THE ROCKY PATH OF FEDERALISM—OUR DUAL SYSTEM OF COURTS*

By JUDGE ROBERT H. HALL**

That great observer of the American scene, Alexis de Tocqueville, began his discourse on the judicial power with a remark which describes my feelings on approaching this subject. He said: I am at a loss to explain the political action of the American tribunals without entering into some technical details of their constitution and their forms of proceeding; and I know not how to descend to these minutiae without wearying the curiosity of the reader by the natural aridity of the subject, or without risking to fall into obscurity through a desire to be succinct. I can scarcely hope to escape these various evils.[1] I hope you will bear with me as I also try to navigate between the banks of aridity and obscurity. And I must begin, I fear, from the port of generality.

From the time of its inception, our peculiar form of federal government has been regarded as one of the most complex in the world. It was created by what we now consider as the ablest political thinkers of any generation. Its form was a result of their skill at compromise. About the only point of agreement of the delegates to the Philadelphia Convention was that government under the Articles of Confederation had not worked, but the opinion about what to do ranged from minor amendment of the Articles to the creation of a completely national government. The resulting compromise was unique to history at that point. The states were to be neither completely sovereign members of a confederacy nor administrative units of the new national government. Madison supplied the philosophical underpinning of the new form by his concept of the sovereignty of the people and their direct relationship to the national government. The people were creating the government, even though the mechanism of ratification was the states.[2]

This semi-mystical notion of dual and partially limited sovereignty between the states and federal government was scarcely off the ground before it came under fire. The doctrine of interposition was born before the decade was out and although a civil war settled the issue for practical purposes, its ghost still walks from time to time. Nevertheless, while our

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** Judge Hall is Presiding Judge of the Georgia Court of Appeals and current President of the American Judicature Society.

1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. VIII, *The Federal Constitution*.

2. THE FEDERALIST No. 39 (Madison); W. BENNETT, AMERICAN THEORIES OF FEDERALISM (1964).

discussions about the nature of our federalism have tended to remain rooted in the patterns of the 1780's, the reality has changed. We have become an increasingly centralized nation because strong social and economic forces have impelled it. The power of the federal government has grown beyond anything Hamilton might have imagined; but we must remember that most of the limitations on that growth have been made by the federal government itself. Beyond the first surge of expansionism in the early 19th century and a brief period in the early 20th century, the Supreme Court and Congress have more often than not been highly solicitous of state rights. The states now have the widest latitude in most areas of governmental activity. For example, no state economic regulation has been held unconstitutional on due process grounds in well over 30 years[3] and certain decisions of the Supreme Court this past year are filled with language which would have warmed Calhoun's heart.[4] I will mention other, more technical, limitations later.

Nevertheless, there is a new form of federalism in the process of emergence. It is not a renaissance of the classical concept of state sovereignty, despite some of the rhetoric that has accompanied the public discussion. Rather, it is a way of problem solving based on the realization that everything cannot be cured in Washington—that there is a point of growth in central administration beyond which there is no sensitivity, creativity or effectiveness. The emphasis is pragmatic. Delegation back to the grass roots is a more effective way to deal with certain problems, but the grass roots, in this sense, are not necessarily the traditional political entities.[5] There is no need to list the ever increasing number of subjects which refuse to be bound by city, county or state lines.

We therefore find ourselves in the process of both philosophical and practical change in the nature and workings of government; but our court systems are still operating under the old forms and largely without any serious re-examination. We know we have problems, but the proposed solutions have been of the minor readjustment variety. I believe it is safe to assume that for the near future no radical reform will occur in the form or distribution of judicial power, just as it is safe to assume that the states are not going to be imminently abolished. With evolution in mind, therefore, I will turn to the subject of our concurrent court systems.

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3. Wisdom, *Frictionmaking Exacerbating the Political Role of the Federal Courts*, 21 Sw. L.J. 411, 416 (1967).

4. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

5. C. MCGOWAN, ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES (1969); Wright, *Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

Two important ideas underlie any discussion. The first is that our dual systems of state and federal courts is also unique. No other federal government has chosen tc emulate our example. The general idea has been that it is unnecessarily complex. I might add that foreign observers are not the only ones who think so. The second important point is that our courts occupy a more powerful place in the political process than in any other country. This is a result of a number of factors: that we began our federal experiment with a basic distrust of government; that we operate under written constitutions which are power *limiting* in nature; and that we have developed the unusual concept of judicial review of the other branches of government.[6] A Canadian commentator described this in an amusing way.

> The people manifestly do not trust their lawgivers and they have therefore loaded their constitutions with prohibitions intended to prevent the legislature from doing most of the things which it would normally wish to do. The legislature is like a servant who is not entrusted with the keys to the cellar or the garage, for fear lest he might help himself and accommodate his friends. Now one of the main functions of the judge in an American state is to keep an eye upon the legislature. The people cannot do this themselves, and he must discharge this duty on their behalf.[7]

The writer, of course, points out that it is conceptually impossible for courts to declare legislation unconstitutional in a parliamentary system where the legislature is deemed to be the complete expression of popular sovereignty. I would also add, for those of us who think there is something unprecedented in the recent political activism of the judiciary, that de Tocqueville said in 1835 that Americans are inclined to turn any political question into a lawsuit.

Our court systems developed in the same way as the general scheme of federal government—as the result of our own colonial history and as the compromise of the many cross currents of thought born of that history. For example, there was never any real question that the national government ought to have judicial power or the types of jurisdiction appropriate to it. This was vested in the Supreme Court by article III. There was considerable debate, however, over the necessity or desirability of inferior federal courts.[8] The constitutional provision which em-

6. THE FEDERALIST No. 78 (Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

7. SMITH, FEDERALISM IN NORTH AMERICA 120 (1923).

8. For a general review of the history of the establishment of inferior federal courts, *see* C. MCGOWAN, ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES (1969).

powered Congress to establish them was yet another of the compromises of the Philadelphia Convention. Many of those who supported the provision didn't believe that Congress would actually rush into doing anything about it. The feeling was strong that the existing and complete systems of state courts could adequately deal with any claim of federal right, with ultimate review in the United States Supreme Court if necessary. Only a few voices suggested that the real possibility of conflict between general and local policy would make the state courts inappropriate to administer national laws.[9]

However, the first Congress did act to establish inferior courts. The Judiciary Act of 1789 was, once again, the result of compromise. Admiralty and maritime jurisdiction had been made exclusive to the national judicial power. A basic agreement that lower courts were necessary to exercise it had grown during the ratification interval; but whether they should be granted any other constitutionally authorized jurisdiction was hotly debated. Today it may seem surprising that Congress finally decided to grant these courts diversity jurisdiction but not federal question. Again, the feelings of the day have to be examined. What we could call xenophobia was common. The national thinkers were the exceptions. People were more than willing to trust their own state courts to deal with their rights as national citizens, but not to trust another state court to deal fairly with them in any matter. The theory has also been advanced that the original basis for diversity was not regional but rather class bias, *i.e.*, that federal judges would be of the propertied class and would be more sympathetic to interstate commercial litigation.[10] It was not until 1875, and in the wake of the great national feeling born of the Civil War, that the inferior federal courts were clothed with federal question jurisdiction.

This set the stage for two developments. The most far reaching was the implementation of the strong centralizing and unifying tendencies of national law by judicial expression and enforcement. In other words, the federal courts became powerful nationalizing instruments. This new role, of course, made the existence of dual systems even more complex and greatly enlarged the areas of friction between them.

That the two systems would necessarily have large areas of concurrent jurisdiction was recognized very early. Hamilton wrote:

> The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litiga-

9. THE FEDERALIST No. 81 (Hamilton).

10. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948).

> tion between the parties within its jurisdiction, though the causes of the dispute are relative to the laws of the most distant part of the globe . . . . When in addition to this we consider the state governments and the national governments . . . as parts of *one whole*, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.[11]

Since that time, the principle has been continuously reiterated that the state courts share the duty of enforcing federally created rights and obligations; and, of course, the same duty rests on federal courts. Diversity litigation is the most obvious example, but even in federal question cases there are often significant issues of state law as well.

Therefore, while concurrent jurisdiction in the broad sense is necessary, given a dual court system, we must also find ways to rationally divide the work load between the two systems. As a practical matter it cannot be done by simply determining whether a case is state or federal in nature. There is too much overlap. On the other hand, the various methods we have employed to sort out cases have led to confusion and inefficiency in some areas and to friction and hostility in others.

Perhaps the most obvious example of inefficiency is diversity litigation. Judge Wright of the United States Court of Appeals believes that its practice under *Erie* squanders the resources of the federal judiciary. When state law is not clear, exhaustive research and analysis is required to predict what the state court would do and then the result merely settles the immediate dispute. It fails to achieve that other important objective of a legal decision, *i.e.*, establishing a precedent and organizing a body of law. He also believes it retards the formation and development of state law by postponing issues until another appropriate case comes to the state court.[12] The most extreme version of the doublethink necessary under *Erie* is in determining conflict of laws rules. There the federal judge must decide what he thinks the forum state would think that another state would think "on an issue about which neither has thought."[13]

The reverse side of the coin is the problem of the state judges who must decide cases arising under federal statutory law, *e.g.*, Federal Employer's Liability Act, Fair Labor Standards Act, Jones Act, and Miller Act. Jurisdiction over these matters has been made specifically

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11. THE FEDERALIST NO. 82 (Hamilton) (Emphasis added).

12. *See* Wright, *Federla Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

13. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (1960).

concurrent by the statutes. The problem here is also one of determining what the law is. Even when they originate in the federal courts, these cases rarely get beyond circuit level. The state judge is faced with conflicting decisions among the circuits and the states. He can only choose among them at his peril. The result is a lack of uniformity even within a circuit. There is also a similar inefficiency because the state judge does not see enough of these cases to develop an expertise. He must necessarily spend more time than usual in research and analysis. Finally, he faces some procedural quirks which may not have any solution. For example, forum shopping across state lines is possible in FELA cases because the employer, usually a railroad, is amenable to suit nearly everywhere. Without a state doctrine of forum non conveniens, how does a state judge dispose of a suit which clearly does not belong in his court?

So far I have mentioned situations which are wasteful and confusing, but do not often cause conflict between the systems. However, there are other areas in which concurrent jurisdiction is highly abrasive to state-federal relations. The oldest and most obvious one is the Supreme Court's power of review over state decisions which conflict with federal law or the Constitution. However repugnant it may be to a state, the power to resolve these conflicts follows naturally from the supremacy clause, and indeed is inherent to our federal union itself. The issue of direct review has long since been settled[14] although it is sometimes discussed as if the question were open. Much more annoying to the states is the review exercised by the lower federal courts in certain instances. I will return to that in a moment, but first I want to mention another category of cases which Judge Moore of the Second Circuit calls "the ships that pass in the night group."[15] These are the parallel suits in each system which have different results. A recent, well publicized illustration was the tug-of-war played by the courts with the Braves baseball team. Would they play in Atlanta or Milwaukee? A more classical example is the embroiled parallel litigation surrounding the amours of a Nevada Senator which ultimately resulted in the shooting of a California judge by the bodyguard of a Supreme Court Justice. The second round of confrontation occurred when the federal court enjoined the bodyguard's prosecution for murder in the state.[16] Possibly the only remedy for these cases is the discreet use of abstention or res judicata. Certainly injunctions, even in the limited instances where they are available, act as exacerbating influences.

14. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
15. Moore, *State and Federal Judicial Conflict*, 39 N.Y.S. B.J. 292 (1967).
16. *See In re* Neagle, 135 U.S. 1 (1889).

The power of a lower federal court to enjoin state courts or officials from enforcing state civil or criminal laws on the basis of their unconstitutionality is, of course, a prime area of friction. Possibly because of fears for the independence of state judicial systems, a federal anti-injunction statute was first enacted in 1793. Over the course of time, however, many exceptions to it were carved out, culminating in the famous case of *Ex Parte Young* in 1908.[17] It vividly demonstrated the power of one man to negate state regulatory measures passed by representatives of the people for their protection. The public's reaction was hostile and the result was the passage of the Three Judge Court Act,[18] a compromise which allowed the retention of certain federal injunctive power. It seems clear, however, that despite the limitations and safeguards contained in both the present anti-injunction statute[19] and the three judge court, the potential for abrasive interference can only be mitigated by court developed rules of comity and the desire of the federal bench to interfere no more than absolutely necessary to enforce the Constitution uniformly across the country. But how much is "no more than necessary?" Judge Moore suggests that the decision of the Supreme Court that an apportionment plan adopted by popular referendum was unconstitutional falls in a shadowy area.[20] He queries:

> If the people of the state were happy with moderate malapportionment, should they be permitted to remain that way, however benighted the Supreme Court may have thought them?[21]

Among the problem areas of federalism, possibly the most acute is dissatisfaction with the habeas corpus jurisdiction of the federal courts over state prisoners. State judges believe it a violation of the dignity due the state's highest courts when they are, in effect, reversed by a single federal district judge. Prosecutors believe it impedes the administration of criminal justice. Even the federal judges are unhappy because the large volume of frivolous applications of the past ten years has severely burdened their work load.

One important fact needs to be emphasized now. Discussions of federal habeas corpus have often proceeded on the false assumption that the whole thing is a device dreamed up by the United States Supreme Court, willingly abetted by the district courts. The jurisdiction was, of

17. 209 U.S. 123 (1908).
18. 28 U.S.C. § 2281 (1970 ed.).
19. 28 U.S.C. § 2283 (1970 ed.).
20. Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).
21. Moore, *State and Federal Judicial Conflict*, 39 N.Y.S. B.J. 292, 297 (1967).

course, first granted by an Act of Congress in 1867.[22] On many occasions since then, proposals have been made to limit or even abolish it for all practical purposes.[23] The proposals have been backed by the Conference of Chief Justices and other similar prestigious groups. In each case, and after full consideration, Congress has refused to abrogate the jurisdiction. The 1966 amendments were little more than legislative recognition of the methods and standards developed by case law and already used by the judges to screen applications.

While there is room for debate concerning the necessity or efficiency of present habeas procedures, the point I have been making is that it must be directed to the legislative branch. The chief role of the Supreme Court has been to establish definitively the existence and scope of the power in the federal courts *under the Act.*[24] However, the rapid increase in the volume of applications is mainly due to the steady incorporation of federal constitutional protections into state criminal systems by way of the series of fourteenth amendment-due process cases of recent years.[25]

It seems clear that Congress believes that the existence of the remedy is essential to maintain minimum, uniform standards of due process in criminal procedure throughout the country and that considerations of federalism, however important, do not outweigh this necessity. It is interesting that in Canada, criminal procedure has always been a matter of dominion law although the substantive criminal law is both provincial and dominion. Justice Shaefer of Illinois has said that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law" and that to the people of the world, "the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."[26]

It seems likely, then, that the federal habeas corpus remedy will be retained until a uniform criminal procedure exists in this country, both in letter and application. Appellate review by the Supreme Court is not a practical alternative for a variety of reasons. The approach should therefore be to devise a better form of the remedy—one which will take account of both federal bench work load and state court sensibilities.[27]

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22. Present 28 U.S.C. §§ 2244, 2254 (1970 ed.).

23. For a good history of federal habeas corpus, *see* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

24. Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

25. Hopkins, *Federal Habeas Corpus: Easing Tension Between State and Federal Courts*, 44 ST. JOHN L. REV. 660 (1970).

26. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

27. *See* Bell, *State Courts and the Federal System*, 21 VAND. L. REV. 949 (1968).

Now that I have outlined the various problem areas, I would like to mention some recent developments which tend to mitigate, and reforms which have been proposed, including some of my own.

The diversity jurisdiction of federal courts has come under increasing fire by legal scholars in recent years. It is widely asserted that the local prejudice which gave rise to the jurisdiction originally no longer exists. The American Law Institute has made an extensive study of the subject. Its draft proposals have been published under the title "Study of the Division of Jurisdiction between State and Federal Courts." Although there are many minor changes which would affect the volume of diversity litigation, the chief one would abolish the right of a plaintiff to institute an action in the federal court of his home state. The rationale is that while there is still a risk of bias against a litigant from a distant part of the country, the justification for diversity jurisdiction to protect him does not support its initial invocation by an in-state resident. In other words, the resident cannot claim he is prejudiced by having to use his own state courts. The American Law Institute proposal is a compromise of sorts, since it would retain approximately 50 per cent of the diversity cases. It has, however, received little support and a lot of criticism from the bar. The feeling is widespread that federal courts are better in every way and practitioners do not want to relinquish the option to use them.[28] Judge McGowan has characterized the proponents of this position as those

> successful members of the bar who make states' rights speeches by night but want to try their cases by day in the federal courts and who, therefore, make of professional interest and convenience a standard for the allocation of jurisdiction between the dual systemes.[29]

I would also suggest that the assumption of superiority is no longer based completely on reality. The federal blue-ribbon jury is a thing of the past. In some states the judicial system has been upgraded to federal standards by comparable staffing and salaries. Where effective merit selection is practiced and discipline and removal commissions exist, they may even be better. The time may yet come when there will be no particular advantage to choosing a federal court in the vast majority of cases based on state law. Then diversity jurisdiction can be dropped by consensus.

28. *Compare* Field, *Diversity, a Response to Judge Wright*, 13 WAYNE L. REV. 489 (1967) *with* Wright, *Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

29. C. MCGOWAN, ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 86 (1969).

In the meantime, the American Law Institute proposals are a reasonable start to solving the difficulties of diversity under *Erie* which I mentioned earlier. They ought to be backed by everyone who is concerned with the efficient administration of justice. I should also mention another, independent factor which is operating to diminish the importance of diversity litigation. That is the shrinking of state law's traditional subject matter because of the rapidly expanding federal coverage through pre-emption and federal common law.

The American Law Institute study also resulted in several proposals which would expand federal question jurisdiction, chiefly by abolishing the monetary limitations and by permitting defendants with a substantial federal defense to remove. The justification here is that uniformity in federal law is not only crucial, but much more likely to be had within the single system. There has been little opposition to these proposals, although no great haste to implement them either. In one respect, though, I believe they fall short. The American Law Institute recommends the retention of concurrent jurisdiction (which in some instances carries a statutory prohibition against removal) in those cases which grow out of federal statutory law, such as FELA. There was apparently no consideration of the difficulties for the state judge I described earlier. It seems to me there is also a lingering assumption that federal courts are, in fact, superior and should not be burdened by minor claims. I would make a counter-proposal. If the district courts do not want the business, then there should be federal small claims courts. The federal government can certainly afford to provide these forums better than the states, and the clarity and uniformity rationale is just as good here as in federal question jurisdiction generally. A pattern for lower judicial officers already exists in the referees and magistrates and a pattern of expeditious procedure in the Tax Court. There is no reason why another variation could not be used in these types of cases.

Several other recent developments should be mentioned which act to ease state-federal friction. One is the series of Supreme Court cases decided this past year which drastically limits federal court intervention in state criminal matters to those situations where the state trial courts are powerless to provide the relief necessary to protect constitutional rights.[30] The only apparent example of such a situation so far is massive bad faith harrassment by state prosecuting and police officials.[31]

Another development is the unusual form of abstention practiced in

30. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971).

31. For a discussion of the import of these cases, *see* 59 CALIF. L. REV. 1549 (1971).

the Fifth Circuit which extends to diversity cases involving only an unclear issue of state law. The doctrine was enunciated in a 1964 case, *United Services Life Insurance Co. v. Delaney*.[32] The basis seems to be a desire to let the state courts always have the first shot at deciding questions of state law. While the idea may be sound for state-federal harmony, the method is doubtful. Even traditional abstention in federal question cases is not in favor today because of the extra cost and delay entailed in the second action. The American Law Institute has proposed an abstention doctrine for the district courts which would limit its use to a fairly rigorous set of conditions.

A more promising way to achieve the same result is the certification procedure. Six states, including Florida, now have some method which allows their courts to decide controlling issues of state law certified to them by federal courts. The advantage of this method is the potential for a rapid and inexpensive determination of the issue by the state court. However, it has not always worked this way in practice. Obviously, the attitude of the state court toward the procedure will have an effect, as will other factors such as its backlog of work.

How to deal with habeas corpus is, of course, the knottiest problem. It is clear that any change in method which adds appreciably to the workload of the federal bench will be unacceptable to Congress. For example, a proposal to require a three-judge court for any proceedings beyond the initial screening was rejected in 1966. If anything, the wind is blowing in the opposite direction. In order to deal with the volume, the federal courts could quite reasonably ask for authority in the magistrates to make the preliminary determination, with the right of appeal to the district judge. This will do nothing to ease relations with the state courts, however. I would like to suggest an alternative which I believe strikes a balance between the need to handle the applications more efficiently in the federal system and the need to reduce the obviously real vexation of the state courts with the remedy. When we analyze the problem, it becomes clear that the only dissatisfaction is with the case in which the writ is granted, not those which are terminated in some other way. Statistically, these cases are hardly significant. In fiscal 1969-70, only .01 per cent of the applications were granted nationally; .007 per cent in the Fifth Circuit; and .02 per cent in Georgia. In actual numbers, we are talking about only twelve grants for the entire Fifth Circuit in 1969-70. In the interest of state-federal harmony it would seem reasonable that in those few cases where the district court judge

32. 328 F.2d 483 (1964), *cert. denied*, 377 U.S. 935 (1964).

(usually after a hearing) determines the writ should be granted, the record should be certified to and reviewed by a panel on the circuit level, with the writ actually issuing there. It seems a very small price to pay for the smoother working of the dual systems.

Finally, I would like to sail completely into the blue and question the necessity of two systems at all today. The peculiar circumstances of 1787 no longer exist and other similar federal governments feel no need for such a complicated court structure. The judiciary of Canada and Australia derive authority from an undivided national sovereignty and administer the law of the nation, whether the law is federal or provincial in origin. Along similar lines, Justice Garwood of Texas once proposed a single system for this country, with the judiciary selected and paid for jointly. The suggestion is not absurd. We have, in fact, been tending that way philosophically if not structurally. But it is the structure which causes the trouble. If a recalcitrant court system is ordered, in effect, to apply certain law by another system, there is more resentment than if a particular judge fails to perform his clear duty and is reversed by a higher court in his own system.

We are a long way from such a solution, however, just as we are a long way from full implementation of the new federalism. In the meantime, each system must look for ways of accommodation with one another. Judge Roberts of Pennsylvania, when addressing the judges of the 3rd Circuit, sounded this same note. He recognized that with *Erie*, the federal judiciary had led the way in easing tension; and that just as it

> realized that within a given state the common law should be uniform as to all litigants, so also should we of the state judicial system accept the principle . . . that with respect to certain procedural requirements of due process, the entire nation is but "one state."[33]

With an attitude of cooperation, open channels of communication, and some imagination for new ways of doing things, the two systems should be able to continue dispensing justice in this rapidly changing world until we reach a consensus on a replacement.

33. Roberts, *A State Judge Looks at the Federal Courts*, 116 U. Pa. L. Rev. 468, 471 (1968).