

U.S. Supreme Court Justices generally appreciate the risks associated with rulings that prevent the democratic processes from working in fifty-one different jurisdictions. The more innovative a constitutional claim, the more hesitant the U.S. Supreme Court may be about entering the thicket. That dynamic disappears in the state courts. Innovation by one state court necessarily comes with no risks for other States and fewer risks for that State.

New constitutional rights not only require the articulation of a new constitutional theory. They also require the management of a new constitutional right. Most judges worry about the next case when they think about identifying a new constitutional right. But U.S. Supreme Court Justices have more to worry about than state court judges in view of the scope of their jurisdiction, the enormous breadth of which ensures that it is "always raining somewhere"³² and that any new right will face a bundle of varied circumstances. In some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that federal constitutional law will be underenforced, that a "federalism discount" will be applied to the right.³³ State courts face no such problem in construing their own constitutions.

State courts also have a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee.³⁴ Does anyone doubt that the Wyoming Supreme Court might look at property rights—and takings claims—differently than the New York Court of Appeals? Or that the Alaska and Hawaii Supreme Courts might look at privacy issues differently than other States or, for that matter, the U.S. Supreme Court? Might the regulation of weapons generate a different reading in a supreme court of a state with a large rural population from one with a large suburban and urban population? Might the state courts of Utah and Rhode Island and Maryland construe a free exercise clause differently than other state courts given their histories? State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.

The Brennan article, it is no doubt true, advanced state constitutional law in an essential and everlasting sense: It reminded advocates, through a former state court judge and a well-known Supreme Court Justice, that neglected state constitutional protections remain on the books and provide an alternative theory for relief. But in a state constitutional law equivalent of Stockholm syndrome, the article may have advanced the unfortunate myth that federal constitutional law remains front and center—the first line of inquiry—leaving state constitutional law as a second thought, as an argument of last, perhaps even desperate, resort.

That is an unfortunate and peculiar twist on how law customarily is developed in this country. Why live in a “top-down constitutional world” when we have the option of allowing the states to be the “vanguard—the first ones to decide whether to embrace or reject innovative legal claims”—and allowing the U.S. Supreme Court, informed by these experiences, to decide whether to federalize the issue.²⁰ In a process that Professor Joseph Blocher calls “reverse incorporation,” the U.S. Supreme Court remains free, whether on living-constitutionalist, pragmatic, or originalist grounds, to learn from and, if appropriate, borrow from the States’ experiences.²¹

Prioritizing State Law Claims

If the domination of federal constitutional law and its predictable stepchild, lockstepping, are the scourge of independent state constitutions and if these dynamics are interfering with the full development of American constitutional law, what is the remedy? The rest of this chapter and the one that follows offer a few ideas.

Start with process, the way most state courts sequence the resolution of federal and state claims. State court decisions that imitate federal court decisions not only seem to be prioritizing the wrong decisions in determining the meaning of their own constitutions, but they also seem to be inverting the right sequence for considering state and federal arguments.

In response to this problem, Hans Linde had a good idea—in 1970.²² When state courts face state and federal constitutional claims in the same case, he proposed that they resolve the state claim first and

consider the federal claim only if necessary, only if the court denies relief to the claimant under the state constitution. Linde proposed the idea as a professor at the University of Oregon and later had the opportunity, to his good fortune and ours, to put the idea into practice as a justice on the Oregon Supreme Court for fourteen years. He wrote many decisions and authored several articles implementing the principle.²³ The key insight of Linde's approach is that litigants and courts will be less likely to duck independent assessments of the state claim if they consider it first. If state court judges and lawyers tie themselves to the mast of first-order inquiries into their state constitutions, they will be less likely to succumb to the temptation to treat federal law as state law.

Since 1970, Linde's approach has not been widely accepted. Nearly a half century later, just three States follow this approach on a regular basis: Oregon, Maine, and New Hampshire.²⁴ Two other States—Washington and Vermont—use a variation on this approach. They start with the state constitutional claim but, in contrast to the state-first approach, proceed to resolve the federal claim no matter what happens with the state claim.²⁵

That is not a promising pace of reform, whether one looks at the three States that embrace state primacy or the two others that embrace it in part. It's time to revive Linde's idea—to make state constitutional arguments the first line of defense in individual rights disputes—by explaining some of his reasons for using it and by adding some of my own.²⁶

A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions. State primacy in guarding individual rights flows from the U.S. Constitution and from one of its key structural guarantees of liberty: federalism. The Founders thought of the States as the first bulwarks of freedom.²⁷ The Constitution needed no Bill of Rights, Alexander Hamilton maintained, because the States would stand guard as "sentinels" watching over the People's rights.²⁸ And in the event of federal overreach, state governments were a sufficient "instrument of redress" to remedy the breach.²⁹ Hamilton lost that argument to the People, who preferred to add a belt—the Bill of Rights—to those suspenders. But that reality did not demote the state guarantees from the first line of

defense if a state or local government refused to leave people alone or opted to meddle needlessly in their lives. The Founders also had faith in the state courts as protectors of liberty. They created one Supreme Court but left it to Congress to decide whether to create "inferior" courts, which implies that they had little doubt that state courts would enforce federal and state constitutional rights. Prioritizing the resolution of state constitutional claims in cases involving federal and state claims restores the States to what should be their proud place as the first responders to governmental dilutions of liberty and property.

That place accounts for the essential role of the States in determining the legal and policy context in which *all* federal constitutional challenges to state and local laws arise. Under the National Constitution, the States' reserved powers are "numerous and indefinite."³⁰ State law accordingly "extend[s] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."³¹ Lacking a general police power, the federal government by contrast holds powers "few and defined."³² While the Fourteenth Amendment, for example, prohibits the States from depriving individuals of "property" without due process and Article I prohibits States from "impairing the Obligation of Contracts,"³³ the States still define what counts as property and what makes a contract.³⁴ Yet if the States are the lead players on the stage of private law, why treat them as the understudies of public law?³⁵ State constitutions no less than state statutes and common law decisions started out as, and remain, the place to *begin* any search for individual rights, whether in the context of property, contract, or any other rights.

The nature of a federal constitutional right confirms that state courts should address the state claim first. Pause over the issue at hand: Does state action violate the Federal Constitution? If the state constitution prevents state law from being enforced or prohibits a state official from acting, what work is left for the Federal Constitution to do? Why not consider the state constitutional claim first, given the possibility that it might eliminate any *ultra vires* state action at all?³⁶

Supporting the point is the language under which most challenges to state action arise. That's the language of the Fourteenth Amendment to the U.S. Constitution: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws." How curious for a state court to review the federal claim first when it turns on language about the adequacy of the State's "process" and the adequacy of the State's "equal protection of the laws."³⁷ Nothing prohibits a state constitution from forming "part of the total state action in a case,"³⁸ supplying part of the "process" that is due or being part of "the [state] laws" to which equal protection applies. When a state court arrests the relevant state action under its own constitution, any deprivation of life, liberty, or property or denial of equal protection evaporates. As a matter of federal constitutional law, application of the state constitution is "logically prior to review of the effect of the state's total action" under the Federal Constitution³⁹ and indeed "first in time and first in logic."⁴⁰ By adhering to this natural sequence, state courts claim the rightful independence of their state constitutions.

Federal constitutional avoidance principles point in the same direction. In a case in federal court, the courts will "not pass upon a [federal] constitutional question . . . if there is also present some other ground upon which" to decide the case.⁴¹ Federal courts for this reason generally resolve potentially dispositive state law claims first.⁴² Why should litigation in state court be different? If the state constitution protects the right asserted, leaping to the federal claim flouts the "passive virtues" of judicial restraint no matter which court has jurisdiction.⁴³ If the state supreme court grants relief to the claimant on the state ground and provides a clear statement that it is doing so, the case is over, and the need to construe the federal constitutional provision disappears with it.

No version of the constitutional avoidance doctrine to my knowledge says that courts should consider the claim arising from the larger sovereign before they consider the claim arising from the smaller one. By deciding the federal claim first, state courts do most what one would expect them to do least: aggrandize federal law at the expense of state law.

Abstention and comity principles put an exclamation on the point. *Pullman* abstention requires federal courts to refrain from deciding federal constitutional claims when a case might turn on unsettled questions of state law.⁴⁴ That includes the state constitution.⁴⁵ If federal courts accord States this dignity, surely the States' *own* courts should do so too.⁴⁶ The rationales behind abstention are constitutional

avoidance and comity, all to the end of avoiding needless conflict with the States as fellow sovereigns. But there should be two sides to the comity coin. If it's a good idea for the federal courts to avoid unduly interfering with the States by announcing federal rules without input about the meaning of state law, it's a good idea for the state courts to avoid conflict with their fellow sovereign—the federal government. *Both* sets of courts should follow the same sequence: resolve the state claim before taking on the federal claim and, even then, only if necessary.

Explanations for Prioritizing Federal Claims Do Not Hold Up

Most state courts do not prioritize state claims in handling cases that allege violations of state and federal constitutional rights. The competing schools of thought go by many names, the most prominent of which only an academic could love—the “interstitial” approach. But we should call that approach and any one like it what it is: a “secondary” approach. All that's at issue as a practical matter is this: Does the state court start with the state law claim or the federal claim? And all that's at issue as a policy matter is this: Is the state constitutional claim the first or second line of defense in individual rights cases? Is it the bulwark? Or the backstop?

Here's how one court, the New Mexico Supreme Court, described its interstitial/secondary sequencing of decision-making in a dual-claim case:

Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.⁴⁷

This approach flouts foundational principles of federalism, comity, and the logic of most federal constitutional claims. But that reality would be of only theoretical import if this sequencing of decisions had little impact on the state courts and the independent interpretations

of their own constitutions. If state courts, in prioritizing the resolution of federal claims, still dignified the independent meaning of their state constitutions, the stakes would not be high, and I would have lost interest in this subject long ago. But that is not what has happened. "To this day, most state courts adopt federal constitutional law as their own. Bowing to the nationalization of constitutional discourse, they tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in law reviews, and taught in the law schools."⁴⁸ Worse than that, the state courts often commit to following federal law wherever it leads them in the future—to the "rising and falling tides of federal case law both in method and specifics."⁴⁹ Who takes a voyage without knowing its destination?

Let's examine some of the explanations for prioritizing the resolution of federal claims and what invariably comes with it—lockstepping—to see if they hold up.

Some say that federal claims should be resolved first in dual-claim cases because state courts cannot construe their constitutions to offer *less* protection than the federal guarantee.⁵⁰ Wrong. State courts remain free to construe their constitutional guarantees to offer as little protection as they think appropriate, and only a state constitutional amendment can alter that decision. A few state courts have said as much.⁵¹ The only thing state courts may not do is ignore the independent federal claim. It may be true that a state constitutional ruling that asks less of the government than existing federal constitutional law requires will not impact the parties before the court. But that does not make the ruling inconsequential. Once a state court establishes the interrelation between the two guarantees, it has established that no state constitutional inquiry is needed, a not-unhelpful development for future litigants and courts and assuredly an efficient one.

That's also a not-insignificant development for the U.S. Supreme Court, as it manages and assesses decisions of its own. Some state court rulings may implicate the meaning of a federal guarantee, such as the Eighth Amendment's prohibition on "cruel and unusual punishment." And some state court rulings may help to inform the original meaning of language in the Federal Constitution that first appeared in the state constitutions or may provide pragmatic reasons for following or steering clear of an approach embraced by the States. State courts have much to

offer when they explain why the original, or for that matter pragmatic or living-constitutionalist, understanding of a guarantee under their care does not go as far as its federal counterpart.

To date, most state supreme courts willing to express their disagreement with precedents of the U.S. Supreme Court in construing their own constitutions do so only in explaining why the state constitution covers *more* ground. That is difficult to justify. A healthy form of comparative law—and that's just what this is—should attend to all comparisons, not just some. The state courts thus should explain the interrelation between the two sets of charters in both directions, whether the state guarantee covers more ground or less. Anything less reinforces a ratchet approach to state constitutionalism, one destined to fail over the long term.

Some worry about the potential inefficiencies of resolving state claims first in a world in which federal constitutional law is so well developed—and has become so much more developed than state constitutional law in the last five decades or so. Any clear-eyed proponent of prioritizing state claims must come to terms with this objection. Keep in mind that, by one count, 95 percent of the disputes resolved by courts in this country are filed in the state courts, as opposed to the federal ones.⁵² Just one of those courts, the California Supreme Court, resolved thirty-seven state constitutional law disputes in 2005, while the U.S. Supreme Court resolved thirty federal constitutional law disputes that same year.⁵³ All of this makes it understandable that state courts would keep up with their burgeoning dockets by sticking to the calf-path rather than diverging from it.⁵⁴ Even though twenty-first-century state courts are as apt to be constitutional innovators as federal courts, decades of state court precedents remain on the books paralleling the federal precedents or at least starting their analyses with them. In the context of this burgeoning volume of cases, many state courts may think it unrealistic to change the order in which they address all such claims and the order in which they expect lawyers to brief all such claims.

One area of law offers an insight into the gravitational pull of precedents from the U.S. Supreme Court. Consider the state and federal experiences with *unincorporated* rights. Through the process of selective incorporation, the National Court has incorporated all but the following

provisions in the first eight Amendments of the Bill of Rights: the Third Amendment's prohibition on the quartering of soldiers; the Fifth Amendment's grand jury indictment requirement; the Sixth Amendment's unanimous jury requirement in criminal cases; the Seventh Amendment's right to a jury trial in civil cases; and the Eighth Amendment's Excessive Fines Clause.⁵⁵ In these areas, the federal guarantee does not bind the States, meaning that the state courts have exclusive responsibility for the protection of these types of rights under their state constitutions in state court and meaning there is no possibility of dual-claim cases. The experience with one of these rights, the jury trial guarantee, offers a sobering lesson about the pull of federal precedent. Forty-seven States have jury-trial guarantees in their constitutions, and those guarantees provide the exclusive protection to individuals in state court civil cases. And yet a significant percentage of the States have followed federal precedent in construing their civil-trial guarantee.⁵⁶ If it is difficult for state courts to resist the appeal of leaning on federal precedent in areas where they have exclusive power over the issue, any ambitions for change in this area warrant caution.

But this consideration, powerful though it may be, comes with its own qualification. It might well be unrealistic to take all of this on at once. Yet nothing prevents a state court from identifying an area or areas that are particularly amenable to independent state constitutionalism in this State or that one. Then start there. A ground-up assessment of that constitutional right might show that it does less than the federal guarantee, ending any need to consider the issue again. Or the assessment may show that it goes further, making it unnecessary to worry about less-protective federal rights. Or the assessment may show nuances that favor state claims in some instances and federal ones in others. Once the state court has figured out one area of state-federal interaction, it can move to another.

Some fear confusion in the bar if the state courts delink the two constitutional inquiries, if two lines of constitutional law emerge in certain areas as opposed to one uniform approach. After all, the U.S. Supreme Court's multidecade experiment with dual standards for Bill of Rights guarantees applicable to the state and federal governments did not end well, with the Court ultimately collapsing the two.⁵⁷ But is confusion really a problem for a single State? If the state courts treat the

two guarantees as distinct, the bench, bar, law enforcement, and citizenry usually will have to pay attention to just one standard: the more protective of the two.

Some point out that the secondary approach—preferencing the resolution of federal claims over state ones—pays tribute to the on-the-ground reality that the vast majority of lawyers start with the federal claim and brief it most thoroughly. Rarely, they add, do advocates provide an assessment of the independent meaning of the state guarantee premised on its language, its history, or early understandings of its meaning. What state courts often see at most is the argument that they should construe the state guarantee differently because they can or because the dissent rather than the majority in a U.S. Supreme Court case has the better of the . . . federal arguments. But a state court always may ask for additional briefing on the textual, historical, or precedent-driven reasons for construing a state guarantee independently of its federal counterpart. After a few such requests, lawyers (most of them anyway) will get the hint.

As for the unwillingness of many lawyers to do the groundwork needed for this kind of briefing, perhaps inadequate resources are the explanation in some cases. But that should not be true for institutional litigants, whether private ones (e.g., the ACLU, the NAACP, the Chamber of Commerce) or public ones (e.g., state attorneys general, local prosecutors, public defenders).⁵⁸ In an appropriate case, one would think it highly useful to figure out the underlying meaning of a state guarantee and to do the groundwork for figuring it out. As for the lawyer intimidated by the lack of guidance from modern state court precedents, I have little sympathy. For most lawyers, the chance to shape arguments on a clean slate is a gift, a rare and much appreciated opportunity.

Some worry that a state-first approach will diminish established federal constitutional norms that took many years to develop. Five years after Justice Brennan's 1977 article, the editors of the *Harvard Law Review* published a collection of student notes on "The Interpretation of State Constitutional Rights," which tried to turn Justice Brennan's article into an academic model.⁵⁹ The editors agreed with Justice Brennan that state courts should develop their own constitutional jurisprudence without mindlessly adopting federal doctrine as state doctrine. But

they remained concerned about the possibility that state courts might ignore federal protections, which were "extensive," "well articulated," and broadly enforceable against the States.⁶⁰ To avoid requiring each State "to construct a complete system of fundamental rights from the ground up," the editors reasoned that the best approach to developing state constitutional law was a model that "recognizes federal doctrine as a settled floor of rights and asks whether and how to criticize, amplify, or supplement this doctrine to yield more extensive constitutional protections."⁶¹ They thus proposed that state courts should "acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions."⁶² What they proposed became the interstitial model—the secondary approach to interpretation.

Several state court justices agreed with the *Law Review's* editors. Massachusetts Justice Herbert P. Wilkins wrote at the time: "If the Supreme Court has expressed broad rights under the federal Constitution, it is often superfluous to determine state constitutional principles in the same area."⁶³ Washington Supreme Court Justice Robert F. Utter maintained that state courts had a responsibility to analyze federal law even when it was not dispositive.⁶⁴ Because federalism concerns and "the institutional position of the federal Supreme Court cause[] it to 'underenforce' constitutional norms," Utter argued, the Supreme Court could always benefit from state court commentary on its decisions in parallel to analyses of their own constitutions.⁶⁵ Several scholars have supported this view as well.⁶⁶

One should not lightly cast these arguments aside, not least because they have largely carried the day so far. Most American lawyers (and judges) are considerably more familiar with the Federal Constitution than they are with their State's constitution. Few lawyers know anything about their State's founders, their purposes in creating the State's constitution, the events that may have shaped their thinking, or "how the various provisions of the document fit together into a coherent whole."⁶⁷ By contrast, many features of state constitutions have their sources in a shared national and cultural heritage that embraces documents from Magna Carta and the Declaration of Independence to U.S. Supreme Court opinions, past and present. All of this leads many commentators to claim that state courts should use the Federal Constitution as a baseline instead of constructing each State's constitutional jurisprudence

from the "ground up."⁶⁸ To "condemn state judiciaries for referring to federal doctrine when interpreting their own charters," it was said, "would force an irrational chauvinism on the state courts."⁶⁹

But what one could have guessed would happen with this approach over the last half century has happened. Chauvinism, yes, but in exactly the wrong direction. A federal-first approach to constitutional interpretation has led to entrenched and still-growing federal domination in the dialogue of American constitutional law. Presumptions become destiny. If lawyers and judges presume the meaning of a guarantee in the Federal Constitution is the same for a similar guarantee in the state constitution, that is often where they will end up. Just look at the last five decades of experience if you have any doubt.

Any argument in favor of prioritizing federal law confuses what is with what should be. Sure, most lawyers are more familiar with the Federal Constitution, its history, and its debates than they are with their own state constitutions. But we should let this status quo lie only if we are content with it and with what it produces. Once a State prioritizes its own claims (even if just by doing so one guarantee at a time), that forces lawyers to brief the histories, structures, and texts of their particular constitutional provisions, allowing a distinct state law jurisprudence to emerge in some areas and not in others.⁷⁰ It's worth remembering that the U.S. Supreme Court has not always been perceived as the primary guardian and interpreter of rights. Some of the country's greatest judges, including James Kent, Benjamin Cardozo, and Roger Traynor, wrote celebrated (and innovative) opinions as state judges, and Cardozo did his most impactful work as a state court judge. As the *Buck v. Bell* story illustrates, national decisions are not invariably the soundest or the most rights-sensitive decisions.

If proponents of a federal-first model worry about the potential dilution of federal constitutional law, they should be willing to account for (and justify) the actual dilution of state constitutionalism norms caused by their model. From an accountability perspective, state supreme court justices have the final say over the meaning of the States' constitutions. And Federal Supreme Court justices have the final say over the meaning of the U.S. Constitution. State court jurisprudence that starts and (often) ends with the state claim keeps the lines of accountability clean and true. But state court jurisprudence that blurs the line between

federal and state norms blurs the line between who is accountable for state court decisions and who is not. The secondary approach permits state court judges, particularly elected state court judges, to convey the impression that federal law prompted the decision—that the U.S. Supreme Court made them do it. Accountability considerations firmly support the state-first model because it ensures that state courts take transparent responsibility for independently construing their constitutional guarantees or transparent responsibility for mimicking the federal approach. Whichever approach a state court wants, it should be clear which one it is adopting.

Nor is there any material risk that state court judges will diminish American constitutional norms by suddenly deciding, say, that their state constitutions do not offer key free speech protections. In areas like this one, the protections reflect norms built up by state and federal courts over a long time, and indeed reflect traditions started in the state constitutions. If that means the state courts frequently will replot deeply plowed ground and end up adhering to today's federal standards and tests anyway, so be it. That entrenches what should be entrenched: that certain constitutional norms are beyond reproach. But even universal truths have local dialects. The U.S. Constitution and a state constitution may equally value free speech while having different understandings of commercial speech. So too of regional understandings of privacy, education, speech, and family structures that stem from sources different from the text of the Federal Constitution.

The irreducible minimum is that state courts decide for themselves the meaning of their own constitutions, each with its own independent traditions and words. If state courts turn to their constitutions only when the Federal Constitution does not decide the question—or worse, only when they disagree with the U.S. Supreme Court's interpretation of the National Constitution—the documents will collect more dust and become more diminished. All with the risk that a day will come when we need them even more. So long as state courts give a "presumption of correctness" to U.S. Supreme Court decisions when it comes to interpreting their own constitutions, they will continue to "shift the debate away from analyzing the state constitution to a preoccupation with the shadow cast by the United States Supreme Court decision."⁷¹

Some fear that state primacy will lead state courts to view their constitutions in isolation without any reference to the Federal Constitution and decisions interpreting it. But that's not what's meant by urging state court judges to look to their constitutions *first*. It may be necessary to consult federal documents and precedents to understand some state constitutional provisions or even to decide how some state provisions should be construed. And the reverse is true. In each event, constitutional law—state and federal—will be richer if state judges do not assume one way or the other that the Federal Constitution will decide all fundamental questions and the state constitutions will at best provide supplements.

If there is a risk of chauvinism in all of this, it's the risk of assuming that the States can't be trusted to take individual rights seriously. The point of telling these American constitutional law stories in full is to burst some of these bubbles and to deflate a few others—to illustrate the risks of relying too heavily on the U.S. Supreme Court as the guardian of our rights, to show that the state supreme courts at times have been committed defenders of our rights, and to confirm that the right balance between the state and federal courts when it comes to rights protection is deeply complicated and relentlessly worth bringing into account.

In the final analysis, there assuredly are historical and practical explanations for linking the meaning of federal and state guarantees and for prioritizing consideration of the federal ones. But continuing to do so today as a matter of course is increasingly difficult to justify and, worse, all the more likely to deepen the inertia-driven channel that already exists.⁷²

When told in full, these stories provide a healthy counterweight to received wisdom. They show the risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our liberties as well as the farsighted role the state courts have played before in dealing with threats to liberty. Even the most acclaimed individual rights decision in American history, *Brown v. Board of Education*, is more complicated than it might at first appear when it comes to the role of the States and national government in rights protection. It's worth remembering the other half of that story. The companion case to *Brown* was *Bolling v. Sharpe*, in which the Court demanded the end of segregation in the public schools of the District of Columbia, an enclave controlled by the federal government, not a State. Those who place complete faith in just *one* branch of American government to protect their rights will eventually be disappointed.

Nor are these stories restricted to the twentieth and twenty-first centuries. To use one example mentioned in a recent state supreme court case, the nineteenth century saw a marked contrast between the treatment of African Americans in the U.S. Supreme Court and in the Iowa High Court, with the Hawkeye State coming out on top.¹

But do these stories stand alone? How do they fit into the history of litigation over other individual rights? That is no small topic, one that cannot be covered in full (or even in meaningful part) in an epilogue. But it's worth offering a few other examples and a few other data points, at a minimum to provoke continued thought about the States' role as guardians of liberty, with the possibility to convince that this role can grow.

The States' responses to the Supreme Court's 2005 decision in *Kelo v. City of New London*² offer a contemporary illustration of the capacity and willingness of state courts and legislatures to protect—or at least thoughtfully to consider protecting—other individual rights when the Supreme Court declines to do so. *Kelo* upheld a city's development plan for property acquired through eminent domain because it amounted to a "public use" within the meaning of the Takings Clause. The decision displaced Susette Kelo from her multigenerational family home (by permitting the city to replace it with a planned, though never built, corporate headquarters) and dispirited property-rights advocates (by seeming to allow all manner of future takings). The U.S. Supreme Court's opinion was not the last word on the issue, however.

A black and white portrait of James Madison, a man with long, light-colored hair, wearing a dark coat and a white cravat. He is seated and looking slightly to the right.

Madison

Writings

government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism.

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the oeconomic use of buttons of that material, in favor of the manufacturer of buttons of other materials!

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of