

Cleveland State University
EngagedScholarship@CSU



Cleveland-Marshall
College of Law Library

Cleveland State Law Review

Law Journals


2004

State Constitutional Law, New Judicial Federalism, and the Rehnquist Court

Shirley S. Abrahamson

Chief Justice, Wisconsin Supreme Court

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 Clev. St. L. Rev. 339 (2004)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol51/iss3/4>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

STATE CONSTITUTIONAL LAW, NEW JUDICIAL FEDERALISM, AND THE REHNQUIST COURT

SHIRLEY S. ABRAHAMSON¹

Dean Steinglass, faculty, students, fellow panelists, guests. Ohio, as you all know, was admitted to the Union on March 1, 1803.² It was the seventeenth state.³ The state is celebrating this 200th anniversary with a yearlong series of activities honoring the state's rich history: bicentennial bells, historical markers, celebration of Ohio's role in the birth and development of aviation and aerospace, Ohio's Tall Ship Challenge, Tall Stacks on the Ohio River, and a bicentennial stamp.

The Ohio legal system also celebrates the bicentennial. It celebrates in quiet contemplation of its state constitutional history.

The first Ohio constitution came with statehood in 1803.⁴ That constitution was then replaced by a new constitution in 1851.⁵ Since then, the Ohio Constitution has been amended 153 times, averaging nearly one amendment per year.⁶

As a guest at this celebration of the bicentennial anniversary of the Ohio Constitution, I was inspired to learn a little bit about Ohio.

Ohio, I discovered, was the first state carved out of the Northwest Territory.⁷ It was an early gateway to the wild, untamed western area of the United States⁸—a

¹Chief Justice, Wisconsin Supreme Court. The author wishes to thank Kevin Francis O'Neill, Associate Professor of Law, Cleveland-Marshall College of Law, and Attorney Ingrid A. Nelson, judicial assistant to Chief Justice Abrahamson, for their work in preparing this speech for publication.

²GEORGE W. KNEPPER, OHIO AND ITS PEOPLE 92-93 (3d ed. 2003); WILLIAM T. UTTER, THE FRONTIER STATE 1803-1825, at 31(1942); OHIO ALMANAC 14 (Roberta Rivera ed., 1977); 3 EMILIUS O. RANDALL & DANIEL J. RYAN, HISTORY OF OHIO 153-54 (1912).

³ENCYCLOPEDIA OF OHIO 66 (Frank H. Gille ed., 1982); OHIO ALMANAC, *supra* note 2, at 14.

⁴The convention that drafted Ohio's first constitution completed its work on November 29, 1802. KNEPPER, *supra* note 2, at 92; 3 RANDALL & RYAN, *supra* note 2, at 141. That constitution went into effect on February 19, 1803, when President Thomas Jefferson signed federal legislation approving it. KNEPPER, *supra* note 2, at 92

⁵KNEPPER, *supra* note 2, at 204-06; ENCYCLOPEDIA OF OHIO, *supra* note 3, at 70; OHIO ALMANAC, *supra* note 2, at 24; EUGENE H. ROSEBOOM & FRANCIS P. WEISENBURGER, A HISTORY OF OHIO 164 (2d ed. 1969).

⁶See Table of Proposed Amendments to Ohio Constitution, OHIO REV. CODE ANN., OHIO CONST. at 587-607 (West 1994 & Supp. 2003) [hereinafter OHIO CONSTITUTIONAL AMENDMENTS].

⁷KNEPPER, *supra* note 2, at 82-93; ENCYCLOPEDIA OF OHIO, *supra* note 3, at 86-87; OHIO ALMANAC, *supra* note 2, at 14; UTTER, *supra* note 2, at 3-31; 3 RANDALL & RYAN, *supra* note 2, at 145-54.

⁸See generally R. DOUGLAS HURT, THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720-1830 (1996); OLIN DEE MORRISON, OHIO, "GATEWAY STATE" (1965); DAVID ELDRIDGE CROUSE, THE OHIO GATEWAY (1938).

reference that included Wisconsin, my home state. Wisconsin may seem to some still part of the untamed west. Earlier this month, the citizens of Wisconsin amended the state constitution to provide people “the right to fish, hunt, trap and take game subject only to reasonable restrictions as prescribed by law.”⁹

A buckeye, I discovered, comes from the many buckeye trees that once covered the hills and plains.¹⁰ The Indians called the tree “buckeye” because the markings on the nut resembled the eye of a buck.¹¹

More on point—and of particular interest to me, a state supreme court justice—I discovered that the citizens of Ohio were long skeptical of the power of the Ohio Supreme Court.¹² In 1807, just a few years after the U.S. Supreme Court decided that it had the power to determine the constitutionality of legislative enactments in *Marbury v. Madison*,¹³ Justice George Tod of the Ohio Supreme Court wrote that the Ohio Supreme Court had the power to declare an Ohio legislative act unconstitutional.¹⁴ He then struck down an act under the state constitution.¹⁵ As a result of the opinion, he faced the threat of impeachment¹⁶ and survived by just one vote in the Senate.¹⁷

In 1912, judicial review was limited by an amendment to the Ohio Constitution that required the vote of six of the seven justices to strike down a state statute as unconstitutional.¹⁸ It was not until 1968 that this amendment was repealed and the

⁹WIS. CONST. art. 1, § 26. The detailed inclusion of such special rights is a common feature of state constitutions. Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1331 (2001).

¹⁰SAM BENVIE, *THE ENCYCLOPEDIA OF NORTH AMERICAN TREES* 39 (2000); THOMAS S. ELIAS, *THE COMPLETE TREES OF NORTH AMERICA* 768 (1980).

¹¹CLARENCE M. WEED, *OUR TREES: HOW TO KNOW THEM* 245 (5th ed. 1936).

¹²See Christopher M. Winter, Comment, *The Ohio Supreme Court Reaffirms Its Right to Declare Statutes Unconstitutional*, 31 RUTGERS L.J. 1468, 1471 (2000).

¹³5 U.S. (1 Cranch) 137 (1803).

¹⁴*Rutherford v. McFaddon* (1807), in ERVIN H. POLLACK, *OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823*, at 71 (1952); *id.* at 87 (Tod, J., concurring) (“legislative acts are subordinate to, and must be tested by, constitutional provisions”). See KNEPPER, *supra* note 2, at 97-98; ROSEBOOM & WEISENBURGER, *supra* note 5, at 73-74; UTTER, *supra* note 2, at 45; 3 RANDALL & RYAN, *supra* note 2, at 155-57; Winter, *supra* note 12, at 1471; Frederick Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. CIN. L. REV. 191, 275 (1939).

¹⁵POLLACK, *supra* note 14, at 86-87 (Tod, J., concurring) (invoking OHIO CONST. of 1802, art. VIII, § 7). See KNEPPER, *supra* note 2, at 97-98; Winter, *supra* note 12, at 1471.

¹⁶POLLACK, *supra* note 14, at 100; KNEPPER, *supra* note 2, at 98; ROSEBOOM & WEISENBURGER, *supra* note 5, at 74; UTTER, *supra* note 2, at 48-49; 3 RANDALL & RYAN, *supra* note 2, at 157-58; Winter, *supra* note 12, at 1471; Woodbridge, *supra* note 14, at 275-76.

¹⁷POLLACK, *supra* note 14, at 102; KNEPPER, *supra* note 2, at 98; UTTER, *supra* note 2, at 51; Winter, *supra* note 12, at 1471; Woodbridge, *supra* note 14, at 276.

¹⁸OHIO CONST. art. IV, § 2 (1912) (“No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges....”). See OHIO CONSTITUTIONAL AMENDMENTS, *supra* note 6, at 590; 1 A HISTORY OF THE COURTS AND

Ohio Supreme Court could once again declare state statutes unconstitutional by a simple majority.¹⁹

The structure of state government and the power of each branch of government are, of course, important issues that are uniquely matters of state constitutional law.²⁰

Which brings me to the topic of this keynote address. I consider it my task this evening to put the Ohio Constitution into the larger context of federal and state constitutionalism, and to lay the groundwork for the heavy lifting that will be done tomorrow when the speakers will focus on trends in Ohio constitutional interpretation and specific issues in Ohio state constitutionalism such as equal protection, separation of powers, tort reform, and education.

Since the first state constitutions were drafted, their importance and development in protecting individual rights and shaping state and local government have ebbed and flowed as views of the U.S. Constitution and federal-state relationships have changed.²¹

Today, I believe, we find ourselves at an interesting crossroads. Over the past few decades, under the banner of new judicial federalism, many state courts have asserted a role for state constitutions in the protection of individual liberties and the resolution of legal disputes.²² This outburst of state constitutional fervor, however, has been met with great criticism from different camps, all believing that the uniformity provided by our federal constitution as interpreted by the U.S. Supreme Court should guide state court decisions and especially state constitutional interpretation.²³ At the same time, the very ability of state courts to decide state constitutional questions is being threatened. The Rehnquist Court has carved out for itself a greater ability to review the decisions of state courts, even on matters of state law.²⁴

I will set the stage for tomorrow's program by discussing the ebb and flow of the importance and development of state constitutions through this country's history. I will then paint a picture of the present and what I see as new interesting times for

LAWYERS OF OHIO 155 (Carrington T. Marshall ed., 1934); Winter, *supra* note 12, at 1472; Woodbridge, *supra* note 14, at 278.

¹⁹See OHIO CONSTITUTIONAL AMENDMENTS, *supra* note 6, at 598; Winter, *supra* note 12, at 1472.

²⁰See Hammons, *supra* note 9, at 1329-30.

²¹See Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 KY. L.J. 1009, 1010-15 (1997-98); Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 726-31 (1991); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144-48 (1985).

²²See 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-1(a) (3d ed. 2000).

²³E.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). See 1 FRIESEN, *supra* note 22, at § 1-3(d) (recounting the criticism directed at state constitutional independence).

²⁴See Marie L. Garibaldi, *The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 70-73 (1998).

state constitutional law. The past thirty years have seen the reemergence of state constitutional law, but this reemergence may be facing an increasingly hostile environment.

I.

Federalism is a slippery word. At the adoption of the U.S. Constitution, the word “federalists” referred to those who favored a strong central government.²⁵ Thereafter, however, the word “federalism” has often been used to mean states’ rights.²⁶ I suppose this shift is appropriate, as the word “federalism” in its most neutral and generic sense refers to the distribution of power between the national government and the states—a distribution of power that is ever shifting.²⁷

The interconnectedness of state and federal constitutional law is, of course, by design. The U.S. Constitution embraced two political entities within one system: a central government and the states.²⁸ The framers of the U.S. Constitution rejected a purely national government, but at the same time recognized that the central government was to be more than a confederation of separate nation states.²⁹ The central government was not to swallow up the states, and the states were not to undermine the national government.³⁰ As James Madison wrote, the U.S. Constitution “is in strictness, neither a national nor a federal Constitution, but a composition of both.”³¹

States and state constitutions predate the federal Constitution.³² The federal Constitution is built on the existence of states, making reference to states over fifty times. On the other hand, to ensure that the laws and constitution of the central government would be fairly and uniformly applied, the framers of the U.S. Constitution included a supremacy clause.³³ Article VI of the Constitution declares that the constitution, laws, and treaties of the United States are the supreme law of the land.³⁴

²⁵See David F. Epstein, *The Case for Ratification: Federalist Constitutional Thought*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 292, 294 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) [hereinafter FRAMING AND RATIFICATION].

²⁶See, e.g., Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 408 (2003).

²⁷ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3 (2d ed. 2002).

²⁸Shirley S. Abrahamson & Diane S. Gutmann, *New Federalism: State Constitutions and State Courts*, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 103, 105-08 (Burke Marshall ed., 1987).

²⁹See Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, in FRAMING AND RATIFICATION, *supra* note 25, at 132.

³⁰*Id.*

³¹THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

³²Leonard W. Levy, *Introduction: American Constitutional History, 1776-1789*, in FRAMING AND RATIFICATION, *supra* note 25, at 1, 1; Rachel E. Fugate, Comment, *The Florida Constitution: Still Champion of Citizens’ Rights?*, 25 FLA. ST. U. L. REV. 87, 89 (1997).

³³Zuckert, *supra* note 29, at 144.

³⁴U.S. CONST. art. VI.

State constitutions generally serve two functions in our federal system. To a large extent, they determine the structure of state government, and they protect individual liberties.³⁵

The state constitution prescribes how the powers of government are distributed among the branches of government and between state and local governments.³⁶ The Ohio Constitution, for example, creates the typical state government structure of an executive branch,³⁷ a bicameral legislature,³⁸ and an elected judiciary.³⁹ The Ohio Constitution, like other state constitutions, restrains legislative power in several ways, such as prohibiting special legislation⁴⁰ and limiting taxing and public financing.⁴¹ The limiting provisions are, to a large extent, in response to deleterious legislative activities and the rise of economic centers of power.

State constitutions, through a bill of rights or declaration of rights, also protect individual liberties, such as freedom of speech, religion, and press, and freedom from unreasonable searches and seizures, against intrusion by state government, and sometimes against action by private persons.⁴²

As you all know, the federal Constitution did not originally have a bill of rights.⁴³ To many of the constitutional convention delegates, the guarantees of individual liberty in each state constitution were sufficient. Because the central government was a government of limited enumerated powers, a bill of rights was considered unnecessary.⁴⁴

The people, however, were not persuaded by this argument during the ratification process. The first session of the first Congress therefore drafted a series of constitutional amendments to the federal Constitution.⁴⁵ Ten of these amendments were approved by the required number of states in 1791 and are now known as the Bill of Rights.⁴⁶

(Interestingly, the framers' arguments against a bill of rights would have fallen on deaf ears today as well. In celebrating the 200th anniversary of the federal

³⁵Hammons, *supra* note 9, at 1329-31.

³⁶*Id.* at 1329-30; Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 211 (2002).

³⁷OHIO CONST. art. III.

³⁸OHIO CONST. art. II.

³⁹OHIO CONST. art. IV

⁴⁰*E.g.*, OHIO CONST. art. XIII, § 1.

⁴¹OHIO CONST. art. XII.

⁴²Hammons, *supra* note 9, at 1331-32. *See, e.g.*, OHIO CONST. art. I.

⁴³Murray Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in FRAMING AND RATIFICATION, *supra* note 25, at 271, 287; Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in FRAMING AND RATIFICATION, *supra* note 25, at 305, 305.

⁴⁴Epstein, *supra* note 25, at 299; Dry, *supra* note 43, at 287-88.

⁴⁵Rutland, *supra* note 43, at 309-15.

⁴⁶*Id.* at 315-16.

Constitution in 1987, citizens were urged to sign a copy of the original constitution. Many would not sign the original constitution because it supported slavery, did not have a bill of rights, and did not guarantee women the right to vote. Very quickly, the sponsors of the celebration added all the amendments, and people very willingly signed the document.)

While the citizens in 1791 were able to get a bill of rights added to the Constitution, the federal Bill of Rights was fairly limited in its protections for well over a century, because it limited only those actions of the federal government.⁴⁷ State actions were to be governed by individual state constitutions, and the federal government did not get involved.⁴⁸

In 1833, for example, the U.S. Supreme Court declared that the Fifth Amendment to the U.S. Constitution, requiring compensation for taking of property, did not protect a person against the acts of the City of Baltimore.⁴⁹

The Civil War and the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—changed the scope of the U.S. Bill of Rights and changed the relationship between the national and state court systems. The Fourteenth Amendment expressly limits states' interference with civil liberties. It prohibits the state from making or enforcing any law that abridges the privileges or immunities of U.S. citizens; that deprives any person of life, liberty, or property without due process of law; or that denies any person within its jurisdiction the equal protection of law.⁵⁰ The last section of the Fourteenth Amendment empowers Congress to enforce the amendment by appropriate legislation.⁵¹

Still, from 1787 to 1925, the Bill of Rights offered individuals little or no protection in their relations with state and local governments.⁵² The state constitutions provided these protections.⁵³ And during this period, the states' records in preserving individual rights were uneven—varying from state to state and from right to right.⁵⁴

Then, in 1925, this division between state and federal constitutional law began to crumble. That year, the U.S. Supreme Court decided *Gitlow v. New York*,⁵⁵ and suggested in dictum that the rights guaranteed by the First Amendment are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment against state government.⁵⁶

Many have argued that it was the failure of the states to provide better protection for individual rights that created a void that the U.S. Supreme Court filled. Others

⁴⁷CHEMERINSKY, *supra* note 27, at 5-6.

⁴⁸Abrahamson & Gutmann, *supra* note 28, at 121.

⁴⁹*Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁵⁰U.S. CONST. amend. XIV, § 1.

⁵¹U.S. CONST. amend. XIV, § 5.

⁵²CHEMERINSKY, *supra* note 27, at 470-79.

⁵³*Id.* at 472; Fugate, *supra* note 32, at 90.

⁵⁴Abrahamson & Gutmann, *supra* note 28, at 121.

⁵⁵268 U.S. 652 (1925).

⁵⁶*Id.* at 666.

have pointed out that the nationalization of individual liberties coincided with technological, economic, and social changes that tended toward nationalization.

Either way, after 1925 the U.S. Supreme Court began a process of incorporating the enumerated guarantees of the first eight amendments into the Fourteenth Amendment,⁵⁷ with the pace accelerating in the Warren Court in the 1960s.⁵⁸ Because many of the first eight amendments deal with the criminal process, the incorporation doctrine involves, to a large extent, but not exclusively, a defendant's criminal procedural rights.⁵⁹ The Court also expanded First Amendment protections, barring states from requiring prayers in public schools⁶⁰ and limiting the extent to which public officials⁶¹ and public figures⁶² could avail themselves of state libel laws.

The incorporation doctrine gave prominence to the U.S. Constitution as a protection against invasions of individual liberties by either the state or national government. State courts were therefore routinely applying federal law in state cases. The federal Constitution was a floor, a minimum, which was in many states above the state constitutional ceiling.⁶³

Under these circumstances, the state bills of rights had little to add to their federal counterpart. The state bills of rights began to lose their significance in state court cases.⁶⁴ Soon, state courts and lawyers forgot to examine their state constitutions, and there was talk that revised state constitutions did not need a bill of rights in the post-incorporation era.⁶⁵ The nationalization of individual rights through the Fourteenth Amendment seemed to have arrested the development of state constitutional law.

II.

In the 1970s came the resurgence of state constitutions with the birth of "new judicial federalism," sometimes referred to as "new federalism."⁶⁶

New judicial federalism refers to state courts' examining their own constitutions to determine individual civil liberties.⁶⁷ The emergence of this "new judicial

⁵⁷CHEMERINSKY, *supra* note 27, at 478-84.

⁵⁸*Id.* at 483.

⁵⁹*Id.*

⁶⁰*Engel v. Vitale*, 370 U.S. 421 (1962).

⁶¹*New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁶²*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

⁶³*Abrahamson & Gutmann*, *supra* note 28, at 123.

⁶⁴Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987) (reporting that during the 1950s and 1960s, "only ten state court decisions relied on state constitutional provisions to protect individual rights").

⁶⁵*Abrahamson & Gutmann*, *supra* note 28, at 124.

⁶⁶*See* 1 FRIESEN, *supra* note 22, at § 1-1(a).

federalism” is generally attributed to U.S. Supreme Court Justice William Brennan and an article he wrote for the Harvard Law Review in 1977.⁶⁸ Justice Brennan urged state courts to look to their own state constitutions and to become a new “font of individual liberties.”⁶⁹ Why? Brennan, and others, saw the Burger Court as retreating from protecting individual rights and as using procedural devices designed to limit federal adjudication of claims against state action.⁷⁰

A state court’s decision to rely on its own constitutional law does not necessitate a particular result in a case. Under the theory of new judicial federalism, a state court may interpret its state constitution in the same way that federal courts have interpreted an analogous federal provision. On the other hand, a state court may, without violating the U.S. Constitution, interpret a state constitution as granting an individual more protection than the federal rights.⁷¹

Since the 1970s, new judicial federalism has been the subject of a raging debate in law reviews and journals and among state court judges. The debate centers on whether state court reliance on the state constitution is a sound process of decision-making.

The proponents of new judicial federalism argue that our federalism is based on the dual concepts of strong states and a strong national government. They argue that states should continue to look to state law to decide state court cases in the post-incorporation era.⁷²

Proponents also argue that even if there were only one correct answer to questions of textual interpretation, the U.S. Supreme Court should not be deemed always to have a monopoly on the correct answer.⁷³ Different courts might reach different conclusions about the meaning of the open textual provisions of a constitution;⁷⁴ each judge should construct the best interpretation of a constitutional

⁶⁷*Id.*; G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism’s First Generation*, 30 VAL. U. L. REV. xiii (1996).

⁶⁸William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁶⁹*Id.* at 491.

⁷⁰*Id.* at 495-98.

⁷¹See Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997); Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984). In construing their own constitutions, state court judges are free to find greater protection for individual liberty than that found by federal judges in the analogous provisions of the U.S. Constitution. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). This is true even where the state and federal constitutions have similar or identical language. *Aladdin’s Castle*, 455 U.S. at 293; *Pruneyard*, 447 U.S. at 81.

⁷²See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065 (1997)

⁷³*Id.* at 1067; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1155 (1993).

⁷⁴Friesen, *supra* note 72, at 1069; Kahn, *supra* note 73, at 1155.

doctrine of which he or she is capable.⁷⁵ State courts needn't shift with changes in the decisions of the U.S. Supreme Court, urge proponents of new federalism.⁷⁶

An advantage of new judicial federalism, according to its proponents, is that a state can be innovative within its own borders without involving the entire nation. State courts have greater latitude in devising remedies that respond to local concerns. Indeed, state judicial review may be said to foster the values of federalism by allowing the nation to profit by using what succeeds in a state and avoiding what fails.⁷⁷

Finally, the proponents urge that when a state court's interpretation of a state constitutional provision differs from the federal courts' interpretation of a similar federal provision, a constructive dialogue on the issue continues among judges, scholars, and the people.⁷⁸

On the other side of this debate is a diverse group of critics. Opponents of new judicial federalism come from many camps, and they object to state court deviation from federal doctrine on several grounds.

Some reject new judicial federalism as not grounded in legal doctrine or principles.⁷⁹ Others reject new judicial federalism as a romantic longing for vibrant local communities, a notion harkening back to the Seventeenth and Eighteenth Centuries.⁸⁰ These opponents urge that the states are not that different from each other, that we are one homogenous nation, and that we therefore require a national bill of rights. The principle of national supremacy entails national uniformity in the interpretation of a right or set of rights, the opponents argue.

Still other critics view new judicial federalism as result-oriented,⁸¹ designed to enlarge the protections afforded to criminal defendants and inimical to law enforcement and prosecutors.⁸²

⁷⁵Friesen, *supra* note 72, at 1069-70; Kahn, *supra* note 73, at 1155-56.

⁷⁶Friesen, *supra* note 72, at 1071; Kahn, *supra* note 73, at 1154-55.

⁷⁷Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2001).

⁷⁸Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97-99 (2000); DiGiovanni, *supra* note 21, at 1022; Garibaldi, *supra* note 24, at 82.

⁷⁹*E.g.*, Gardner, *supra* note 23; Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism"*, 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

⁸⁰*See* Kahn, *supra* note 73, at 1147.

⁸¹*E.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) (voicing concern "that state constitutional law is simply 'available' to be manipulated to negate [U.S.] Supreme Court decisions which are deemed unsatisfactory"); George Deukmejian & Clifford Thompson, *All Sail and No Anchor – Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 1009 (1979) (calling the California Supreme Court "result-oriented" in its interpretation of the state constitution).

⁸²*E.g.*, Nina Morrison, *Curing "Constitutional Amnesia": Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. REV. 880 (1998); James W. Diehm, *New Federalism and*

Another group of critics of new judicial federalism includes civil libertarians. These critics assert that new federalism is a means for the national government to retreat from its role of ensuring civil liberties. They are concerned that it will be harder to persuade fifty state courts than one U.S. Supreme Court of the correctness of their position.

Still others fear that state court judges, especially those who are elected, will be susceptible to local political influences and thus not able to decide the tough individual rights cases without a fear of the reaction of the majority.⁸³ These critics are also concerned that citizens unhappy with judicial decisions will amend state constitutions to bolster the majority's will.⁸⁴ In many states, constitutional amendment is relatively easy to accomplish.⁸⁵

There are also those critics who oppose new judicial federalism as undermining the people's trust and confidence in the U.S. Supreme Court and the Court's moral authority.⁸⁶

Despite the debate, since the 1970s state courts have decided hundreds of cases that involve the interpretation of state bills of rights.⁸⁷ New judicial federalism has given state courts an opportunity to shape their own role in the federal system and to adjust their relationship with the federal courts.

The fundamental puzzle is to determine what the appropriate criteria are for deciding which questions in state and federal constitutional law should be deemed to be a matter of uniform national policy and which ones allow for state differences.

These competing principles of national supremacy and state autonomy have played out differently in the state courts. A state court may, for example, conclude that interpretation of its state constitution should follow the federal Constitution in a particular case or subject area because of its principled belief that national uniformity is a paramount consideration in that area. Thus, some state courts might conclude that uniformity is needed in search and seizure law so that federal and state law enforcement officers and prosecutors may cooperate more easily, while simultaneously deciding to give other rights a uniquely local interpretation.

In contrast, the majority of the justices on the Wisconsin Supreme Court generally adhere to federal precedent to interpret all parallel provisions of the Wisconsin Bill of Rights. Wisconsin's relationship to the federal system can, for the most part, be described as lock step.

New judicial federalism is not an attempt to return to pre-Civil War nullification. The proponents of new judicial federalism do not suggest that state courts be the sole guardians of individual liberty or that the U.S. Supreme Court should cease defining the federal Bill of Rights. Justice Brennan saw new judicial federalism as providing

Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?, 55 MD. L. REV. 223 (1996).

⁸³Garibaldi, *supra* note 24, at 80.

⁸⁴*Id.* at 80-81.

⁸⁵*See* Hammons, *supra* note 9, at 1333-34; Williams, *supra* note 36, at 215-16; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999).

⁸⁶Garibaldi, *supra* note 24, at 77.

⁸⁷*See* 1 FRIESEN, *supra* note 22, at § 1-1(a).

a double source of protection for the rights of the people.⁸⁸ The pull of federal constitutional doctrine is strong, and various interpretive doctrines give deference to the federal interpretation as state courts balance their interpretations of state law with their view of federalism and national supremacy.⁸⁹

III.

And so we arrive in the present: the year 2003 and this conference in particular. I have three observations I would like you to consider.

The first is this: Both the proponents and critics of new judicial federalism should be careful what they wish for.

Debates about new judicial federalism have, to a large part, concentrated on decisions addressing the rights of criminal defendants⁹⁰—partially because of Justice Brennan’s emphasis on civil liberties, partially because the protections for criminal defendants are analogous to those found in the U.S. Constitution, and partially because these cases raise controversial law and order issues. Cases determining the scope of these controversial criminal justice issues, therefore, most clearly raise federalism issues.⁹¹

The next frontier of new judicial federalism relating to individual rights, however, will involve different rights and different amendments. I believe we are at the threshold of a debate on property rights. New judicial federalism may raise the question whether states should give greater property rights and economic rights than those granted under the Fifth Amendment to the U.S. Constitution.⁹²

Will there be the same talk about local needs, national uniformity, political influence of state court judges, trust and confidence in the U.S. Supreme Court, and result-oriented decision-making when state courts have the opportunity to define a taking requiring compensation more broadly than the Supreme Court has? Will proponents and opponents of new judicial federalism change their positions when property rights, rather than criminal defendant rights, gain more protection under state constitutions than under the federal Constitution?

My second observation is this: New judicial federalism’s initial focus on the rights of criminal defendants may have distorted the discussion of state constitutional law by putting undue emphasis on the practical needs for conformity with federal interpretation.⁹³ But many state constitutional provisions protecting individual rights have no federal analogue.⁹⁴ Some state constitutions, for example, guarantee

⁸⁸Brennan, *supra* note 68, at 491.

⁸⁹See Garibaldi, *supra* note 24, at 75-78.

⁹⁰*Id.* at 80.

⁹¹See Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 57 (2001-02).

⁹²*Id.* at 51.

⁹³See, e.g., Morrison, *supra* note 82; Diehm, *supra* note 82.

⁹⁴See Hammons, *supra* note 9, at 1332 (offering examples of state constitutional provisions that have no federal counterpart — an equal rights clause specifying protection for men *and* women, an express right to an interpreter for any non-English speaker who is charged with a crime, a clause giving laborers the right to collective action); 1 FRIESEN, *supra* note 22,

affirmative rights such as the right to education.⁹⁵ The New York Constitution declares: “The aid, care and support of the needy are public concerns and shall be provided by the state . . . in such manner . . . as the legislature may from time to time determine.”⁹⁶ Federal law offers little assistance in resolving these issues.

Moreover, issues relating to the constitutional structure of state government are particularly well-suited for state constitutional analysis, without any practical need for lock step analysis with the federal Constitution. The U.S. Constitution has limited utility when a state court must interpret those provisions of a state constitution that address government powers and structure.⁹⁷ For example, cases involving the power of the state legislature to tax, to incur debt, or to transfer powers from one agency to another. Cases involving the governor’s veto power or power to contract. Cases involving access to courts, such as standing, ripeness, and mootness. These are all peculiarly state issues. Doctrines of federal justiciability based on Article III of the federal Constitution may not be applicable to state judicial systems based on different constitutional provisions and different premises about governmental power. Yet one commentator has pointed out, “very few states have considered how they may construct their own justiciability doctrines to meet the special needs of state and local governance.”⁹⁸ Whatever one’s view of new judicial federalism with regard to individual rights, state courts must recognize where their constitutions are unique or relate to the structure of state government, and that they have the power and the need to decide these issues independently.

My third observation is this: The ability of state courts to debate new judicial federalism may be threatened.

New judicial federalism faces a new threat from the view of federalism now espoused by the Rehnquist Court. Many view the Rehnquist Court as creating an environment hostile to state court independent interpretation of state constitutional law.⁹⁹

The Rehnquist Court’s federalism has been referred to as “constitutional federalism.”¹⁰⁰ More specifically, of course, constitutional federalism represents the approach of five Justices of the Rehnquist Court—Chief Justice Rehnquist and Justices O’Connor, Kennedy, Scalia, and Thomas.¹⁰¹

at § 6-2 (analyzing state clauses that guarantee a right to a civil remedy for injuries); *id.* § 2-2(a) (reviewing state clauses that afford *express* protection for privacy rights).

⁹⁵Hershkoff, *supra* note 85, at 1186-90.

⁹⁶N.Y. CONST. art. XVII, § 1.

⁹⁷*See* Hammons, *supra* note 9, at 1329-30.

⁹⁸Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1841 (2001).

⁹⁹*See, e.g.*, Garibaldi, *supra* note 24, at 70-73; Fugate, *supra* note 32, at 96-99.

¹⁰⁰Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001).

¹⁰¹*Id.* at 25; Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity, and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1283-84 (2000).

Constitutional federalism may be described as reviving judicially enforced constitutional limits on national power under the banner of federalism.¹⁰²

An underlying theme of the Rehnquist Court's federalism is to preserve the states as independent and autonomous political entities.¹⁰³ To many, the Rehnquist Court has become known as A State's Best Friend. Yet as scholars have pointed out, while the Rehnquist Court's constitutional federalism has imposed new limits on Congress vis-a-vis the states, the Court has not really championed state autonomy.¹⁰⁴ Indeed, Professor Joondeph, writing in the *Ohio State Law Journal*, says the Court has regularly disregarded important state sovereignty interests in federalism cases not involving limits on congressional authority.¹⁰⁵ (I assume it is permissible to cite to the law review of another Ohio law school.)

In short, the Rehnquist Court is not a steadfast champion of state sovereignty and autonomy.

The Rehnquist Court's concept of federalism entails two conflicting ideas about state authority. On the one hand, the Rehnquist Court takes seriously the Constitution's limits on Congress's powers vis-a-vis the states, and has worked to protect the states from an overreaching federal government and thus to some extent enhanced the political autonomy of the states.¹⁰⁶ On the other hand, the Rehnquist Court takes federal judicial supremacy seriously, imposing limitations on state court power in the interest of national uniformity and protecting national interests from state interference.¹⁰⁷

Most people familiar with the Rehnquist Court recognize the first of these two ideas—the Rehnquist Court's emphasis on devolution of power from Congress to the states.¹⁰⁸

¹⁰²See Calabresi, *supra* note 100, at 24 (“[t]he revival of federalism limits on national power by the U.S. Supreme Court”); Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 261 (2001) (“resurrect[ing] the repudiated theory that state sovereignty and sovereign immunity act as affirmative limitations on federal powers”).

¹⁰³Simmons, *supra* note 102, at 268.

¹⁰⁴Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 119 (2001) (“[D]espite their federalist rhetoric, the conservative justices have not hesitated to strike down state and local legislation and other action enhancing individual rights....”).

¹⁰⁵Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1784 (2001).

¹⁰⁶Calabresi, *supra* note 100, at 25; Joondeph, *supra* note 105, at 1784; John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 783 (2001).

¹⁰⁷Schwartz, *supra* note 104, at 124-27, 129; Joondeph, *supra* note 105, at 1784.

¹⁰⁸See William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE L. & POL'Y REV. 1 (1996); Calabresi, *supra* note 100.

The Rehnquist Court has limited Congress's power through interpretations of Commerce Clause powers, the Tenth and Eleventh Amendments, and Section 5 of the Fourteenth Amendment.¹⁰⁹

The Court struck down the Gun Free School Zones Act as exceeding Congress's commerce power.¹¹⁰ The Court held that the civil remedy of the Violence Against Women Act, permitting victims of gender-motivated violence to sue their attackers for damages, went beyond Congress's Commerce Clause authority.¹¹¹ The breadth of Congress's Commerce Clause power is now "ultimately a judicial rather than a legislative question."¹¹²

The Rehnquist Court held that a federal act directing states to regulate low-level radioactive waste according to federal directives or take title to waste generated in their borders exceeded Congress's powers.¹¹³ Congress could not "commandeer" the legislative processes of the state by directly compelling them to enact and enforce a federal regulatory program.¹¹⁴ On similar grounds, the Court struck down the Brady Handgun requirement that local law enforcement officers do background checks on handgun purchasers.¹¹⁵ Thus, the Tenth Amendment allows the Court to impose limits on Congressional legislative authority.¹¹⁶

Similarly, the Court has used the Eleventh Amendment to protect states from suit¹¹⁷— and, in a series of cases, the Rehnquist Court has adopted a restrictive view of Congress's authority under Section 5 of the Fourteenth Amendment.¹¹⁸

Fewer people, however, are familiar with the second idea that makes up constitutional federalism—the expansion of the Supreme Court's own power vis-à-vis state courts.

¹⁰⁹Joondeph, *supra* note 105, at 1804; Chemerinsky, *supra* note 101, at 1283.

¹¹⁰United States v. Lopez, 514 U.S. 549 (1995).

¹¹¹United States v. Morrison, 529 U.S. 598 (2000).

¹¹²Lopez, 514 U.S. at 557 n.2 (subsequently quoted in *Morrison*, 529 U.S. at 614). See Joondeph, *supra* note 105, at 1807.

¹¹³New York v. United States, 505 U.S. 144 (1992).

¹¹⁴*Id.* at 188.

¹¹⁵Printz v. United States, 521 U.S. 898 (1997).

¹¹⁶Joondeph, *supra* note 105, at 1811-13.

¹¹⁷See, e.g., Alden v. Maine, 527 U.S. 706 (1999) (holding that the Eleventh Amendment gives states immunity from suits in state court arising under federal law issued pursuant to Congress's Article I powers); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that the previously established congressional power to abrogate state immunity is limited to implementation of the Fourteenth Amendment). For a stinging critique of the Rehnquist Court's Eleventh Amendment jurisprudence, see Chemerinsky, *supra* note 101, at 1286 ("These decisions are the height of judicial hypocrisy. The five most conservative Justices, who profess the need for judicial restraint in cases involving individual rights, disregard this completely in protecting state governments from suit. No matter how much the Court pretends otherwise, the cases are nothing more than a value choice to favor state government power over individual rights. This is a value choice that the Justices never justify and, I believe, cannot possibly justify.").

¹¹⁸See Joondeph, *supra* note 105, at 1813-20.

I offer two examples. The first is the Rehnquist Court's application of *Michigan v. Long*,¹¹⁹ a 1983 Burger Court decision, and the second is the Rehnquist Court's decision in *Bush v. Gore*.¹²⁰ Both cases are examples of the Rehnquist Court's imposing limitations on state court power in order to preserve federal supremacy and promote national uniformity.

State courts are the final arbiter of state law,¹²¹ an old and familiar doctrine. Furthermore, if a state judgment rests on adequate and independent state grounds, the U.S. Supreme Court will not review either the state or the federal issues in the case,¹²² another old and familiar doctrine. The adequate and independent state grounds doctrine is the generally accepted and traditional test for reconciling the respective claims of the state for independence of state law and of the national government for review of interpretations of federal law.¹²³

Before *Michigan v. Long*, if a state court opinion cited both the federal and state grounds for its decision on a constitutional issue, the U.S. Supreme Court would apply one of three approaches: (1) it would dismiss the case; (2) it would remand the case to the state court to obtain clarification about the nature of the decision; or (3) it would examine state law to determine whether the state court had applied federal law to guide the application of state law or to provide the actual basis for the state court decision.¹²⁴ These choices favored deference to the states.

In 1983 the Burger Court decided *Long*, which replaced these three choices with a presumption in favor of U.S. Supreme Court review.¹²⁵ Under *Long*, U.S. Supreme Court review can occur whenever (1) "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law," and (2) "the adequacy and independence of any possible state law ground is not clear from the face of the opinion."¹²⁶ In such cases, the U.S. Supreme Court will assume "that the state court decided the case the way it did because it believed that federal law required it to do so."¹²⁷

Importantly, however, the *Long* Court declared that if the state court indicates "clearly and expressly" by "a plain statement" that federal law is used for guidance and does not compel the result, federal review is not permitted.¹²⁸

¹¹⁹463 U.S. 1032 (1983).

¹²⁰531 U.S. 98 (2000).

¹²¹Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 801 (1995) (citing *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874) for the proposition that state courts are the final arbiters of state law).

¹²²ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 10.5.3, at 678 (3d ed. 1999).

¹²³See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 511 (3d ed. 2000).

¹²⁴Garibaldi, *supra* note 24, at 69.

¹²⁵*Id.* at 69.

¹²⁶*Long*, 463 U.S. at 1040-41; see Garibaldi, *supra* note 24, at 69.

¹²⁷*Long*, 463 U.S. at 1041; see Garibaldi, *supra* note 24, at 69.

¹²⁸*Long*, 463 U.S. at 1041; see Garibaldi, *supra* note 24, at 69-70.

Commentators are divided¹²⁹ on whether the *Long* decision was designed to discourage state courts from exceeding federal courts in the protection of fundamental rights¹³⁰ or was merely intended to hold state courts directly accountable for their decisions and prevent them from hiding behind the federal courts.¹³¹

Either way, the result of the *Long* decision appeared to be that state courts could, according to the U.S. Supreme Court, develop state jurisprudence unimpeded by federal interference and still preserve the integrity of federal law. State courts simply had to say expressly that that is what they were doing.¹³²

The Rehnquist Court has repeatedly reaffirmed its adherence to the *Long* doctrine, and its application of *Long* has led it to hold that a substantial number of state cases do not support the conclusion that they were decided on independent and adequate state grounds.¹³³

Dissenting U.S. Supreme Court justices have asserted, however, that the Court has extended *Long* beyond its original scope.¹³⁴ Justice Marie Garibaldi of the New Jersey Supreme Court concludes that the Rehnquist Court cases suggest that the “justifications offered by the Court for preserving the adequate and independent state grounds doctrine, namely the reluctance to render advisory opinions and respect for state court decisions, are not being realized in the post-*Long* era.”¹³⁵

Nonreviewability of a state court decision is the U.S. Supreme Court’s acknowledgment of state autonomy. Reviewability is the affirmation of national supremacy and the supremacy of the U.S. Supreme Court. By expanding the ability of the U.S. Supreme Court to review state decisions, the Rehnquist Court has undermined the development of state constitutional law.

¹²⁹See Garibaldi, *supra* note 24, at 70 (surveying the range of critical responses to the *Long* decision).

¹³⁰Stewart G. Pollock, *The Court and State Constitutional Law*, in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* 244, 245 (Bernard Schwartz ed., 1998) (citing, as an example of this perspective, Ken Gormley, *Ten Adventures in State Constitutional Law*, 1 *EMERGING ISSUES IN ST. CONST. L.* 29, 37 (1988) (suggesting that the *Long* decision was an attempt to expand U.S. Supreme Court review “over potentially unpalatable state constitutional decisions”).

¹³¹Pollock, *supra* note 130, at 245 (citing, as an example of this perspective, Michael Esler, *State Supreme Court Commitment to State Law*, 78 *JUDICATURE* 25, 30 (1994)).

¹³²Garibaldi, *supra* note 24, at 70; Pollock, *supra* note 130, at 245-46.

¹³³Garibaldi, *supra* note 24, at 70-73.

¹³⁴See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (holding that Pennsylvania Supreme Court’s opinion did not rest on an adequate and independent state law ground, but was instead “interwoven” with federal law); *id.* at 947 (Stevens, J., dissenting) (observing that “every indication is that the rule adopted [by Pennsylvania] rests primarily on state law,” such that the majority’s decision has “extend[ed] *Michigan v. Long* beyond its original scope”); *id.* at 950 (Stevens, J., dissenting) (“Because the state-law ground supporting these judgments is so much clearer than has been true on most prior occasions, these decisions exacerbate [the unfortunate] effects [of the *Long* decision] to a nearly intolerable degree.”).

¹³⁵Garibaldi, *supra* note 24, at 73 (internal quotation marks omitted) (citing and quoting W. Craig Williams, *Constitutional Law: Premature Federal Adjudication Through the Plain Statement Rule*, 8 *U. FLA. J.L. & PUB. POL’Y* 129, 135 (1996)).

I now turn to *Bush v. Gore*.¹³⁶ The Rehnquist Court, as you will remember, resolved a presidential election dispute.

Some view the decision as hypocritical because the Rehnquist Court is known as the state's best friend, and the Court's order ending the election contest "was based on its own interpretation of Florida election law, apparently encroaching on the Florida Supreme Court's authority to determine the meaning of Florida statutes."¹³⁷

Others view the decision, especially the concurrence, as consistent with the core aspects of the Rehnquist Court's constitutional federalism.¹³⁸ The concurrence argued that Florida's judiciary "had so re-written the state's electoral laws that it had violated Article II's delegation of authority to the state legislatures to choose the method for selecting presidential electors."¹³⁹ As one commentator concludes, the concurrence viewed Article II as granting plenary power to state legislatures and thereby mandating federal oversight of a state court's interpretation of state law.¹⁴⁰ "Under this theory, the federal courts not only review whether state law, as interpreted by state courts, violates the federal Constitution, but also review whether the state court correctly interpreted state law."¹⁴¹

The concurrence justified this extraordinary assertion of federal authority "based on the need to protect the state legislature from the state courts."¹⁴² Thus, the concurrence saw uniformity in construction of state election procedures as desirable and a justification for federalizing the interpretation of state law.¹⁴³ According to this same commentator, the concurrence has a flawed understanding of state constitutions and the role of state constitutions in the state law process.¹⁴⁴ The flaw is viewing state constitutions as homogenous and distrusting state judges.¹⁴⁵ This combination of attitudes does not bode well for new judicial federalism.

Thus, in *Bush v. Gore*, as it has done in its application of *Michigan v. Long*, the Rehnquist Court appears to have limited state court power to interpret state law in order to preserve the interests of the nation.¹⁴⁶ In deciding *Bush v. Gore*, the Court arguably acted in keeping with the general trends of its own jurisprudence over the last decade.¹⁴⁷ And in both of these decisions, the Rehnquist Court has increased its powers vis-a-vis Congress and the state courts.

¹³⁶531 U.S. 98 (2000).

¹³⁷Joondeph, *supra* note 105, at 1783.

¹³⁸Yoo, *supra* note 106, at 790.

¹³⁹*Id.* at 790.

¹⁴⁰Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 661, 662 (2001).

¹⁴¹*Id.* at 662.

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶Joondeph, *supra* note 105, at 1784.

¹⁴⁷*Id.* at 1784-86.

IV.

A former deputy solicitor general of the United States said federalism is presently a mess.¹⁴⁸ I see federalism as an evolving process. In the history of our federal system, decentralization predominates in certain decades, while centralization predominates in others. We are in an era of both centralization and decentralization. State courts have been reasserting themselves and giving attention to their state constitutions. At the same time, the U.S. Supreme Court is creating a role for itself that may be viewed as increasingly hostile to independent state constitutional interpretation.

It is in this milieu that state courts must now interpret their own constitutions, and tomorrow we turn to Ohio's approach to state constitutional law.

I close by paraphrasing Garrison Keillor's message from Lake Wobegon.¹⁴⁹ Tomorrow we'll hear all the news from Ohio, where all the women justices on the Ohio Supreme Court are strong, all the men justices are good looking, and all the Ohio Supreme Court decisions are above average.

¹⁴⁸Diehm, *supra* note 82, at 224-25.

¹⁴⁹GARRISON KEILLOR, LAKE WOBEGON DAYS (1985).