

# ValpoScholar

## Valparaiso University Law Review

---

Volume 26  
Number 1 *Symposium: The Bill of Rights  
Yesterday and Today: A Bicentennial  
Celebration*

---

*Symposium: The Bill of Rights Yesterday and Today: A Bicentennial  
Celebration*

### In Honor of Justice William J. Brennan, Jr.: Justice Brennan and the State Courts

The Honorable Richard S. Arnold

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

#### Recommended Citation

The Honorable Richard S. Arnold, *In Honor of Justice William J. Brennan, Jr.: Justice Brennan and the State Courts*, 26 Val. U. L. Rev. (1991).

Available at: <https://scholar.valpo.edu/vulr/vol26/iss1/1>

This Introduction is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



# JUSTICE BRENNAN AND THE STATE COURTS

RICHARD S. ARNOLD\*

Most of Justice Brennan's legal legacy, of course, will be found in his opinions. Judges occasionally produce other writings, however, such as articles and lectures, and one such piece by the Justice seems to me especially worthy of comment. In the interests of full disclosure, I confess at the outset that the Justice produced the work in question, at the James Madison Lectures, New York University, during the Term when I was with him. It is proper to add, lest the reader suspect otherwise, that this Lecture, first draft and all, was the Justice's personal work. Neither of us law clerks (in those ancient days there were only two) did a first draft. Not only the philosophy and the concepts, then, were original Brennan, but also the writing, in all its details. About all we could claim was some proofreading and maybe a few footnotes.

The title of the Lecture is *The Bill of Rights and The States*. It is reprinted, along with similar lectures by Chief Justice Warren and Justices Black and Douglas, in a little book called *The Great Rights*.<sup>1</sup> The ruling concept of the Brennan Lecture was that the Bill of Rights, originally conceived as limiting the federal government only, was being gradually applied to the states, not by the wholesale incorporation advocated by Justice Black, but by a more conservative process which Justice Brennan described as selective incorporation or "absorption."

The Lecture, comprising only twenty printed pages, was delivered on February 15, 1961. Its main thesis is important, but it is a subsidiary point, really made only in passing, that I wish to emphasize here. At the very end of the Lecture the Justice makes the following observation:

It is reason for deep satisfaction that many of the states effectively enforce the counterparts in state constitutions of the specifics of the Bill of Rights. Indeed, some have been applied by states to an extent beyond that required of the national government by the corresponding federal guarantee.<sup>2</sup>

---

\* Circuit Judge, United States Court of Appeals for the Eighth Circuit. Law Clerk to Mr. Justice Brennan, October Term, 1960.

1. *THE GREAT RIGHTS*, (Edmond Cahn ed., 1963).

2. *Id.* at 85 (footnote omitted).

In these two sentences is the germ of an idea which has grown more and more important in American Constitutional Law in the last thirty years. As federal courts, in the opinion of some, have increasingly narrowed those individual liberties protected by the Bill of Rights, state courts and state law have begun to assume a more important role. State constitutions are now increasingly regarded as potential sources of individual rights, sources that are unaffected by the trends of adjudication on the Supreme Court of the United States. State courts must of course give to individuals the full range of rights secured by the Federal Constitution. This is a floor, a minimum, below which the states may not go. It is not, however, a ceiling or maximum. A state may create, as against itself, any additional rights it wishes, and it may use as a source for such rights clauses in its own constitution, even for clauses worded exactly the same as their federal counterparts, such as, for example, Due Process.

We may use as an example one given by Justice Brennan in the 1961 Lecture. In *People v. Deñ Uyl*,<sup>3</sup> “the Supreme Court of Michigan applied the state privilege against self-incrimination to exonerate from disclosure whenever there is a probability of prosecution in state or federal jurisdictions.”<sup>4</sup> The rule under the Fifth Amendment to the Federal Constitution is otherwise.<sup>5</sup> Under the Fifth Amendment, no privilege exists against incriminating oneself under the laws of a sovereign, including any state, other than the United States.

As Justice Brennan went on to point out, state statutes, too, could be the source of rights going beyond the Federal Constitution. My favorite example is given in his same footnote 66. On January 17, 1961, House Bill 111 was introduced in the Arkansas General Assembly. The bill provided that conviction or acquittal of an offense against the United States would be a bar to an Arkansas prosecution for the same conduct. This proposition ultimately became law,<sup>6</sup> contrasted with the rule under the Fourteenth Amendment to the Federal Constitution.<sup>7</sup> Indeed, when Justice Brennan learned of the bill that had been introduced in the Arkansas Legislature, I am proud to recall, he observed that the Southern states, in a way paradoxically, seemed in some ways to have a keener appreciation for the legal rights of individuals than some other sections of the country.

This idea -- that the state courts, interpreting their own law, and thus having nothing to fear from the reviewing power of the Supreme Court of the

---

3. 29 N.W.2d 284, 287 (Mich. 1947).

4. THE GREAT RIGHTS, *supra* note 2, at 166 n.66.

5. See, *United States v. Murdock*, 284 U.S. 141 (1931).

6. ARK. CODE ANN. § 5-1-114 (1987).

7. See, *Bartkus v. Illinois*, 359 U.S. 121 (1959) (state prosecution not barred by previous federal conviction or acquittal for same conduct).

1991]

United States, could be the course of individual liberties greater than those secured by the Federal Constitution -- has been elaborated in many ways and many contexts since Justice Brennan referred to it in 1961. In fact, for many years the idea was a centerpiece of the Appellate Judges Seminars conducted by the Institute for Judicial Administration at New York University. Justice Brennan was a member of the faculty of that seminar for a number of years during the 1960s, a capacity in which I followed him twenty years later. Group after group of state appellate judges were told -- and some few of them appeared surprised to hear -- that the states' own constitutions could be independent sources of law, that due process of law under the Constitution of Texas, say, could create more rights than the identical phrase in the Federal Constitution.

The point of all this is not that state courts must or should interpret their own constitutions differently or more expansively than the Supreme Court of the United States interprets the Federal Constitution. The point is more basic: whether to adopt such more generous interpretations is a choice, and a choice wholly within the competence of the highest court of each state. The concept, really, is one of states' rights -- the right of a state, not to exercise more governmental power for itself, but to secure for its own citizens a greater degree of individual freedom. And if, as time goes by, some of Justice Brennan's opinions broadly interpreting the liberties of the citizen as guaranteed by the Constitution of the United States cease to commend themselves to a majority of his successors, perhaps some of the ideas in those opinions will turn up in the decisions of state courts. If this happens, and there is evidence that it is already happening, there will be good reason to claim that the Brennan legacy has an additional important part. This is altogether fitting for one who came to the Supreme Court of the United States after serving as a state-court judge at three different levels.

