THE DOUBLE PROTECTION FOR RIGHTS: THE AMERICAN EXPERIENCE AND ITS IMPLICATIONS*

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In Federalist n. 51 James Madison observed that there is a double protection for rights in the US. Both the federal and state constitutions have bills of rights restricting government, and this double security is made effective through the federal and state judiciaries, each of which bears a responsibility for enforcing constitutional rights. Thus, we see in the US dual guarantees and dual guarantors. In this article, I will outline the legal foundations of this system, describe how this system has developed and operated over time, and consider what lessons, if any, the experience of the United States might provide for other federal systems.

Let me begin by sketching the three legal principles underlying this system of dual protections. First of all, in the present day, both federal and state bills of rights protect against the violation of rights by state governments. This was not always the case. When the federal Bill of Rights was adopted, its proponents were concerned to rein in what they feared was an unduly powerful national government, and therefore the restrictions of the Bill of Rights applied only against that government. The initial system for protection of rights was, thus, a system of parallel rather than double protection, with state bills or declarations of rights protecting against state violations, and the federal Bill of Rights protecting against federal violations. The adoption of the Fourteenth Amendment to the U.S. Constitution in 1868 was designed to provide the federal government with more power to remedy state violations of rights. Relying on the Due Process Clause of the Fourteenth Amendment, the U.S. Supreme Court began early in the twentieth century, through a process known as selective incorporation, to gradually extend the protections of the federal Bill of Rights to prohibit state violations of rights. By the 1960s this process of selective incorporation was more or less complete, so that virtually all the guarantees of the Bill of Rights applied equally against state governments and the federal government. As a result of this process of incorporation, what was originally a system of divided responsibilities – the federal Bill of Rights protecting against federal violations, and state constitutions protecting against state violations – was transformed into a system of concurrent responsibility, a system of double protection. Both the federal Constitution and state constitutions, both federal courts and state courts, can now be brought to bear against state violations of rights.

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The second crucial legal principle is that, in interpreting state and federal law, the federal Supreme Court serves as the ultimate interpreter of the federal law, including the Constitution, but each state supreme court as the ultimate interpreter of its state's law, including the constitution of that state. The U.S. Supreme Court can review the rulings of state supreme courts whenever federal law is involved. For example, were a person arrested and charged with possession of drugs under state criminal law, he might argue in state court that the evidence against him should be excluded from trial since it was seized in violation of his rights under the Fourth Amendment. Ultimately, since there is a federal constitutional claim involved, the U.S. Supreme Court could review the ruling of the state court. This Supreme Court review helps ensure that state courts interpret the federal Constitution in line with authoritative Supreme Court precedent – state courts are not permitted to give either a broader or narrower reading of federal constitutional rights than has been given by the US Supreme Court.

However, let me change the scenario slightly. Suppose that the defendant made no claim under the federal constitution but merely claimed that the police search violated the state constitution or state statutory law. In such a case, where the state court ruling is based exclusively on state law, on what judges typically refer to as "independent and adequate state grounds," there would be no possibility of review by the U.S. Supreme Court. When federal law is not implicated, the decision of the state supreme court on state law, including state bills of rights, is final and not subject to appellate review. The fact that rulings based exclusively on state bills of rights are insulated from review by the U.S. Supreme Court has become a crucial tactical consideration for civil-liberties groups as they plot their litigation strategies.

The final legal principle is that federal law is supreme within its sphere, so that when federal and state law conflict, federal law prevails. States and state courts therefore cannot recognize less in the way of rights for their residents than is required by federal law. Federal law creates a national minimum of rights or, in the words of one state court, "the least common denominator" of rights protection. But in the U.S. federal system, states and state courts can provide more protection for rights than is required as a matter of federal law.

And since the early 1970s, that is precisely what the states have done. From 1950 to 1969, in only ten cases did state judges rely on state guarantees of rights to afford greater protection than was available under the federal Constitution. However, from 1970 to 2000, they did so in more than one thousand cases. Scholars refer to this resurgence of state civil-liberties law, this new willingness of state courts to provide greater protections than are available under federal constitutional law, as the new judicial federalism. Federal constitutional law still remains the primary protection for rights in the US and the primary source of constitutional doctrine. But state constitutional law today serves as a complement to – and occasionally as an antidote to – federal pronouncements.

The development of this new judicial federalism raises a question, however. The governing legal principles that we have reviewed have not changed over time. Why then has the role of state courts and of state bills of rights changed? Why did the new judicial federalism arise when it did?

The standard account is that the new judicial federalism dates from the early

1970s and is closely linked to changes in personnel on the U.S. Supreme Court, best symbolized by the appointment of Warren Burger to succeed Earl Warren as chief justice. These personnel changes alarmed civil-liberties advocates, who expected that the reconstituted Supreme Court would erode the gains they had made during the Warren Court era, particularly with regard to the rights of defendants in criminal cases. In retrospect, it appears that these fears were exaggerated: the Burger Court did not launch a full-scale assault on *Mapp v. Ohio*, *Miranda v. Arizona*, or other landmark Warren Court rulings. But whether these fears were warranted or not is not really the issue, at least for present purposes. What is crucial is the response of these civil-liberties groups, which was to look for alternative means to safeguard rights, a search that led them eventually to embrace state bills of rights.

On initial inspection, this might seem an odd choice. State bills of rights protect many of the same set of fundamental rights – the freedoms of speech and of the press, religious liberty, and protections for defendants – that are found in the federal Bill of Rights, and state courts had not been aggressive (to put it mildly) in enforcing.those guarantees. Nevertheless, several factors made these state bills of rights attractive to rights advocates. First, state judges interpreting state bills of rights are not obliged to conform their interpretations to the rulings of federal courts interpreting analogous federal provisions. Even when the language is identical or nearly identical, state judges are interpreting a unique document, with a unique history, and this uniqueness may justify a different interpretation. Moreover, even if the federal courts have interpreted an identical provision in a nearly identical case, the federal ruling is not binding – states are the ultimate interpreters of their state constitutions, and they may simply disagree, they need not assume that the federal interpretation is the best legal interpretation.

Second, even when the state guarantees are analogous to those found in the federal Bill of Rights–for example, state guarantees of freedom of speech and of religious liberty – they are often framed in distinctive language. In particular, they are often more specific than their federal counterparts. For example, in addition to prohibiting governmental establishment of religion, nineteen states specifically bar religious tests for witnesses or jurors, and thirty-five prohibit expenditures for "any sectarian purpose". These textual differences may provide the basis for interpretations diverging from those emanating from the US Supreme Court.

Third, many state declarations of rights contain additional protections that have no federal analogue. For example, thirty-nine states guarantee access to a legal remedy to those who suffer injuries, eleven expressly protect a right to privacy, and seventeen expressly protect gender equality. Thus, these constitutions offer the prospect of extending rights protections beyond those recognized by the Warren Court.

Fourth – and most important – under the doctrine of "independent and adequate state grounds," rulings based solely on state law are not subject to federal review. This means that expansive state rulings, if based on state rights guarantees, are insulated from reversal by the Supreme Court. Thus, the standard account of the new judicial federalism emphasizes that the shift to state bills of rights represented a tactical maneuver by groups eager to evade what they perceived as a less hospitable federal constitutional law.

This is accurate as far as it goes. But in focusing on the incentives of litigants to rely on state constitutional guarantees, it ignores an important question: when litigants first advanced state constitutional arguments, why were state supreme courts receptive to those arguments? After all, historically state judges have been far less aggressive than their federal counterparts in initiating legal change, and until the advent of the new judicial federalism, their contributions to civil-liberties law were minimal. What prompted them to adopt a more rights-protective posture in the 1970s and thereafter, thereby supporting the emergence of the new judicial federalism?

The answer to those questions, I believe, lies in the recognition that state constitutional interpretation in the United States occurs in the context of – and is influenced by – a broader American legal tradition. Part of this tradition involves standards of appropriate judicial practice, which are best understood as prescribing a

range of legitimate interpretive strategies rather than rigid rules governing judicial practice. These standards also change over time; and justices of state supreme courts, like their federal counterparts, both participate in creating those standards and respond to them. As judges become educated as to the prevailing standards, these standards affect how they approach their work. Thus most state supreme court justices, I suspect, have learned how to interpret their state constitutions by watching how other courts (both federal and state) interpret their own constitutions. Litigants have also played a role here, of course, providing the opportunity for state constitutional interpretation by ensuring that appropriate claims and arguments, pioneered in other judicial arenas, are brought before the supreme courts of their states.

Now consider how this relates to the emergence of the new judicial federalism. When state supreme courts began to give broad readings to their state guarantees of rights in the 1970s, they were willing to do so because they had reason to believe that such a course was legitimate. For in interpreting the federal Bill of Rights, the U.S. Supreme Court under Chief Justice Earl Warren had supplied a model as to how a court should approach the interpretation of rights guarantees. Indeed, as one state supreme court justice has put it: "When I was in law school, [Justices] Warren and Brennan were my heroes." This also helps explain why state supreme courts did not develop civil-liberties law during the nineteenth and early twentieth centuries. Although the existence of state constitutional guarantees and the absence of federal involvement appeared to afford an opportunity for state judicial initiatives, these were necessary but not sufficient conditions. What was missing was a model of how state supreme courts could develop a civil-liberties jurisprudence. Because Americans had not come to rely on courts to vindicate civil liberties, state supreme courts throughout the nineteenth and early twentieth centuries gained little experience in interpreting civil-liberties guarantees–few cases were brought to them. Nor could they during that period look to federal courts for guidance in interpreting their constitutional protections. The federal courts likewise decided few civil-liberties cases during this era, and their rulings often revealed little sympathy for rights claimants. Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop its state's constitutional guarantees, could a state civil-liberties jurisprudence emerge. Thus, when the appointment of Chief Jus-

tice Warren Burger 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.

Some rather ironic conclusions follow from this argument. First, although the activism of the Warren Court has often been portrayed as detrimental to federalism, my argument suggests that this activism was a necessary condition for state supreme courts becoming actively involved in protecting civil liberties. The protection of civil liberties is not a zero-sum game, in which increased activity by one set of courts necessitates decreased activity by the other. Rather, the relationship between the federal and state judiciaries in the US involves a sharing of responsibility and a process of mutual learning, such that a change in orientation by one set of courts tends over time to be reflected in the other set of courts as well.

This leads to a second conclusion. Although the new judicial federalism rests on the doctrine of independent and adequate state grounds, the actual independence of state courts from federal law is far from complete. This is reflected in the wholesale transfer of doctrinal categories, such as "compelling state interest" and "suspect classifications," from federal to state constitutional law. Moreover, even as state supreme courts base their rulings on their own state constitutions, on independent and adequate state grounds, their approach to the interpretation of those grounds has been heavily influenced by the U.S. Supreme Court's approach to interpreting the federal Bill of Rights. I want to emphasize that this is not a criticism of state courts, merely a description reflecting the fact that there is a common American legal culture on which all courts draw.

If one switches the focus from the development of the new judicial federalism to its status today, two things stand out. First, the new judicial federalism is no longer new or controversial. In saying this, I do not deny that specific decisions based on state bills of rights continue to excite controversy and sometimes are even overturned by state constitutional amendments. Yet it is important to recognize what is–and what is not – at stake in these situations. The dispute typically concerns whether the state supreme court has properly interpreted the state constitution, not whether it was appropriate for it to consult the state constitution or to enforce its guarantees. The question in the American states is no longer whether the independent interpretation of state constitutions is legitimate–that is simply taken for granted – but rather whether particular interpretations of those constitutions are legally defensible.

Second, the new-judicial-federalism agenda of state supreme courts is no longer driven primarily by the rulings of the US Supreme Court. As I noted earlier, the new judicial federalism originated in reaction to the rulings–or anticipated rulings – of the Burger Court, particularly in the criminal justice area, and the majority of early rulings under the new judicial federalism involved the rights of defendants. Other early state constitutional rulings involved the reform of public school finance, which itself became a state constitutional issue after the US Supreme Court in *San Antonio Independent School District v. Rodriguez* foreclosed consideration of the issue under the federal Constitution. State civil-liberties law thus began as a fall-back position, a second-best approach, when the preferred approach of federal constitutional protection was unavailable. And the state constitutional agenda was largely determined,

ironically enough, by the adverse decisions of the US Supreme Court.

But in more recent years, important state constitutional issues have arisen that do not reflect disappointment about the decisions emanating from the nation's capital. Let me highlight two of these issues. The first involves gay rights – more specifically the right of gay and lesbian couples to marry. This issue has never been specifically addressed by the US Supreme Court, and indeed, the Supreme Court has until recently had little to say about the rights of homosexuals. However, state courts, relying on state constitutions, have weighed in on the issue. In 1993 the Hawaii Supreme Court ruled that denying marriage licenses to gay and lesbian couples violated the state constitution. Five years later, an Alaska court concluded that marriage was a fundamental right and that barring same-sex marriages amounted to sex discrimination in violation of the Alaska Constitution. And in 1999 the Vermont Supreme Court ruled that the state constitution guaranteed gay and lesbian couples the same legal rights and benefits of marriage enjoyed by heterosexual couples, and it ordered the Vermont Legislature to craft a law that would satisfy the ruling, either by legalizing gay marriage or by creating an equivalent partnership structure. A direct challenge to a ban on gay marriage is currently making its way through the Massachusetts courts.

Another emerging area in state constitutional law, likewise one in which federal courts have played little role, involves the intersection of constitutional law and tort law. Within the US, business interests, insurance companies, and the medical profession have long complained that tort-law legal doctrines unduly favor plaintiffs, and that juries in tort cases, especially when those cases pit ordinary citizens against large corporations, tend to award compensatory and punitive damages that are arbitrary and excessive. Whatever the validity of those charges, they have received a sympathetic hearing from state legislators, who have enacted so-called tort-reform statutes designed to shift the balance of power between plaintiffs and defendants. Among the provisions found in these tort-reform statutes are limits on joint and several liability, caps on punitive damages, and statutes of repose that set a time limit on manufacturers' liability for injuries caused by their defective products. The plaintiffs' bar has challenged several of these statutes, claiming that they violate various state constitutional guarantees, including the right to a jury trial and the right to redress of grievances. In several states – including Illinois, Ohio, and Oregon – these constitutional challenges have succeeded. However, the issue is far from decided–new reform statutes are likely to spawn new litigation. Indeed, the plaintiffs' and defendants' bars are likely to contest the issue of tort reform throughout the country, in state after state, both in cases before state supreme courts and in judicial elections that will determine the composition of the courts deciding these constitutional disputes. It seems likely that this will be the salient state constitutional issue of first decade of the 21st century, and it is one that has emerged altogether independently of the rulings of the US Supreme Court.

The states' experience with regard to same-sex marriages and tort reform points out another key feature of how the new judicial federalism operates, namely, that it is intimately bound up with the political process in the states. The federal Constitution is difficult to amend, and on only five occasions has it been altered to overturn

Supreme Court rulings. In contrast, state constitutions are relatively easy to amend, and voters are not at all reluctant to change their constitutions, even their state declarations of rights, in order to overrule judicial decisions with which they disagree. Hawaii and Alaska did so with regard to gay marriage, adopting amendments confirming that marriage was confined to heterosexual couples. Nor are voters bashful about removing judges who render unpopular decisions, a real possibility in states that either elect their judges or require periodic popular review of their performance in office. Controversial state constitutional rulings may thus start, rather than conclude constitutional debates, and the participants in those debates are likely to include legislators, interest groups, and ordinary citizens, as well as judges. Some view this as a negative, but I disagree. I think the involvement of the populace in constitutional debate is a particularly attractive feature of the system of dual protection of rights that has developed in the US.

Let me summarize to this point. From a theoretical perspective, under the American system of rights protection, the federal government provides the base, the constitutional minimum, ensuring the protection of fundamental (universal) rights, while state protections build upon that base, providing whatever additional protections the citizens of the state deem appropriate. From the institutional perspective, the logic is slightly different. The initial responsibility for protecting rights often rests with the states, both their political branches and their courts. Federal intervention usually occurs as a result of litigation, when the states have failed to meet their responsibilities.

The key question remains: does the system of dual protection that I have described make sense for other federal systems? One should be cautious about transplanting practices and institutions from one cultural and historical context to another. Nevertheless, let me offer some thoughts.

Whether it makes sense to allow states a role in defining and protecting rights beyond the federal minimum may depend, at least in part, on how one expects that this power will be exercised. The experience of the US may offer some clues. First of all, states may be expected to enshrine guarantees that reflect changes in political perspective that have occurred since the time the federal bill of rights was written. For example, the US Constitution does not expressly recognize positive rights – such as rights to housing, to medical care, and the like – and the Supreme Court has rejected claims that such rights are implicit in the document. This absence of positive rights may reflect the emphasis on "negative rights" (protections against government intrusions) in the late 18th century, at the time the federal Bill of Rights was adopted, or perhaps federalism concerns. Whatever the reason, the absence of protections for positive rights has created an opportunity for state constitution-makers. Most state constitutions are more recent than the federal Constitution, and many include positive rights. During the late nineteenth century, as public education emerged as the most important state responsibility, most state constitutions imposed a duty on state government to provide a quality education to all children (which has readily translated into a right to a quality education). During the 1930s, the era of the Great Depression, NY introduced a right to housing and a right to welfare, and during the 1940s NJ instituted a right of collective bargaining. More recently,

several states have added guarantees of a right to a clean environment to their constitutions.

States may also be expected to include in their bills of rights protections reflecting values that are dominant in the particular state, even if those values are not accepted nationwide. For example, the federal Constitution prohibits cruel and unusual punishments, but some states have gone further, either banning the death penalty or, in the case of Utah, requiring that those imprisoned "not be treated with unnecessary rigor." Other states have gone the other direction, including provisions emphasizing that they retain the right to impose the death penalty. The system of dual protection has thus assisted in accommodating differences in fundamental values.

States may also be expected to include additional rights guarantees because of distinctive features of the state population. The US Constitution does not directly address the rights of groups, but these rights do find some recognition in state constitutions, particularly in states with concentrations of ethnic or religious or racial groups. Thus, New Mexico protects the language rights of Hispanics, Montana the cultural heritage of American Indians, and Hawaii has an entire article addressed to the cultural concerns of its native population. Protections such as these show the advantages of a system of dual protection of rights. Such provisions reflect the distinctive concerns of particular states, something that could not readily be recognized at the federal level but can gain recognition and protection within specific states.

Finally, states may also be expected to include in their bills of rights guarantees not found in the federal Constitution that reflect particular concerns within the state. For example, California has included a right to safe schools and a right to fish on public lands; and Montana a right of access to public meetings and public records.

In deciding whether a double protection makes sense, one might also wish to consider whether it fosters federal values. I would argue that it does. Federalism is designed to encourage pluralism and diversity, and allowing states to define what rights beyond the federal minimum they wish to protect recognizes pluralism and encourages diversity.

Federalism is also designed to encourage experimentation within the states, and the experience of the US with dual protection of rights suggests that it fosters such experimentation. On the judicial level, state courts may feel free to interpret state constitutions as providing greater protection for rights than is available under the federal Constitution because they know that their rulings will have effect only within the borders of the state. The US Supreme Court refused to strike down reliance on the property tax to finance public education, even though this resulted in unequal funding for schools in poor areas, because of concerns about federalism, about major federal involvement in an area traditionally the responsibility of state and local governments. Because they are not affected by such federalism concerns, state courts have felt free to assess the constitutionality of state funding schemes, and in many instances they have required state governments to remedy inequities.

More generally, one can note that in the US most initiatives relating to individual rights were pioneered by individual states, not by the federal government. For example, it was the state of Vermont that first outlawed slavery, the state of Wisconsin that initiated unemployment insurance in the US, the state of Massachusetts that first

instituted a minimum wage for women and children, and the state of New York that first established protection against racial discrimination in employment. Only after these initiatives were emulated in other states did a national consensus emerge that found expression in the Constitution or federal statutes. Thus, in the area of rights protection, a division of responsibility encourages the states and the federal government to learn from the experience of other states.

Are there risks associated with a system of dual protection? Yes, there are, though I would not fear them unduly. Having more than one government defining rights makes things more complex and potentially more confusing, but any country that embraces federalism must know that it is simultaneously embracing complexity in government. Creating more constitutional rights empowers judges, providing them with more opportunities to strike down laws, although the possibility of overruling judicial pronouncements by constitutional amendment serves as a check. Finally, allowing states to define rights destroys the uniformity of rights in the country, although since the federal Bill of Rights protects the most fundamental rights, one may well wonder whether diversity in this area is more problematic than in any other area of public policy.

Ultimately, of course, each federal democracy must design the institutions that best fit its population, its history, and its culture. The double protection of rights is therefore unlikely to be desirable in all federal systems. But in the US the double protection for rights that Madison envisioned is a reality, and I would suggest that it is one of the most positive features of American federalism.