The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*

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I. INTRODUCTION

During the past decade, law journals and other sources have devoted considerable attention to the emergence of the "new judicial federalism," the renewed reliance by state courts on state constitutions as independent sources of constitutional rights, often with the aim of extending greater protection to individual liberties than is available under current interpretations of the federal constitution.[1] Typically, the Burger Court has received the credit, or the blame, for this phenomenon, as commentators have variously emphasized rulings on access to the courts that have limited the kinds of claims cognizable in federal courts,[2] that have modified criminal justice rulings of the Warren Court,[3] or that have apparently invited state experimentation.[4] Attributing changes in state judicial practice to doctrinal shifts of the United States Supreme Court has become common: when students of judicial federalism abandon their traditional interest in delineating the separate spheres of state and federal judicial business, they generally tend to assume a hierarchical federal perspective.[5] Despite an avowed interest in the state perspective, a recent survey of state constitutional developments clung to the standard view: "State constitutions do not exist in a vacuum. On the contrary, federal law largely determines their role as sources of civil rights and liberties."[6]

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1. The literature on the new judicial federalism is extensive. For listings of basic sources, see Tarr, *Bibliographical Essay*, in STATE SUPREME COURTS 206–08 (1982); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) [hereinafter cited as *State Constitutional Rights*]; and R. Welsh, Federalism and the Burger Court's Review of State Civil Liberties Judgments (Sept. 2–5, 1982) (unpublished paper delivered at the 1982 American Political Science Association Annual Meeting; to be published in 10 HASTINGS CONST. L.Q.). For a broader view of state constitutional litigation, see Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

2. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Younger v. Harris, 401 U.S. 37 (1971).

3. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682 (1972); Harris v. New York, 401 U.S. 222 (1971).

4. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975).

5. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973).

6. *State Constitutional Rights*, *supra* note 1, at 1331.

There are serious questions, however, about the adequacy of this view. Even if the Burger Court has been responsible for the emergence of the new judicial federalism, the view that the activity of state appellate courts can be understood historically in terms of responses to federal developments is open to question. Moreover, it is not clear whether the heralded emergence of the new judicial federalism has prompted state appellate courts to depart from past practices and traditions and undertake new policymaking responsibilities. For whereas some state high courts have been willing to revitalize state constitutional guarantees, others have continued to ignore them. Since civil liberties litigation accounts for only a small fraction of their caseloads, the relation between the new judicial federalism and the policymaking, such as common-law rulings, review of administrative decisions, and criminal appeals, in which state courts rather routinely engage also needs to be explored. To address these issues, this Article focuses on the Ohio Supreme Court's response to the new judicial federalism.

Apart from studies examining the effects of judicial selection methods,[7] scholars have paid no systematic attention to the Ohio Supreme Court. This may be because the court and its justices have done little to claim the interest of scholars, the press, or the public. It has shown neither the California Supreme Court's penchant for controversy[8] nor the New Jersey Supreme Court's enthusiasm for broad structural reform.[9] The Ohio Supreme Court has not pioneered in reforming tort law,[10] family law,[11] or, indeed, any other area of law. Rather, it has acted largely to legitimate and maintain the social, political, and legal status quo in the state, assuming a policy orientation that reflects "the traditional, non-ideological character of Ohio politics generally."[12] In this respect, the Ohio court differs little from many other state supreme courts; and although, for reasons to be discussed later, one is reluctant to label it, or any other state supreme court, as typical, it is clearly more representative of state high courts than are those that are consistently activist and often con-

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7. Political scientist Kathleen Barber has undertaken the bulk of this research. *See, e.g.*, Barber, *Selection of Ohio Appellate Judges: A Case Study in Invisible Politics*, in POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO 175 (1972); Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762 (1971); Barber, *Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan*, 20 CASE W. RES. L. REV. 401 (1969); K. Barber, Nonpartisan Ballots and Voter Confusion in Judicial Elections (Apr. 28–May 1, 1982) (unpublished paper delivered at the 1982 Midwest Political Science Association Annual Meeting) [hereinafter cited as K. Barber, Nonpartisan Ballots]; K. Barber, Judicial Politics in Ohio (undated draft paper) [hereinafter cited as K. Barber, Judicial Politics]. For a comparative perspective on Ohio judicial elections, see P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980).

8. *See, e.g.*, P. STOLZ, JUDGING JUDGES (1981); Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

9. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983). For an overview of the *Robinson* litigation that underscores the activist character of the New Jersey court, see R. LEHNE, THE QUEST FOR JUSTICE (1978).

10. Canon & Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 978 (1981).

11. Tarr & Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 937–50 (1982) [hereinafter cited as Tarr & Porter, *Gender Equality*]. However, the Ohio Supreme Court has followed some pioneering decisions of the United States Supreme Court. For examples, see *In re* Byrd, 66 Ohio St. 2d 334, 421 N.E.2d 1284 (1981), and Cherry v. Cherry, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981).

12. K. Barber, Judicial Politics, *supra* note 7, at 1.

troversial.[13] For this reason, an examination of the Ohio court's response to the new judicial federalism is useful for understanding the factors that influence state appellate court actions and the forces that shape judicial federalism.

II. The Ohio Supreme Court and the New Judicial Federalism: The Cases

The Ohio Supreme Court's response to the new judicial federalism is manifested in a series of five decisions in which the Ohio court had opportunities to develop state constitutional law along lines established by other courts. The first case, *State* v. *Gallagher*,[14] concerned the admissibility of a confession obtained from a defendant in custody by a parole officer who had failed to issue *Miranda*[15] warnings. Although the police previously had advised the defendant of his rights, he waived them. Later, Gallagher's parole officer, without reminding him of his rights, questioned Gallagher seven days after his initial refusal to discuss the circumstances surrounding the arrest.[16] The Ohio Supreme Court ruled that the confession was inadmissible because questioning by a parole officer was inherently more coercive then questioning by police, and the confession could not be considered voluntary.[17] The court did not specify the constitutional guarantee on which it relied, observing only that the issue was whether use of the confession was "in violation of appellant's privilege against self-incrimination, as guaranteed by Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution."[18] The state appealed the decision to the United States Supreme Court, urging that *Miranda* not be extended to these particular circumstances. The question arose during oral argument whether the Ohio Supreme Court's ruling rested on independent state grounds,[19] which was a crucial consideration in determining whether the United States Supreme Court had jurisdiction.[20] On remand, the Ohio Supreme Court replied that it had, indeed, relied on the state constitution; Supreme Court review was, perforce, foreclosed.[21] But the Ohio Supreme Court failed to define the scope of the state protection, noting merely that the justices would "reach the same conclusion under the Fourteenth Amendment."[22]

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13. For an early investigation of the relation of a state supreme court to its political context, see Vines, *Political Functions of a State Supreme Court*, in Studies in Judicial Politics (Tulane Studies in Political Science Vol. 8, 1962). For a more recent overview, see Porter & Tarr, *Introduction*, in State Supreme Courts xi (1982).

14. 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), *vacated*, 425 U.S. 257, *on remand*, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976) (per curiam).

15. Miranda v. Arizona, 384 U.S. 436 (1966).

16. 38 Ohio St. 2d 291, 292–94, 313 N.E.2d 396, 397–98 (1974).

17. *Id.* at 297, 313 N.E.2d at 400.

18. *Id.* at 294, 313 N.E.2d at 398–99.

19. Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 Ky. L.J. 729, 748 (1976).

20. Recent discussions of independent state grounds include Bice, Anderson *and the Adequate State Ground*, 45 S. Cal. L. Rev. 750 (1972); Falk, *Foreword—The State Constitution: A More than "Adequate" Nonfederal Ground, The Supreme Court of California, 1971–1972*, 61 Calif. L. Rev. 273 (1973); Friedelbaum, *Independent State Grounds: Contemporary Invitations to Judicial Activism*, in State Supreme Courts 23 (1982); R. Welsh, *supra* note 1.

21. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

22. State v. Gallagher, 46 Ohio St. 2d 225, 228, 348 N.E.2d 336, 338 (1976) (per curiam).

The situation in *Gallagher* gave rise to a slight, and it might be argued, logical extension of *Miranda*. The next defendants' rights case that involved an interpretation of criminal justice rulings of the Warren Court posed a more complex issue. At stake in *State v. Roberts*[23] was whether a defendant's right to confront adverse witnesses was violated by the admission of testimony taken at a preliminary hearing from a witness later unavailable for trial. In *Barber v. Page*[24] the United States Supreme Court ruled that a state's failure to make a good faith effort to produce a witness for trial rendered such testimony inadmissible even though defendant's counsel had foregone an opportunity to cross-examine the witness at the preliminary hearing.[25] But in *California v. Green*[26] the Burger Court held that when there had been an honest effort to produce the witness, when an opportunity for cross-examination had existed at the preliminary hearing, and when the testimony bore various "indicia of reliability," the testimony was admissible.[27] Faced with these precedents, the *Roberts* majority distinguished *Green* on the ground that the opportunity to cross-examine at a preliminary hearing for the purpose of establishing probable cause does not provide the same protection as cross-examination at trial, at which guilt must be established beyond a reasonable doubt.[28] The defendant's sixth amendment rights had therefore been violated. On appeal, the United States Supreme Court reversed on the grounds that the questioning of the witness was thorough, that she was unavailable for trial, and that her testimony met the indicia of reliability standards.[29] Since the witness had been so rigorously questioned, the Court concluded that there was no need to decide whether the mere opportunity to cross-examine at a preliminary hearing met the federal constitutional requirements. It therefore remanded the case for further consideration in light of the indicia of reliability requirements, at which point the Ohio Supreme Court accepted the Supreme Court's approach and conclusions.

Reversal by the United States Supreme Court need not, however, have ended the matter. The state counterpart to the federal confrontation clause reads:

> In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; . . . to meet the witnesses face to face . . . ; but provision may be made by law for the taking of a deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at trial, always securing to the accused means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully *and in the same manner as if in court*.[30]

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23. 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978), *rev'd*, 448 U.S. 56 (1980). For supportive commentary and critical analysis, see Note, State v. Roberts: *Balancing the Right to Confront with the Admission into Evidence of Preliminary Hearing Testimony*, 10 CAP. U. L. REV. 365 (1980); Note, State v. Roberts: *A Persuasive but Unsupported Position*, 27 CLEV. ST. L. REV. 453 (1978).

24. 390 U.S. 719 (1968).

25. *Id.* at 724–25.

26. 399 U.S. 149 (1970).

27. *Id.* at 165. The indicia of reliability listed by the Court were representation by counsel, opportunity to cross-examine, testimony under oath, and proceedings before a judicial tribunal providing a record.

28. 55 Ohio St. 2d 191, 196–99, 378 N.E.2d 492, 496–97 (1978).

29. 448 U.S. 56, 73, 75 (1980).

30. OHIO CONST., art. I. § 10 (emphasis added).

This clearly means, as one commentator has put it, that "preliminary hearing testimony should be admissible at trial only if the witness is dead or precluded from testifying through the connivance of defendant."[31] On remand, this provision could have been cited in support of a holding that under Ohio law, testimony taken at a preliminary hearing, no matter how reliable, simply is no substitute for testimony given at trial. But that holding would have required the invalidation of a recently enacted statute authorizing the use of hearsay evidence and would, additionally, have forced the court to overrule earlier decisions that sustained the introduction of evidence of this type against state constitutional claims.[32] Acceptance of the federal mandate in this particular case, thus, may have seemed the less disruptive and more sensible alternative.

In a similar case, *State* v. *Madison,*[33] the Ohio Supreme Court held that preliminary hearing testimony was admissible at trial.[34] The United States Supreme Court's *Green* guidelines had been met in *Madison*—a good faith effort to produce the witness for trial had been made, and the testimony satisfied the "indicia of reliability" test. Yet in finding such testimony admissible, the Ohio Supreme Court abandoned the far more stringent *Roberts* criteria. Only Justice Paul Brown, author of the *Roberts* opinion, dissented in *Madison,* arguing that the Ohio Constitution afforded greater protection than the federal constitution and that the state constitution was violated when a defendant's opportunity to cross-examine witnesses occurred only during the preliminary hearing.[35]

The Ohio Supreme Court's failure to invoke state constitutional guarantees in *Roberts* and *Madison* was hardly unprecedented, for in *Forest City Enterprises v. City of Eastlake*[36] it had also refused a prime opportunity to invigorate a state guarantee. *Eastlake* concerned the constitutional validity of a city charter amendment whereby all zoning changes required approval both of the council and an extraordinary majority, fifty-five percent, in a referendum. The amendment was precipitated by a city planning commission's recommendation that a zoning ordinance be altered to permit construction of light industry and a multifamily high-rise. The court held that the charter change, by delegating legislative power to the people, violated the due process guarantees of the federal constitution.[37] In what has been described as a carefully crafted opinion,[38] the court relied on United States Supreme Court rulings that had established the principle that "procedures for the exercise of municipal power [must] be structured such that fundamental choices among competing . . . policies

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31. *Criminal Procedure—Sixth Amendment, Ohio Law Survey,* 51 U. CIN. L. REV. 171, 178 (1982) (relying on State v. Wing, 66 Ohio St. 407, 64 N.E. 514 (1902)) (footnote omitted). *See also* State v. Madison, 64 Ohio St. 2d 322, 332–33, 415 N.E.2d 272, 278–79 (1980) (P. Brown, J., dissenting).

32. OHIO REV. CODE ANN. § 2945.49 (Page 1982) authorizes the use of preliminary hearing testimony in some circumstances. The earlier decisions include State v. Swiger, 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966), and Henderson v. Maxwell, 176 Ohio St. 187, 198 N.E.2d 456 (1964) (per curiam).

33. 64 Ohio St. 2d 322, 415 N.E.2d 272 (1980).

34. *Id.* at 330–31, 415 N.E.2d at 277.

35. *Id.* at 332–34, 415 N.E.2d at 278–79 (Brown, J., dissenting).

36. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd,* 426 U.S. 668, *on remand,* 48 Ohio St. 2d 47, 356 N.E.2d 499 (1976) (per curiam).

37. 41 Ohio St. 2d 187, 196, 324 N.E.2d 740, 746 (1975).

38. Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1423 (1978).

are resolved by a responsible organ of government."[39] The Eastlake charter, on the contrary, "blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational."[40] Moreover, four members of the five-judge majority concurred separately to focus attention on the underlying issue in the case, namely, the use of zoning regulations "to perpetuate the de facto divisions in our society between black and white, rich and poor."[41]

On appeal the United States Supreme Court reversed, ruling that the referendum could not be regarded as an unconstitutional delegation of power because the electorate had only exercised a power reserved to itself.[42] The Court thereby avoided confronting, as Justices Powell and Stevens pointed out, the "disquieting opportunities for local governmental bodies to bypass normal protective procedures for resolving issues affecting individual rights."[43] The majority supported its decision by noting that the Ohio Constitution secured the right to employ referenda as a means of exercising authority reserved to the people. Although the Ohio Supreme Court had originally relied solely on federal precedent, this reference to the state constitution underscored the possibility that on remand it could "conform state practices to the premises of due process contained in the Ohio Constitution."[44] This, in "reflexive obedience to the United States Supreme Court's view,"[45] it failed to do. The Ohio court stated, "[W]e perceive no state due-process constitutional questions which, under this record, we would choose to decide in a manner other than that mandated by the opinion on remand."[46]

An even more clear-cut invitation to explicate state constitutional law was extended in *Zacchini v. Scripps-Howard Broadcasting Co.*[47] Here, the Ohio Supreme Court upheld the right of a television station to videotape and broadcast a human cannonball act at a county fair against the claim that it violated the performer's right to publicity.[48] Although the court did not specifically cite the first amendment, it relied on Supreme Court rulings to support the claim that the privilege to report matters of legitimate public interest outweighed the performer's right to control access to his act and to profit from it.[49] The United States Supreme Court reversed on the ground that the media could not claim federal constitutional protection when they broadcast a performer's act in its entirety and without his permission.[50] Despite ambiguities in the Ohio opinion, the majority determined that the Ohio court had

39. 41 Ohio St. 2d 187, 196, 324 N.E.2d 740, 746 (1975).
40. *Id.*
41. *Id.* at 201, 324 N.E.2d at 749 (Stern, J., concurring).
42. 426 U.S. 668, 672 (1976).
43. *Id.* at 680 (Powell, J., dissenting).
44. Sager, *supra* note 38, at 1423–24 (footnote omitted).
45. *Id.* at 1424.
46. 48 Ohio St. 2d 47, 48, 356 N.E.2d 499, 500 (1976) (per curiam).
47. 433 U.S. 562 (1977), *rev'g* 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *on remand,* 54 Ohio St. 2d 286, 376 N.E.2d 582 (1978) (per curiam).
48. For the innovative common-law aspects of this case, see Comment, *Tort Law: Appropriation of a Performer's Act by the News Media—Is It Privileged?* 16 WASHBURN L.J. 786 (1977).
49. 47 Ohio St. 2d 224, 233–34, 351 N.E.2d 454, 460–61 (1976).
50. 433 U.S. 562, 575 (1977).

relied on federal grounds, and that even if it had not, the Supreme Court would have to assume jurisdiction in order to correct the state court's erroneous interpretation of federal case law. Yet in remanding for consideration of the question of restitution to the performer, the Court pointed out that the Ohio court could, under state law, extend protection to the television station beyond that required by the first amendment.[51] Despite this clear invitation, the Ohio Supreme Court remanded the case to the trial court, instructing it to determine whether the Ohio Constitution immunized the station from paying damages.[52] The court's obvious reluctance to take the responsibility for issuing guidelines for consideration of the state constitutional issue prompted Justices Celebrezze, who had dissented in *Zacchini I*, and William Brown to file concurring opinions in which they criticized their colleagues for evading the state law issue.[53]

In a final case, the encouragement to expand state constitutional provisions came not from the highest federal court, but from a lower state court. In *State v. Geraldo*[54] a common pleas court held that use of a warrantless tap with the consent of a police informant violated the defendant's fourth amendment rights. To reach this conclusion the court rejected the precedent of *United States v. White,* which held that since there is no legitimate expectation of privacy in telephone conversations with police agents or informers there can be no fourth amendment violation when police monitor single-party consent calls,[55] and relied instead on Ohio statutory and common law that prohibits telephone taps and recognizes an invasion of privacy tort for its violation.[56] But because Ohio had no exclusionary rule[57] for police violation of state law,[58] it was necessary, to reach the desired judicial outcome, to combine state law with federal constitutional principles. Federal law, said the trial judge, "is not the sole source from which an individual's expectation of privacy may be 'legitimated' . . . . [I]t is necessary to look to state law when analyzing the legitimacy of an individual's expectation of privacy."[59] Put differently, although the United States Supreme Court in *Katz v. United States*[60] provided the standard for interpreting the fourth amendment, Ohio law provided the basis for determining that a telephone tap violated a reasonable expectation of privacy.

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51. *Id.* at 577–79.

52. 54 Ohio St. 2d 286, 288, 376 N.E.2d 582, 583 (1978) (per curiam).

53. *Id.* at 288, 376 N.E.2d at 584 (Celebrezze, J., concurring); *id.* at 291, 376 N.E.2d at 585 (W. Brown, J., concurring).

54. No. CR 78-7059A (Lucas County C.P. Oct. 18, 1979) (order suppressing evidence), *rev'd,* No. L-79-303 (Ohio Ct. App. Oct. 3, 1980), *aff'd,* 68 Ohio St. 2d 120, 429 N.E.2d 141 (1981), *cert. denied,* 456 U.S. 962 (1982).

55. 401 U.S. 745, 751 (1971).

56. OHIO REV. CODE ANN. § 4931.28 (Page 1977); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963); LeCrone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961).

57. State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936).

58. *See* City of Cincinnati v. Alexander, 54 Ohio St. 2d 248, 255–56 n.6, 375 N.E.2d 1241, 1246 n.6 (1978).

59. State v. Geraldo, No. CR 78-7059A, slip op. at 3 (Lucas County C.P. Oct. 18, 1979), *quoted in* Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law,* 16 HARV. C.R.-C.L. L. REV. 1, 15 (1981).

60. 389 U.S. 347 (1967).

Although an Ohio Court of Appeals reversed, a dissenting judge pointed out that the Ohio General Assembly had failed to adopt legislation authorizing consent taps, thereby indicating that it intended to provide "greater protection . . . under state law than the federal government does under federal law."[61] *Geraldo,* then, came to the Ohio Supreme Court after judges on two lower courts had, with great clarity, pointed out the applicablity of state law to its resolution. Nevertheless, the Ohio Supreme Court, relying on *White,* upheld the legality of the tap. Although it acknowledged the United States Supreme Court's invitation to state courts in *White* and in *Oregon v. Hass*[62] to grant rights broader than those guaranteed under the federal constitution, the court expressed its disinclination "to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment."[63]

III. Explaining the Failure of the New Judicial Federalism

A. *The Ohio Supreme Court*

Roberts, Madison, Eastlake, Zacchini, and *Geraldo* exemplify the failure of the new judicial federalism, for in each the Ohio Supreme Court ignored opportunities to follow the lead of other courts in developing state constitutional law. For that matter, *Gallagher* should also be included in the list; for even when the ultimate result was an expansion of defendants' rights under state law, the Ohio Supreme Court continued to insist that its decision comported with federal precedent. Whatever the merits of the individual decisions, together they point to the Ohio court's reluctance to consider state law as an independent source of rights and, concomitantly, a reluctance to engage in a particular and historically unique form of policymaking.

To understand the course that the new judicial federalism has thus far taken in Ohio, one must look first to the Ohio Supreme Court's own traditions, practices, and attitudes, and to the legal and political environment in which it operates. A court's receptivity to new opportunities for policymaking frequently parallels its response to previous policymaking opportunities, which response is itself influenced by the court's perception of its function in the state political system. In other words, factors internal to the state and the court, just as much as the actions of the United States Supreme Court, determine the contours of judicial federalism. Certainly, if one compares the Ohio Supreme Court's past approach to civil liberties, and to policymaking more generally, with its response to the new judicial federalism, the consistencies are unmistakable.

One constant element is the Ohio court's approach to cases, which generally has not been conducive to thoughtful policy development. Even when dealing with com-

61. State v. Geraldo, No. L-79-303, slip op. at 466 (Ohio Ct. App. Oct. 3, 1980), *quoted in* Walinski & Tucker, *supra* note 59, at 19 n.68.

62. 420 U.S. 714, 719 (1975).

63. State v. Geraldo, 68 Ohio St. 2d 120, 125, 429 N.E.2d 141, 145 (1981).

plex legal issues, the court has the reputation of substituting speed for thoroughness of consideration. It characteristically announces its decisions in brief opinions issued shortly after oral argument, relying heavily on its own precedent and paying little attention to legal treatises, law reviews, social facts, or legal developments outside the state.[64] References to rulings from other jurisdictions are peremptory and provide little indication of their relevance to the case at hand. Moreover, the comparative frequency of dissent on the Ohio court, which has remained stable over time,[65] when considered in conjunction with the rapidity of the court's decisions, suggests little concern with collegial deliberation or the development of common perspectives on issues.

A second common element is the Ohio court's overall orientation toward judicial initiation of policy change. Although in the past few years its outlook has been transformed from a body reflecting "basically Republican, conservative . . . and rural values [to one which is] Democratic, pro-labor, and highly urban,"[66] in recent decades the Ohio court has largely abjured an active policy role. Thus, although constitutional provisions grant the court considerable discretion in choosing the cases it will hear, "[t]here has never been a clear understanding of what standards the Court does or should apply,"[67] and the court has used this lack of clarity to avoid ruling on controversial issues. As a result, several important constitutional cases have gone directly from intermediate courts of appeals to the United States Supreme Court after the Ohio Supreme Court denied review for want of a "substantial constitutional question."[68] Furthermore, in the cases it has heard, the court often has been unwilling to follow the pioneering decisions of other courts. In *State v. Thomas,*[69] for example, the Ohio Supreme Court offhandedly rejected the admission of expert testimony on

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64. *See* T. MARVELL, APPELLATE COURTS AND LAWYERS 17, 98, 114–15, 187, 192 (1978); Archibald, *Stare Decisis and the Ohio Supreme Court,* 9 W. RES. L. REV. 23 (1957). Commentary on these tendencies is illustrative.

> The noticeably short opinion of the Supreme Court of Ohio [in two defendants' rights cases] reveals a lack of analysis of the current and controversial issue concerning the introduction of mug shots into evidence on direct examination. . . .
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> Furthermore, the court's opinion lacked development of the issue of whether the new rule of criminal procedure [announced previously] should be applied retroactively. . . . [T]he court's opinion will do little to aid the future development of Ohio law on the issue of retroactive application of the new rules of criminal procedure.

State v. Evans: *Mug Shots and Retroactivity, Ohio Supreme Court Review,* 1 OHIO N.U.L. REV. 179, 187 (1973). Other commentary has referred to "superficial treatment of the administrative/legislative issue" in zoning decisions. 51 U. CIN. L. REV. 149, 160 n.94 (1982).

65. Glick & Pruet, Conflict and Consensus in State Supreme Courts: Historical Change and Contemporary Behavior 4 (Sept. 2–5, 1982) (unpublished paper delivered at the 1982 American Political Science Association Annual Meeting).

66. Confidential letter to Mary Cornelia Porter (May 24, 1983) (discussing decisions of the Ohio Supreme Court). Recent press commentary has focused on the Court's "populist tendencies" marked by decisions which "side with the little guy or gal" against government and business. Chief Justice Celebrezze is quoted as saying, "If I had to characterize the nature of the Ohio Supreme Court, I would definitely consider it a people's court." Sharkey, *Celebrezze Is Supreme at the Court,* Clev. Plain Dealer, Aug. 28, 1983, at 25-A, 29-A. For an illustrative ruling, see Oliver v. Kaiser Health Found., 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

67. Jacobs, *The Supreme Court of Ohio, 1969 Term,* 30 OHIO ST. L.J. 626, 632 (1969).

68. Among these cases were Moore v. City of East Cleveland, 431 U.S. 494 (1977), Brandenberg v. Ohio, 395 U.S. 444 (1969), and Terry v. Ohio, 392 U.S. 1 (1968).

69. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

the battered woman syndrome as a defense in a homicide case, although twenty states now permit its introduction.[70] This has been true even in common-law adjudication, an area in which courts have traditionally engaged in policymaking. The Ohio Supreme Court's response to the post-World War II revolution in tort law,[71] for example, has been hesitant and, for the most part, the despair of commentators.[72] Finally, the Ohio court has gone out of its way to avoid conflict with the reigning political forces in the state. It has tended to defer to the state legislature; for example, it sustained the state's school finance law against state constitutional challenge[73] and upheld a post-*Furman*[74] death penalty statute despite its obvious constitutional defects.[75] The Ohio court has been unusually solicitous of the political processes and interests to which the justices owe their positions—judicial candidates run in the regular partisan primaries and are elected on nonpartisan ballots.[76]

A third common element has been the Ohio Supreme Court's approach to civil liberties issues. Prior to the mid-1960's the Ohio court, like most high courts, heard few civil liberties cases. Except for a smattering of first amendment claims, mostly

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70. *See* Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980); Case Comment, State v. Thomas: *The First Blow to Battered Women?*, 43 OHIO ST. L.J. 491 (1982). It must be added, however, that like all courts, the Ohio Supreme Court has not always run true to form. At times it has followed national trends and innovative United States Supreme Court rulings on family law. *In re* Byrd, 66 Ohio St. 2d 334, 421 N.E.2d 1284 (1981), for example, represented a significant departure from previous Ohio law dealing with the rights of unwed fathers. For similarly innovative rulings concerning the rights of the illegitimate and men faced with alimony payments, see Case Note, *Bastardy Proceedings—The Expansion of the Rights of Illegitimates*—Franklin v. Julian, 30 Ohio St. 2d 228, 283 N.E.2d 813 (1972), 34 OHIO ST. L.J. 428 (1973); Cherry v. Cherry, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981).

71. For discussions of the tort law revolution, see R. KEETON, VENTURING TO DO JUSTICE (1969); Baum & Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS 83; Canon & Baum, *supra* note 10, at 978.

72. For charitable immunity, see Roheffer, *Charitable Immunity in Ohio: Time for a Change*, 2 OHIO N.U.L. REV. 33 (1974); for strict products liability, see Comment, *The Coming of Age of Strict Products Liability in Ohio*, 39 OHIO ST. L.J. 586 (1978); for sovereign immunity, see *We're Sorry Your Child Is Dead. . . . But You Can't Sue the State*, 3 OHIO N.U. INTRA. L. REV. 29 (1973), and Note, *Governmental Immunity in Ohio: Common Law Doctrine or Constitutional Prohibition*, 3 CAP. U.L. REV. 134 (1974); for comparative negligence, see Comment, *Judicial Adoption of Comparative Negligence in Ohio*, 44 U. CIN. L. REV. 811 (1975); for interspousal immunity, see 40 OHIO ST. L.J. 771 (1979).

More recent developments, however, indicate a far less cautious approach. Shroades v. Rental Homes, Inc., 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981) (landlords are liable for injuries proximately caused by their failure to fulfill statutory duties to maintain the demised premises), overruled precedent established the previous year in Thrash v. Hill, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980) (per curiam). The long-established doctrine of immunity for municipalities acting in a governmental capacity was precipitously abrogated in Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982). *See also* Enghauser Mfg. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (despite *Haverlack's* sweeping language, sovereign immunity still covers a municipal corporation's acts or omissions involving the exercise of a legislative or judicial function, or of an executive or planning function entailing a high degree of official judgment or discretion). In Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983), the Ohio Supreme Court overruled 75-year-old precedent and declared negligent infliction of serious emotional distress without a contemporaneous physical injury actionable. *See also* Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983). Tort law activism of this sort has been attributed to political motivations. *See* Appleson, *'Resign-to-Run' Canon Faces Test in Ohio*, 68 A.B.A. J. 535 (1982), discussing, inter alia, Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) (employee's pursuit of common-law remedies against his employer for an intentional tort not inconsistent with workers' compensation system). For another case overhauling Ohio workers' compensation law, see Littlefield v. Pillsbury Co., 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983) (following California precedent, court rules that injured employee is entitled to benefits when the employment creates a special hazard from which the injuries result).

73. Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1014 (1980).

74. Furman v. Georgia, 408 U.S. 238 (1972), precipitated the change in state death penalty statutes.

75. State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062, *rev'd as to death penalty statute*, 438 U.S. 586 (1976).

76. K. Barber, Nonpartisan Ballots, *supra* note 7.

involving convictions obtained under obscenity statutes,[77] the court's constitutional docket was devoted to challenges to such governmental actions as zoning regulations, tax assessments, administrative orders, and the taking of private property. When the court did address civil liberties claims, it was generally unsympathetic. In the notorious Sam Sheppard murder case,[78] for example, it acknowledged that the "atmosphere of a 'Roman holiday'"[79] surrounded the pretrial and trial proceedings, but nonetheless concluded that the judge's willingness to permit highly questionable activities by the press, as well as others, had not denied Dr. Sheppard a fair trial.[80] In another case the Ohio court turned a deaf ear, despite prodding from the United States Supreme Court, to due process claims of witnesses bullied by a legislative committee investigating subversive activities.[81]

When, in the early 1960's, the Warren Court began to issue a series of broad innovative decisions affecting the administration of justice in the states, the Ohio Supreme Court's response was largely negative. Chief Justice Kingsley Taft stated his opposition to *Mapp v. Ohio*[82] in off-the-bench writings, predicting that the exclusionary rule would undermine public confidence in the law.[83] And although most state supreme courts readily followed the 1963 mandate of *Gideon v. Wainright,*[84] the Ohio court initially sought to circumscribe its effects. As one commentator noted, by "restricting habeas corpus writs, by not requiring magistrates to inquire whether defendants want, need, or can afford counsel, and by allowing waiver of the right to counsel to be presumed, the Ohio Supreme Court has abdicated its responsibility to protect constitutional rights."[85] The Ohio court's initial response to *Miranda v. Arizona*[86] demonstrated a further lack of sympathy for the aims of the Warren Court.

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77. A prime example is State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960), *rev'd,* 367 U.S. 643 (1961). It should be noted that prior to the adoption of the 1969 Modern Courts Amendment, the Ohio Constitution provided that no appellate court ruling could be overturned without the concurrence of six of the seven high court justices, the "all but one rule." In *Mapp* four justices would have reversed the conviction on the grounds that the statute, which prohibited mere "knowing possession" of obscene materials and under which Mapp was convicted, violated the first amendment to the federal constitution. Four members of the United States Supreme Court also found the first amendment claim to be compelling. *See* 367 U.S. 643, 672 (Stewart, J., mem.); *id.* at 673 (Harlan, J., dissenting).

78. State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied,* 352 U.S. 955 (1956). In a later proceeding the United States Supreme Court ordered that a writ of habeas corpus be issued on the ground that publicity denied Sheppard a fair trial. Sheppard v. Maxwell, 384 U.S. 333 (1966).

79. 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956).

80. *Id.* at 301, 135 N.E.2d at 346.

81. State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104, *vacated for reconsideration in light of recent decisions,* 354 U.S. 929 (1956), *on remand,* 167 Ohio St. 295, 147 N.E.2d 847 (1958) (per curiam), *aff'd in part, rev'd in part sub nom.* Raley v. Ohio, 360 U.S. 423 (1959). As Justice Brennan noted, "[T]o sustain the judgment of the Ohio Supreme Court . . . would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." 360 U.S. 423, 438 (1959).

82. 367 U.S. 643 (1961).

83. Taft, Book Review, 42 NOTRE DAME LAW. 589 (1967); Taft, *Protecting the Public from* Mapp v. Ohio *Without Amending the Constitution,* 50 A.B.A. J. 815 (1964).

84. 372 U.S. 335 (1963). For a discussion of reactions to *Gideon,* see S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT 149–51 (1970).

85. Recent Development, *The Right to Counsel Under the Sixth and Fourteenth Amendments,* 24 OHIO ST. L.J. 435, 446 (1964), referring, inter alia, to Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1962) (per curiam), *vacated and remanded for reconsideration in light of* Gideon, 372 U.S. 781 (1963), *on remand,* 175 Ohio St. 46, 191 N.E.2d 727 (1963) (per curiam), *rev'd sub nom.* Doughty v. Maxwell, 376 U.S. 202 (1964).

86. 384 U.S. 436 (1966).

In *State v. Edgell*[87] it upheld a conviction although the defendant's repeated requests for counsel had been ignored. In several other cases the court showed an unusual willingness to accept claims that confessions were voluntary and that defendants had waived their rights,[88] leading one commentator to conclude that "if a defendant's confession has been induced by threats or promises, such as to make it involuntary according to current United States Supreme Court standards, that defendant does stand a better chance of having his confession held involuntary by a federal court than by the courts of Ohio."[89]

This is not to say that the Ohio Supreme Court consistently ignored, distinguished, or circumvented directives from the United States Supreme Court; no state supreme court can do that. Thus, in 1964 the court followed *Mapp* in excluding evidence in *State v. Bernius,*[90] and in *State v. Tymcio*[91] it adhered to the spirit of *Gideon,* holding that the criterion for determining eligibility for state-provided counsel was not "whether the accused ought to be able to employ counsel, but whether he is in fact able to do so."[92] Over time it also tempered its distaste for *Miranda,* establishing precise guidelines for police to follow in determining whether defendants had waived their rights,[93] and refusing the implication of a waiver of the right to counsel, even though the facts of the case might have supported the state's contention.[94] On the other hand, it did anticipate the Burger Court's erosion in *Harris v. New York*[95] of the *Miranda* protections, ruling two years prior to *Harris* that although previous inconsistent statements obtained in violation of *Miranda* were inadmissible, they could be used by the prosecutor to impeach the defendant's trial testimony because the privilege against self-incrimination does not permit the accused "to lie with impunity once he elects to take the stand to testify."[96]

There emerges from this survey the picture of a court that is neither an innovator nor an enthusiastic emulator, deferential toward other branches of state government, and anxious to avoid controversy. The court not only has failed to develop a body of state civil liberties law but has had little experience in interpreting the state constitution. The Ohio Supreme Court's record under the new judicial federalism, with the

87. 30 Ohio St. 2d 103, 283 N.E.2d 145 (1972).

88. *See* Swayman, State v. Wellman: *"Intelligent" and "Knowing" Waiver of Right to Counsel,* 2 OHIO N.U.L. REV. 53, 57–58 (1974).

89. Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?,* 10 AKRON L. REV. 261, 280 (1976).

90. 177 Ohio St. 155, 203 N.E.2d 241 (1964).

91. 42 Ohio St. 2d 39, 325 N.E.2d 556 (1975).

92. *Id.* at 45, 325 N.E.2d at 560.

93. State v. Jones, 37 Ohio St. 2d 21, 26–27, 306 N.E.2d 409, 412 (1974).

94. State v. Wellman, 37 Ohio St. 2d 162, 309 N.E.2d 915 (1974), discussed in Swayman, *supra* note 88.

95. 401 U.S. 222 (1971).

96. State v. Butler, 19 Ohio St. 2d 55, 60, 249 N.E.2d 818, 821 (1969). In Harris v. New York, Chief Justice Burger virtually echoed the Ohio Supreme Court: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense . . . ." 401 U.S. 222, 226 (1971). Justice Brennan, dissenting, noted that six federal appellate courts and fourteen state appellate courts did not distinguish between direct examination and impeachment, while only three appellate courts, including the Ohio Supreme Court, did so distinguish. *Id.* at 231 (Brennan, J., dissenting).

possible exception of the initial decision in *Eastlake,* is consistent with this picture. When given an alternative in *Geraldo* to following a Burger Court modification of the Warren Court principles developed in *White* and *Katz,* the court sustained governmental practice and refused to consider the novel legal arguments presented in the litigation. When its decisions expanded individual liberties and social rights against governmental action and plebiscitarian democracy, as in *Gallagher, Roberts,* and *Eastlake,* the Ohio court made clear that federal precedent compelled the outcomes. When, as in *Zacchini,* the threat to freedom of the press came from a private lawsuit, much as in libel cases, the court's posture was the same. When the United States Supreme Court ruled on appeal that federal precedent did not dictate the decisions reached by the court in *Roberts, Eastlake,* and *Zacchini,* the Ohio court retreated and either upheld governmental practices and the majority will, as in *Roberts* and *Eastlake,* or left further legal developments to other courts, as in *Zacchini.* Only in *Gallagher* did the Ohio Supreme Court reaffirm a pro-rights decision following Supreme Court review; yet what distinguished this case is that the Ohio court was not reversed and that it claimed its decision based on the state constitution was mandated by the federal constitution as well.

B. *The United States Supreme Court*

The successful practice of the new judicial federalism has, until recently, been thought to depend on the willingness of state courts to exercise options long available to them. The United States Supreme Court's encouragement, approval, or at least tolerance of state court activism has been presumed; and the Court's complaints about its workload might indicate that it would be only too pleased to leave the business of protecting American freedoms, as long as minimal federal standards were observed, to state judiciaries.[97] However, as some state high courts began to take the United States Supreme Court at its word, the Court in turn began to show considerable uneasiness about the trend in state court decisions.

This uneasiness has been reflected most clearly in the Court's tendency to remand state rulings based on federal as well as state constitutional provisions, as in *Gallagher,* those that employ federal precedent to buttress state law, as in *Zacchini,* or those that do not unambiguously spell out the grounds for decision.[98] These remands can be justified, theoretically at least, on the grounds that to meet the stipulations in *Murdock v. City of Memphis,*[99] the state ground must be "adequate," that is, based on the state constitution or well-established state law or policy, and "independent" of federal law. The state ground, in other words, may not provide the means of evading the jurisdiction of the United States Supreme Court, nor may it be

97. R. Welsh, *supra* note 1, at 29.

98. Justice Stevens would have remanded *Zacchini* for this reason. 433 U.S. 562, 583 (1977) (Stevens, J., dissenting).

99. 87 U.S. (20 Wall.) 590 (1875).

employed to substitute a state court interpretation of the federal constitution for that of the federal courts. Of course, the state ground must also comport with federal constitutional principles.

The difficulty this poses in terms of the new judicial federalism is that state court rulings are often mixtures of state and federal law. This "intertwining" is particularly common when "the state court sees its state law result to be concordant with or encouraged by its reading of federal law,'[100] as in *Gallagher* and *Zacchini*, and is appropriate "when the right asserted lies only slightly beyond the boundaries of federal protection,"[101] as in *Gallagher*. Moreover, this reactive reasoning is almost unavoidable for the very good reason that civil rights and liberties have for so long been guaranteed by federal court interpretations of the federal constitution. As Robert Welsh has observed, "[W]hen state judges turned their attention to their own charter, it was only natural for them to look to federal precedents as a way to invigorate their long dormant state provisions."[102]

In *Gallagher* the Ohio Supreme Court stated that its ruling was mandated by state and federal constitutional guarantees. Although the court did not explain how the state protection differed from the federal and on remand held that it believed the federal standard was as strict as the state standard, its reference to the state constitution and its concern for the facts of the case were equally unambiguous. In-custody interrogation by a parole officer, to whom, in the nature of things, the defendant would have been subservient, is qualitatively different from interrogation by police. "Hence, when the court concluded that 'testimony as to utterances made by an accused to his parole officer is inadmissible at trial,' could there really be any doubt that the decision rested on an independent violation of the state constitution?"[103] The Ohio Supreme Court had extended *Miranda* principles, since no others were available, to a situation unique to Ohio. As dissenting Justices Stewart, Marshall, and Blackmun pointed out, there was no reason for the remand and no reason for the United States Supreme Court not to accept the Ohio court's word that *Gallagher* was grounded in state law.

Even if technically correct, the *Gallagher* remand was hardly in keeping with the United States Supreme Court's purported enthusiasm for state court reliance on state law. Such a remand clearly signalled to state courts that their attempts to construe state constitutions would be accepted if they were willing to reiterate the state constitutional ground, which, in essence, is all that occurred in *Gallagher*. This approach has been decried by Justices Stevens and Marshall as "presumptuous—if not paternalistic."[104]

100. *State Constitutional Rights, supra* note 1, at 1340 n.44.
101. *Id.* at 1363.
102. R. Welsh, *supra*, note 1, at 22.
103. *Id.* at 20 (quoting State v. Gallagher, 38 Ohio St. 2d 291, 297, 313 N.E.2d 396, 400 (1974)).
104. South Dakota v. Neville, 103 S. Ct. 916, 925 (1983) (Stevens, J., dissenting).

> No matter how eloquent and persuasive our analysis of the Federal Constitution may be, we cannot simply *presume* that the highest court of a sovereign state will modify its interpretation of its own law whenever we interpret comparable federal law differently. Even when a state tribunal misconceives federal law, this Court cannot vacate its judgment merely to give it an unsolicited opportunity to re-analyze its own law. If a state court judgment is premised on an adequate state ground, *that ground must be presumed to be independent unless the state court suggests otherwise.*[105]

One commentator has suggested that the change in the Supreme Court's attitude toward state court creation of civil liberties law is attributable to the Court's disapproval of rulings affording extensive protections to individual liberties.[106] At least some support for this assertion is provided by Chief Justice Burger's recent concurring opinion in *Florida v. Casal*,[107] in which he pointedly reminded state electorates that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state . . . have the power to amend state law to ensure rational law enforcement."[108] Further, it may be that the Court feels a need to reassert its authority in the face of the exercise of state court autonomy and leadership.[109] But whatever the reason, the effect of the Court's actions is predictable. The high court of Ohio, unlike that of California, Michigan, New Jersey, or Oregon,[110] is neither inclined, nor apparently equipped, to strike out and hold its own. Because the Ohio court needs help and encouragement, the actions of the United States Supreme Court can be particularly important. Permitting *Gallagher* to go unquestioned, expressly urging consideration of the state constitution in the *Eastlake* remand, or following Justice Stevens' *Zacchini* position, rather than lecturing the Ohio Supreme Court about its misapplication of federal precedent, would have neither compromised *Murdock* nor undermined federal law. Instead, the Court chose to exercise its power in a way that discouraged initiative and imagination by a court that was never particularly enterprising in the first place. One can, of course, never claim with certainty that the Ohio Supreme Court's experiences in *Gallagher, East-*

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105. *Id.* at 925–26 (emphasis in last sentence added).

106. R. Welsh, *supra* note 1, at 19, 25.

107. 103 S. Ct. 3100 (1983) (per curiam).

108. *Id.* at 3102 (Burger, C.J., concurring).

109. Collins, *High Court Reasserts Its Authority*, Nat'l L.J., May 16, 1983, at 13.

110. Justice Hans Linde of the Oregon Supreme Court has been a major proponent of the new judicial federalism; *see* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Linde, *Without "Due Process:" Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). For an example of the influence of his views on the jurisprudence of the Oregon court, see Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981). Overviews of state constitutional developments that highlight the activities of the California, Michigan, and New Jersey Supreme Courts include: Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 880–83 (1975); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 431–51 (1974); *State Constitutional Rights*, *supra* note 1. An initial attempt to identify courts that have most frequently availed themselves of the opportunities provided by the new judicial federalism is found in Tarr & Porter, *Gender Equality*, *supra* note 11, at 926 n.50.

lake, and *Zacchini* influenced the ultimate outcome in *Roberts*, or the *Madison* and *Geraldo* holdings, but it seems logical to surmise that a cause-and-effect relationship exists. Justices Stevens and Marshall would probably agree.

IV. CONCLUSIONS

This Article, which has focused on the response of the Ohio Supreme Court to the new judicial federalism, has implications for a broader understanding of state supreme court policymaking. First and foremost, the analysis of one aspect of the Ohio Supreme Court's policymaking has emphasized the need to consider the actions of state supreme courts in the context of their legal and political milieus. While legal developments in other states and United States Supreme Court rulings unquestionably affect a state high court, its response to such external factors depends on internal factors such as the court's legal traditions, its position vis-à-vis other political institutions in the state, and the perception of its role as a policymaker. This means that research should incorporate an historical focus, addressing the court's reaction to policymaking opportunities over time, and should seek to relate judicial activity to political and social developments within the state. It also suggests that research on particular state courts may yield greater insights than broad comparative studies.

Second, the analysis in this Article suggests that the political and legal context in which state supreme courts operate may often be hostile to judicial policy initiatives. Those heralding the advent of the new judicial federalism have at times seemed to assume that the mere announcement of the opportunity to develop state constitutional law would promote a resurgence of state court creativity. Yet an unkind observer might well conclude that there have been more articles celebrating the emergence of the new judicial federalism than decisions exemplifying it. In any event, the record of the new judicial federalism has—or should have—tempered this initial enthusiasm. Moreover, other data likewise advise caution. In separate sets of interviews with justices on eight state supreme courts, Henry Glick and John Wold both found that the judges overwhelmingly viewed themselves as "law interpreters," rather than "lawmakers."[111] Insofar as these self-perceptions affect behavior—and it is noteworthy that only the members of the activist New Jersey Supreme Court consistently identified themselves as "lawmakers"—they support the expectation that state courts will only reluctantly initiate policy change. In addition, both studies on judicial impact and data on case outcomes offer some support for an understanding of state supreme courts as defenders of state policies and practices.[112] The point is not that all state supreme courts are consistently passive, for that is not only demonstrably wrong

111. H. GLICK, SUPREME COURTS IN STATE POLITICS 41, table 2–3 (1971); Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239, 239–41 (1974). *See also* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124–25 (1977).

112. G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977); Atkins & Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); Tarr, *State Supreme Courts and the U.S. Supreme Court: The Problem of Compliance*, in STATE SUPREME COURTS 155 (1982).

but also creates the false impressions that all state supreme courts follow a similar pattern. Nonetheless, researchers' focus on activist courts has created a distorted picture of state supreme court activity.

Third, if many state supreme courts are, for whatever reasons, reluctant to initiate policy changes, it follows that they are particularly susceptible to expressions of disapproval, either express or tacit, from the United States Supreme Court. Here the example of the Ohio Supreme Court may well be generalizable, and, thus, the Supreme Court's recent aggressive oversight of state supreme court initiatives under state constitutions assumes a particular importance. If the Court continues to demand detailed explanations from state supreme courts of the bases for their decisions, a stifling of the hesitant initial efforts of many courts to resuscitate long-forgotten constitutional protections is likely to result. The survival of the new judicial federalism may not depend on a continuing receptivity of the Supreme Court to state experimentation—the California and New Jersey courts, to name but two, are likely to maintain their innovative stances regardless of the Court's posture—but the extent and degree of state court reliance on state constitutions may well be affected.

Finally, this Article's emphasis on the influence of Ohio's political and legal culture on its supreme court's receptivity to the new judicial federalism might seem to suggest that state courts over time develop stable orientations toward judicial activism and restraint. Although this is generally correct, the reality is somewhat more complex. Some state supreme courts, for example, although reluctant to develop state constitutional law, have been quite innovative in their common-law rulings.[113] It follows that the legal and political culture of a state may support some kinds of judicial policymaking but not others. Furthermore, Canon and Baum's comparison of tort law innovation by state supreme courts before and after World War II showed considerable variation in particular courts' willingness to innovate.[114] Although this variation can be attributed in part to litigants' willingness to bring issues before the courts, the data also point to changes in orientations toward judicial policy initiation.[115] These studies suggest that although approaches to judicial policymaking are stable, they are not static. Rather, they can and do respond to changes in the legal and political culture of the state. Finally, as the Ohio Supreme Court's initial *Eastlake* ruling demonstrates, on occasion even relatively passive courts may take an active part in policymaking. When these decisions appear, they direct attention to the particular factors that might have promoted a divergence from the court's general pattern. Yet, it is the backdrop of a general pattern that makes decisions like the initial *Eastlake* decision stand out. In sum, this observation leads back to the starting point of this Article: state supreme courts are very much the creatures of the political systems in which they operate.

113. *See* R. KEETON, *supra* note 71; Baum & Canon, *supra* note 71; Tarr & Porter, *Gender Equality*, *supra* note 11.

114. Canon & Baum, *supra* note 10.

115. For a recent study of the transformation in the Alabama Supreme Court's orientation toward judicial policymaking, see M. Porter & G. Tarr, Judicial Federalism and the Alabama Supreme Court (Sept. 2–5, 1982) (unpublished paper delivered at the 1982 American Political Science Association Annual Meeting).

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