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New Judicial Federalism in Perspective

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THE NEW JUDICIAL FEDERALISM IN PERSPECTIVE

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I. INTRODUCTION

According to a nineteenth century journalist, things were so quiet on the Wisconsin Supreme Court that you could hear the justices' arteries clog.[1] Whether or not this depiction of the Wisconsin court (which I owe to a current member of the court, Chief Justice Shirley Abrahamson) was accurate then, it certainly does not describe the contemporary Wisconsin Supreme Court—or any other present-day state supreme court.[2] Things are not as they were, and the new judicial federalism—the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution—is one of the main reasons for the change.[3]

The new judicial federalism emerged during the early 1970s, following the appointment of Chief Justice Warren Burger to succeed Earl Warren on the U.S. Supreme Court, and was encouraged by Justice William Brennan, a stalwart of the Warren Court.[4] Thus, when

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1 Shirley S. Abrahamson, *Homegrown Justice: The State Constitutions, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 315 (Bradley McGraw ed., 1985).

2 For an overview of contemporary state supreme courts, see G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988).

3 The literature documenting the new judicial federalism is vast. The development of the new judicial federalism is surveyed in *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); *New Developments in State Constitutional Law*, PUBLIUS: J. FEDERALISM, Winter 1987; HUMAN RIGHTS IN THE STATES (Stanley H. Friedelbaum ed., 1988); and in the annual issues on state constitutional law in *Rutgers Law Journal* (1989–1996).

4 On the connection between the advent of the Burger Court and the emergence of the new judicial federalism, see Earl M. Maltz, *The Political Dynamism of the "New Judicial Federalism"*, 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989). For Justice Brennan's encouragement of the new judicial federalism, see William J. Brennan, Jr.,

state supreme courts began to rely on their state constitutions, critics charged that they were merely attempting to evade Burger Court rulings and safeguard the civil libertarian gains of the Warren Court.[5] This criticism lost force, however, as the new judicial federalism spread, and the supreme courts of almost every state announced rulings based on the rights guarantees of their state constitutions.[6] Now, when a state supreme court invokes the rights guarantees of its state constitution, it is hardly newsworthy. In fact, some state supreme courts have even indicated that they would address state constitutional claims first and consider federal constitutional claims only when cases could not be resolved on state grounds.[7] By the late 1990s, then, the new judicial federalism has become an established feature of American federalism.

The development of the new judicial federalism raises intriguing questions about the role played by state supreme courts and state constitutions in safeguarding rights and—more generally—about the

State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489–503 (1977); and William J. Brennan, Jr., *The Bill of Rights: The Revival of State Constitutions as Guardians of Individual Rights*, 59 N.Y.U. L. REV. 535 (1986).

5 For criticisms from the bench, see, for example, *People v. Ramey*, 545 P.2d 1333, 1341 (Cal. 1976) (Clark, J., dissenting); *People v. Disbrow* 545 P.2d 272, 282 (Cal. 1976) (Richardson, J., dissenting); *People v. Norman*, 538 P.2d 237, 245 (Cal. 1975) (Clark, J., dissenting). For criticism in legal publications, see, for example: George Deukmeijian & Clifford K. Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); and Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972). Certainly there was some basis for this complaint. *See, e.g.*, People v. Anderson, 493 P.2d 880 (Cal. 1972). Moreover, some proponents of the new judicial federalism encouraged frankly evasive rulings. *See* Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). Thus, other proponents of the new judicial federalism worried about "reactive" rulings that cast an aura of illegitimacy over serious efforts to interpret state declarations of rights. *See, e.g.*, Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Mary Cornelia Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Mary Cornelia Porter & G. Alan Tarr eds., 1982).

6 On the spread of the new judicial federalism, see Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, PUBLIUS: J. FEDERALISM, Summer 1986, at 141. See also the annual surveys of developments of state constitutional law in *Rutgers Law Journal*.

7 These states include Maine—see, for example, State v. Cadman, 476 A.2d 1148 (Me. 1984); Oregon—see, for example, Sterling v. Cupp, 625 P.2d 123 (Or. 1981); Vermont—see, for example, State v. Badger, 450 A.2d 336 (Vt. 1982); and Washington—see, for example, State v. Coe, 679 P.2d 353 (Wash. 1984). This approach was championed by Justice Hans E. Linde of the Oregon Supreme Court. *See* Hans E. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

character of contemporary American federalism. Does the new judicial federalism represent a return to an earlier federalism, or is it something new? Insofar as the new judicial federalism represents an innovation in constitutional law, why did state courts "discover" state constitutional guarantees only recently? How great a shift in responsibility for protecting rights has the new judicial federalism produced? Is it merely a response to a particular set of circumstances, or does it signify a fundamental shift in responsibility for protecting rights? Now that the new judicial federalism is no longer new, we are in a better position to answer these questions, and they provide the focus for this Article.

II. THE NOT-SO-NEW JUDICIAL FEDERALISM?

A. The Standard Account: Three Eras of Rights Protection

The standard account of the new judicial federalism suggests that it is not really novel but rather involves a "rediscovery" of state constitutions and state declarations of rights. According to this account, the history of rights protection in United States falls into three distinct eras.[8] During the first era, which lasted roughly 140 years, state constitutions were necessarily the primary vehicle for protecting individual rights. Until the 1930s state governments were far more involved than the federal government in domestic policy; as a result, civil liberties litigation usually involved challenges to the actions of state governments. The federal Constitution offered few protections against state violations of rights because prior to incorporation, the U.S. Bill of Rights only restricted the federal government.[9] For protection against most state infringements on rights, therefore, claimants had to turn to state declarations of rights. This conjunction of more frequent state opportunities to invade rights and the absence of federal remedies for

8 For an account of the three eras focusing on criminal justice, see Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985). For extension of this notion to civil liberties more generally, see Shirley S. Abrahamson & Diane S. Gutmann, *The New Judicial Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88 (1987); and Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991). The assumption of the three eras underlies much of the writing about the new judicial federalism. For my own ill-considered endorsement of the notion, see G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, *in* HUMAN RIGHTS IN THE STATES, *supra* note 3, at 38–39.

9 Federal constitutional limitations on the states included a ban on bills of attainder and ex post facto laws, U.S. CONST. art. I, § 10, cl. 1, and a requirement that citizens of each state be accorded the privileges and immunities of citizens in the several states, U.S. CONST. art. IV, § 2, cl. 1.

such invasions ensured (according to the standard account) that state courts and state law dominated the protection of rights during the first era.

During the second era, beginning in the 1930s and continuing into the 1970s, the federal government (and particularly the federal courts) assumed primary—indeed, almost exclusive—responsibility for protecting rights. This shift coincided with the expansion of the federal government's involvement in domestic policy, which increased the potential for federal violations of constitutional rights and for litigation in federal courts to vindicate those rights. Even more important were the gradual incorporation of the federal Bill of Rights and the increased activism of federal courts in civil liberties cases. Once the U.S. Supreme Court pioneered in developing a civil liberties jurisprudence during the 1920s and 1930s, the Court's activism attracted litigants who either brought their claims in federal court or, if that was impossible, based their claims in state court on federal constitutional law. Likewise important to civil liberties litigants were various procedural advantages, such as the familiarity of the Federal Rules of Civil Procedure, which encouraged them to file their claims in federal court. The arguments of litigants, together with the ease of relying on readily available federal precedent, encouraged state judges to ignore their declarations of rights and base their civil liberties rulings on federal guarantees. As a result, according to the standard account, civil liberties law during the second era became almost exclusively federal law.

According to the standard account, the third era, the era of the new judicial federalism, blends elements of the first and second eras. It resembles its immediate predecessor in that federal civil liberties law continues to predominate. However, it also harkens back to the first era, in that state supreme courts are interpreting state declarations of rights as independent sources of rights. Given this asserted continuity with the first era, state judges who base their rulings on state guarantees are not inaugurating a jurisprudential revolution; they are merely recovering a neglected tradition in state constitutional law.

B. Inventing the Past

The standard account of the judicial protection of rights—and particularly its description of the "first era"—does have a surface plausability. Until the 1930s state governments did have more opportunities to invade rights than did the federal government, given the limited scope of federal activity; and prior to incorporation, federal

remedies for state invasions of rights were often unavailable. Moreover, one may well sympathize with the concern that underlies this account. It is far easier to legitimize state judicial rulings expanding civil liberties if one can give them an historical pedigree, if one can portray them as nothing more than the recovery of a tradition. But unfortunately for proponents of the new judicial federalism, the standard account of the first era is more edifying than accurate: the new judicial federalism is indeed new. Although the conditions may have seemed ripe for the development of state civil liberties law in the nineteenth and early twentieth centuries, no such development occurred. In fact, until the advent of the new judicial federalism, state courts' contributions to developing constitutional protections for civil liberties were minimal. An examination of the issues addressed by state supreme courts during the first era and their rulings on important civil liberties issues—such as religious liberty, freedom of speech, and the rights of criminal defendants—confirms this assessment.

1. The Business of State Supreme Courts

Although evidence is fragmentary, historical studies of the business of state supreme courts reveal that these courts were not heavily involved in protecting civil liberties during the first era.[10] During the antebellum period, constitutional litigation in general was relatively rare in state supreme courts. In fact, when the New York Court of Appeals, locked in a dispute with the legislature, invalidated fifty-two statutes from 1840–1860, this was "probably [more] than in all the other states of the Union combined."[11] According to one account, fewer than forty state laws were invalidated in Southern supreme courts from 1776–1861. Although over half these statutes were held to violate some provision of a state bill of rights, "they scarcely touched fundamental matters such as freedom of speech, freedom of the press, freedom of religion, and freedom of assembly."[12] Accounts of judicial review in the late nineteenth and early twentieth centuries offer a similar picture. On the basis of a sampling of rulings of sixteen state high courts over a hundred-year period, Robert Kagan and his associates concluded that during the late nineteenth and early twenti-

10 Important surveys of cases decided by state supreme courts are Robert A. Kagan et al., *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121 (1977) [hereinafter Kagan, *Business*]; and Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

11 Edward S. Corwin, *The Extension of Judicial Review in New York: 1783–1905*, 15 MICH. L. REV. 281, 303 (1917).

12 DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 22 (1989).

eth centuries, property and business cases dominated the agendas of state supreme courts. Most of these cases involved "ordinary commercial disputes—disputes over title to real estate, foreclosure of mortgages, creditors' rights against defaulting debtors and failed businesses."[13] Public law cases accounted for only twelve percent of all cases, and they primarily involved issues of land use (e.g., zoning, eminent domain, and condemnation) and taxation. What state constitutional litigation there was typically involved provisions unique to state constitutions and focused on issues such as taxes and revenues and the structure and powers of local governments, rather than on civil liberties.[14] Indeed, Kagan concluded that throughout the period of their research, "free speech and race discrimination cases have been rare."[15] State high courts did hear a sizable number of appeals in criminal cases—roughly eleven percent of all their cases from 1870 to 1935—but less than one-fifth of these cases raised constitutional issues.[16] Not until the transformation of criminal justice by the Warren Court did state supreme courts experience a significant increase in criminal cases raising constitutional issues.

2. Religious Liberty

Most state constitutions from the very outset contained guarantees of religious liberty.[17] In addition, many states during the first era added more stringent and detailed requirements for a separation of church and state, such as bans on state support for sectarian activities or for places of worship, than are found in the First Amendment.[18]

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13 *See* Kagan, *Business*, *supra* note 10, at 133.

14 James Willard Hurst has argued that the greater detail and specificity of late-nineteenth-century state constitutions "worked to increase the power of the judges, by giving them broader scope for their interpretation and application of the fundamental law." JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW 228 (1950). However, this greater detail and specificity seldom involved state declarations of rights. Rather, it typically was found in provisions concerned with the regulation of corporations, the governing of municipalities, and restrictions on the legislature's power to enact private law. *See* CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS (1894).

15 Kagan, *Business*, *supra* note 10, at 150.

16 *Id.* at 133 tbl.1, 147.

17 *See, e.g.*, Pennsylvania Declaration of Rights § 3; DEL. CONST. art. 29; N.J. CONST. of 1776, art. XVIII; VA. CONST. of 1776, art. I, § 16 (Declaration of Rights). For an overview of these provisions and their development prior to the adoption of the federal Constitution, see THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT, chs. 6–7 (1986).

18 For a discussion of these provisions, see G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).

Moreover, religious conflict between Protestants and Catholics flared in many states during the nineteenth century, affording the occasion for religious liberty litigation.[19] Yet, not much litigation resulted from this or from other religious controversies. Instead, states tended to resolve religious disputes by political action, constitutional amendment, or statute. For example, in response to efforts by Catholics to secure public support for their schools, several states during the latter half of the nineteenth century adopted amendments prohibiting the use of state funds to support sectarian schools.[20] Earlier in the century, several states had enacted statutes or ratified amendments that superseded the common law and permitted atheists to serves as witnesses and as jurors.[21]

The sole exception to this pattern of resolving religious issues through amendment or statute involved Bible reading in public schools. While a few states expressly authorized the practice in their constitutions, most did not, and during the nineteenth and early twentieth centuries, fifteen state supreme courts were called upon to rule on its constitutionality.[22] Yet even these cases did not provide the foundation for a state constitutional law of religious liberty. Most state judges upheld Bible reading with scant analysis of the principles underlying the relevant state guarantees. For example, some judges contended that the Bible was not a sectarian book, even if the version favored by a particular denomination was utilized exclusively.[23] Others simply asserted that the daily reading of Scripture passages did not transform the school into a place of worship in violation of consti-

19 Useful accounts of these conflicts include: ROY ALLEN BILLINGTON, THE PROTESTANT CRUSADE, 1800–1860 (1938); LEO PFEFFER, CHURCH, STATE AND FREEDOM (1967); JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK STATE HISTORY (1967); and ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (rev. ed. 1964).

20 ALA. CONST. of 1875, art. 12, § 8; ARK. CONST. of 1869, art. 9, § 1; CAL. CONST. of 1879, art. 9, § 8; COLO. CONST. art. 9, §§ 7, 8; DEL. CONST. art. X, § 3; KAN. CONST. of 1855, art. 7, § 2; MASS. CONST. of 1780, art. XVIII (amended 1855); MINN. CONST. art. 8, § 3; N.Y. CONST. of 1846, art. IX; N.D. CONST. art. 8, §§ 1, 5; OHIO CONST. art. VI, § 2; OR. CONST. art. 1, § 5; PA. CONST. of 1874, art. X, § 2; WASH. CONST. art. I, § 11 (1889, amended 1957); WYO. CONST. art. I, § 19.

21 *See* CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER STATE CONSTITUTIONS, chs. 2, 5 (1965); WILLIAM GEORGE TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA, chs. 9–10 (1948).

22 For an example of a provision authorizing Bible reading in the schools, see MISS. CONST. of 1890, art. 3, § 18. The early cases in which Bible reading was challenged are collected and discussed in Tarr, *supra* note 18, at 100–03.

23 *See, e.g.*, Hackett v. Brooksville, 87 S.W. 792 (Ky. 1905); Donahue v. Richards, 38 Me. 399 (1854).

tutional strictures.[24] Although judges in five states struck down Bible reading in the schools, their rulings neither persuaded their colleagues in other states nor promoted the development of a body of religious liberty law.

3. Freedom of Speech

From the very outset, state declarations of rights contained ringing endorsements of freedom of speech and of the press, though several also warned that those who abused these freedoms would be held responsible for the abuse.[25] During the latter half of the nineteenth century, various commentators—among them, Thomas Cooley, Frederick Grimke, and Theodore Schroeder—explored the meaning of these freedoms, insisting that democratic government required a libertarian reading of the constitutional guarantees.[26] However, neither the constitutional protections nor the commentators' libertarian theory of free speech had much effect on constitutional litigation during the first era. State courts heard few speech or press cases, and—in the words of a leading expert on the subject—"the overwhelming majority of [pre-World War I] decisions in all jurisdictions rejected free speech claims, often by ignoring their existence."[27]

During the first era, questions of speech or press freedom were, for the most part, resolved without litigation. Libel is a case in point. During the earliest years of the Republic, libel prosecutions and civil actions for libel by political leaders were fairly common, although courts rarely viewed them as implicating constitutional guarantees of

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24 *See, e.g.*, People *ex rel.* Vollmar v. Stanley, 255 P. 610 (Colo. 1927); Pfeiffer v. Board of Educ., 77 N.W. 250 (Mich. 1898); Church v. Bullock, 109 S.W. 115 (Tex. 1908).

25 These provisions are collected in Ronald K.L. Collins, *Bills and Declarations of Rights Digest, in* THE AMERICAN BENCH 2483, 2483–523 (3d ed. 1985/86). For pertinent discussions, see Robert C. Palmer, *Liberties as Constitutional Provisions, in* LIBERTY AND COMMUNITY: CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (1987); and DONALD LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980).

26 For a discussion of their arguments, see NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL, ch. 7 (1986); Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56 (1980); Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow, in* THE FIRST AMENDMENT RECONSIDERED (Bill F. Chamberlin & Charlene J. Brown eds. 1982); and David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47 (1992).

27 David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

free speech.[28] From the Jacksonian era to the end of the nineteenth century, however, such libel actions virtually ceased. For one thing, "[e]njoying easy access to party or factional newspapers, political leaders could quickly meet opposition slander with denials, countercharges, or libels of their own."[29] For another thing, politicians recognized that libel actions conflicted with their vested interest in an unrestricted party press. Thus, changes in political practice rather than constitutional rulings protected the press.

Perhaps the most important free speech issue of the antebellum era involved the rights of abolitionists. Yet this issue too was resolved without litigation in state supreme courts.[30] In the South, not surprisingly, legislative bans on abolitionist publications and the circulation of abolitionist materials went unchallenged. In the North, legislatures refused to restrict press freedom, although at times local mobs prevented abolitionists from publishing.

In the late nineteenth and early twentieth centuries, the most contentious free speech issue was the rights of political radicals.[31] In most cases, state judges rejected the radicals' free speech claims, either applying a version of the "bad tendency" test or—in the case of municipalities' refusal to grant permits for peaceful marches or demonstrations—recognizing virtually unlimited government control over the use of public property. Almost none of these rulings were based on a sustained analysis of free speech rights. Even the few cases in which judges ruled in favor of rights claimants, however, did not signal the beginnings of state constitutional jurisprudence. As David Rabban has put it, "the few relatively libertarian opinions were not analytically more rigorous than the norm for this period."[32] In summary, when the U.S. Supreme Court addressed free speech in the early twentieth century, there was no body of state court free speech law on which it could draw in developing its jurisprudence.

4. Criminal Justice

The most frequent civil liberties cases coming before state supreme courts, at least during the latter half of the nineteenth century, involved appeals by criminal defendants who claimed that their

28 This account of libel actions during the nineteenth century relies on ROSENBERG, *supra* note 26.

29 *Id.* at 143.

30 This account relies on RUSSEL BLAINE NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860 (1963).

31 The analysis in this paragraph relies on Rabban, *supra* note 27, and on Anderson, *supra* note 26.

32 Rabban, *supra* note 27, at 558.

convictions involved a violation of constitutional rights. A few of these cases led to landmark rulings.[33] For the most part, however, these appeals differed significantly from modern criminal justice litigation.[34] Few involved major challenges to the system of criminal justice. The vast majority involved much narrower concerns, such as whether the particular facts of the case brought the defendant within some existing legal rule. While obviously of interest to the defendants, these cases thus required no transformations of constitutional law for their resolution, nor did state courts seize on opportunities to develop state civil liberties law. Indeed, as Lawrence Friedman has noted, "in most of the cases, constitutional points seem raised almost as an afterthought and rejected cavalierly, almost with a yawn."[35]

In sum, our survey of state judicial rulings during the first era reveals that state supreme courts did not develop a body of civil liberties law prior to the 1930s. The new judicial federalism thus represents not a return to the past but an unprecedented exercise of state judicial power.

III. THE NEW JUDICIAL FEDERALISM IN HISTORICAL CONTEXT

If state court interpretations of state constitutions did not play an important role in protecting rights prior to the new judicial federalism, the obvious question is why. This question, in turn, points to a broader issue, namely, the role that state supreme courts have played historically in state constitutional development. During the 1950s and 1960s, scholars investigated this issue in the course of analyzing state constitutional change. In the wake of the new judicial federalism, their explanations of why state judges had proved less aggressive than their federal counterparts in initiating constitutional change are not altogether persuasive. Nonetheless, examination of these explanations sheds further light on the new judicial federalism and illuminates how interactions between state and federal courts have influenced state constitutional development.

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33 *See, e.g.*, State v. Sheridan, 96 N.W. 730 (Iowa 1903); Carpenter v. Dane, 9 Wis. 249 (1859).

34 For a more detailed presentation of the argument of this paragraph, see Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Nineteenth Century*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkleman & Stephen E. Gottlieb eds., 1991).

35 *Id.* at 274. Loren Beth has also concluded that the state cases on fair trial during the late nineteenth and early twentieth centuries were too "scattered" to suggest any trends. LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877–1917 (1971).

A. *Constitutional Provisions*

One explanation offered for the limited role played by state supreme courts in state constitutional change is that the greater specificity of state constitutional provisions leaves little room for judicial interpretation.[36] This argument, however, is unpersuasive. Undoubtedly, many state constitutional provisions are so clear and detailed that they generate no litigation.[37] Yet the same thing can be said about many provisions of the Federal Constitution: for example, there is no controversy over the mode of representation in the Senate or over the President's power to appoint ambassadors. In addition, in contrast with the Federal Constitution, state constitutions contain numerous policy provisions—for example, guarantees of a "thorough and efficient education," requirements of environmental quality, and the like—that seem to invite litigation.[38] Moreover, the presence of "statutory" material in state constitutions does not preclude state courts from playing an important role in governance. They can construe restrictive provisions in a way that promotes legislative discretion in dealing with problems. For example, the New York Court of Appeals has interpreted various limitations on local finances in such a way as to drastically reduce or altogether eliminate their effect.[39] Alternatively, state courts can hamstring state legislatures through punctilious assertions of constitutional requirements. Finally, it should be noted that the federal provisions which have generated the most litigation in recent years—the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and protections of defendants' rights—all have analogues in state constitutions. The relative absence

36 *See, e.g.*, ELMER E. CORNWELL, STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 8 (1975). According to John Orth, this explained the infrequency of judicial interpretation of North Carolina's 1776 constitution. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 7 (1993).

37 *See* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169, 1181–83 (1992).

38 On school finance, see, for example, N.J. CONST. art. 8, § 4, ¶ 1; on environmental quality, see MICH. CONST. art. 4, § 52. For overviews of these constitutional commitments, see A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); and *Symposium: Investing in Our Children's Future: School Finance Reform in the 90's*, 28 HARV. J. ON LEGIS. 293 (1991). The fact that these provisions seem to invite litigation may reflect the contemporary legal culture rather than something intrinsic to the provisions.

39 PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 184–98 (1991). For the judicial evisceration of procedural requirements for state legislation, see Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, PUBLIUS: J. FEDERALISM, Winter 1987, at 91.

of civil libertarian activism by state judges, therefore cannot be attributed primarily to the substance of state constitutions.

B. Judicial Restraint

Some commentators have suggested that the relative passivity of state supreme courts reflects a tradition of judicial restraint in the states.[40] It is easy to collect quotations from state judges eschewing a policy role for their courts or to infer an attachment to judicial restraint from the absence of innovative constitutional rulings.[41] However, over time state supreme courts have contributed in important ways to the governance of their states. For example, during the early nineteenth century, the era of what Karl Llewellyn has called "the American grand style," state judges "Americanized" the common law by eliminating elements inconsistent with the republican character of the American regime.[42] They also substantially revised standards of liability to encourage the growth of commercial enterprise.[43] During the 1960s and 1970s, state judges initiated a revolution in tort law designed to afford greater redress for plaintiffs.[44] During the 1980s, it has been argued, they quietly staged a tort law counterrevolution.[45] These initiatives reveal that state courts have not consistently recognized judicial restraint as a requirement, at least in the sphere of private law.

Insofar as there is a tradition of judicial restraint in the states, therefore, it must be limited to constitutional law. Yet, even in the constitutional realm, there is reason to distrust judicial restraint as an

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40 *See, e.g.*, Ernest R. Bartley, *Methods of Constitutional Change*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 22–24 (W. Brooke Graves ed., 1960).

41 HENRY ROBERT GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE (1971); Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239 (1974).

42 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62 (1960). On changes in state judges' orientation toward common-law policymaking, see GRANT GILMORE, THE AGES OF AMERICAN LAW (1977). On the substantive changes in the common law, see WILLIAM EDWARD NELSON, AMERICANIZATION OF THE COMMON LAW (1975).

43 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

44 For overviews, see ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW (1969); Baum & Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Mary Cornelia Porter & G. Alan Tarr eds., 1982); TARR & PORTER, *supra* note 2, at 34–40.

45 James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Examination of Legal Change*, 37 UCLA L. REV. 479 (1990).

explanation. For one thing, the argument for such a tradition seems curiously circular. State courts have not initiated constitutional change, it is argued, because of a tradition of judicial restraint. Yet, the sole evidence for that tradition is the absence of court-initiated change. For another thing, historical evidence reveals that state courts have not consistently embraced judicial restraint in their constitutional pronouncements.

Even before the U.S. Supreme Court decided *Marbury v. Madison* in 1803, state supreme courts asserted their authority to invalidate legislative enactments.[46] Furthermore, as Suzanna Sherry has shown, early in the nation's history, state courts showed little reluctance in relying on extratextual justifications in invalidating state laws.[47] In the period after the Civil War, state supreme courts were increasingly willing to determine election controversies, issue injunctions, and otherwise intervene in day-to-day governance.[48] They also were more willing to invalidate state laws as violations of equal protection or substantive due process.[49] Indeed, when the U.S. Supreme Court began to invalidate state economic regulations on due process grounds, it was merely "nationalizing a constitutional ideology averse to special government burdens or benefits" that had been pioneered in the states.[50] Even after the U.S. Supreme Court abandoned the responsi-

46 5 U.S. (1 Cranch) 137 (1803). On the pre-*Marbury* recognition of judicial review, see H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note, in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkleman & Stephen E. Gottlieb eds., 1991).

47 Suzanna Sherry, *The Early Virginia Tradition of Extratextual Interpretation, in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkleman & Stephen E. Gottlieb eds., 1991); and Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994). For studies of the exercise of judicial review by state courts in the early nineteenth century, see MARGARET VIRGINIA NELSON, A STUDY OF JUDICIAL REVIEW IN VIRGINIA, 1789–1928 (1947); and Corwin, *supra* note 11.

48 MORTON KELLER, AFFAIRS OF STATE 358–70 (1977). Kermit Hall has also argued that the move from an appointive to an elective judiciary in the mid-nineteenth century coincided with an increase in judicial activism. Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 HISTORIAN 337 (1983).

49 The New York Court of Appeals invalidated almost three hundred statutes from 1865–1900, as compared to sixty-five in the antebellum era. *See* Corwin, *supra* note 11, at 283–85. The Supreme Judicial Court of Massachusetts invalidated only ten laws prior to 1860 but struck down thirty-one from 1860–1893. The Virginia Supreme Court invalidated roughly one-third of all challenged statutes in the late nineteenth century. And the Ohio Supreme Court struck down fifty-seven statutes from 1880–1900. These data are drawn from KELLER, *supra* note 48, at 362.

50 HOWARD GILLMAN, THE CONSTITUTION BESEIGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 14 (1993).

bility, many state judges continued to supervise state regulation of economic activity.[51] Finally, the development of the new judicial federalism itself casts doubt on the claim of a well-established tradition of judicial restraint. If state courts were committed to judicial restraint in constitutional interpretation, why would some state courts so readily go beyond the U.S. Supreme Court in protecting rights?

C. The American Judicial Tradition and American Federalism

A more fruitful approach to understanding why the new judicial federalism emerged when it did is to view state constitutional interpretation as occurring in the context of—and being influenced by—a broader American judicial tradition.[52] In making this claim, we are not denying differences among states or among historical eras. Rather, we are suggesting that the standards of appropriate judicial practice—best understood as prescribing a range of legitimate behavior rather than rigid rules governing judicial practice—change over time. State judges, like their federal counterparts, participate in creating those standards and respond to them. Gradually, judges become educated as to the prevailing standards; that is, they learn how to approach and interpret their state constitutions by watching how other courts (both federal and state) interpret their own charters.[53] Litigants also ensure that appropriate claims and arguments, pioneered in other judicial arenas, are brought before them. Thus, it was not surprising that in the late eighteenth and early nineteenth centuries, state courts looked to extratextual sources in interpreting their state constitutions; other courts were doing likewise.[54] Nor was it surprising that in the late nineteenth century, state courts began to invalidate legislation that trespassed on economic liberty; they had such a course urged on them by influential legal treatises and authorized by the ex-

51 Peter J. Galie, *State Courts and Economic Rights*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 76 (1988); Susan P. Fino, *Remnants of the Past: Economic Due Process in the States*, *in* HUMAN RIGHTS IN THE STATES, *supra* note 3, at 145.

52 For an overview of this tradition, which recognizes the contributions of state judges to its development, see EDWARD G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976). For a thoughtful analysis that links state and federal traditions, see Friedman, *supra* note 34.

53 These patterns of interaction between state and federal courts and among state courts have been described as vertical judicial federalism and horizontal judicial federalism. *See* TARR & PORTER, *supra* note 2, ch. 1.

54 *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

ample of sister courts.[55] Similarly, it was not surprising that, in the 1970s, state courts began to emulate the Warren Court in giving broad reading to their states' rights guarantees.

This, in turn, helps explain why the new judicial federalism did not develop until the 1970s. The existence of state constitutional guarantees and the absence of federal involvement appeared to afford an opportunity for judicial initiatives during the first era, but that was not enough. What was missing was a model of how state judges could develop a civil liberties jurisprudence. Because Americans had not yet come to rely on courts to vindicate civil liberties, state courts throughout the nineteenth and early twentieth centuries gained little experience in interpreting civil liberties guarantees. Nor could they look to federal courts for guidance in interpreting their constitutional protections. The federal courts also decided few civil liberties cases, and their rulings typically revealed little sympathy for rights claimants.[56] Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decades had laid the foundation for the development of state civil liberties law.

Paradoxically, then, the activism of the Warren Court, which has often been portrayed as detrimental to federalism, was a necessary condition for the emergence of vigorous state involvement in protecting civil liberties. From a somewhat different perspective, the protection of civil liberties in the United States should not be viewed as a zero-sum game, in which increased activity by one judiciary necesitates decreased activity by the other. Rather, the relationship between federal and state judiciaries involves a sharing of responsibility and a process of mutual learning, such that a change in orientation by one set of courts is likely, over time, to be reflected in other courts.

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55 *See* GILLMAN, *supra* note 50.

56 In free speech cases, "the Supreme Court, with one exception, uniformly found against free speech claimants." *See* Rabban, *supra* note 27, at 520. Whether or not correctly decided, the Supreme Court's religion rulings likewise reveal little sympathy for religious minorities. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

IV. THE SCOPE AND IMPACT OF THE NEW JUDICIAL FEDERALISM

Writing in 1986, Justice William J. Brennan suggested that the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our time."[57] Although many legal scholars have echoed Brennan's sentiments, his assessment should probably not be taken as conclusive. After all, Brennan was the intellectual godfather of the new judicial federalism, and his disagreement with the conservative majority on the U.S. Supreme Court gave him reason to encourage the development of state constitutional law.[58] We therefore must consider the actual impact of the new judicial federalism: how often litigants bring state constitutional claims before state courts, how often those courts base their rulings on state versus federal law, and to what extent their reliance on state constitutions results in broader protections for rights than are available under the federal Constitution.

A. The Scope of the New Judicial Federalism

During the past twenty-five years, there has clearly been an upsurge in state courts' reliance on state declarations of rights in civil liberties cases. Legal scholars have identified major initiatives by state courts involving school finance, the rights of defendants, and the right to privacy, among other matters.[59] Quantitative analyses likewise confirm the greater attention to state guarantees. For example, Ronald Collins and Peter Galie found over three hundred cases from 1970 to 1986 in which state judges relied on their state guarantees to afford greater protection than was available under the federal Bill of Rights or the Fourteenth Amendment.[60] This contrasts with only ten such

57 William J. Brennan, NAT'L L.J., Sept. 29, 1986, at S-1.

58 Justice Brennan's major contribution was his widely cited article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

59 On school finance, see Russell S. Harrison & G. Alan Tarr, *School Finance and Inequality in New Jersey*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 178, 178–201 (G. Alan Tarr ed., 1996). On the rights of defendants, see BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991). On the right to privacy, see Mary Cornelia Porter & Robyn Mary O'Neill, *Personal Autonomy and the Limits of State Authority*, *in* HUMAN RIGHTS IN THE STATES, *supra* note 3, at 73–96. For an overview of state rulings, see ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993).

60 Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, PUBLIUS: J. FEDERALISM, Summer 1986, at 111.

cases from 1950 to 1969.[61] Moreover, most of the rulings dated from 1977 onward, indicating an increasing propensity to rely on state guarantees. This coincides with the perception of state judges. A 1985 survey of state high court judges found that over seventy-five percent believed that litigants were raising state constitutional arguments more frequently than they had in the past, and twenty-five percent of the surveyed judges believed that the change was substantial.[62] The annual surveys of state constitutional cases in *Rutgers Law Journal* furnish more evidence of reliance on state guarantees. During 1990, for example, state supreme courts decided over 140 civil liberties cases based either exclusively on state protections of rights or on a combination of federal and state protections.[63] Yet despite these data, some recent studies have concluded that the new judicial federalism has had a rather limited impact on civil liberties litigation in state courts and on the development of constitutional law.

B. The Frequency of State Constitutional Challenges

One indicator of the impact of the new judicial federalism is the frequency of challenges to state laws on state constitutional grounds, in lieu of—or, at a minimum, in conjunction with—federal constitutional challenges. Attorneys can be expected to raise state constitutional arguments only if they believe that judges will respond sympathetically to them; so the frequency with which they raise such arguments suggests the extent to which state courts have become attuned to the new judicial federalism. In addition, most courts refuse to decide cases on the basis of legal arguments not briefed by the parties; indeed, most state supreme courts do not allow counsel to raise state constitutional issues if they were not argued in the lower court.[64] Therefore, state constitutional arguments are a prerequisite for decisions based on state declarations of rights.

To determine how frequently state constitutional claims are advanced, Craig Emmert and Carol Traut examined all state and federal constitutional challenges to state laws coming before state supreme courts from 1981 to 1985.[65] In only twenty-two percent of the cases did litigants challenge statutes solely on state constitutional grounds. Such challenges were particularly rare when there were analogous

61 *Id.* at 146 tbl.1.

62 *Id.* tbl.3.

63 *Developments in State Constitutional Law: 1992*, 22 RUTGERS L.J. 1105 (1993).

64 Collins et al., *supra* note 6, at 155 tbl.7.

65 Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992).

state and federal provisions, as is typically true in civil liberties litigation.[66] In fact, most state-constitution-only cases involved non-civil liberties issues, such as restrictions on special legislation, spending and debt limitations, and the like. In over half the civil liberties cases, litigants challenged state laws exclusively on the basis of the federal Constitution.[67] In less than seventeen percent of those cases did they challenge state laws exclusively on state constitutional grounds.

C. The Bases for Judicial Decisions

Proponents of the new judicial federalism estimate that state judges have announced over seven hundred rulings invalidating state statutes based on state declarations of rights. In order to assess the impact of the new judicial federalism, however, it is necessary to put that figure in perspective, to consider in what proportion of constitutional cases state courts based their rulings on state guarantees. Emmert and Traut have reported that most criminal justice and bill of rights cases involving analogous state and federal provisions are resolved exclusively on the basis of federal law, in part because litigants relied on state law infrequently. In only eighteen percent of criminal cases were claims based exclusively on state law, and in only twenty percent on a combination of state and federal law. In bill of rights cases, a similar pattern emerged: litigants brought claims based exclusively on state law in only fourteen percent of the cases and on a combination of state and federal law in only nineteen percent.[68] Decisions based on state constitutions thus constituted a rather small proportion of all civil liberties rulings from 1981 to 1985.

Other studies, focusing on instances when state courts had an opportunity to rely on either federal or state guarantees, report similar findings. In a study of all rulings by six state supreme courts in 1975, Susan Fino found that only seventeen percent of all cases that raised constitutional issues were resolved on the basis of state law.[69] In a later study of all equal protection cases decided by state supreme courts from 1975 to 1984, she found that less than seven percent rested exclusively on state guarantees.[70] In areas of considerable constitutional controversy, such as racial discrimination and criminal jus-

66 *Id.* at 42 tbl.1, 46 tbl.3. Unless otherwise indicated, other figures in this paragraph are drawn from the same article.

67 *Id.* at 44 tbl.2 (computed from "criminal rights" and "bill of rights" cases).

68 *Id.*

69 SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM 142 (1987).

70 Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, PUBLIUS: J. FEDERALISM, Winter 1987, at 33.

tice, state courts overwhelmingly relied on federal doctrine and federal law. Only in areas of traditional state concern—such as bar regulation cases, Sunday closing cases, inheritance cases, and the like—did state high courts recur with any regularity to state equal protection guarantees. These cases seldom involved important civil liberties issues.

The findings of a more recent study, which examined all state ruling in self-incrimination cases from 1981 to 1986, are similar.[71] Because the federal government and almost all states provide constitutional protection against self-incrimination, state judges deciding self-incrimination cases could presumably base their rulings on either state or federal grounds. In seventy-eight percent of the cases, however, state judges based their rulings exclusively on federal law. Only eight state supreme courts decided more than half their self-incrimination cases on state grounds, while fourteen states did not base any of their decisions on state law.

Finally, Emmert and Traut found that when both federal and state constitutional arguments were advanced by counsel, state courts that invalidated state laws usually rested their rulings on both federal and state grounds.[72] However, it is difficult to know how to interpret this finding. One cannot know whether state judges gave serious consideration to the state provision or merely mentioned it as an afterthought, while focusing their analysis on federal law and federal precedent.[73]

In summary, by examining not only how often state judges rely on state declarations of rights but also how often they could have done so but failed to do so, these commentators have concluded that the new judicial federalism has had a rather limited effect on state supreme courts' resolution of civil liberties cases.

D. Greater Protection for Rights?

Justice Brennan assumed that reliance on state declarations of rights would result in greater protection for rights than is available

71 Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25 (1994).

72 Emmert & Traut, *supra* note 65, at 42.

73 Indeed, the frequent failure of state courts to clarify whether their rulings rested on adequate and independent state grounds led the U.S. Supreme Court, in *Michigan v. Long*, 463 U.S. 1032 (1983), to require "clear statements" of the grounds for state judicial rulings. However, there is little indication that the Court has induced greater clarity in state courts' rulings. *See* Felicia A. Rosenfield, Note, *Fulfilling the Goals of* Michigan v. Long*: The State Court Reaction*, 56 FORDHAM L. REV. 1041 (1988).

under the federal Constitution. However, reliance on state grounds to decide cases does not necessarily translate into more rights-affirming decisions. Some state guarantees may afford less protection than the federal Constitution (although litigants would, in such circumstances, still enjoy the rights guaranteed by the federal provision).[74] More important, state judges may base their rulings on state constitutional provisions but interpret them as affording no greater protection than do the analogous federal guarantees. Although proponents of the new judicial federalism have decried the tendency toward "lockstep analysis," it is hardly surprising that state judges take account of pertinent federal precedents in interpreting analogous state provisions and at times conform their interpretations to federal precedent.[75]

Barry Latzer's comprehensive study of rulings in new judicial federalism cases confirms the tendency toward lockstep analysis.[76] Latzer examined all state supreme court rulings in criminal procedure cases from the late 1960s to 1989 that were decided on the basis of state constitutions. He found that state judges routinely incorporated U.S. Supreme Court doctrines into state constitutional law; indeed, they adopted the Court's reasoning in over two-thirds of their criminal procedure decisions.[77] Some of the states that were most willing to base their rulings on state constitutional guarantees, such as Connecticut and New Hampshire, were also among those most willing to endorse U.S. Supreme Court doctrine.[78] Meanwhile, Florida and California, two states that had actively rejected Supreme Court doctrine, were "brought into line" during the 1980s by constitutional amendments that compelled conformity with federal law and, thereafter, substantially reduced their opposition. Based on these findings, Latzer concluded that there was a "hidden conservatism" in the new judicial federalism because state judges—instead of independently developing new state civil liberties law—tended to construe state and federal guarantees identically.

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74 *See, e.g.*, Serna v. Superior Court, 707 P.2d 793 (Cal. 1985); State v. Smith, 724 P.2d 894 (Or. 1986); State v. Hopper, 822 P.2d 775 (Wash. 1992).

75 On the undesirability of lockstep analysis, see Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984). For a defense of lockstep analysis, see Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988).

76 LATZER, *supra* note 59.

77 *Id.* at 160–61 tbl.1. Unless otherwise indicated, data in this paragraph are drawn from that table.

78 *Id.* at 165.

More impressionistic studies support Latzer's conclusion. Several studies have noted the failure of most state courts to develop a broader protection for speech and press than is available under the federal Constitution.[79] Similarly, a study of state rulings in both speech and religion cases concluded that they "continued to reflect the assumption that consideration of these issues should begin and, in most instances, end with federal precedent."[80] Even in construing their own constitutions, state courts characteristically relied on federal precedent and doctrine in interpreting the state provisions.

V. CONCLUSION

When state judges turned to their state declarations of rights in the early 1970s, they were not recovering a tradition but creating one. Their unfamiliarity with state guarantees, the absence of a state constitutional jurisprudence, the easy availability of federal doctrine and precedent, and qualms about the legitimacy of judicial activism all worked against the development of state civil liberties law. Yet, with the intermittent encouragement of the U.S. Supreme Court and the example of a few pioneering state courts, state judges began to rely more frequently on state declarations of rights in deciding cases.[81]

In most states, however, this recurrence to state guarantees has remained intermittent. Most judges have not adopted the state-law-first approach championed by Hans Linde nor, typically, any principled basis for deciding when or whether to address state constitutional claims.[82] There is no indication that this will change soon. For most state supreme courts, federal constitutional law will remain the primary protection for rights and the primary source of constitutional doctrine. Occasional recurrence to state provisions, in turn, will make it difficult for these courts to develop a coherent body of state civil liberties law.

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79 *See* Sue Davis & Taunya Lovell Banks, *State Constitutions, Freedom of Expression, and Search and Seizure: Prospects for State Court Reincarnation*, PUBLIUS: J. FEDERALISM, Winter 1987, at 13; Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305 (1985).

80 Tarr, *supra* note 8, at 39.

81 For examples of encouragement, see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); and *Oregon v. Haas*, 420 U.S. 714 (1975). For less encouraging signals, see *Pennsylvania v. Finley*, 481 U.S. 551 (1987); and *Michigan v. Long*, 463 U.S. 1032 (1983).

82 The "state-law-first" approach is advocated in Linde, *supra* note 7. The main principled alternative is a "criteria" approach under which judges would rely on state guarantees only when certain criteria were met. For a discussion of the criteria approach, see WILLIAMS, *supra* note 59, at 316–29.

This is not to deny the importance of the new judicial federalism. Quantitative analyses may indicate that state judges often do not rely on state guarantees in civil liberties cases. However, while counting all cases equally may be necessary for quantitative analyses, it obscures the major impact of some state judicial initiatives. Among these are state constitutional rulings involving education and exclusionary zoning, rulings which occurred in part because of the U.S. Supreme Court's refusal to grant relief and which would have been impossible without the new judicial federalism.[83] Moreover, even intermittent reliance on state guarantees represents a major shift in state judicial practice, and the reinvigoration of apparently obsolescent state constitutional provisions is itself a noteworthy development. Finally, the new judicial federalism has helped to spark a renewed interest in state constitutions, indicated most strikingly by campaigns to amend the constitutions either to extend or to curtail rights.

Ultimately, the new judicial federalism will most likely disappoint both its proponents and detractors. Most state judges will not embrace the state-law-first approach, thereby foregoing the discretion to choose between constitutional guarantees. Nor will state declarations of rights replace the federal Bill of Rights as the primary protection for individual rights. Nevertheless, having had the experience of interpreting state guarantees and having seen the creation of a body of precedent on which they can draw, neither are state judges likely to return to the second era's neglect of state protections or thoughtlessly assume that federal and state guarantees offer equivalent protection. Although they may learn from the rulings of the U.S. Supreme Court, they will not slavishly imitate them. Moreover, at times the justices of the U.S. Supreme Court may learn from the initiatives of their sister courts in the "laboratories" of the states. The new judicial federalism may be new no longer, but there is reason to believe that it will not soon disappear.

83 The pertinent Supreme Court rulings are, on education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); and, on exclusionary zoning, *Warth v. Seldin*, 422 U.S. 490 (1975). For discussion of the state rulings and their effects, see G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING ch. 11 (1994); G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Supreme Court and Exclusionary Zoning*, 15 RUTGERS L.J. 514; and Harrison & Tarr, *supra* note 59.