JUSTICE BRENNAN AND FEDERALISM

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Federalism is a chameleon-like concept whose appearance changes with the academic terrain. The concept clearly has something to do with the allocation of power between national and local governmental entities, but how this allocation is interpreted depends upon profession and discipline. Economists, for example, view federalism as an invitation to specify the most efficient possible arrangement of national and local power, whereas political scientists view federalism as a matter of generating descriptive and perhaps predictive models of these arrangements. For American constitutional lawyers and judges, however, federalism means something altogether different; it entails the articulation of constitutional values that specify how power ought to be allocated between federal and local governments. These values are incorporated into judicial decisionmaking. This essay is a study of the place of these values in the constitutional jurisprudence of Justice William J. Brennan Jr.

When judges or lawyers speak of the value of federalism, they generally picture the national government and the states engaged in a tug-of-war for power. This struggle is seen as a zero-sum game, so that every allocation of power to the national government is viewed as a defeat for "federalism" and as a diminution of the prerogatives of the states. This picture of federalism emerged from epic battles over the reach of the federal commerce power, the "incorporation" of federal rights into the fourteenth amendment, and the extent of the jurisdiction and equitable powers of federal courts. These controversies revolved around real and palpable tensions between the demands of a national and centralized authority and the prerogatives of local and decentralized state institutions. The tensions are aptly captured in the concept of state "sovereignty," the central concept underlying legal notions of federalism.[1] The concept

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1. On the pervasive use of the concept of sovereignty in legal discussions of federalism,

assumes the existence of "exclusive domains of state authority,"[2] so that every advance of national power can by definition occur only at the expense of state authority.

I develop this image of federalism at some length, not merely because it is pervasive, but also because its acceptance makes Justice Brennan's views on federalism seem incoherent or unprincipled. The traditional legal understanding of federalism invites judges, in effect, to "choose up sides" between state and national authority. Justice Brennan has declined this invitation. If he is justly known as a champion of the powers of the federal judiciary *vis-a-vis* state judiciaries, he is equally well known as the author of one of the most cited law review articles in recent history urging state judges to base their decisions on state constitutional provisions so as to safeguard those decisions from interference by the federal judiciary.[3] If he has been a strong supporter of federal legislative power, the author of a powerful dissent from the Court's recent and short-lived effort to use principles of state sovereignty to limit that power,[4] he has also attempted to exempt state legislative powers from the centralizing regulation of the dormant commerce clause,[5] and thus to leave to "the States the widest latitude to deal with the dynamics of social and economic change in seeking to satisfy their needs and further their progress."[6]

Justice Brennan professes to be "a devout believer" in "our concept of federalism."[7] But the kind of federalism to which Brennan holds allegiance is far from obvious. It is certainly not the kind of federalism that simply cedes more or less "sovereignty" to the states. In fact the theses of this essay are that Brennan's philosophy of federalism cannot be understood except as an outgrowth of his concern for individual rights, and that only within the last fifteen years has his philosophy of federalism become a disciplined and forceful instrument of analysis.

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see Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 346-59.

2. *Id.* at 356.

3. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Fred Shapiro has calculated that this article is the nineteenth most frequently cited law review article of those published within the past forty years. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1550 (1985).

4. National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Brennan, J., dissenting).

5. Kassell v. Consolidated Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

6. Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 954 (1964).

7. Brennan, *supra* note 3, at 502.

I

A good place to begin a study of Justice Brennan's views of federalism is a speech he gave to the Conference of Chief Justices in New York on August 7, 1964. The talk was entitled "Some Aspects of Federalism,"[8] and it was clearly intended to mollify state judges who had been unsettled by recent decisions of the Warren Court.

Brennan was of course one of the primary architects of that Court. The chief justices of the states saw before them the author of the landmark decision of *New York Times v. Sullivan*,[9] which had been issued only five months earlier, and which for the first time extended the reach of federal constitutional control into state defamation law. Only two months before, Brennan had delivered an opinion for the Court holding, against all precedent, that the fifth amendment's proscription of self-incrimination was incorporated into the fourteenth amendment, and hence could be asserted against the states.[10] In the same month the Court had decided *Reynolds v. Sims*,[11] which announced the revolutionary rule of "one man one vote," and which had been made possible by Brennan's epic 1961 opinion in *Baker v. Carr*.[12] *Baker* itself had overruled over a century of precedents and rendered disputes justiciable over legislative apportionment. And, of course, Brennan was probably best known to his audience as the author of *Fay v. Noia*,[13] the notorious decision which permitted use of federal habeas corpus to release a state prisoner because of constitutional errors in state processes, despite the presence of adequate state grounds to support the conviction.

It is no wonder, then, that the chief justices of the states would, in the summer of 1964, be uneasy, and even hostile. Brennan began his speech by comparing himself to Daniel in the lion's den. He assured his audience, however, that he had once been, "after all, a state judge,"[14] and that he well understood the "functionally different" roles of the federal and state judiciaries.[15] But his purpose, Brennan said, would be to demonstrate that there "is no justifica-

8. Brennan, *supra* note 6, at 945 (1964).

9. 376 U.S. 254 (1964).

10. Malloy v. Hogan, 378 U.S. 1 (1964). Brennan would later proudly say of *Malloy* that it was the first time that "the Court finally decided a case by speaking in explicitly incorporationist terms." Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 543 (1986).

11. 377 U.S. 533 (1964).

12. 369 U.S. 186 (1961).

13. 372 U.S. 391 (1963).

14. Brennan, *supra* note 6, at 948. Brennan had been a New Jersey judge for seven years prior to his appointment to the United States Supreme Court in 1956. For four of those years he was an Associate Justice of the New Jersey Supreme Court.

15. *Id.* at 949.

tion for the view that we are headed in opposite directions, and that the only legal bond between us is the subjugating one of the supremacy clause."[16]

At the outset of his talk Brennan invoked a familiar image of federalism, stating that "our federal structure necessarily" implied that some cases "will present a problem of reconciling state and federal authority."[17] The notion that federal and state authority were in conflict was no doubt at the root of the chief justices' anger. But Brennan tried to place this anger in historical perspective. "Controversies over constitutional limits upon state powers have been with us from our national beginnings," he observed, "we settle one only to have another emerge of different mien."[18] This appeal to history, however, was but a prelude to Brennan's real point, which was that the modern controversies should not properly be considered issues of federalism at all.

> The modern problems of consistency of state action with the Constitution are of a different order from those of even twenty-five years ago. Now implicated are the various constitutional guarantees designed to protect individual freedom from repressive governmental action. Of course, the federal system's diffusion of governmental power has the purpose of securing individual freedom. But this is not all the Constitution provides to secure that end. There are also explicit provisions to prevent government, state or federal, from frustrating the great design. I do not think there can be any challenge to the proposition that the ultimate protection of individual freedom is found in court enforcement of these constitutional guarantees.[19]

Brennan's message was startlingly blunt. Federalism, as a system of decentralization designed to secure "individual freedom," was outmoded. The growth of government power after World War II had placed individuals at risk, and the danger could be averted only by judicial enforcement of civil rights. The issue was thus not one of state *versus* federal power, but rather of the power of government, generically understood as state *and* federal government, versus the individual. Brennan attempted to use this reformulation as a bridge to reach out to his fellow judges. "You and I," he said in his eloquent conclusion, "are committed to the constitutional ideal of libertarian dignity protected through law."

> Crises at hand and in prospect are creating, and will create, more and more threats to the achievement of that ideal—more and more collisions of the individual with his government. The need for judicial vigilance in the service of that ideal was never greater. It has become the business of all of us to protect fundamental constitutional rights threatened today in ways not possibly envisaged by the Framers.[20]

16. *Id.* at 945.
17. *Id.* at 947.
18. *Id.* at 953.
19. *Id.* at 954.
20. *Id.* at 960.

Brennan's ultimate appeal was thus to the shared norms of a common professional role. His claim was that judges qua judges were concerned with individual rights, with the maintenance of "libertarian dignity protected through law," and hence that judges should be relatively indifferent to whether encroachments on that dignity emanated from state or federal governments. Brennan's argument rested upon the elaboration of a shared commitment to a professionalism that was so powerful as to overshadow competing loyalties to the autonomy of state institutions. Those loyalties, Brennan tried to demonstrate, were out-of-touch with modern realities, in which the "unity of the human family" was an increasingly tangible fact. "Our political, industrial, agricultural and cultural differences cannot stop the process which is making us a more united nation."[21]

Brennan's address was thus nothing less than a plea to abandon the traditional legal understanding of federalism. If at the beginning of his talk Brennan had acknowledged the usual legal image of competition between federal and state governments, the acknowledgement was only for the purpose of leading his audience to transcend that image by coming to see that the real competition was instead between individuals and government, generically understood. If in his talk Brennan had initially recognized the usual legal image of federalism as guarding the value of diversity, the recognition was only a prelude to his demonstration of the contemporary inadequacy of that value. If Brennan's audience understood federalism to consist of loyalty to the tribal values of individual states, Brennan used his address to highlight instead their loyalty to their professional roles, roles which were of national scope and application.

Brennan's address, in short, left no room for traditional federalism as a source for principled or coherent constitutional values. It is thus no surprise that for the early Brennan, " 'considerations of comity and federalism' " would necessarily seem to be "vague concepts" without "content."[22]

The perspective set forth in Brennan's address was by no means merely strategic. It represented his deepest beliefs, at least as those beliefs can be measured by his judicial actions. Brennan's commitment to the expansion of individual rights needs no elaboration. But two consequences of that commitment have particular relevance to a discussion of Brennan's views on federalism.

First, Brennan's emphasis on individual rights accounts, I

21. *Id.* at 960.
22. Francis v. Henderson, 425 U.S. 536, 548-49 (1976) (Brennan, J., dissenting).

think, for his almost religious belief in the importance of courts. "[T]he soul of a government of laws," Brennan has said, "is the judicial function, and that function can only exist if adjudication is understood by our people to be, as it is, the essentially disinterested, rational and deliberate element of our society."[23] Individual rights depend for their articulation and legal existence upon judicial processes, and hence to protect these rights Brennan has throughout his career fought tenaciously to ensure access to courts.[24] This theme runs throughout his opinions, and touches such disparate areas as justiciability,[25] standing,[26] habeas corpus,[27] federal equitable power,[28] sovereign immunity and the eleventh amendment,[29] abstention,[30] and the interpretation of Section 1983.[31] In all these areas Brennan has sought to use courts, primarily federal courts, to protect individual rights against both state and federal governments. He was an early and ardent supporter of the incorporationist doctrine, through which he sought to impose the requirements of the Bill of Rights against the states.[32] Conversely, he was a pioneer in the development of the constitutionally "implied cause of action," which permitted federal officials to be sued for constitutional violations to the same extent as the states under Section 1983.[33]

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23. Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 395 (1981).

24. Indeed, in NAACP v. Button, 371 U.S. 415, 429, 431 (1963), Brennan wrote that "[I]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. *It is thus a form of political expression.* . . . For such a group, association for litigation may be the most effective form of political association." (Emphasis added).

25. Baker v. Carr, 369 U.S. 186 (1961).

26. Warth v. Seldin, 422 U.S. 490, 519 (1975) (Brennan, J., dissenting); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 490 (1982) (Brennan, J., dissenting).

27. Fay v. Noia, 372 U.S. 391 (1963); Francis v. Henderson, 425 U.S. 536, 542 (1976) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting); Wainwright v. Sykes, 433 U.S. 72, 99 (1977) (Brennan, J., dissenting); Murray v. Carrier, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting).

28. Dombrowski v. Pfister, 380 U.S. 479 (1965); Steffel v. Thompson, 415 U.S. 452 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975) (Brennan, J., dissenting); Juidice v. Vail, 430 U.S. 327, 341 (1977) (Brennan, J., dissenting); Trainor v. Hernandez, 431 U.S. 434, 450 (1977) (Brennan, J., dissenting).

29. Yeomans v. Kentucky, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting); Penhurst State School & Hosp. v. Halderman, 465 U.S. 89, 125 (1984) (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

30. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).

31. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978); Quern v. Jordan, 440 U.S. 332, 349 (1979) (Brennan, J., dissenting).

32. Cohen v. Hurley, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting); Malloy v. Hogan, 378 U.S. 1 (1964).

33. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

Second, Brennan's sharp focus on individual rights and on courts as the instrumentalities for the assertion and protection of those rights, led him to a particular picture of the world, one in which individuals and governments confronted each other, with courts mediating between the two. Since in this picture governments do not assist the development of individuals but instead *constrain* them, Brennan was led to view individuals as essentially independent and autonomous and to understand the function of the judiciary as shielding this independence. There was thus little room in his philosophy for the notion that the identity and values of individuals could be molded and shaped by social groups.

Parham v. J.R.,[34] for example, involved the due process rights of children who had been institutionalized in a mental hospital at the behest of their parents. The majority opinion, written by Chief Justice Burger, "reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."[35] Brennan's separate opinion, however, rejected these concepts, asserting instead that "it ignores reality to assume blindly that parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights."[36] For Brennan the children were to be understood as individuals, distinct from any social "unity" comprised by the family, and endowed with rights *vis-a-vis* the state that were unmediated by any group or organization. Brennan believed courts should protect these rights, despite the danger that judicial intervention might itself cause further disintegration of the family.

Parham is a representative example of the individualism that underlies Brennan's focus on courts and individual rights.[37] This individualism had powerful implications for Brennan's vision of federalism. Felix Frankfurter, perhaps the most eloquent exponent of the values of federalism in the past fifty years, continually stressed that individual identity inheres in great measure in a "binding tie of cohesive sentiment,"[38] that is created and nurtured by the "special relations between a State and its citizens."[39] Just as it is an oversimplification to see a child only as a rights-bearing individual, because the child's identity is in part dependent upon its family, so

34. 442 U.S. 584 (1979).
35. *Id.* at 602.
36. *Id.* at 632 (Brennan, J., concurring in part and dissenting in part).
37. There are, of course, exceptions. For example, Brennan has been quite sensitive to the corporate identity of religious institutions, and has striven to develop legal doctrines to protect that corporate identity. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).
38. Minersville Dist. v. Gobitis, 310 U.S. 586, 596 (1940).
39. Toomer v. Witsell, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring).

it was in Frankfurter's view an oversimplification to view citizens merely as rights-bearing individuals, because the identity of citizens is in part dependent upon the communities or states in which they live. Judicial action defending individual rights severs the "cohesive sentiment" that unites citizens to their states and local communities. From Frankfurter's perspective, therefore, Brennan's philosophy of individualism systematically undercut the normative basis for federalism.

For Brennan, on the other hand, the states were always governments, rather than loci of community sentiments and identity. Hence the only purpose which Brennan could perceive in American federalism was the creation of a "federal structure" conducive to "securing individual liberty."[40] It thus made no sense to Brennan to uphold state laws actually infringing upon that liberty; he could not accept the view that "the principle of federalism should be accorded absolute supremacy at the sacrifice, in its name, of the individual's constitutional protections."[41] When in the 1970s the Burger Court made precisely such arguments, Brennan was aghast, accusing the Court of giving "a distorted and disturbing meaning" to "the great concept" of federalism:[42]

> Under the banner of vague, undefined notions of equity, comity, and federalism, the Court has embarked upon the dangerous course of condoning both isolated . . . and systematic . . . violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly reflect the nature of our federalism. "Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[43]

II

Until the 1970s there was little or no occasion for Brennan to think seriously about the independent value of federalism. Federalism was for him a matter of protecting individual rights, and these rights were to be defined and protected by national institutions. Deference to state institutions, or any of the other indicia of decentralization ordinarily associated with federalism, thus had only marginal significance in Brennan's thinking.

With the advent of the Burger Court, however, the Supreme

40. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961).

41. *Id.* at 426.

42. Juidice v. Vail, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting).

43. *Id.* at 346-47 (quoting Brennan, *supra* note 3, at 502-03).

Court began increasingly to step back from an aggressive role in the protection of individual rights. The Court also moved toward a reaffirmation of "Our Federalism," by which it meant "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[44] At root, "Our Federalism" was a sign of the Court's refusal to follow the Warren Court's individualism to its logical conclusion. In conflicts between individual liberty and state institutions, the latter needn't always give way, in part because the value of federalism did not simply inhere in the furtherance of individual rights.

The challenge of the Burger Court spurred Brennan to rethink his position about federalism. For the first time in 1977 he professed himself to be "a devout believer" in "our concept of federalism."[45] Strikingly, however, the version of federalism to which he now gave his allegiance was entirely compatible with individualism. As such it is a unique and fascinating variant of American federalist thinking. To explicate it, I will examine a second text, Brennan's 1986 lecture on "The Bill of Rights and the States: The Renewal of State Constitutions as Guardians of Individual Rights."[46]

Brennan began his talk with a defiant assertion. The Warren Court's most significant contribution to "the preservation and furtherance of the ideals we have fashioned for our society," he said, was neither *Brown v. Board of Education* nor the reapportionment decisions, but rather "the decisions binding the states to almost all of the restraints in the Bill of Rights."[47] These decisions "reshaped the law of this land" by acknowledging that "it was vital to secure certain fundamental rights against state and federal governments alike."[48] They exposed and destroyed the myth "that states could be trusted to nurture individual rights" because of "the assumption of 'an identity of interests between the states, as the level of goverment closest to the people, and the primary corpus of civil rights and liberties of the people themselves.' "[49]

Brennan thus staked out his methodological individualism and his rejection of any communitarian defense for federalism. States

44. Younger v. Harris, 401 U.S. 37, 44 (1971).
45. Brennan, *supra* note 3, at 502.
46. Brennan, *supra* note 10, at 535.
47. *Id.* at 536.
48. *Id.* at 540.
49. *Id.* at 537 (quoting from L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-3, at 5 (1978)).

were not communities that were identified with their populations; they were instead governments which like all governments stood always in potential opposition to the rights of their own citizens. Hence Brennan applauded the "nationalization process" represented by the incorporationist decisions, not because of its nationalism, but rather because it forced "modern constitutional law" to revolve "around questions of civil and political liberty."[50] Nationalism was simply the medium through which constitutional law had come to its natural focus on individual rights. But how was this focus to be reconciled with the federalism to which Brennan now claimed allegiance?

The answer was dramatically simple. Brennan had come to the realization that the Supreme Court's faltering protection of individual rights was in fact inherent in its role as a "national court," which "must remain highly sensitive to concerns of state and local autonomy," and which must "represent the common denominator to allow for diversity and local experimentation."[51] Hence the "Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."[52] Federalism must thus be considered as a structure creating a "double"[53] protection for individual rights, which should be safeguarded by both federal and state courts. The requirements of the fourteenth amendment represented only "a common national standard," but "our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so."[54] "[S]tate experimentation may flourish in the space" above the "federal floor of protection" created by the fourteenth amendment, but "diversity" can be tolerated "only *above and beyond* this federal constitutional floor."[55] For Brennan "this reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure."[56]

If in 1964 Brennan's commitment to individual rights led him to an unabashed nationalism and a celebration of national unity, by 1986 he had altered his understanding of federalism sufficiently to entertain a respectable role for the values of diversity and local autonomy. Diverse state protections for individual rights were to be

50. *Id.* at 545.
51. *Id.* at 549.
52. *Id.* at 548.
53. *Id.* at 552.
54. *Id.* at 551.
55. *Id.* at 550.
56. *Id.*

applauded. They were to be insulated from the interference of the federal judiciary, ironically enough, by the constitutional rule of "adequate state grounds," the very rule which Brennan had earlier sought to circumvent in such cases as *Fay v. Noia*[57] and *Henry v. Mississippi*.[58] The range of state diversity was strictly limited, however, in two ways: it must not violate minimum national norms, and it must be committed to the maintenance of individual rights.[59]

One is tempted to charge that Brennan's most recent version of federalism is simply the result of expediency. His is not a true vision of federalism, we might say, because it is only designed to achieve his pre-existing goal of maximizing the protection of individual rights. Yet analysis of this charge reveals much about contemporary conceptions of federalism, for most of these conceptions have exactly the same character as Brennan's perspective: they use federalism as a means to achieve an ulterior goal. Those goals range from the diffusion of power, to the facilitation of diversity and experimentation, to the efficiency of local governance.[60] Brennan's vision of federalism differs from these only in the stark clarity of its formulation and in the strict logic with which Brennan tailors federalist principles to the achievement of his chosen goal. But if we were seriously to view federalism, for example, as a system designed to achieve the value of efficient local administration, the federalist principles we would devise would have a similar "expedient" feel.

The only vision of federalism that would not have such a "feel" is one that would embrace local government not as a means to an ulterior end, but for its own sake. Such a vision of federalism does

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57. 372 U.S. 391 (1963).

58. 379 U.S. 443 (1965). Of course in *Henry* itself Brennan had been quite explicit that in applying the "principle" that "this Court will decline to review state court judgments which rest on independent and adequate state grounds," it was "important to distinguish between state substantive grounds and state procedural grounds." *Id.* at 446. This was because "[w]here the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand," whereas a "procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right." *Id.* at 446-47.

59. In turning to state courts for the protection of individual rights, Brennan was able to draw on a substantial and growing literature which assessed the theory and extent of the divergence of state and federal constitutional law. *See* Brennan, *supra* note 3, at 500 n.76 (citing Faulk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure*, 63 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973)); Mosk, *The State Courts in American Law: The Third Century* 213 (B. Schwartz ed. 1976).

60. *See* Scheiber, *Federalism*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 697, 699 (L. Levy & K. Karst eds. 1986).

of course exist. It stresses the values of local participation and celebrates the ability of small communities to foster a kind of *gemeinschaft* that constitutes and embraces the identities of those who comprise them. This was the ultimate basis of Justice Frankfurter's commitment to federalism. It suggests that the debate between Brennan's and Frankfurter's perspectives on federalism is in some respects analogous to the contemporary debate between communitarians and liberals.[61] Whereas the former view the most valued aspects of the self as stemming from its constitution by community life, the latter stress the importance of individual autonomy and independence.

For Supreme Court Justices, however, the debate over federalism is not merely academic; it is a matter of how to use the force of law to structure social relations. In part the resolution of this debate depends upon the answers to empirical questions. We need to know, for example, whether the states in fact comprise communities such as those envisioned by Frankfurter. We need to assess the reality of local participation and whether the constitutional value of federalism actually assists its creation. We need to decide whether a better sociological description of contemporary realities is offered by the recent communitarian surge, reflected in the Court's renewed commitment to federalist values, or by Justice Brennan's alternative vision of a bureaucratic society divided between individuals and the state.

But in the end, as with so many things, such empirical inquiries may not be determinative; the answers no doubt lie somewhere in the middle. And that, of course, merely frames the usual unattractive question for the law: should it throw its authority behind one sociological tendency or the other? To take Brennan's path may well exacerbate and accelerate the modern loss of community, but to adopt the perspective of modern communitarians may well risk sacrificing tangible individual rights at the altar of a speculative and nostalgic ideal.

61. An overview of that debate may be found in Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985); Thigpen & Downing, *Liberalism and the Community Critique*, 31 AM. J. POL. SCI. 637 (1987); Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581 (1987).