

While *Lyons* is a notoriously egregious example, it is only one of many cases restructuring doctrine in a way that makes it harder to enforce rights in federal court. Yackle gamely lays out the basics in crucial doctrinal areas like habeas corpus, abstention, and federal question jurisdiction, drawing attention to the sharp contrasts between the Warren Court and later Courts. He attempts to bring some life to dreary doctrine by beginning each chapter with a somewhat vivid illustration of a particular case.\(^\text{11}\) He strives to make his explanations concise and straightforward. But reading this
book is still very hard work, even for someone who has long taken an interest in the field of federal courts and who has read and taught the cases many times. It is hard to imagine a nonspecialist, let alone a nonlawyer, getting through this doctrinal morass.

I am sure Yackle hopes to shock the reader by demonstrating the Court’s insensitivity to rights and its seemingly devious resort to jurisdictional doctrine to achieve its unsavory goals. Yet the almost inevitable response to the materials is exasperation and ennui: a reader’s mundane irritation at having to absorb something so dull. This is not to criticize Yackle’s restatement of the doctrine but to recognize that its hypertechnical nature presents a seemingly insoluble problem. Shortening and simplifying the material makes it less comprehensible and produces the sort of abstract quality that makes the desired passionate response even less likely. On the other hand, if one were to try to explain it in depth, the reader would turn away in disgust. Perhaps the book that could be read cannot be written. It may be that federal courts law can only be perceived as a political hotbed after a long, patient adjustment to the material, reading one’s way through the opinions of the different Justices and gradually perceiving the patterns. The hope of stirring up political pressure to open up the jurisdiction of the federal courts seems strained indeed. Yet Yackle quite sincerely means to rekindle the flame of Warren Court veneration in the general populace.

Early on, Yackle addresses the lay reader:

I warn you now; beware agile minds that make things more difficult than they really have to be. The intricacies that abound in these materials often have the effect, and sometimes the purpose, of restricting access to the federal courts. (At 3)

Deadly dry and confusing doctrines can mask fundamental differences over values that actually drive arguments about whether the federal courts should be open to adjudicate claims. (At 3)

Perhaps that Court has deliberately complicated matters to avoid scrutiny. But there is another explanation for the complexity that plagues the law of federal court jurisdiction. It is much less exciting but, I think, more accurate. Simple structures of jurisdiction can

For example, in Sawyer v. Smith, 110 S. Ct. 2822 (1990), a man found guilty of murdering a woman in a horrifyingly brutal torture challenged his conviction on the ground that the prosecutor’s closing argument erroneously informed the sentencing jury that they were not finally responsible for imposing the death sentence. At the time the state judge permitted the argument, the U.S. Supreme Court had not yet decided the case that held this kind of argument unconstitutional. See Caldwell v. Mississippi, 472 U.S. 320 (1985). In one of a line of conservative decisions dealing with whether a habeas petitioner can assert “new rules” of constitutional law, the Supreme Court denied access to federal court because the state judge had not used an unreasonable interpretation of constitutional law in light of the precedent available at the time. Interestingly enough, the rule the petitioner wanted to enforce through access to federal court had in fact already been recognized by some state courts. Justice Kennedy, writing for the majority, took the opportunity to point out that those state court decisions refuted the notion that state courts do not enforce rights.
be proposed from either political extreme. Yackle’s book offers a fully simplified liberal version of federal court doctrine. A fully simplified conservative version could also be devised. The law is complex because the Court — like the electorate — has never fully embraced either extreme. It may have moved in one direction or the other at various points in history, but it was never on a path of destiny. Rather, a moderate position has always had its pull.

The force of moderation should scarcely surprise us. The Court consists of nine persons, appointed over a long stretch of time, by presidents of various political persuasions who are often driven by a perceived need to balance the Court ideologically. Presidents have often resisted the urge to overdo their political influence on the Court, choosing instead a moderate jurist, known for careful, thoughtful decisions that tend only slightly in the political direction favored by the president. When presidents too blantly try to skew the Court’s politics toward an extreme, they implicitly authorize Senate opponents to attack the president’s nominee on openly political grounds — a phenomenon memorably demonstrated by the rejection of Judge Bork. Presidents who have learned the lesson of the Bork rejection*1074 have turned to the sort of judges who take moderate positions. Four of the five Justices appointed since Bork’s rejection — Kennedy, Souter, Ginsburg, and Breyer — fit this model.12

The judges who speak to the center of the Court will also tend to write the important majority opinions and, indeed, to determine what position will prevail. The clear-cut positions, pruned of complexity, are often stated, but in dissenting or concurring opinions. One can read pristine articulations of doctrine from former Justice Brennan or, at the other extreme, Justice Scalia, but it is the hedging, elaborate, frustrating balancing and exception making of a Justice Kennedy or O’Connor that will hold the majority. They have defined the center of the Court, the place where agreement can be reached.13 Of course, it isn’t pretty. But neither is it very sinister.

Yackle purports to untangle the doctrinal mess the Court has created, and he does indeed present a simplified picture of doctrine, complete with proposed legislation designed to remove inconsistencies and complexities. He admits that he is seeking an “ideologically coherent framework” (at 8). That is, he achieves simplicity by embracing a distinct political ideology. Yackle does not hold out his ideal jurisdictional structure as a neutral interpretation, correct in some way apart from politics. While he accuses the Court’s conservatives of structuring doctrine according to their conservative politics, he does not contend that politics do not belong in jurisdictional analysis. He simply asserts

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12 The fifth Justice, Thomas, who does seem to have been chosen for his strong conservatism, had not served as a judge long enough to have created a substantial record subject to attack, as Judge Bork had. See Timothy M. Phelps & Helen Winternitz, CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION (1993). Moreover, during his confirmation hearings, Justice Thomas, like Kennedy, Souter, Ginsburg, and Breyer, meticulously avoided discussing legal issues and presented himself as a thoughtful, technically competent jurist. Judge Bork, by contrast, actively engaged with the Senate Judiciary Committee on specific issues. In any event, Justice Thomas did attract a good deal of opposition before his confirmation. Id.
13 One very politically oriented commentator, disparaging Justice Kennedy’s centrism, wrote, “Kennedy proved reliable only in his instinct for the winning side,” noting the important cases of United States v. Lopez, 115 S. Ct. 1624 (1995) (voting on the side of state power in a commerce clause case) and United States Term Limits v. Thornton, 115 S. Ct. 1842 (1995) (voting against state power to impose term limits on members of Congress). Jeremy Rabkin, Common Sense v. The Court, AM. SPECTATOR, Sept. 1995, at 26. But Kennedy, as the fifth vote, would have won whichever position he had taken. Far from being the sort of political animal who seeks victory without regard for principle, Kennedy is simply a judicial moderate, repelled, it would seem, by both political extremes, uninterested in gaining a reputation for “ideological consistency.” See id.
that liberal politics are good and should provide the framework for jurisdiction. He counts as his enemies not only the Court’s conservatives but also all those who seek solutions without taking a political position. Thus the moderates, with their crafted and balanced compromises, are just as much of a problem as the ideologues. He wants the reader to see that jurisdictional doctrine is a battleground of liberal and conservative politics (at 11). As the book’s title suggests, the liberals have lost ground in this battle and need to reclaim it.

**Sources of Complexity**

How accurate is the stark picture of ideological Justices using jurisdiction as a smokescreen for a political agenda? Let us consider for a moment some of the doctrine that has caused these dire accusations that the Court has expressed its hostility to rights through jurisdiction. I have criticized Yackle’s doctrinal summary as both too complicated to digest and as simplified by his liberal politics. Now I find I must challenge the reader’s forbearance by explaining some of the doctrine I have already stigmatized as unbearably tedious. Moreover, it is my goal in this section to hack away at some of the simplifications and provide the reader with the seemingly dubious benefit of additional complexities.

When defendants in ongoing proceedings in state court have defenses based on federal constitutional rights, they might prefer to recast those federal issues as affirmative claims and file separate lawsuits in federal court (at 126-48). Current abstention doctrine thwarts this preference, based on the assumption that the state courts can and should do their constitutional duty, required by the Supremacy Clause, and enforce federal law. This approach to abstention dates to 1971, shortly after Warren Burger became Chief Justice.\(^{14}\) The Warren Court, in *Dombrowski v. Pfister*, had begun to articulate doctrine that would have welcomed federal rights claimants to use federal courts to enjoin ongoing state court proceedings,\(^{15}\) but the Burger Court constricted the federal role. One might say that the Warren Court embraced “federal court primacy”: It assumed that federal rights belonged in federal court and tended to permit immediate access. The Burger Court – and later the Rehnquist Court – embraced “state court primacy.” The state court primacy model attempts to channel most litigation to the state courts and to reserve the federal courts as a backup, to fill the needs that arise when state courts fall below minimum standards. Thus, under the Burger Court approach to abstention doctrine, the general rule is that state criminal defendants must raise their federal claims as defenses within their state court criminal case. They can only proceed in federal court if they can show the inadequacy of the state courts, that is, the need for the federal court backstop.

The Burger and Rehnquist Courts also extended abstention doctrine to bar state court defendants in various sorts of state-initiated civil proceedings from attacking those proceedings with an affirmative claim in federal court based on federal rights. Consider *Moore v. Sims*.\(^{16}\) There, parents accused at child abuse in a “Suit Affecting the


\(^{15}\) See Dombrowski v. Pfister, 380 U.S. 479 (1965).

\(^{16}\) 442 U.S. 415 (1979).
Parent-Child Relationship” wanted to argue that the state’s family law code violated the federal due process clause. The Supreme Court, expanding the scope of abstention doctrine, barred them from asking a federal court to enjoin the state court proceeding. They would have to present their federal rights issues in the form of a defense in state court. We might fairly assume that the state judge, who faces reelection and is part of the state government, will have more sympathy for the goals and methods of the state’s family law code, while the federal judge, who feels greater ties to federal law, is more likely to favor due process rights. Indeed, if it were not so, the parents would, by their own choice, continue in the state court forum. They only have the motivation to incur the inefficiencies of switching forums if they believe they are more likely to win.

Can we use these doctrinal developments to make dire conclusions about the reactionary politics of the post-Warren Supreme Court? Several important points must be made here. First, we do not know whether the Warren Court would have continued to provide generous federal court access. In *Dombrowski*, state actors in Louisiana had brought a series of harassing prosecutions against civil rights workers in a blatant effort to discourage their political activities. How would the Warren Court’s low regard for state policies – so appropriate in that 1965 case – translate to the context of state officials pursuing a positive and important state policy like protecting children from abuse? How would the Warren Court’s sympathy for rights, so strong in *Dombrowski* – where civil rights workers sought to exercise First Amendment rights – translate to a setting in which parents asked federal courts to tinker with the various steps in the process by which a state attempts to rescue abused children? Second, the state court’s closeness to state policy, assuming it exists, may lead to a more sensitive and well-developed elaboration of the state interests that underlie that policy, something we may want as a component of the due process analysis. Given that the U.S. Supreme Court will ultimately have the opportunity to correct for any excessive weighting of state interests, state courts might do a better job than federal courts.

Even if the same Justices had remained on the Court, the passionate interlude of the 1960s, so strikingly exemplified by *Dombrowski*, would have ended, and changes in adherence to federal court primacy might have occurred. Any change that enlarges federal jurisdiction brings with it numerous new demands on the federal courts, which will inevitably affect the way judges perceive the importance of federal jurisdiction. When harassed civil rights workers cried First Amendment, courts opened the door. When abusive *1077* parents whined due process, courts rethought how open that door ought to be.

Doctrinal change has also affected habeas corpus (at 151.211). By statute, persons convicted of crimes in state court can petition the federal courts for relief if they are “in custody in violation of the Constitution or laws or treaties of the United States.” Ample room for judicial interpretation exists: When does custody violate the Constitution? One could say that if the state court provided a full and fair opportunity to litigate all the applicable constitutional issues, the result reached in the state court system does not

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violate the Constitution. At the other extreme, one might say that habeas corpus offers federal court access to correct every erroneously decided federal constitutional question. The Warren Court moved toward greater access to federal courts, while the Burger and Rehnquist Courts have gone the other way.

In the 1950s and 1960s, the Warren Court opened the way to the routine relitigation of federal issues at the habeas stage. In *Fay v. Noia*, it even permitted habeas petitioners to raise issues that they had failed to raise in state court pursuant to state court procedure. Only if the habeas petitioner had “deliberately bypassed” the state procedure would the federal court view the state court default as also precluding litigation at the habeas phase. Thus, if a lawyer had simply blundered and forgotten to raise an issue, the federal courts would remain open. In *Fay v. Noia* itself, the Court applied the deliberate bypass standard in a way distinctly favorably to the rights claimant. Noia, who had received a life sentence after a murder conviction, chose not to appeal out of concern that on retrial, if convicted, he might receive the death penalty. Instead of saying that Noia had deliberately bypassed the state appeal procedure in making this choice, the Court took the position that the risk of the death penalty meant that Noia did not have a real choice. Thus, both the standard and the way it was applied worked to maximize access to federal court.

The post-Warren Court has instituted many cutbacks in habeas jurisdiction. It barred the routine relitigation of Fourth Amendment exclusionary rule issues at the habeas stage. The petitioner would need to show that the state court failed to offer a “full and fair opportunity to litigate” the issue. The Court also began to view the failure to raise an issue in state court much more harshly: now, petitioners would need to show that some cause extraneous to the defense had led to the default. The completely nondeliberate blunder would foreclose habeas relief. Within a state court primacy model, there is no occasion to invoke the federal courts. After all, as long as one does not attribute the failings of defense counsel to the state court, one might say, the state court had done nothing wrong and therefore deserves no intrusion of federal power.

Here, too, the progression of history and the changes in the kinds of federal issues raised have had an impact on the Court. Noia’s conviction rested entirely on a confession coerced by hardcore “third degree” tactics. In the Burger era case that toughened the standard, the habeas petitioner asserted a far less compelling right. While he too sought to exclude a confession from evidence, his only argument was that he had been too drunk to understand the *Miranda* warnings. Police practices had improved since Noia’s time, as

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20 See *Stone v. Powell*, 428 U.S. 465 (1976). In a key example of the Court's tendency toward moderation, see text accompanying notes 24-25, has resisted attempts to extend this harsher standard beyond the Fourth Amendment. See *Withrow v. Williams*, 113 S. Ct. 1745 (1993).
22 The Second Circuit case granting habeas relief to Noia’s codefendants, *United States ex. rel. Caminito v. Murphy*, 222 F.2d 698 (1955), cert. denied, 350 U.S. 896, provides the best description of the methods used by the police. Judge Jerome Frank described the police methods holding the suspects incommunicado and interrogating them for 27 hours as “loathsome,” “satanic,” and “torture.” Reflecting the spirit of his own times, Judge Frank criticized these police practices by likening them to the behavior of “totalitarian regimes” “behind the Iron Curtain” and urged Americans concerned about McCarthy Era “inroads on the constitutional privileges of persons questioned about subversive activities” to become outraged by the routine “police brutality” employed in less conspicuous cases.
had state court adherence to the basic norms of federal constitutional law. At the same time, the flow of habeas petitions, permitted by the forgiving standard of *Fay v. Noia*, had increasingly burdened the federal courts. It is thus not terribly surprising that the Supreme Court – regardless of the political affiliation of its members – would reconsider the “deliberate bypass” standard.

It is possible to square the post-Warren Court’s model of federal jurisdiction with the importance of enforcing federal rights, at least to some extent. Ideally, the enforcement of rights should be routine: Every court handling a case should have internalized the relevant case law and should not resist or underenforce the law. Ideally, there should be parity between state and federal courts. But how best to achieve it? One answer is to hold the state courts to the obligation to enforce federal law by denying rights claimants their immediate preference to escape to federal court. Accordingly, jurisdictional doctrine should bring federal courts into action only to the extent that they increase the incentives on state courts to live up to their obligation. Since self-interested litigants can be expected to take advantage of federal jurisdiction when it is available, allowing routine, early access to federal courts can be seen as dysfunctional. The worst state courts – the ones that most heartily resist the obligation to follow federal law – get the biggest reward, as federal rights claimants desert them entirely. While the escape to federal court would satisfy rights claimants in individual *1079* cases, long-term problems would set in as the far more numerous state courts go unused and federal courts, overrun with too many claims, lose the very qualities – sympathy to federal rights and superior competence – that made them attractive to rights claimants in the first place.23

**Jurisdiction as a Political Battleground**

To the Warren Court devotee, however, the Court’s new model of federal jurisdiction is actively sinister. The argument above is merely a “sterile” or “antiseptic”24 justification that fails to unmask the Court’s malevolent attack on rights. This attack on rights takes place on two fronts: The Court narrows the definitions of rights and the Court relegates rights enforcement to state courts. The assumption is that the state courts will apply the various established rules of law stingily, reject arguments for recognizing new rights or expanding existing ones, make innumerable decisions on procedural and evidence issues that disadvantage rights claimants, and fashion crabbed remedies whenever rights claimants do manage to prevail.

In fact, one can portray this jurisdictional mode of attacking rights as even more pernicious than the restrictions of the rights themselves. When the Court narrows the definition of a right, its hostility appears on the surface where it can attract criticism.

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23 Even Yackle would bar state criminal defendants from routine attempts to use the federal courts in this way. He would, however, limit the *Younger* abstention doctrine to criminal cases. He disapproves of the many cases that extend abstention to other kinds of state court proceedings. See, e.g., Moore v. Sims, 442 U.S. 415 (1979). He bases this distinction on the availability of habeas corpus to rights claimants to those who have gone through criminal proceedings; no similar later access exists for those who face civil proceedings. His support for *Younger* abstention in the area of criminal cases is offset by his demand for very broad access w federal courts at the habeas stage.

24 In using these words as favorite pejoratives (see at 40, 139, 140, 154), Yackle expresses his antagonism to the Legal Process analysis exemplified by Herbert Wechsler’s demand for “neutral principles.” See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See also infra text accompanying notes 30-31.
When the Court attacks rights by relegating them to the state courts, it acts in an obscure arena of doctrine comprehensible to very few. Generally, only the expert in the notoriously arcane field can suspect the impact that changes in federal courts doctrine have had in the enforcement of rights. And even they must rely on the leap of faith that equates relegation to state court with the restriction of rights. If the Supreme Court issues an important opinion limiting freedom of speech or equal protection rights, everyone hears the decision explained on the evening news. If the Court denies relief to the same rights claimants using some doctrine of federal courts law, you hear only that the Court disposed of me case on a “technical” ground. Sensible journalists will not squander *1080 precious news minutes attempting to explain the twisted mess that diligent law students must struggle to understand.

Identifying jurisdiction as a political battleground is itself a political tactic. I am not so sure that it is a tactic that will serve the goals of the sort of liberal who wants to restore the aggressive, rights-enforcing style of judging dear to the Warren Court devotee. I understand the frustration felt by those who have watched the Burger and Rehnquist Courts delineate jurisdictional doctrine that dramatically narrows the availability of federal courts to rights claimants. Continuing to make the sorts of arguments that appealed to Justices Brennan and Marshall and, in an earlier day, to the majority of the Court, does seem futile, at least in the short term. The present majority finds the idea of federalism appealing and often invokes it to support the diversion of many claims of right to state courts. The argument that federal rights belong in federal courts makes little headway anymore. Is it time, then, to rip off the mask of neutrality and say, as Yackle does, that these federalism-based arguments are nothing more than justifications for attacks on constitutional rights?

More than two decades of conservative justices’ paean to federalism and liberal justices’ depreciation of the same concept should make anybody cynical about neutral-sounding judicial rhetoric. In Yackle’s words, “federalism is a devil to American liberals and a darling to conservatives” (at 18). According to Yackle, the constitutional founders may have seen federalism as a way of protecting the individual by diffusing power (id.), but the Reconstruction era changes in statutory and constitutional law represented a decisive rejection of that idea. The new constitutional amendments made it possible for individuals to assert federal rights against state actors, and new jurisdictional statutes opened up the federal courts to these claims. At this point in history, then, arguments about federalism became the tools of those who would oppose federal rights and federal jurisdiction. “Thus did federalism surrender its ties to personal liberty and take up its modem links with assertions of state prerogative” (at 18).

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25 For example, in its 1994 Term, the Supreme Court handed down a series of cases dealing with race-based legislative redistricting. Journalists discussed the cases decided on the merits but said little about the one case in which the Court found that the plaintiffs lacked standing. See L. Greenhouse, On Voting Rights, Court Faces a Tangled Web, N.Y. TIMES, 1 July 1995, p. A1, col. 1 (referring to the standing case as “a companion case from Louisiana that the Court dismissed on technical grounds”); Jim Yardley, Redistricting: The Ruling and Its Impact, ATLANTA CONSTITUTION, 30 June 1995, p. 6A (“the court Thursday dismissed a lawsuit against Louisiana’s majority black 4th District on a technicality”); William M. Welch, South’s Politics May Change, USA TODAY, 30 June 1995, p. 8A (“the court set aside the Louisiana case on technical grounds”).

This narrative portrays federalism as a means to an end, sometimes an end the political liberal approves of, sometimes not. Federalism served liberal goals at one point in history, and at another point, it did not. Why, then, should we permanently view federalism as a weapon for attacking rights? Yackle disputes “the claim that the conservative approach is grounded in respect for our decentralized government” (at 9). But even assuming that the conservative members of the current Court embrace federalism solely out of hostility toward rights, it should not permanently rule out decentralization as a means for achieving anything worthy. As Yackle himself recognizes, even individual rights and access to federal courts have been used in their time as a means to achieve ends that the present day political liberal abhors. The relationships among benefits to individuals, constitutional rights, access to federal courts, abuse of power, and centralization and decentralization of power have shifted about throughout our history. It would be foolhardy to succumb to the illusion that history is at an end – or that it reached an end during the Warren era and later backtracked.

I cannot make the leap Yackle asks his readers to make. He would have us abandon inquiries about federalism and the comparative benefits of allocating cases to federal or state court (or to the political process) and systematically maximize access to federal court for the enforcement of federal rights. I understand and appreciate Yackle’s critique of the present Court and would join him in exposing at least some of the Court’s use of the concept of federalism as a means of minimizing the enforcement of rights, but I cannot accept the much more extreme step of permanently politicizing jurisdictional analysis. I understand Yackle to be saying that process-oriented reasoning or comparative institutional analysis is so likely to be used as a smokescreen that we ought to abandon it altogether. While I can see the source of his cynicism and share his distaste for the 1950s Hart and Wechsler style of reasoning that completely banishes political analysis, there are grave dangers in his solutions. I am afraid that open acknowledgment of the political nature of jurisdictional choices will have the unwanted consequence of undermining the legitimacy of any judicial rights-enforcing agenda.

#### THE LEGAL PROCESS DEMON

Yackle traces the history of academic jurisprudence, from Legal Formalism to Legal Realism to Legal Process. At the beginning of this century, Legal Formalism allowed the Court to enforce rights vigorously. Yackle writes, “Formalism was nonsense” (at 22), but it is hard not to notice that formalism – strict adherence to constitutional rights in the face of legislative choices and vigorous judicial enforcement of those rights – would seem to serve Yackle’s present-day goals well. The problem with formalism for the political liberal, of course, was that it activated the Court too much and led to the invalidation of

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*27* See at 20-24 (describing *Lochner* era).

*28* As Barry Friedman points out in his review of Yackle’s book, *Back to the Future: Federal Jurisdiction in the Next Century*, 12 CONST. COMM. 441 (1995), some of Yackle’s proposals would maximize access to federal courts for issues of federal law generally, thus extending federal jurisdiction to a vast quantity of cases that have nothing to do with constitutional rights, such as tort cases that rely on a federal safety standard. As Friedman points out, crowding the federal courts with cases like these should have a negative effect on federal rights claimants hoping to find favorable conditions in federal court. How much time will a federal judge spend looking at habeas petitions and pro se § 1983 claims as increasing numbers of tort plaintiffs file their claims in federal court?
too much progressive legislation. The trouble with the *Lochner* era Justices, writes Yackle, “was not that they gave content to federal rights and enforced those rights, but that they chose the wrong rights” (at 23). For the liberal who heartily approves of activist, rights-enforcing courts, a way is needed to avoid endorsing the pre-New Deal Court, and Yackle’s straightforward acknowledgment of political motivations underlying the judicial rhetoric works well enough here. Interestingly, Yackle adds that the substantive due process rights enforced in the early part of the century “had to surrender to modern social democracy” (*id*.; emphasis in original). I take this enigmatic phrase to mean that no mere court can stave off a truly powerful political movement. If the liberals had to win – legal theories aside – then why is it not also the case that the conservatives have to win now? Once we consign formalism to the historical junkpile, how can we hope to convince judges to enforce those rights claims Yackle so eagerly seeks to bring within their jurisdiction? If the need for progressive social legislation doomed substantive due process rights, we should expect doom for the Fourth, Fifth, and Sixth Amendments if the nation’s fear of crime and terrorism reaches a high enough level. Multiply the Oklahoma City bombing a few times and perhaps the rights of the accused will also “have” to surrender.

Legal Formalism – with different preferred rights – might seem to offer good potential for achieving Yackle’s goals and thus might be a good interpretive theory for the truly political actor in the legal system. Yet Yackle’s own method has much more in common with Legal Realism, the second major 20th-century jurisprudence theory he surveys. The Legal Realists “launched a vigorous attack on the very notion that the law and law-making could be value-free and argued, instead, that judicial decisions inevitably *turned on value choices*” (at 24). But Legal Realism did not function very well to justify the judicial role. Yackle characterizes Legal Process as a theory that emerged to “mediate between the ... extremes” of Legal Realism and Legal Formalism and to meet “the needs of the New Deal” (at 2425). Liberals needed a way to remove the courts from their interference with economic and social regulations that would not, like Legal Realism, completely undercut the courts’ legitimacy (*id*.).

The Legal Process methodology, it would seem, makes the most politically powerful choice. It enables courts to delineate the boundaries of their own power, engaging alternately in either activism or restraint, for elegant reasons unlikely to rouse much criticism. Of course, to Yackle, this is exactly what is wrong with the law of federal jurisdiction: It is written in elaborate Legal Process terms that disguise its political nature and make it difficult to criticize. The painful candor of Legal Realism, on the other hand, may be great fun for the academic, but it does not empower the judge. Legal Realism handily justifies deference to legislatures, but it fails to legitimate judicial enforcement of individual rights in the face of democratic preferences. So why not adopt the Legal Process method? One can pick and choose between activism and restraint, inevitably under the influence of one’s political preferences, and produce unassailably elegant

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30 It should not escape our notice that extremely effective conservative opinions written by Justices Scalia and Thomas rely on the impressively powerful tools of Formalism. Moreover, the Warren Court itself, particularly Justice Brennan, couched many path-breaking liberal opinions in Formalist terms. Of course, we can look on from the sidelines and comment the political nature of these decisions, but for an actor in the system, ready to play politics, talking about politics will in all likelihood weaken one’s arguments.
justifications. The fusty old law professor or reactionary Supreme Court justice wielding Legal Process methodology may frustrate and enrage the liberal activist and tempt him (or her) to blow the lid off the whole charade, but the more effectual course is to keep the jurisprudence and use it to one’s own ends. If that sounds wrong to you, then perhaps you are not really willing to equate law and politics. In that case, it still makes sense to try, however inadequately, to analyze process concerns and make principled decisions. Either way, we cannot exorcise the Legal Process demon.

Yackle is intensely critical of the Legal Process adherents who shaped the law of federal jurisdiction: Felix Frankfurter, Henry Hart, Herbert Wechsler, and Paul Bator. Indeed, Yackle’s real complaints about Legal Process are against these individuals and the way they used Legal Process theory to question the decisions of the Warren Court and laid the groundwork for the shift to judicial restraint accomplished by the Burger and Rehnquist Courts. Yackle criticizes Hart and Wechsler for their assumption that state and federal courts are interchangeable: in their institutional analysis, courts are courts. This assumption of parity between the two systems of courts skewed all of their jurisdictional analysis, making it impossible to equate relegation to state court with the diminishment of constitutional rights. Yet Legal Process methodology did not compel them to make this assumption. As Yackle writes:

[T]hey failed to ask the question seemingly required at the macro level of their approach to law, namely, whether the federal courts or the state courts were the better tribunals for the adjudication of federal issues. ... Hart and Wechsler ducked the really fundamental question. (At 30-31)

If the problem is their failure to pursue all the requisites of their theory, the theory is not the problem. The real problem is their “deep-seated complacency about the existing social and political structure of American government.” Presumably, a less-complacent practitioner of the methodology could wield it to different effect.

But Yackle does not choose to fight the Legal Process giants of federal courts law on their own battlefield. Rather than use Legal Process methodology to establish that federal rights belong in federal courts, he wants primarily to show that Legal Process is a sham, disguising important and powerful decisions about substantive rights. If Legal Process is not what it purports to be – a separate inquiry about the relative capacities of institutions – then the seemingly balanced and careful structures built by the judiciary do not deserve our respectful awe. Instead, we should feel outrage and we should see that a political solution in the political arena is fully justified At the end of his trip through early 20th-century jurisprudence, Yackle takes us not to a new, preferred theory of legal

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31 At 32, Yackle, like many others, takes Herbert Wechsler to task for his Legal Process-based questions about Brown v. Board of Education. Wechsler, 73 HARV. L. REV., worried that the decision rested on the Court’s beliefs about the immorality of segregation, rather than on the “neutral principles” required by his process model of analysis. Yackle writes: “It is astonishing that Herbert Wechsler, a man with a solid civil rights record, had such difficulty fitting the Segregation Cases into some formulation of the process model. For if Legal Process could not offer the Supreme Court a defensible justification for invalidating state-sponsored race discrimination, there was something very wrong with that theory” (at 32). Again, the problem does not seem to lie in the method itself, for the method is quite versatile, as indeed, the academic response to Wechsler’s request for an explanation amply demonstrated. See, e.g., John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
interpretation but to Congress. The best framework for jurisdiction, seen with vision unclouded by judicial smokescreens, can be accomplished through legislation.

**THE PROBLEMATIC POLITICAL SOLUTION**

Yackle offers a series of proposed statutes to replace the judge-made obscurity of current jurisdiction doctrine. His new statutory structure would guarantee near-maximum access to federal courts for the enforcement of constitutional rights. In taking this route, he turns Congress's power over federal jurisdiction from a negative to a positive. The lack of a constitutional foundation for the role of the federal courts often undercuts arguments that the Court must maximize access to federal courts, but, on the other hand, it permits arguments that cast aside most Court decisions and demand that Congress provide broad access. The Court, given its current composition, seems unlikely to restore the interpretations that the Warren Court gave to the jurisdictional statutes, but all is not lost. Congress can change the statutes. This shift in tactics depends on Congress’s enthusiasm for Warren Court ways. Writing before the 1994 election, Yackle envisions popular support for 1960s, style liberalism:

> The time is coming when we Americans will have done with the ideological conservatism that slipped into power when the mainstream liberal consensus collapsed in the mid, 1970s. We are not resigned to letting official action go unchallenged. Our respect for rights against governmental power is not moribund. Our appreciation that rights demand effective implementation is not diminished. (At 3)

Notice the suggestion that political liberalism – like judicial liberalism – is simply the correct position. To Yackle, liberalism is “mainstream”; conservatism “ideological.” When liberals held power, it was because “consensus” prevailed. When conservatism moved into power, it “slipped” in. Liberalism ties to a fundamental and widely shared belief in the importance of enforcing individual rights. This liberalism and these rights stand apart from mere ideology and have a certain vigor that will not die out. Liberalism is our destiny:

> The time is coming when the reins of power will come again to progressive leaders. On that day, with the guidance of a willing chief executive and on the strength of the legislative power of Congress, we will have reform legislation to set right what has recently gone so terribly wrong. (At 3)

Liberalism, Yackle predicts, will return with a charming familiarity. We will some day, once again, see things the right way – the way the Warren Court saw them. The post-Warren Courts have “gone so terribly wrong,” changing things over the past 25 years. When the true understanding of mainstream liberalism attains pervasive political power, it will look for a way to restore the law of the Warren era.

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32 He does preserve *Younger* abstention, in a newly narrowed form, which would require a state court criminal defendant to present federal issues within the ongoing state court proceeding. Access to federal court, in the form of very generous habeas jurisdiction, would become possible only after conviction in state court (at 147-48).
This narrative may express the beliefs of many law professors, but it does not provide a very accurate reading of the present political culture. The 1994 election, bringing a distinctly conservative Congress into power, has undercut Yackle’s statutory proposals. The strategy of deserting the conservative Supreme Court and turning to Congress for reform makes little sense now. The current Congress has shown an interest in legislating in the *1086 area of jurisdiction, but it is moving in a conservative direction even more quickly than the Supreme Court.

One could view this book as a sort of time capsule, preserving the jurisdictional structures of the Warren era. The current Congress lacks any interest in considering these proposals, but eventually, possibly quite far in the future, the political tide will turn. But will this future progressive Congress really want to unearth the solutions worked out in the 1950s and 1960s by the Warren Court? Does our time capsule really contain the correct blueprint for federal jurisdiction that a right-thinking Congress will want to restore? Yackle seems to have reacted quite negatively to the exasperating Legal Process pedagogues who tried to impose their correct solution on him. I doubt whether new waves of lawyers, judges, or legislators – even if they are political liberals – will want to rebuild federal jurisdiction exactly according to Yackle’s plan. New generations will in all likelihood feel their own need to distinguish themselves from the previous generations. When the time comes to open this federal courts time capsule, then, will anybody be around who can see it as something other than an artifact of the 1960s, inspiring, at best, wistful nostalgia?

I wonder whether new generations, who have not experienced the Warren Era firsthand, will ever have the sort of reverence for rights and faith in the rights-enforcing federal judge that fire Yackle. Warren Court devotees who move away from the principled obscurities of 1960s era process rhetoric in order to denounce the law developed by the Burger and Rehnquist Courts are themselves laying obstacles in the path of any return to the substantive, rights-enforcing agenda of that time. Once Yackle has taught us to see the jurisdiction-talk as mumbo-jumbo, will we not go on to see the rights-talk, which he dearly hopes to preserve and revitalize, as equally incoherent and politically motivated? (One cannot help noticing that Yackle’s history of 20th-century jurisprudence ends well before disciples of Critical Legal Studies and Postmodernism appear on the academic scene.)

*Reclaiming the Federal Courts* urges us to become skeptics, but the continued use of the federal courts for the expansive and generous articulation of constitutional rights demands deep believers. The strategy based on *1087 demystifying the courts risks undermining the very qualities that Yackle hopes to rely on after extensive new burdens of jurisdiction are imposed on them by statute. Can we really expect these courts, newly  

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33 A severe new approach to restricting habeas corpus was introduced in the Senate as part of the antiterrorism legislation that gained tremendous political momentum after the Oklahoma City bombing. See Naftali Bendavid, *Habeas Bid Boosted by Bombing: GOP Ties Reform to Anti-Terrorism Bill*, LEGAL TIMES, 8 May 1995, p. 1. The bill would routinely limit petitioners facing death sentences in several ways. First, with some exceptions, only one petition would be permitted, and that petition would need to be filed within one year. Second, the habeas petitioner would need to show that the state trial court acted “unreasonably” or against “established federal law.” *Id.* Conservatives in Congress had been trying for years to constrain habeas corpus, even as liberals have introduced bills aimed at overturning Supreme Court precedent limiting habeas. The recent election, along with public antiterrorism fervor, has carried the conservative agenda much closer to success. *Id.*
exposed as agents of political liberalism, to respond by expanding and enforcing new constitutional rights in Warren Court fashion? If the rights to be enforced are not real, tangible things, but variable, political responses, the hard work of regaining access to federal courts may be repaid with politically responsive interpretations of rights. The forces at play in society will not be the same as those that prevailed in the 1960s. We cannot now predict what conceptions of rights will emerge after we reconstruct federal jurisdiction according to Yackle’s time capsule plan. But I must doubt whether they will be the rights that those of his generation came to know and love in the 1960s.

The passion of the 1960s and the image of the heroic federal judge have by now escaped our collective grasp. Federal courts scholars need to accept that this period was not a consummation of timeless ideals but a part of our history. It will not simply return upon the casting off of our mean, spirited prejudices. It will, like other periods in our history, continue to influence. Just as the Reconstruction era influenced but did not determine the federal jurisdictional decisions of the 1960s, the Warren era ideas about rights and courts remain available for future generations to see through the lenses of their own experience and to tap for their own purposes.

The relative qualities of state and federal courts will not remain the same. Rather than insisting on the superiority of federal courts and looking for ways to bypass the state courts, we would do better to work to include state courts in the rights-enforcing culture of judging. It is always possible to point out the past failings of state courts. (Federal courts have had their own egregiously bad moments.) The Reconstruction era and the 1960s Civil Rights era provide ample material for indicting the state courts. But in the long run, for a culture of reverence for rights to survive, the bypass model is unlikely to work. Even if the federal courts could take every case in which federal rights were asserted, their ability to continue to view rights sympathetically and to enforce them vigorously will wane without a corresponding respect for rights in society.

Federal court primatists like Yackle impugn the state courts for their responsiveness to political pressures. This reaction to state courts is understandable: State courts could not have desegregated the schools or reapportioned state legislatures in the 1960s. But this close connection to local political culture also represents a strength: When that culture includes a respect for rights, rights will have more staying power. The greater security for rights will come not from shoehorning more claims into federal courts but from effectively enlisting the state courts in rights enforcement. I realize that respect for state courts can translate into a mere disregard for rights. It is true that the Legal Process scholars of the 1950s and 1960s were too quick to advocate reliance on state courts. To the extent that they were too willing to treat a long-term aspiration as if it were already an accomplished fact, they made an error that endangered rights. But that does not make their long-term aspiration wrong. By the same token, the effectiveness of federal courts in

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34 See Monroe v. Pape, 365 U.S. 167 (1961). In Monroe, the Court revived the Civil Rights Act of 1871, 42 U.S.C. § 1883, designed to deal with conditions following the Civil War, for use in modern day cases. Justice Douglas, writing for the majority, and the dissenting Justice Frankfurter disagreed about the applicability of the old statute. Justice Douglas wrote: "Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and over again in the debates." Justice Frankfurter quoted Zechariah Chafee, Jr.: "It is very queer to try to protect human rights in the middle of the Twentieth Century by a leftover from the days of General Grant."
their quick turn on the stage of social activism should not deceive us into thinking of federal court intervention as a permanent solution.

Rather than attempt to go back and revive the 1960 model of federal court activism, we need new solutions designed to make rights enforcement routine. For this, we need the inclusion, not the rejection, of state courts. The role of the federal courts, then, should be shaped – whether by Congress or the courts – toward this end. Federal court intervention in areas of state interest should be tailored to give the state courts incentives to enforce federal rights.