

# NEITHER ICARUS NOR OSTRICH: STATE CONSTITUTIONS AS AN INDEPENDENT SOURCE OF INDIVIDUAL RIGHTS

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*For more than three decades, observers have vigorously debated the desirability of judicial federalism—the practice of state courts interpreting their state constitutions to provide greater protections for individual rights than does the U.S. Constitution. This Note first discusses the recent history of judicial federalism and the theoretical debate concerning it. The Note then uses two current areas of legal struggle, same-sex marriage and government funding of religious education, to illustrate the effect on judicial federalism of two important structural limitations: the greater likelihood that state constitutions will be amended to overturn politically unpopular court decisions and the supremacy of federal law. The Note concludes that, although those structural features make it less likely that state courts will aggressively expand individual rights, they also serve to legitimate judicial federalism by alleviating its potentially negative aspects and mitigating the countermajoritarian difficulty that plagues federal constitutional decisions. Thus, although state courts engaging in judicial federalism generally will not attempt to fly too high as did the mythological Icarus, nor will they remain flightless like the ostrich. Rather, judicial federalism will continue to serve as a useful means for incremental legal change in a healthy, dynamic federal system.*

## INTRODUCTION

In the modern American mind, state constitutions languish in the shadow of the U.S. Constitution, which, throughout the twentieth century, cast an increasingly large shadow over American law.<sup>1</sup> Many

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<sup>1</sup> See Justice William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546 (1986) (observing ordinary Americans' tendency to think of U.S. Constitution as primary source of individual rights); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1169 (1992) (noting dominance of U.S. Constitution in constitutional discourse and resultant neglect of state constitutions); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 190 (2002) ("Federal constitutional law has received the lion's share of academic and judicial analysis . . .").

commentators unconsciously act as though state constitutions do not exist at all; for example, it is often claimed that the Constitution, created in 1787, is the oldest written constitution still in operation in the world,<sup>2</sup> while in fact that distinction belongs to the constitution of the Commonwealth of Massachusetts, which dates to 1780.<sup>3</sup> Likewise, although the Massachusetts Supreme Judicial Court's recent decision that the state's constitution prohibits exclusion of same-sex couples from marriage<sup>4</sup> has received considerable attention,<sup>5</sup> the state high courts that are the final arbiters of the meaning of state constitutions generally do not enjoy anywhere near the public celebrity of the U.S. Supreme Court, which has occupied a central place in American life for at least the past half century.<sup>6</sup>

Despite this relative anonymity, state high courts are responsible for a phenomenon that Justice William Brennan, Jr., declared, during the 1980s, "the most significant development in American constitutional jurisprudence today": judicial federalism.<sup>8</sup> Judicial federalism is the "well settled" principle that, irrespective of the Supreme Court's interpretation of the federal Constitution, "state supreme courts may

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<sup>2</sup> See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 354 (1993).

<sup>3</sup> James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L.J. 1445, 1446 (2001).

<sup>4</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>5</sup> See *infra* Part III.A.2.c.

<sup>6</sup> The year 2004 marks the fiftieth anniversary of the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); a number of commentators have stressed *Brown's* effect in increasing the Court's role in national affairs, a trend that continued through the Warren Court years right up to the present day. See, e.g., WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 163 (1988) ("*Brown* forever changed the role of the United States Supreme Court in American politics and society."). For extensive discussion of *Brown's* legacy, see, for example, *Symposium: Brown at Fifty*, 117 HARV. L. REV. 1302 (2004), and *Brown@50 Symposium*, 47 HOW. L.J. 473 (2004).

<sup>7</sup> Justice William J. Brennan, Jr., *Foreword to Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11, 11 (1988).

<sup>8</sup> "Judicial federalism" was originally called "new federalism" following the appearance of an influential article on the subject. See Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) (defining new federalism as recognition of rights under state constitutions that are not recognized under cognate provisions of U.S. Constitution). Following the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the burgeoning Tenth and Eleventh Amendment jurisprudence increasingly became known as "new federalism," which led academics to relabel the phenomenon identified by Wilkes as the "new judicial federalism." See, e.g., G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1118 (1997). Now thirty years later, the phenomenon is of course "no longer new at all." Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii, xvii (1996). This Note will therefore refer to this principle as "judicial federalism" or "state constitutionalism."

interpret their constitutions to give greater protection to their citizens.”<sup>9</sup>

Though judicial federalism may seem unremarkable, and for much of American history was considered a perfectly ordinary feature of the legal landscape, the principle has generated a vast theoretical debate over the past thirty years. Using prominent examples from current legal battles, this Note will explore the effect that the theoretical debate, as well as certain structural features of state constitutions and of our federal system, have had on the practice of judicial federalism.

Part I of this Note will provide a brief history of independent state constitutionalism in the realm of individual rights and explain why, despite judicial federalism’s long historical pedigree, it came to be seen by some as illegitimate. Part II explores the post-1970s theoretical debate about judicial federalism, and how state court judges have reacted to that debate. Part III describes two structural limitations on the practice of judicial federalism, namely, the relative ease of amending most state constitutions in response to unpopular court decisions and the possibility of Supreme Court review under the Supremacy Clause. The effects of these two structural features on judicial federalism are illustrated, respectively, by closer examination of two specific areas of great controversy in contemporary American law: same-sex marriage and state funding of religious entities or pursuits. Part IV analyzes the interplay between judicial federalism, the theoretical debate concerning it, and the structural limitations upon it. This Part further argues that the very limitations inherent in judicial federalism actually legitimate it by countering some of its strongest criticisms. The Note concludes that judicial federalism’s negative effects are overstated, and that it is an important feature of the American legal system that serves to facilitate enlightened development of American law.

## I

### SOME HISTORICAL BACKGROUND: INDEPENDENT STATE CONSTITUTIONS BEFORE 1970

Although judicial federalism has been a controversial topic since the mid-1970s, invocation of state constitutions to protect individual rights was in fact the historical norm for much of the nation’s exis-

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<sup>9</sup> Dennis J. Braithwaite, *An Analysis of the “Divergence Factors”: A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 3 (2001). See also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (acknowledging that states may provide greater protection under state constitutions than is provided by federal Constitution).

tence.<sup>10</sup> As James Madison suggested during the ratification debates,<sup>11</sup> for the first 175 years after the adoption of the federal Constitution, state constitutions were the primary guarantors of individual rights.<sup>12</sup> In 1833, the Supreme Court held in *Barron v. City of Baltimore*<sup>13</sup> that the provisions of the federal Bill of Rights were inapplicable to the states; thus, as against actions by state officials, state constitutions were generally the *only* guarantors of individual rights during this period. Even after the Fourteenth Amendment—intended to provide federal protection against violations of individual rights by the states<sup>14</sup>—was adopted in 1868, most of the specific guarantees of the Bill of Rights did not apply to the states for almost another century,<sup>15</sup> leaving to the states their historic role of protecting individual rights and liberties under their own constitutions.

Much of the modern controversy surrounding judicial federalism results from the dramatically expanded role of the Supreme Court in the protection of individual rights over the past half century. Believing that many states were not effectively performing this duty,<sup>16</sup> the Supreme Court revolutionized American law, imposing many federal constitutional guarantees on the states by incorporating them

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<sup>10</sup> Indeed, in the earliest years of the United States, reference to “the constitution” necessarily meant the state constitution: Each of the original thirteen states adopted a constitution prior to the federal Constitutional Convention of 1787. Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980). Vermont, independent from both Great Britain and the United States between 1777 and 1791, operated under its own constitution in this period as well and did not send representatives to the 1787 Constitutional Convention. See Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 81–84 (2001) (describing state constitutional history).

<sup>11</sup> See THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . .”).

<sup>12</sup> For a history of state constitutionalism prior to the modern era, see generally Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996).

<sup>13</sup> 32 U.S. 243 (1833).

<sup>14</sup> See Brennan, *supra* note 1, at 537–38 (noting deleterious effect of Civil War on original notion that states were natural protectors of individual rights and liberties and resultant adoption of Fourteenth Amendment).

<sup>15</sup> See *id.* at 539 (“[O]nly three specific rights from the Federal Bill had been deemed to apply to the states . . . in 1961.”).

<sup>16</sup> See Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 539 (1989) (arguing that Supreme Court’s decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which opened lower federal courts to many more suits under 42 U.S.C. § 1983 (2000), “rested upon a fundamental distrust of state courts to protect federal rights”). See also Robert B. McKay, “*With All Deliberate Speed*”: A Study of School Desegregation, 31 N.Y.U. L. REV. 991, 1038–66 (1956) (describing state officials’ attempts to resist or circumvent Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

through the Due Process Clause of the Fourteenth Amendment.<sup>17</sup> The application of federal constitutional guarantees to the states, combined with the Supreme Court's expansion of the substantive meaning of those guarantees,<sup>18</sup> led to a lamentable paucity of state constitutional interpretation.<sup>19</sup> The newly applicable federal protections either mirrored existing state constitutional guarantees<sup>20</sup> and thus made them seemingly redundant, or compelled states to abide by federal protections that they would not have adopted as a matter of state law.<sup>21</sup> Virtually no state court had any desire to expand protection beyond what was now required as a matter of federal constitutional law. Under such circumstances, it was "only natural" that "state

<sup>17</sup> It has long been settled that the specific guarantees of the federal Constitution's Bill of Rights do not apply directly to the states. *See Barron*, 32 U.S. at 250–51. The Fourteenth Amendment, however, prohibits the states from taking life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. Between 1868, when the Fourteenth Amendment was adopted, and 1961, the Supreme Court had held that certain protections found in the Bill of Rights were sufficiently essential to due process of law to be binding on states via the Fourteenth Amendment; this practice is commonly known as "incorporation." *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating, through Fourteenth Amendment, First Amendment's guarantee of free exercise of religion); *Whitney v. California*, 274 U.S. 357 (1927) (incorporating First Amendment's freedom of speech guarantee); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating Fifth Amendment's protection against taking of private property without just compensation). During the 1960s, the Supreme Court incorporated virtually all of the remaining provisions of the Bill of Rights and thereby drastically altered American law. *See, e.g., Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating Fifth Amendment's protection against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (declaring Fifth Amendment privilege against self-incrimination binding on states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that Sixth Amendment right to counsel applies to states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (imposing exclusionary rule on states via Fourteenth Amendment). *See also* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987) (noting shift from state constitutional protection of individual rights to federal constitutional protection, due to selective incorporation of Bill of Rights).

<sup>18</sup> *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring prophylactic warnings to be issued prior to custodial interrogation in order to safeguard Fifth Amendment right against self-incrimination).

<sup>19</sup> *See* Utter & Pitler, *supra* note 17, at 636. Utter and Pitler note:

Framers of . . . state constitutions intended their charters as the primary devices to protect individual rights. The federal Bill of Rights was perceived as a secondary layer of protection . . . Nevertheless, we have witnessed . . . a complete reversal in roles due to the United States Supreme Court's application of much of the federal Bill of Rights against the states through selective incorporation . . . As federal constitutional litigation came to dominate the individual rights field, state constitutional rights litigation all but disappeared.

<sup>20</sup> *See* *Elkins v. United States*, 364 U.S. 206, app. at 224–25 (1960) (noting that twenty-six states had adopted exclusionary rule in whole or in part by 1960, despite absence of Fourteenth Amendment requirement that they do so).

<sup>21</sup> *See, e.g., Miranda*, 384 U.S. at 521 (Harlan, J., dissenting) (noting that "[n]o State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own").

courts saw no reason to consider what protections, if any, were secured by state constitutions"<sup>22</sup> and "civil liberties law . . . became almost exclusively federal law."<sup>23</sup> State constitutions' role as the primary guarantors of civil liberties thus came to an abrupt halt, and the resultant jurisprudential gap has prompted much of the criticism of modern state constitutional interpretation, and has led some observers to brand the practice illegitimate.<sup>24</sup>

*A. State Constitutional Law as an Alternative to the  
Burger and Rehnquist Courts and Beyond*

The judicial federalism hiatus, though dramatic, proved relatively short. After Warren E. Burger replaced Earl Warren as Chief Justice of the U.S. Supreme Court in 1969, the Court came to define individual rights, particularly those of criminal defendants, ever more narrowly.<sup>25</sup> In response, some state judges, with overt approval from commentators,<sup>26</sup> turned to state constitutions to curtail the perceived "unwarranted erosion of federal . . . protection."<sup>27</sup>

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<sup>22</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). Ironically, it has been suggested that the Warren Court's legacy, though in the short run obviating the need to interpret state constitutional provisions, laid the groundwork for the state constitutionalism movement that would develop in the 1970s and beyond, because it provided a model for courts to vindicate civil liberties. See Williams, *supra* note 8, at xix (citing G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63, 72-73 (1994)).

<sup>23</sup> Tarr, *supra* note 8, at 1100.

<sup>24</sup> The lack of state constitutional doctrinal development during this period is responsible for one of the most persistent criticisms of judicial federalism: that it is jurisprudentially incoherent and is often an unprincipled reaction to federal decisions with which state courts do not agree. See *infra* pp. 114-15.

<sup>25</sup> Between 1969 and 1972, President Richard M. Nixon, who had made fighting crime a focal point of his 1968 campaign, appointed four new Supreme Court justices. The Nixon appointees turned the Court in a more conservative direction, particularly on questions of criminal procedure. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (holding that otherwise inadmissible statements made by criminal defendant without *Miranda* warnings may be admitted as evidence to impeach defendant's credibility as witness); see also Brennan, *supra* note 22, at 495-98; *infra* note 32 and accompanying text.

<sup>26</sup> See, e.g., Wilkes, *supra* note 8, at 434-35 (encouraging greater use of state constitutions to "evade" conservative Burger Court rulings). Professor Robert F. Williams notes that Robert Force's *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969), is a "too-little recognized article [that] foresaw virtually all of the major themes and developments in state constitutional law between 1969 and the present," which predates Wilkes's work. Williams, *supra* note 8, at xiv.

<sup>27</sup> Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 9 (1993). Though the Supreme Court is commonly seen as the defender of individual rights in the face of recalcitrant states, not all states have been as hostile to individual rights as has been suggested. See, e.g., *People v. Kreuger*, 675 N.E.2d 604, 611-12 (Ill. 1996) (noting that Illinois voluntarily adopted exclusionary rule almost forty years before it was required by *Mapp v. Ohio*, 367 U.S. 643 (1961)); *State v. Taylor*, 210 N.W.2d 873, 882 (Wis. 1973)

Despite attention in academic circles, judicial federalism was in its new resurgence a small phenomenon, with only a handful of states invoking their state constitutions on rare occasions to provide greater protection for individual rights than that offered under the U.S. Constitution as interpreted by the Supreme Court.<sup>28</sup> As the Burger Court's rightward drift continued during the mid-1970s, however, independent state constitutionalism gained an influential fan: Justice Brennan.

After first noting the reemergence of independent state constitutionalism in dissent,<sup>29</sup> Justice Brennan authored an article on the subject in 1977 in the *Harvard Law Review*,<sup>30</sup> noting with approval that "more and more state courts are construing state constitutional counterparts of provisions in the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions."<sup>31</sup> Justice Brennan also suggested that "these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from" vigilant protection of individual rights,<sup>32</sup> and

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(noting long history of Wisconsin courts affording greater protection for individual rights under state constitution than U.S. Supreme Court had done under federal Constitution).

<sup>28</sup> See, e.g., *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975) (holding that "California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than required by the United States Constitution"); *State v. Kaluna*, 520 P.2d 51 (Haw. 1974) (finding search and seizure proper under federal constitutional law to be violation of Hawaiian Constitution); *State v. Johnson*, 346 A.2d 66, 67-68 (N.J. 1975) (rejecting, under New Jersey Constitution, Supreme Court's standard for consent searches enunciated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)). For a pre-1974 discussion of this trend, see generally, Wilkes *supra* note 8.

<sup>29</sup> See *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

<sup>30</sup> Brennan, *supra* note 22.

<sup>31</sup> *Id.* at 495. As one commentator noted, the idea of looking to state courts to protect individual liberties in response to the failure of the Supreme Court to do so adequately was "both aberrant and paradoxical in the sense that the federal court . . . for more than half of this century, was viewed as the forum available to obtain an efficacious panacea against state judicial and legislative abuse." Alexander Williams, Jr., *The New Patrol for the Accused: State Constitutions as a Buffer Against Retrenchment*, 26 HOW. L.J. 1307, 1307 (1983) (emphasis added). Indeed, Justice Brennan himself had once "expressed a very different and much more negative opinion about the efficacy of state law in protecting basic human rights." Daniel Gordon, *Brennan's State Constitutional Era Twenty-Five Years Later—The History, the Present, and the State Constitutional Wall*, 73 TEMP. L. REV. 1031, 1032 (2000) (citing William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 777-78 (1961), as suggesting that "too many state practices fall far short" of protecting individual rights).

<sup>32</sup> Brennan, *supra* note 22, at 495. Regarding the Burger Court's trend toward scaling back protections of defendants' rights, see, for example, *New York v. Belton*, 453 U.S. 454 (1981) (holding that incident to custodial arrest, police may search vehicle and clothing of vehicle's occupants). See also, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (defining narrowly type of police conduct that qualifies as "custodial interrogation" and thus gives rise to *Miranda* rights); *Oregon v. Hass*, 420 U.S. 714 (1975) (extending *Harris v.*

asserted that the trend "constitutes a clear call to state courts to step into the breach."<sup>33</sup>

Although initially the notion of turning to the states to protect civil liberties may have seemed strange to many activists, over the next few years the expansion of state constitutional doctrine would become one of the most noted features of the American legal landscape.<sup>34</sup> A number of state high courts made it known that they expected state constitutional claims to be explored and that they would be open to providing broader protections of individual rights under those constitutions.<sup>35</sup> Justice Brennan noted in 1986 that "[b]etween 1970 and 1984, state courts . . . handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law."<sup>36</sup> By 1997, seven

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*New York*, 401 U.S. 222 (1971), to statements made by accused after he was given *Miranda* warnings but denied telephone call to lawyer); *United States v. Robinson*, 414 U.S. 218, 225-26, 235 (1973) (creating categorical exception to rule announced in *Chimel v. California*, 395 U.S. 752, 762-63 (1969), that, pursuant to arrest, police may only conduct warrantless search of area into which suspect might reach in order to grab weapon or destructible evidence). Justice Brennan documents these and other cases in his article. Brennan, *supra* note 22, at 495-98.

<sup>33</sup> *Id.* at 503.

<sup>34</sup> In 1982, the Harvard Law Review devoted its "Developments in the Law" issue to state constitutionalism. Symposium, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982). Additional scholarship addressing state constitutional doctrine includes, for example, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 S.W. L.J. 951 (1982); Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CINN. L. REV. 317 (1986); and Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

<sup>35</sup> Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1018-22 (1997). A notable example of a state court's reaction to the U.S. Supreme Court's jurisprudence occurred in *State v. Opperman (II)*, 247 N.W.2d 673 (S.D. 1976). In its first decision in the case, nineteen months earlier, the South Dakota Supreme Court held that inventory searches of impounded cars violated the Fourth Amendment. *State v. Opperman (I)*, 228 N.W.2d 152 (S.D. 1975). After the Supreme Court reversed on the federal question, *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976), the state court on remand reinstated its prior opinion, citing the state, rather than federal, constitution. *Opperman (II)*, 247 N.W.2d at 674. It is noteworthy that the analogous provision is textually almost identical to the Fourth Amendment. Compare U.S. CONST. amend. IV, with S.D. CONST. art. VI, § 11. It also is striking that the state court's first decision made no reference whatsoever to the state constitution, indicating that a break with the Supreme Court was the furthest thing from the court's mind. *Opperman (I)*, 228 N.W.2d at 156-159.

<sup>36</sup> Brennan, *supra* note 1, at 548. Just three years after Justice Brennan noted this trend, Washington Supreme Court Justice Robert Utter claimed that "more than 450 published state court opinions [had interpreted] state constitutions as going beyond federal constitutional guarantees." Robert F. Utter, *State Constitutional Law, The United States*



hundred decisions had invalidated state statutes based on state declarations of rights.<sup>37</sup>

More importantly, what began as a reaction to the Burger and Rehnquist Courts eventually came to receive "much more sophisticated" theoretical treatment from scholars.<sup>38</sup> State courts have endeavored to develop a more coherent state constitutional jurisprudence, and judicial federalism, in some form or other, has been a nearly universal occurrence among American states.<sup>39</sup> A quarter century after Justice Brennan's article first appeared, it has truly left its mark in both legal scholarship and state constitutional jurisprudence.

## II

### THE THEORY OF JUDICIAL FEDERALISM: PRO AND CON

Since the "renaissance" of judicial federalism in the mid-1970s, a vigorous theoretical debate has been waged about its legitimacy and desirability. As the debate has had a profound effect on the way judicial federalism is practiced, an exploration of the debate is necessary to understanding the phenomenon.

#### A. Arguments in Favor of Judicial Federalism

Most arguments in favor of judicial federalism arise from a strong belief in the basic principle of constitutional federalism: The idea that state courts are legitimately the final arbiters of the meaning of their own constitutions and need not defer to federal decisions when interpreting them.<sup>40</sup> Advocates of judicial federalism argue that too much deference to the Supreme Court reflects an insufficient appreciation of state sovereignty.<sup>41</sup> State courts must, they claim, interpret their

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*Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27 (1989).

<sup>37</sup> Tarr, *supra* note 8, at 1114.

<sup>38</sup> Williams, *supra* note 8, at xxiv. See also G. Alan Tarr & Robert F. Williams, *Foreword: Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191, 191-92 (1998) (noting that state constitutionalism "has been transformed" into "rapidly advancing field of study").

<sup>39</sup> See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 92 (1996) (noting that "47 of the 50 states have established or enlarged federal search and seizure rights on state constitutional grounds"; only Alabama, Georgia, and Virginia have not); see also O'Neill, *supra* note 27, at 14-19 (naming thirty-one states that have found greater protection for individual liberty under their state constitutions than exists under federal Constitution).

<sup>40</sup> See Braithwaite, *supra* note 9, at 4-5 (proposing that New Jersey assert greater independence from U.S. Supreme Court to further "coherent development of New Jersey constitutional law").

<sup>41</sup> See *id.* at 23-25 ("The New Jersey Supreme Court is the final arbiter of rights provided by the New Jersey Constitution. . . . There is no requirement for the New Jersey

state constitutions independently<sup>42</sup> rather than taking a “relational” approach centering on Supreme Court jurisprudence.<sup>43</sup>

Proponents of judicial federalism also argue that robust state constitutionalism merely restores the historic role states occupied in protecting individual rights.<sup>44</sup> Many state declarations of rights, after all, predated and served as models for the federal Bill of Rights.<sup>45</sup> Madison originally conceived of the states as the primary guardians of individual liberties,<sup>46</sup> and state constitutional provisions were in fact the primary, if not the only, sources of protection against infringement of rights by the states until the Supreme Court made most of the guarantees in the federal Bill of Rights applicable to the states through incorporation.<sup>47</sup>

Moreover, proponents assert that, even if federal constitutional guarantees are binding on the states, they only represent a national minimum, a floor beneath which no state may go.<sup>48</sup> Above that floor, however, states should be free to grant greater protection to their citizens.<sup>49</sup> This argument is derived from federalism itself; it is the direct

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Supreme Court to ask when to diverge from federal precedent, and there is no need for such a requirement.”).

<sup>42</sup> Justice Hans Linde of the Oregon Supreme Court, a major proponent of independent state constitutionalism, believed that a state court’s duty was not to compare the state constitutional provision at hand to a federal provision or those of other states, but simply to decide “what the state’s guarantee means.” Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177–79 (1984) [hereinafter Linde, *E Pluribus*]. However, it is a common state practice to look to the decisions of other states, as well as federal decisions, for initial guidance. Tarr & Williams, *supra* note 38, at 196. Justice Linde was wary of this trend. See Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 228–29 (1992) [hereinafter Linde, *Common Law*] (cautioning against looking to other states in constitutional cases). For a more modern view taking a favorable position on looking not only to the constitutional decisions of other states, but those of other nations as well, see generally Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn From Their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004). Chief Justice Marshall’s willingness to explore other sources might well signal a diminished defensiveness as state constitutionalism has developed.

<sup>43</sup> See Linde, *E Pluribus*, *supra* note 42, at 177–79 (arguing that Supreme Court’s interpretation of U.S. Constitution has limited applicability to interpretation of state constitutions).

<sup>44</sup> Braithwaite, *supra* note 9, at 27–30; Eve Cary & Mary R. Falk, *People v. Scott & People v. Keta: “Democracy Begins in Conversation”*, 58 BROOK. L. REV. 1279, 1324 (1993).

<sup>45</sup> Brennan, *supra* note 22, at 501–02.

<sup>46</sup> See *supra* note 11 and accompanying text.

<sup>47</sup> See *supra* note 17 and accompanying text.

<sup>48</sup> Braithwaite, *supra* note 9, at 27–28.

<sup>49</sup> *Id.* at 28; Brennan, *supra* note 1, at 548, 551. Professor Barry Latzer correctly points out that, as a pure matter of state law, states may interpret their own constitutions to provide less protection than the federal Constitution. Barry Latzer, *Whose Federalism? Or, Why “Conservative” States Should Develop Their State Constitutional Law*, 61 ALB. L.

descendant of Justice Brandeis's contention in *New State Ice Co. v. Liebmann*<sup>50</sup> that one of the major advantages of the federal system is the ability of each state to act as "a laboratory" conducting policy experiments that the rest of the country (both other states and the federal government) can observe and perhaps emulate if they are successful.<sup>51</sup> Our federal system, particularly given the inapplicability of the Bill of Rights to the states until relatively recently,<sup>52</sup> can fairly be said to presuppose such diversity.<sup>53</sup> Judicial federalism therefore vindicates the conception of state sovereignty at the heart of American federalism.<sup>54</sup>

Furthermore, both the text<sup>55</sup> and history<sup>56</sup> of many state constitutional provisions differ materially from roughly analogous federal provisions, militating against treating the state and federal provisions as identical. State constitutions are generally much more specific than the federal Constitution,<sup>57</sup> and often guarantee rights in affirmative

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REV. 1399, 1404–10 (1998) [hereinafter Latzer, *Whose Federalism?*]. The Supreme Judicial Court of Maine has thus noted that there is still no state exclusionary rule in Maine. *Id.* at 1406. The Oregon Supreme Court likewise found no protection for religiously motivated peyote use under the state constitution, though it believed at the time that the Free Exercise Clause of the First Amendment to the U.S. Constitution protected the activity. *Smith v. Employment Div.*, 721 P.2d 445, 449 (Or. 1986), *vacated and remanded*, 485 U.S. 660 (1988), *reaff'd*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872 (1990). Due to incorporation, such state constitutional interpretations currently have no practical effect since states are bound by the Supremacy Clause to afford all federal protections. See *infra* Part III.B. Professor Latzer, pointing to the effectiveness of state courts in protecting individual rights in the judicial federalism era, provocatively argues that the U.S. Supreme Court should "disincorporate" certain provisions of the Bill of Rights, leaving states free to go below the federal "floor" not only doctrinally but in application as well. Latzer, *supra* note 39, at 68–70. Justice Brennan, to the contrary, believes that a meaningful federal minimum is essential. Brennan, *supra* note 1, at 550.

<sup>50</sup> 285 U.S. 262 (1932).

<sup>51</sup> *Id.* at 311 (Brandeis, J., dissenting); see also Brennan, *supra* note 1, at 549.

<sup>52</sup> See *supra* Part I.A.

<sup>53</sup> See *State v. Kaluna*, 520 P.2d 51, 58 n.6 (Haw. 1974) (noting that "the system of federalism envisaged by the U.S. Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law").

<sup>54</sup> Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4–6 (1984); see also Braithwaite, *supra* note 9, at 22, 25.

<sup>55</sup> See, e.g., O'Neill, *supra* note 27, at 30 (arguing that "state constitutions depart dramatically from the federal text").

<sup>56</sup> See, e.g., Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 345–47 (1993) (noting that particular historical commitment to egalitarianism in Pennsylvania militates against treating state equal protection provision as identical to federal Equal Protection Clause).

<sup>57</sup> Ka Tina R. Hodge, Comment, *Arkansas's Entry into the Not-So-New Judicial Federalism*, 25 U. ARK. LITTLE ROCK L. REV. 835, 839 (2003) (arguing that state constitutions need to be more specific since they cover local government structures, thus dealing with issues federal Constitution need not address, and because they provide framework for alternatives to areas not covered by Constitution).

terms, whereas federal constitutional rights are cast in negative terms.<sup>58</sup> These differences may be "so striking that a court, when presented with the contrast, should hesitate before pronouncing that both be given the identical construction."<sup>59</sup>

Judicial federalism's advocates thus often argue that state courts not only legitimately may interpret their constitutions independently of Supreme Court precedent,<sup>60</sup> but that they have a duty to do so.<sup>61</sup> This particularly holds true when a state constitutional provision's text and history differ significantly from its federal counterpart,<sup>62</sup> but also when they are virtually identical.<sup>63</sup> State constitutions are not, after all, subsets of the federal Constitution; they are wholly independent documents serving as the charter for governance within a state's borders. State courts have the ultimate say on their meaning, and they cannot abdicate that duty.<sup>64</sup>

It has been suggested that uncritical adoption of Supreme Court precedent as a matter of state constitutional law is tantamount to conferring upon the Supreme Court the functional ability to amend the state constitution, which the Court has no authority to do.<sup>65</sup> While Supreme Court precedents can be "valuable sources of wisdom" for state courts,<sup>66</sup> state judges themselves "bear ultimate responsibility for the safe passage of" their state constitutional ship.<sup>67</sup> In the end,

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<sup>58</sup> See, e.g., Braithwaite, *supra* note 9, at 42–43 (stating that New Jersey Constitution imposes affirmative obligation to protect individual rights).

<sup>59</sup> O'Neill, *supra* note 27, at 31.

<sup>60</sup> *People v. Scott*, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring); Williams, *supra* note 35, at 1016, 1063; Williams, *supra* note 56, at 347–48.

<sup>61</sup> Williams, *supra* note 35, at 1015 (quoting *State v. Hempla*, 576 A.2d 793, 800 (N.J. 1990)).

<sup>62</sup> See *supra* notes 55–59 and accompanying text.

<sup>63</sup> See *Virmani v. Presbyterian Health Serv. Corp.*, 515 S.E.2d 675, 692 (N.C. 1999) ("We have said that even where provisions of the state and federal Constitutions are identical, 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution . . .'" (quoting *State v. Jackson*, 503 S.E.2d 101, 103 (1998) (citations and internal quotation marks omitted))); *State v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) ("We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution."). Cf. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293 (1982) (finding that state court has discretion both in interpretation of state constitutional provision and in mode of analysis utilized in favor of its own model).

<sup>64</sup> *Scott*, 593 N.E.2d at 1341–42; Braithwaite, *supra* note 9, at 4, 17–18, 46; Williams, *supra* note 35, at 1015–17.

<sup>65</sup> See Braithwaite, *supra* note 9, at 33.

<sup>66</sup> *State v. Hunt*, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring).

<sup>67</sup> *Id.*

Supreme Court precedent is only persuasive authority<sup>68</sup> to be scrutinized critically.<sup>69</sup> There is nothing unusual about this parallel decisionmaking: The Supreme Court, charged with interpretation of a different document, has itself recognized<sup>70</sup> that it is not the "sole repository of judicial wisdom."<sup>71</sup> Independent state court interpretation therefore simply reflects the fundamental fact that "[t]he Framers split the atom of sovereignty."<sup>72</sup>

### B. Arguments Against Judicial Federalism

Judicial federalism is, however, not a universally beloved phenomenon,<sup>73</sup> and the movement's many opponents have leveled a number of strong criticisms at it.<sup>74</sup> In 1992, Professor James A. Gardner, in a particularly potent theoretical critique of judicial federalism, asserted that, "contrary to the claims of New Federalism, state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."<sup>75</sup>

Gardner attributed this confusion largely to a lack of useful state case law to guide state courts,<sup>76</sup> and a resultant "poverty of state

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<sup>68</sup> See, e.g., *People v. Bullock*, 485 N.W.2d 866, 870 (Mich. 1992) (stating that Michigan Supreme Court "alone is ultimate authority with regard to the meaning and application of Michigan law").

<sup>69</sup> See *Hunt*, 450 A.2d at 960 (Pashman, J., concurring) (noting that states should perform "independent constitutional analysis unless there are particular reasons to conform" to federal constitutional interpretation).

<sup>70</sup> See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution."); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) ("Our reasoning . . . does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").

<sup>71</sup> Brennan, *supra* note 1, at 551.

<sup>72</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>73</sup> See, e.g., Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 863 (1991) (offering that "New Judicial Federalism has not escaped criticism," particularly from conservatives who view states' "rejectionism" as "unprincipled, especially when textual differences between the state and federal constitutional provisions are minor," and potentially destructive to balance of power); Williams, *supra* note 8, at xxii.

<sup>74</sup> In addition to scholars and some state judges, Supreme Court justices more conservative than Justice Brennan were critical of the phenomenon and urged the overruling of rights-protective state court decisions by state constitutional amendment. See *infra* note 122 and accompanying text.

<sup>75</sup> James A. Gardner, *The Failed Discourse of State Constitutional Law*, 90 MICH. L. REV. 761, 763 (1992).

<sup>76</sup> *Id.* at 780-84, 793-94.

constitutional discourse.”<sup>77</sup> The shortage of case law to which Professor Gardner alluded is partially due to state courts’ widespread abandonment of state constitutional law during the Warren Court era.<sup>78</sup> The Warren Court also paved the way for another criticism of judicial federalism by instilling in a generation of legal minds a core belief in federal supremacy.<sup>79</sup> In the late 1970s and 1980s, many observers accustomed to the Supreme Court’s dominance in matters of rights protection viewed state constitutionalism as a “cute trick”<sup>80</sup> and “simply a flexing of state constitutional muscle” by impertinent state courts.<sup>81</sup> Although the Supreme Court has recognized state constitutionalism as legitimate,<sup>82</sup> many in the legal profession continue to believe that the Supreme Court is entitled to deference in all things “constitutional.”<sup>83</sup> For example, Professor Paul Bator in 1981 sharply criticized Justice Brennan’s “campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court.”<sup>84</sup> It is clear that Professor Bator viewed state constitutional decisions adopting doctrines that have already been rejected, as a matter of federal law, as an attempt by judges sympathetic to the Supreme Court minority to have their way despite having “lost” in the nation’s highest court; he did not view such decisions as legitimate interpretations of a wholly separate document whose text and history might be more closely related to a dissent’s approach than that of the Supreme Court majority.

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<sup>77</sup> *Id.* at 766, 768–69.

<sup>78</sup> See *supra* Part I.A.

<sup>79</sup> See Williams, *supra* note 31, at 1307 (describing Burger Court period of retrenchment following decades of viewing federal court as “the forum available to obtain an efficacious panacea against state judicial and legislative abuse”).

<sup>80</sup> H.C. Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) (“There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not ‘real’ constitutional law at all.”).

<sup>81</sup> *State v. Miller*, 630 A.2d 1315, 1328 (Conn. 1993) (Callahan, J., concurring in part and dissenting in part).

<sup>82</sup> See *supra* note 70 and accompanying text.

<sup>83</sup> See, e.g., *See v. Commonwealth*, 746 S.W.2d 401, 402 (Ky. 1988) (“The majority of this court is not convinced that the [alleged error] is so violative of a basic right guaranteed by the Kentucky Constitution that we should place ourselves in direct opposition to an opinion of the United States Supreme Court.”); *State v. Hempele*, 576 A.2d 793, 815–16 (N.J. 1990) (O’Hern, J., concurring in part and dissenting in part) (“Throughout our history, we have maintained a resolute trust in [the U.S. Supreme] Court as the guardian of our liberties. . . . [T]he content of our freedom under law is drawn from the Bill of Rights. I rather doubt that most Americans think otherwise.”).

<sup>84</sup> Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981).

Another common criticism of judicial federalism focuses on the practical implications of inconsistencies created when state constitutional decisions conflict with Supreme Court precedent.<sup>85</sup> Divergence in state criminal procedure law particularly poses problems for federal agents working on joint investigations with local authorities, and state agents operating outside their home state.<sup>86</sup> Justice Daniel O'Hern of the New Jersey Supreme Court thus argued, "[t]he fourth amendment is the fourth amendment. It ought not mean one thing in Trenton and another across the Delaware in Morrisville, Pennsylvania."<sup>87</sup>

Justice O'Hern also advanced a more fundamental argument for uniformity: "Respect for law flows from a belief in its objectivity. To the extent possible, we ought not personalize constitutional doctrine. When we do otherwise, we vindicate the worst fears of the critics of judicial activism."<sup>88</sup> Judicial federalism, thus, poses a threat to the rule of law by exposing the possibility of contradictory resolutions of similar cases.<sup>89</sup>

Perhaps the most common critique of judicial federalism is that, largely because there are often few state precedents to guide courts, it is an unprincipled, ideologically driven reaction to Supreme Court decisions with which state judges do not agree.<sup>90</sup> In light of the federal floor represented by incorporation,<sup>91</sup> this criticism is often leveled by political conservatives frustrated at what they perceive as a one-

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<sup>85</sup> See James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244-57 (1996) (arguing that conflicting federal and state court decisions in area of constitutional criminal procedure can lead to inequity in application of law and hinder effective prosecution of criminal cases in which both federal and state officials are involved).

<sup>86</sup> *Id.* at 244-50; Latzer, *supra* note 73, at 865-74.

<sup>87</sup> *Hempele*, 576 A.2d at 816 (O'Hern, J., concurring in part and dissenting in part).

<sup>88</sup> *Id.*

<sup>89</sup> The same rationale for uniformity Justice O'Hern offers would militate against publishing dissents. Though the law is in theory objective, it can only be interpreted by human beings. Thus, despite the best intentions of many judges, judging should perhaps be recognized as an inherently subjective, political act. Cary & Falk, *supra* note 44, at 1349-50.

<sup>90</sup> See, e.g., *Hempele*, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part) ("[I]t is not enough to say that because we disagree with a majority opinion of the Supreme Court, we should invoke our State Constitution to achieve a contrary result."); *People v. Scott*, 593 N.E.2d 1328, 1350-51 (N.Y. 1992) (Bellacosa, J., dissenting) (stating that disagreement with U.S. Supreme Court should be based on "sufficient reasons" and not on "mere ideological disagreement . . . with the definitive decisions of the highest Court in the land"); *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985) ("It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented."); *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986) (addressing concern that "our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of . . . the United States Supreme Court").

<sup>91</sup> See *supra* Part I.A.

way street only affording greater rights protection.<sup>92</sup> Though this last criticism, more than any other, has affected the way state judges interpret their constitutions, each of the criticisms described herein has been keenly felt.

### C. *Judicial Reactions to the Theoretical Debate: Caution and Reluctance*

The theoretical debate concerning judicial federalism's legitimacy and desirability has had a profound impact on state court judges. The criticisms made are not without merit, and they have been taken seriously by state judges. Indeed, even those courts largely persuaded by the arguments in favor of the practice have faced resistance, from within<sup>93</sup> and without.<sup>94</sup> Many state courts, to counter criticisms like those leveled by Professor Gardner and suggestions that judicial federalism is unprincipled, have developed lists of specific factors that must be present before the court will invoke the state constitution to diverge from Supreme Court precedent.<sup>95</sup>

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<sup>92</sup> See, e.g., George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979) (arguing that results of state constitutionalism are ideologically motivated to achieve liberal ends); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) (arguing that judicial federalism is motivated by desire to achieve liberal results). Of course, state constitutions may also be invoked to protect "conservative" rights such as compensation for taking of property for public use and equal protection rights against affirmative action. See *infra* note 124.

<sup>93</sup> See, e.g., *People v. Belton*, 432 N.E.2d 745, 749 (N.Y. 1982) (Gabrielli, J., concurring) ("I question the propriety of the majority's interpretation of . . . our State Constitution in a manner differing from the Supreme Court's interpretation of the Fourth Amendment to the United States Constitution.").

<sup>94</sup> In 1982, for example, the California Constitution was amended by popular referendum to bar the exclusion of criminal evidence seized in violation of state constitutional guarantees unless authorized by a statute enacted by a two-thirds majority of the California Legislature or required by the U.S. Constitution under *Mapp v. Ohio*, 367 U.S. 643 (1961). See CAL. CONST. art. I, § 28(d). See *infra* Part III.A for more extensive discussion of amending state constitutions.

<sup>95</sup> See *State v. Hunt*, 450 A.2d 952, 963–67 (N.J. 1982) (Handler, J., concurring) (noting "danger . . . in state courts turning uncritically to their state constitutions," suggesting that "state courts should be sensitive to developments in federal law" to promote uniformity, and identifying factors that should be present before state courts diverge from federal rules of law). See generally Williams, *supra* note 35, for a thorough review of states adopting such divergence factors. Williams identifies New Jersey, Washington, Vermont, Pennsylvania, Illinois and Connecticut as leading states adopting this approach. See *id.* at 1018–39. New Jersey's divergence factors, for example, include: (1) differences in text, (2) particular legislative history, (3) preexisting state law, (4) structural difference between state and federal constitutions, (5) matters of particular state concern, (6) local traditions, and (7) public attitudes within the state. *Hunt*, 450 A.2d at 965–67 (Handler, J. concurring).



A number of state high courts have issued “teaching opinions” designed to educate the local bar about their approach to state constitutional interpretation, including divergence factors.<sup>96</sup> Washington and Connecticut have even required counsel to argue, in their briefs, that the factors are applicable before they will consider a state constitutional claim.<sup>97</sup> Pennsylvania initially adopted a similarly strict approach before relaxing it.<sup>98</sup> New York, on the other hand, identified a set of criteria<sup>99</sup> but has not consistently applied these criteria.<sup>100</sup>

Though criticized by more ardent advocates of state constitutionalism,<sup>101</sup> this intermediate approach, avoiding both uncritical adoption of Supreme Court precedent as a matter of state law and unprincipled deviation from it, remains popular precisely because it provides a defense against charges of unprincipled decisionmaking.<sup>102</sup> This approach, however, may restrict the extent to which judicial federalism can flourish,<sup>103</sup> particularly where state courts flatly refuse to entertain state constitutional claims if the divergence factors are not present.

<sup>96</sup> *Hunt*, 450 A.2d at 963–67 (Handler, J., concurring). For examples of “teaching opinions” from other states, see *State v. Geisler*, 610 A.2d 1225 (Conn. 1992), *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), *State v. Gunwall*, 720 P.2d 808 (Wash. 1986), and *State v. Jewett*, 500 A.2d 223 (Vt. 1985).

<sup>97</sup> See *Williams*, *supra* note 35, at 1027–28, 1037 (discussing fixation of Washington Supreme Court on *Gunwall* criteria approach, 720 P.2d at 811, 812–813, and similar use of criteria approach in Connecticut based on *Geisler*, 610 A.2d at 1231–34).

<sup>98</sup> *Id.* at 1032–33.

<sup>99</sup> See *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 560 (N.Y. 1986) (discussing difference between “interpretive” factors related to substantive disagreement with Supreme Court and “non-interpretive” factors such as those set forth by states).

<sup>100</sup> See *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992) (finding greater protection under state constitution without analysis of divergence factors); *id.* at 1347 (Kaye, J., concurring) (rejecting need for “ironclad checklist to be rigidly applied” before reaching state constitutional issue); *id.* at 1356 (Bellacosa, J., dissenting) (lamenting perceived departure from earlier requirement of “non-interpretive” factors for deviation).

<sup>101</sup> Braithwaite, *supra* note 9, at 4–5, 23–26. Cary and Falk, *supra* note 44, at 1348–49, point out that:

Non-interpretive analysis is a judicially created restraint on the power of state courts . . . [T]here is neither a constitutional command nor a historical precedent which requires that [a state court] justify its actions on the basis of non-interpretive factors. Indeed, such analysis is directly contrary to the very notion of state constitutionalism.

<sup>102</sup> See John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don’t the ‘Primacy’ States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1049 (1993) (arguing that “neutral factors” such as those adopted by Washington lead to “principled state constitutional practice” and “provide[ ] perhaps the best reply to criticism of state constitutionalism”); Jon F. Sheehan, Comment, *State v. Pierce: State Constitutional Protection Against the Belton Search Incident to Arrest Rule*, 30 NEW ENG. L. REV. 843, 870–71 (1996) (pointing to factors adopted by New Jersey as defense against charges of unprincipled decisionmaking).

<sup>103</sup> Braithwaite, *supra* note 9, at 4–5, 14.

Many state courts (perhaps the majority) demonstrate more reluctance to provide greater protection for individual rights than the Supreme Court. Such courts therefore tend uncritically to adopt federal decisions as a matter of state constitutional law.<sup>104</sup> This "lockstep" approach is anathema to proponents of judicial federalism, who consider it the ultimate abdication of a state court's duty to decide state constitutional questions independently,<sup>105</sup> particularly where the text and history of the state provision point to a different result.<sup>106</sup> Despite such criticism, the lockstep approach remains the most common approach to state constitutionalism.<sup>107</sup> Though some states

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<sup>104</sup> Gardner, *supra* note 75, at 788–93.

<sup>105</sup> See, e.g., Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1137 (1985) (arguing that lockstep approach renders state provisions nugatory and represents failure of state courts to fulfill their duty); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 402–04 (1984) (arguing that state constitutional jurisprudence suffers when validity of Supreme Court interpretation is presumed). For judicial critique of the lockstep approach, see, for example, *State v. Tucker*, 626 So.2d 707, 719 (La. 1993) (Dennis, J., dissenting):

[M]y colleagues have sunk this court to the lowest pitch of abject followership. They no longer believe in our state constitution as an act of fundamental self-government by the people of Louisiana. They no longer perceive this court to be the final arbiter of the meaning of that constitution . . . Instead, for them, our state constitution is a blank parchment fit only as a copybook in which to record the lessons on the history of the Common Law that flow from Justice Scalia's pen.

*Id.* See also *State v. Havlat*, 385 N.W.2d 436, 447 (Neb. 1986) (Shanahan, J., dissenting) ("When called upon to construe the Nebraska Constitution, this court should not exhibit some pavlovian conditioned reflex in an uncritical adoption of federal decisions as the construction to be placed on provisions of the Nebraska Constitution.").

<sup>106</sup> See Williams, *supra* note 56, at 353 (noting unique commitment to egalitarianism in Pennsylvania); see also Lisa D. Munyon, Comment, "It's a Sorry Frog Who Won't Holler in His Own Pond": *The Louisiana Supreme Court's Response to the Challenges of New Federalism*, 42 LOY. L. REV. 313, 334–37 (1996) (pointing out incongruity of lockstep approach in light of Louisiana's unique history); O'Neill, *supra* note 27, at 31 (arguing that state courts should hesitate to interpret textually different provisions in identical manner).

<sup>107</sup> See Gardner, *supra* note 75, at 788–93 (documenting use of lockstep approach in many states); Latzer, *supra* note 73, at 864 (noting that "two out of every three state supreme court decisions adopt doctrines approved by the Supreme Court"); O'Neill, *supra* note 27, at 34 (noting that lockstep mentality is primary challenge for judicial federalism proponents).

have departed from the lockstep approach in recent years,<sup>108</sup> others have strongly resisted independent analysis.<sup>109</sup>

The popularity of the lockstep approach reveals the extent to which allegations of result-oriented decisionmaking, a sense of deference to the Supreme Court, and a desire to preserve uniformity have generated a fundamental reluctance on the part of many state court judges to engage in active judicial federalism.<sup>110</sup> As a result, active judicial federalism has been heavily concentrated in certain states,<sup>111</sup> prompting proponents to express disappointment that more widespread rejection of the Burger and Rehnquist Courts' jurisprudence has not taken place.<sup>112</sup> Thus, although hundreds of state court opinions have extended state constitutional protections beyond those

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<sup>108</sup> See, e.g., Hodge, *supra* note 57, at 851 (noting Arkansas's rejection in 2002 of former approach whereby court would limit its analysis of Arkansas constitutional provisions in lockstep with U.S. Supreme Court); Jessica L. Schneider, *Breaking Stride: The Texas Court of Criminal Appeals' Rejection of the Lockstep Approach 1988–1998*, 62 ALB. L. REV. 1593, 1593–94 (1999) (noting Texas's gradual shift away from lockstep approach); Matthew S. Wilzbach, Comment, *Search and Seizure and the Lockstep Doctrine—Illinois Deviates from the Lockstep Doctrine in Telling the Police that They Cannot Rely on Illinois' Laws*, 22 S. ILL. U. L.J. 181, 191–92 (1997) (criticizing Illinois Supreme Court for departure from lockstep approach).

<sup>109</sup> For example, Ohio stands out. See O'Neill, *supra* note 27, at 34–38 (criticizing reluctance of Ohio Supreme Court to depart from Supreme Court precedent); Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 147–49 (1984) (noting reluctance of Ohio Supreme Court to take active role in policymaking). Following the Supreme Court's reversal of the Ohio Supreme Court's federal law determination in *Ohio v. Robinette*, 519 U.S. 33 (1996), the state supreme court declined on remand to reinstate its prior determination as a matter of state law. *State v. Robinette*, 685 N.E.2d 762, 766 (Ohio 1997) (holding that Ohio constitutional protections are coextensive with federal protections).

<sup>110</sup> See Shaw, *supra* note 102, at 1046 (noting reluctance of state courts to recognize rights that they are unsure state residents want); Williams, *supra* note 35, at 1016 (noting belief of some state judges that state court departure from federal norms is illegitimate). Professor Latzer suggests that “lockstep” decisions may not reflect an uncritical adoption of Supreme Court precedent, but rather a reasoned agreement with the Court's substantive decision. Latzer, *supra* note 73, at 864 & n.8.

<sup>111</sup> See Diehm, *supra* note 85, at 238 n.76 (identifying Alaska, Colorado, Hawaii, Massachusetts, New Jersey, and Pennsylvania as states most likely to reach state constitutional decisions differing from U.S. Supreme Court precedents); Williams, *supra* note 10, at 98 (identifying Vermont as “a leader in the development of the New Judicial Federalism”). See also Kevin M. Mulcahy, Comment, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 866–69 (2000) (noting that New Jersey Supreme Court is recognized as innovative leader in judicial federalism); John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701–05 (1998) (citing New Jersey's Supreme Court as among nation's leading state high courts and enthusiastic adherent of judicial federalism).

<sup>112</sup> See Tarr, *supra* note 8, at 1117–18 (noting that “[f]or most state supreme courts, federal constitutional law will remain the primary protection for rights” and that “[u]ltimately, the new judicial federalism will most likely disappoint both its proponents and detractors”).

offered by the federal constitution,<sup>113</sup> reluctance on the part of many judges to engage in the practice acts as a significant limitation on judicial federalism as a tool for rights expansion.

### III

#### STRUCTURAL LIMITATIONS ON JUDICIAL FEDERALISM

Though judicial reluctance to deviate from Supreme Court precedent, as evidenced by the factor and lockstep approaches, has limited the extent to which state courts have engaged in active judicial federalism, it is perhaps not the biggest obstacle in the path of those who wish to convince state courts to extend protections beyond those required by federal law. Two significant additional difficulties, inherent in the structure of state constitutions<sup>114</sup> and the federal system, also serve as a check on judicial federalism: the relative ease of amending state constitutions and the possibility of Supreme Court review of state constitutional judgments under the Supremacy Clause.<sup>115</sup> Two enormously controversial areas where judicial federalism has played a prominent role, gay marriage and state funding of religious institutions, provide a clear illustration of the effects of these structural limitations, confirming both the potential of judicial federalism as a means of achieving legal change and its limitations.

#### A. *The Ease of Amending State Constitutions*

##### 1. *Overview*

Particularly compared to the U.S. Constitution, “state constitutions are often relatively easy to amend.”<sup>116</sup> For example, while the federal Constitution has been amended twenty-six times since its adoption in 1787 (the first ten being the Bill of Rights, adopted in 1791), in 1996–97 alone forty-two states attempted to amend their

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<sup>113</sup> See *supra* notes 34–36 and accompanying text.

<sup>114</sup> See *supra* note 93 and accompanying text.

<sup>115</sup> U.S. CONST. art. VI., § 2.

<sup>116</sup> Brennan, *supra* note 1, at 551; see also Williams, *supra* note 1, at 192 (commenting on “relative ease” of amending state constitutions). State constitutions are also more frequently discarded in favor of wholly new versions. Though Massachusetts and Vermont still operate under their original constitutions, most original state constitutions have been replaced. See, e.g., Gary S. Gildin, *Coda to William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 101 (2001) (noting that Pennsylvania adopted new constitutions in 1776, 1790, 1838, 1874, and 1968); G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 7–12 (2003) (noting that states adopt new constitutions relatively often and that Louisiana has adopted eleven in its statehood and Georgia ten).

constitutions a total of 233 times.<sup>117</sup> Seventy-six percent of these amendments, 178 in total, were approved,<sup>118</sup> for an average of over four amendments per amending state in that short period.<sup>119</sup>

Popular initiatives and referenda, which have become increasingly common tools,<sup>120</sup> make amending a state constitution even easier.<sup>121</sup> Many amendments have been adopted by initiatives to overrule unpopular state supreme court decisions.<sup>122</sup> For example, California voters passed Proposition Eight, amending the constitution to abolish the state exclusionary rule.<sup>123</sup> Californians also adopted Proposition 209 in 1996 to abolish affirmative action,<sup>124</sup> and over-

<sup>117</sup> Janice C. May, *Amending State Constitutions 1996-97*, 30 RUTGERS L.J. 1025, 1025 (1999).

<sup>118</sup> *Id.* The recent tone is politically conservative; all seventeen proposed amendments in the criminal procedure realm favored prosecutors, and all of them passed. *Id.* at 1026-30.

<sup>119</sup> The large number of amendments is also due in part to the fact that state constitutions are frequently much longer and more specific than the U.S. Constitution. Williams, *supra* note 1, at 191-92. For example, many state constitutions provide affirmative rights to education and even shelter and welfare benefits. See, e.g., Bradley R. Haywood, Note, *The Right to Shelter As a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 157-60 (2002) (arguing that New York Constitution contains affirmative constitutional duty to provide for welfare of needy, including shelter); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135, 1137-38, 1155-69 (1999) (noting different constraints that federal courts face as result of institutional and constitutional differences); Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2241 (2003) ("Nearly every state constitution requires the state to provide its children with an education.").

<sup>120</sup> See May, *supra* note 117, at 1025 (recording level and methodology of state constitutional amendments during 1996-97); G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 742 (1998) (noting increase in "constitutional populism"). The availability of the initiative varies by region, being most common in western states. Tarr & Williams, *supra* note 38, at 194.

<sup>121</sup> See Barry Latzer, *State Constitutional Chutzpah*, 59 ALB. L. REV. 1733, 1734 (1996) (noting that state constitutions, especially those that permit amendment by popular initiative and referendum, are easier to amend because, unlike federal Constitution, they do not require national consensus).

<sup>122</sup> *Id.* at 1734. Chief Justice Burger has even suggested state constitutional amendment as a counter to judicial federalism. *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

<sup>123</sup> Under the amendment, the exclusion of evidence is barred unless authorized by a statute enacted by a two-thirds majority of each house of the California Legislature. See CAL. CONST. art. I, § 28(d). Florida likewise amended its constitution to mandate lockstep jurisprudence on exclusion of evidence. FLA. CONST. art. I, § 12.

<sup>124</sup> See May, *supra* note 117, at 1026. Proposition 209, though achieving a politically conservative result, is doctrinally an expansion of state constitutional rights, in that it provides greater protection for potential non-minority plaintiffs than the Fourteenth Amendment. In the wake of the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding narrowly tailored use of race as admission criterion at University of Michigan Law School), California activist Ward Connerly, a principal architect of Proposition 209, hopes to place a similar initiative on Michigan's ballot to undo the result

rode the California Supreme Court's 1972 abolition of capital punishment.<sup>125</sup>

The relative ease in amending state constitutions to overturn unpopular state constitutional decisions reveals a fundamental paradox of state constitutional law: State constitutions are, in theory, supposed to provide fundamental rights, yet those rights often can be overridden by majority vote.<sup>126</sup> Though not every controversial and well-publicized state constitutional decision is overruled,<sup>127</sup> the omnipresent possibility of being overruled by amendment, together with other forms of heightened judicial accountability in most state courts,<sup>128</sup> has a significant impact on how state constitutional law is developed.<sup>129</sup> The development of state constitutional jurisprudence relating to same-sex marriage, or an alternative legally recognized union, is perhaps the best illustration of this phenomenon; further exploration of the state decisions recognizing a right to such unions helps to illuminate the manner in which state constitutional decision-making occurs.

## 2. *The Example of Same-Sex Marriage*

Over the past twenty years, gay rights issues have become more visible in American society at large and on the Supreme Court's

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within that state's borders. Editorial, *Drive to Ban Affirmative Action Reopens Wounds*, DETROIT NEWS, Jan. 13, 2004, at A8.

<sup>125</sup> Latzer, *supra* note 121, at 1733–34. The California Supreme Court in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), held that capital punishment violated the state constitution.

<sup>126</sup> *Baker v. State*, 744 A.2d 864, 888 (Vt. 1999).

<sup>127</sup> A drive to amend the Vermont Constitution to ban both marriage and civil unions for same-sex couples failed following the Vermont Supreme Court's decision in *Baker v. State*, 744 A.2d at 864. See Jes Kraus, Note, *Monkey See, Monkey Do: On Baker, Goodridge, and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 976 (2002). It remains to be seen whether the Massachusetts Supreme Judicial Court's decision mandating gay marriage in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), will be overruled by amendment. The Massachusetts legislature rejected four proposed constitutional amendments in February 2004, but approved a potential amendment in March 2004. That amendment, however, must pass the legislature again in 2005 and be submitted to the voters of Massachusetts before it can take effect. See *infra* notes 176–77 and accompanying text.

<sup>128</sup> Brennan, *supra* note 1, at 551. State judges typically are not afforded the life tenure and protections against salary diminution that federal judges possess. See U.S. CONST. art. III, § 1. Many state judges are elected, and thus are directly accountable to voters. See *Republican Party v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) (noting that thirty-nine states use elections for at least some appellate or general jurisdiction trial judgeships). There have been well-publicized instances of state judges being voted out of office due to dissatisfaction with their decisions. See Shaw, *supra* note 102, at 1047 (noting that Rose Bird's opposition to death penalty led to her being voted off California Supreme Court); Williams, *supra* note 8, at xxvii.

<sup>129</sup> See *infra* Part IV.

docket.<sup>130</sup> Given the recent decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*,<sup>131</sup> which found that same-sex couples have a state constitutional right to marry,<sup>132</sup> gay rights currently represents the most publicly debated issue in judicial federalism.

State constitutional law has played a long and prominent role in the movement for gay rights. Between 1986, when the Supreme Court held in *Bowers* that the U.S. Constitution does not prohibit the criminalization of homosexual sodomy, and 2003, when the Court overruled *Bowers* in *Lawrence*, eight states rejected the *Bowers* approach and decriminalized sodomy by judicial decision as a matter of state law.<sup>133</sup> It is clear that judicial federalism influenced the Supreme Court's opinion in *Lawrence*, as the Court found the trend in the states toward decriminalization, a trend largely driven by judicial federalism, worthy of consideration in its federal due process analysis.<sup>134</sup>

Judicial federalism has been equally prominent in spurring both debate and legal change on same-sex marriage, an area in which the

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<sup>130</sup> See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (invalidating Texas prohibition on sodomy as violative of Fourteenth Amendment's due process guarantee and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating as violation of Fourteenth Amendment's equal protection guarantee state constitutional amendment that placed restrictions on ability of homosexuals to receive public benefits); *Bowers*, 478 U.S. at 186 (declining to find Fourteenth Amendment due process protection for homosexual sodomy).

<sup>131</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>132</sup> *Id.* at 968.

<sup>133</sup> See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002) (invalidating prohibition on sodomy as violative of state constitution); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (same); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (same); *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992, at \*7 (Md. Cir. Ct. Oct. 15, 1998) ("This court . . . 'in order to avoid serious constitutional issues,' will hold that [the state statute prohibiting sodomy] does not encompass consensual, non-commercial, heterosexual or homosexual activity between adults in private."); *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d 38, 40 (Mass. 2002) (holding that state statutes prohibiting "abominable and detestable crime against nature" and "any unnatural and lascivious act with another person" do not extend to "acts conducted in private between consenting adults"); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001) (invalidating prohibition on sodomy as violative of state constitution); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (same); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (same). Only Texas and Louisiana expressly declined to decriminalize sodomy as a matter of state law. *State v. Smith*, 766 So. 2d 501 (La. 2000); *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd sub nom. Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>134</sup> By 1986, when *Bowers v. Hardwick* was decided, twenty-six states already had decriminalized sodomy. See *Bowers*, 478 U.S. at 193-94. The *Lawrence* Court found it significant that, between 1986 and 2003, twelve more states followed suit. *Lawrence*, 123 S. Ct. at 2481. Eight of those twelve states decriminalized sodomy by judicial decision, seven as a matter of state constitutional law and one as a matter of statutory interpretation. See *supra* note 133 and accompanying text.

Supreme Court is still hesitant to move forward.<sup>135</sup> As the movement toward gay marriage in America is a story about judging in the shadow of a potential constitutional amendment, it offers valuable lessons about the nature of judicial federalism.

a. Hawaii and Alaska: Ill-Fated First Steps Toward Same-Sex Marriage

The first case intimating a right to same-sex marriage under a state constitution was *Baehr v. Lewin*,<sup>136</sup> decided in 1993. The Hawaii Supreme Court held in *Baehr* that, under the Hawaiian Constitution's equal rights amendment,<sup>137</sup> the state could not discriminate on the basis of sex in granting marriage licenses without satisfying strict scrutiny.<sup>138</sup> The court thus remanded for determination of whether the marriage statute was narrowly tailored to advance a compelling government interest.<sup>139</sup> In 1998, as the trial progressed, the people of Hawaii approved an amendment to the state constitution authorizing the legislature to define marriage as only between one man and one woman.<sup>140</sup> The Hawaii Supreme Court had no choice but to reverse its 1993 decision.<sup>141</sup>

A similar situation occurred in Alaska. The Alaska Superior Court, relying on the state constitution's antidiscrimination clause,<sup>142</sup> applied strict scrutiny because it found that "[s]ex-based classification

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<sup>135</sup> Compare *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Alaska Super. Ct. Feb. 27, 1998), *rev'd*, *Brause v. State Dep't of Health & Human Serv.*, 21 P.3d 357 (Alaska 2001) (finding prohibition on same-sex marriage subject to strict scrutiny under state constitution; state constitution later amended to ban same-sex marriage), *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (finding right to same-sex marriage under state constitution), *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (same), and *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding right to civil benefits of marriage for same-sex couples under state constitution), with *Lawrence*, 123 S. Ct. at 2484 (stressing that Court's decision did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"). Some courts, however, have rejected state constitutional claims of a right to same-sex marriage. See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

<sup>136</sup> 852 P.2d 44 (Haw. 1993).

<sup>137</sup> HAW. CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

<sup>138</sup> *Baehr*, 852 P.2d at 57-58.

<sup>139</sup> *Id.* at 68.

<sup>140</sup> HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). Hawaii's legislature did adopt a statute permitting religious organizations to solemnize the unions of same-sex couples. See HAW. REV. STAT. § 572-1.6 (2003).

<sup>141</sup> *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished table decision).

<sup>142</sup> ALASKA CONST., art. I, § 3 ("No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin.").



can hardly be more obvious.”<sup>143</sup> In response, the people of Alaska went further than Hawaii and amended their constitution, effective January 3, 1999, to provide that “[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman.”<sup>144</sup>

#### b. Vermont: A Compromise

In December 1999, a week after the Hawaii Supreme Court conceded that the state constitutional basis for same-sex marriage had been eliminated,<sup>145</sup> the Vermont Supreme Court issued its opinion in *Baker v. State*, holding that the Common Benefits Clause of the Vermont Constitution<sup>146</sup> forbade the exclusion of same-sex couples from the civil benefits of marriage.<sup>147</sup> The court noted that this clause, due to disparities in “language, historical origins, purpose, and development,”<sup>148</sup> differs from the federal Equal Protection Clause.<sup>149</sup> Concluding that an “inclusionary principle” should govern its analysis of the state provision,<sup>150</sup> the court found that “none of the interests asserted by the State provide[d] a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license.”<sup>151</sup>

The Vermont Supreme Court, however, deliberately stopped short of mandating gay marriage. The court noted that “[a]lthough plaintiffs sought . . . to secure a marriage license, their . . . arguments . . . focused primarily upon the consequences of official exclusion from the statutory benefits . . . incident to marriage under Vermont law.”<sup>152</sup> The court left the crafting of a remedy to the state legislature, but suggested the sort of “alternative legal status,” providing the same legal benefits, that the legislature ultimately adopted.<sup>153</sup>

<sup>143</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998), *aff’d sub nom.* *Brause v. State*, 21 P.3d 357 (Alaska 2001).

<sup>144</sup> ALASKA CONST., art. I, § 25.

<sup>145</sup> See *supra* notes 140–141 and accompanying text.

<sup>146</sup> VT. CONST. ch. I, art. 7.

<sup>147</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999). These benefits include “access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.” *Id.* at 870.

<sup>148</sup> *Baker*, 744 A.2d at 870.

<sup>149</sup> U.S. CONST. amend. XIV, § 1.

<sup>150</sup> *Baker*, 744 A.2d at 878.

<sup>151</sup> *Id.* at 886.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* The act creating “civil unions” is codified at VT. STAT. ANN. tit. 15, § 1202 (1999).

The court's remedy reveals much about the workings of judicial federalism; Chief Justice Amestoy's majority opinion strongly indicates that the court wished not only to "provide[ ] greater . . . protection for . . . same sex relationships than ha[d] been recognized by any court of final jurisdiction in this country" other than the Supreme Court of Hawaii,<sup>154</sup> but also to issue a ruling that would endure. Justice Johnson took issue with the civil unions remedy, asserting that granting marriage licenses would avert the "uncertain fate in the political cauldron" that resulted from leaving the remedy to the legislature.<sup>155</sup> The Chief Justice tellingly cited the amendment of the Hawaii and Alaska Constitutions<sup>156</sup> in characterizing Justice Johnson's position as "significantly insulated from reality."<sup>157</sup> The Vermont court's opinion demonstrates that ease of amendment may affect not only whether decisions made by courts survive, but how those decisions are made in the first place, a phenomenon that currently looms large in the next battleground state, Massachusetts.

### c. Massachusetts: Movement Toward Full Equality

On April 11, 2001, soon after Vermont's Civil Unions bill took effect, seven same-sex couples filed suit in Massachusetts Superior Court seeking what the Vermont Supreme Court had declined to provide: a declaration that their exclusion from civil marriage was itself unconstitutional.<sup>158</sup> Though the plaintiffs lost in the trial court,<sup>159</sup> on November 18, 2003, the Supreme Judicial Court of Massachusetts held that the statute<sup>160</sup> limiting civil marriage to opposite-sex couples violated the state constitution.<sup>161</sup>

The opinion noted that the marriage ban implicated both the "guarantees of equality before the law . . . [and] the liberty and due process provisions of the Massachusetts Constitution,"<sup>162</sup> and concluded that, because the statute's limitation was "starkly at odds with the comprehensive network of vigorous, gender-neutral laws pro-

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<sup>154</sup> *Baker*, 744 A.2d at 888.

<sup>155</sup> *Id.* at 898 (Johnson, J., concurring in part and dissenting in part).

<sup>156</sup> *Id.* at 888; see also Josephine Ross, *Sex, Marriage, and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657, 1658-59 (2002) (suggesting *Baker* remedy was jurisprudentially "illogical" and was motivated by fear that decision granting full marriage benefits would be overturned by amendment).

<sup>157</sup> *Baker*, 744 A.2d at 888.

<sup>158</sup> Yvonne Abraham, *Gays Seek Right to Marry: Mass. Lawsuit Goes Beyond Civil Unions*, BOSTON GLOBE, Apr. 12, 2001, at A1.

<sup>159</sup> *Goodridge v. Dep't of Pub. Health*, No. 20011647A, 2002 WL 1299135 (Mass. Super. Ct. May 7, 2002), *vacated by* 798 N.E.2d 941 (Mass. 2003).

<sup>160</sup> MASS. GEN. LAWS ANN. ch. 207, §§ 19-20 (1998).

<sup>161</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>162</sup> *Id.* at 953.

moting stable families and the best interests of children,” the state had failed to articulate an adequate justification for confining marriage to opposite-sex couples.<sup>163</sup> In so concluding, the Supreme Judicial Court noted that *Lawrence* had reserved judgment on the issue,<sup>164</sup> but found that the “Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution.”<sup>165</sup>

The Supreme Judicial Court, like the Vermont Supreme Court, demonstrated initial solicitude toward the legislature, staying entry of judgment for six months “to permit the Legislature to take such action as it [might] deem appropriate in light of [the court’s] opinion.”<sup>166</sup> Unlike the Vermont court, however, the Massachusetts court made no suggestions about the appropriate remedy.<sup>167</sup> In December 2003, the Massachusetts Senate, concerned that a proposed civil union remedy similar to that adopted in Vermont might not suffice, requested an advisory opinion from the Supreme Judicial Court on the matter.<sup>168</sup> The court responded emphatically on February 3, 2004, finding that “[t]he same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by” the Senate proposal.<sup>169</sup> A civil unions bill could not cure the defect, the court wrote, because “it continues to relegate same-sex couples to a different status.”<sup>170</sup> Though the practical benefits of marriage might be granted, “[t]he bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic. . . . [I]t is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status.”<sup>171</sup>

The Supreme Judicial Court’s advisory opinion, making clear that nothing short of full-fledged marriage for same-sex couples would do, immediately triggered the full-scale constitutional debate that had largely been avoided in Vermont.<sup>172</sup> At a constitutional convention less than ten days after the advisory opinion was issued, Massachusetts

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<sup>163</sup> *Id.* at 968.

<sup>164</sup> *Id.* at 948 (citing *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003)).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 970.

<sup>167</sup> *Id.*

<sup>168</sup> *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004). Although the U.S. Supreme Court may not constitutionally issue “advisory opinions,” *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945), the Massachusetts Constitution allows each branch of the legislature to seek an advisory opinion “upon important questions of law.” MASS. CONST. pt. II, ch. 3, art. 2.

<sup>169</sup> *Opinions of the Justices*, 802 N.E.2d at 569.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 570.

<sup>172</sup> See Ross, *supra* note 156, at 1659 (noting that no initiatives seeking to eliminate civil unions by amending Vermont Constitution were placed on ballot in wake of *Baker*).

lawmakers narrowly rejected four proposed amendments to the state constitution.<sup>173</sup> Though *Goodridge* escaped the February 2004 constitutional convention intact, the Massachusetts legislature passed a compromise amendment in March 2004, which will take effect in late 2006 if approved by the legislators again in 2005 and by the electorate in November 2006.<sup>174</sup>

The Supreme Judicial Court's opinion in *Goodridge* and its unequivocal later advisory opinion generated much more controversy, and amendment-related activity, than the Vermont Supreme Court's *Baker* decision.<sup>175</sup> The opinion may have been predicated on the court's desire to simply adjudicate the claim before it,<sup>176</sup> regardless of the consequences for the actual holding, or it may have had greater confidence in the level of public support for gay marriage within Massachusetts. Polls indicate, for example, that although Americans in general are opposed to gay marriage by a margin of fifty-three per-

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<sup>173</sup> See Editorial, *Equality on Beacon Hill*, BOSTON GLOBE, Feb. 13, 2004, at A18; Frank Phillips & Raphael Lewis, *The Constitutional Convention: The Speaker's Move; Two Marriage Amendments Fail; Lawmakers to Reconvene Today*, BOSTON GLOBE, Feb. 12, 2004, at A1.

<sup>174</sup> Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban; Romney to Seek Stay of SJC Order*, BOSTON GLOBE, Mar. 30, 2004, at A1. A constitutional amendment in Massachusetts (unless the product of a popular initiative) requires a majority vote of the legislature in two consecutive sessions, followed by approval in a popular referendum. MASS. CONST. amend. art. XLVIII, pt. IV, §§ 4–5. The earliest an amendment could become operative would therefore be November 2006. Under *Goodridge* and *Opinions of the Justices*, however, same-sex marriage licenses began to issue on May 17, 2004. Yvonne Abraham & Rick Klein, *Free to Marry; Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1; Yvonne Abraham & Michael Paulson, *Wedding Day; First Gays Marry, Many Seek Licenses*, BOSTON GLOBE, May 18, 2004, at A1.

<sup>175</sup> Polls suggest considerably more public discomfort with same-sex marriage than with civil unions. See Joseph Carroll, *American Opinion About Gay and Lesbian Marriages*, The Gallup Organization, Jan. 27, 2004, at [www.gallup.com/poll/focus/sr040127.asp](http://www.gallup.com/poll/focus/sr040127.asp) (last visited Feb. 17, 2004). See also Ross, *supra* note 156, at 1659 (“The sticking point was the symbolism of the word ‘marriage’ rather than the benefits and responsibilities that come with marriage.”).

<sup>176</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Our concern is with the Massachusetts Constitution as a charter for governance . . .”). The approach taken by the Vermont Supreme Court in *Baker* would have been difficult for the Massachusetts court to take, due to critical textual differences between the provisions being construed. The Common Benefits Clause bans conferral of civil benefits on one segment of society that other citizens do not enjoy. VT. CONST. ch. 1., art. 7. Although Article I, Chapters 6 and 7, of the Massachusetts Constitution are similarly focused, Article I, Chapters 1 and 10 implicate equality and liberty concerns to a greater degree. Another crucial difference lies with the courts' respective evaluation of the stigmatic harm—the Vermont court, in excluding marriage licenses from its remedy, appeared to conclude that the symbolic use of the term “marriage” did not constitute such a civil benefit. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). The Massachusetts court considered the difference constitutionally significant, not “semantic.” *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004).

cent to twenty-four percent,<sup>177</sup> a slim majority of Massachusetts residents favored allowing it at the time *Goodridge* was announced.<sup>178</sup> The immediate aftermath of the two Massachusetts decisions (and particularly the *Opinions of the Justices*), however, demonstrates that, whether judges factor it into their decisions or not, the potential for amendment always looms much larger over controversial instances of state constitutional interpretation than federal.

## B. Supremacy and U.S. Supreme Court Review

### 1. Overview

It is long-established that the U.S. Supreme Court, though it may hear appeals from decisions of state high courts,<sup>179</sup> may not review state court determinations of state law, even where federal issues also exist in the case.<sup>180</sup> Furthermore, if the state judgment rests on state grounds that are independent and adequate to support the judgment, the Supreme Court may not hear the appeal<sup>181</sup> because the jurisdiction of the federal courts is constitutionally limited to “cases” and “controversies,”<sup>182</sup> and does not authorize the issuance of “advisory opinions.”<sup>183</sup> The *Goodridge* opinion, for instance, could not be reversed.

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<sup>177</sup> See Carroll, *supra* note 175.

<sup>178</sup> Michael Powell, *Battle Over Gay-Marriage Ruling Begins to Take Shape*, WASH. POST, Feb. 6, 2004, at A3. Soon after the *Advisory Opinion* was issued, support within Massachusetts plunged to thirty-five percent, with fifty-three percent opposed. Frank Phillips, *Majority in Mass. Poll Oppose Gay Marriage*, BOSTON GLOBE, Feb. 22, 2004, at A1.

<sup>179</sup> 28 U.S.C. § 2257 (2000).

<sup>180</sup> *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

<sup>181</sup> *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). The Supreme Court added a twist with its decision in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding that unless state court decision “indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds,” Supreme Court will presume decision rests on federal, not state law, and will assert jurisdiction). Justice Stevens, in dissent, argued that the presumption against Supreme Court jurisdiction should prevail, as it historically had, when the Court’s constitutional authority to hear the case was in doubt. *Id.* at 1066–67 (Stevens, J., dissenting). As the *Long* presumption only has practical effect where state decisions provide greater protection for individual rights than federal law provides, many observers believed that *Long* was intended to thwart judicial federalism. There is some evidence that it has succeeded. See Matthew G. Simon, Note, *Revisiting Michigan v. Long After Twenty Years*, 66 ALB. L. REV. 969, 970 (2003) (noting that state courts have often, despite ease of inserting “plain statement,” failed to satisfy *Long* requirement).

<sup>182</sup> U.S. CONST. art. III, § 2.

<sup>183</sup> The court noted in *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) that [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Some state law grounds, however, are not adequate to support a judgment. Under the Supremacy Clause, the federal Constitution, statutes, and treaties, are the supreme law of the land, and therefore trump state constitutions.<sup>184</sup> It is established, therefore, that states may provide greater protections for individual liberties only "so long as there is no clash with federal law."<sup>185</sup> Thus, if a state court rejects a claim of individual liberty under both the federal and state constitutions, the Supreme Court would have jurisdiction to hear the appeal because a reversal on the federal question would necessarily require reversal of the judgment. State law rulings falling *beneath* the federal "floor"<sup>186</sup> are inadequate to support a judgment in our federal system.

Judicial federalism cases, where the judgment grants greater rights under state law than under a given federal provision, are adequate to support the judgment, and therefore not reviewable, because no possible Supreme Court determination on the federal question can alter the judgment. Such judgments, however, are subject to reversal on supremacy grounds if they conflict with any other provision of federal law.<sup>187</sup> State judges wishing to interpret the independent provisions of the state constitution must therefore, on pain of Supreme Court reversal, ascertain that their judgments are not inconsistent with federal law in any way.<sup>188</sup>

## 2. *The Example of Government Funding for Religious Institutions*

Although states are, as explained above, generally free to offer greater protection for individual rights than exist under federal law so

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<sup>184</sup> U.S. CONST. art. VI, § 2.

<sup>185</sup> Brennan, *supra* note 1, at 548.

<sup>186</sup> See *supra* notes 48–49 and accompanying text.

<sup>187</sup> See, e.g., *Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691, 694 (1984) (finding regulation mandated by state constitution preempted by federal regulation).

<sup>188</sup> This problem exists, to some extent, even in cases that do not involve a substantive conflict with supreme federal law, such as cases within the rule of *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). See *supra* note 181. Review by the U.S. Supreme Court in a *Long* context does not, of course, preclude a contrary state law result on remand. Compare, e.g., *Massachusetts v. Upton*, 466 U.S. 727 (1984) (remanding to state court to reexamine using Fourth Amendment requirement), with *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985) (holding that Massachusetts state law provides greater substantive protection to criminal defendants than does Fourth Amendment), and *South Dakota v. Opperman*, 428 U.S. 364 (1976) (remanding case to state court and finding that search of vehicle towed for parking violation was not unreasonable under Fourth Amendment), with *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) (holding that search of vehicle towed for parking violation was unreasonable under state constitution). Failure to state independent grounds for the judgment in the first instance, however, wastes judicial resources and, by allowing the possibility of a Supreme Court decision on the issue, creates greater pressure for state courts to conform to that decision. *Delaware v. Van Arsdall*, 475 U.S. 673, 701 (1986) (Stevens, J., dissenting).

long as they do not run afoul of any particular federal provision,<sup>189</sup> there are certain areas where the likelihood of conflict with federal law is considerably greater than usual. For example, “[t]he Court and many scholarly commentators have long noted an inherent tension between the Establishment and Free Exercise Clauses.”<sup>190</sup> The religion clauses thus represent the “quintessential example” of “federal constitutional rights that sit in delicate balance with one another, such that the ‘floor’ and the ‘ceiling’ describe a very narrow area” in which states are free to extend additional constitutional protection.<sup>191</sup> The Supreme Court’s decision earlier this year in *Locke v. Davey*<sup>192</sup> shed important light on precisely how narrow that area is, a question that ranks among the most important in judicial federalism, as well as in First Amendment law, today.

The stakes are high in this area—like gay rights, government funding of religious institutions has been one of the most contentious issues in recent years.<sup>193</sup> The issue has taken on particular salience since the election of President George W. Bush, a strong supporter of “charitable choice,” under which federal funds are available to support the works of “faith-based initiatives.”<sup>194</sup> In addition, over the past decade, concern about troubled public schools, particularly in large urban centers, has prompted a significant rise in public support for voucher programs that would enable students to use taxpayer funds to attend private, including religious, schools.<sup>195</sup>

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<sup>189</sup> See *supra* notes 185–187 and accompanying text.

<sup>190</sup> Colleen Carlton Smith, Note, *Zelman’s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1968 (2003); see also *Locke v. Davey*, 124 S. Ct. 1307 (2004) (noting internal tension between two clauses); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (same).

<sup>191</sup> Smith, *supra* note 190, at 1968.

<sup>192</sup> *Locke*, 124 S. Ct. 1307.

<sup>193</sup> See, e.g., Michele Estrin Gilman, “Charitable Choice” and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 801 (2002) (“Charitable choice . . . has engendered controversy and confusion since its inception . . .”).

<sup>194</sup> See Michelle Dibadj, Comment, *The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*, 26 S. ILL. U. L.J. 529, 530–33 (2002) (describing President Bush’s plan to expand availability of federal funds for religious charities and controversy surrounding proposal). Charitable Choice first appeared in the Welfare Reform Act of 1996, codified at 42 U.S.C. § 604a (2000), but it was little noticed until the second President Bush took office and introduced legislation to expand the existing program. Philip N. Yannella, *The Death-Knell for the Lemon Test? Assessing the Constitutionality of the Charitable Choice Act of 2001*, 11 TEMP. POL. & CIV. RTS. L. REV. 181, 182 & n.12 (2001).

<sup>195</sup> Catherine L. Crisham, Note, *The Writing is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 GEO. L.J. 225, 226–27 (2000) (noting that superior performance of private school students combined with lack of equitable public school opportunities had increased support for voucher programs).

Although, in the past, the Supreme Court might have invalidated both government funding for faith-based initiatives and vouchers for religious schools under the Establishment Clause,<sup>196</sup> by the late 1990s, the Supreme Court's Establishment Clause jurisprudence had changed so significantly that observers predicted that both might be upheld.<sup>197</sup> It was therefore not surprising when, in *Zelman v. Simmons-Harris*,<sup>198</sup> the Court did uphold Cleveland's school voucher plan against an Establishment Clause challenge.

Since *Zelman*, state constitutional law has increasingly played a critical role in the voucher debate, with opponents of vouchers looking to state constitutional guarantees of separation of church and state for redress,<sup>199</sup> as civil libertarians did when the Burger Court moved to the right on criminal procedure issues. As with Vermont's Common Benefits Clause,<sup>200</sup> many state constitutions are textually more amenable to separationist results than is the First Amendment. Nearly forty state constitutions "contain explicit provisions barring the use of public money at religious schools or other religious institutions."<sup>201</sup> Those provisions are commonly known as state "Blaine Amendments."<sup>202</sup>

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<sup>196</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

<sup>197</sup> See Crisham, *supra* note 195, at 256 (noting that Court has moved toward "accommodationist philosophy" toward religion and predicting that voucher plan for religious schools would be upheld); see also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 68 (1997) (predicting that Court would uphold 1996 charitable choice provision).

<sup>198</sup> 536 U.S. 639 (2002).

<sup>199</sup> See, e.g., Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 957-58 (2003) (outlining state constitutional challenges to voucher programs in wake of *Zelman*); Smith, *supra* note 190, at 1996-97.

<sup>200</sup> See *supra* Part III.A.2.b; see also *supra* note 176.

<sup>201</sup> Lupu & Tuttle, *supra* note 199, at 959.

<sup>202</sup> The moniker is the result of a fascinating history worth summarizing. In the mid-nineteenth century, as the nation's growing Catholic population increasingly sought to obtain public funding for Catholic schools, alarmed Protestants responded with efforts to prohibit the expenditure of public funds for any sectarian purpose whatever. Legislation to that effect was passed in numerous states, beginning in the 1830s. In 1875, after President Ulysses S. Grant gave a speech urging complete separation of church and state to thwart the growing Catholic menace, Representative James G. Blaine, a Maine Republican with an eye on the Presidency, introduced a proposed amendment to the federal Constitution that would have applied a much more explicit version of the First Amendment's Establishment Clause to the states. The proposed amendment, known to this day as the Blaine Amendment, narrowly failed to pass the Senate and never took effect. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 502-13 (2003).

Kyle Duncan notes:

[Blaine's own mother] was Catholic and [his] daughters went to Catholic boarding schools. . . . Blaine was . . . engaged in rank political opportunism.



Though some state courts, under a lockstep theory, have interpreted clearly separationist state Blaine Amendments as providing no greater separation of church and state than the federal Establishment Clause, other states have explicitly recognized that the state constitution erects a higher wall of separation.<sup>203</sup> In 1999, for example, the Vermont Supreme Court invoked the state constitution to invalidate a voucher program.<sup>204</sup> In 2002, though *Zelman* foreclosed a federal challenge, a Florida court held that the state's voucher program<sup>205</sup> violated Article I, Section 3 of the Florida Constitution,<sup>206</sup> which prohibits expending funds "from the public treasury directly or indirectly in aid of . . . any sectarian institution."<sup>207</sup> The court noted that upholding the program would require "the functional equivalent of redacting the word 'indirectly' from . . . the Constitution."<sup>208</sup>

By its plain text, Florida's Blaine Amendment (and those of many other states)<sup>209</sup> clearly extends beyond the prohibitions of the Establishment Clause as interpreted in *Zelman*. Given that the federal "right" to separation of church and state<sup>210</sup> is, generally speaking, only a minimum "floor,"<sup>211</sup> there would normally be no difficulty enforcing state Blaines of this sort unless the clamor for vouchers

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Once it was clear that Blaine had lost the presidential nomination to Rutherford B. Hayes, he lost all interest in the amendment, participated in none of the congressional debates, and—strikingly, as Blaine had assumed a seat in the Senate by the time that body considered the amendment—did not even show up for the Senate vote on the proposal, which failed to pass by only four votes.

*Id.* at 509.

Though the federal amendment was not adopted, "Blaine's real legacy lay in the numerous state constitutional amendments spawned after" its failure. *Id.* at 512. Before the end of the 1870s, twelve states had adopted similar provisions. The Congressional Enabling Acts (allowing North Dakota, South Dakota, Montana, Washington, Utah, Oklahoma, New Mexico, Arizona, and Wyoming to join the Union) required the adoption of Blaine Amendments, irrevocable except by federal consent, as a condition of statehood. *Id.* at 513–14.

<sup>203</sup> *Id.* at 523–27. For a survey of state interpretations, see *id.* at 515–28.

<sup>204</sup> *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999).

<sup>205</sup> Florida was the only state with a statewide voucher program when the suit was filed. *Lupu & Tuttle, supra* note 199, at 958. Colorado adopted one after *Zelman*, which has been challenged in court. *Smith, supra* note 190 at 1953 n.2.

<sup>206</sup> *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

<sup>207</sup> FLA. CONST. art. I, § 3.

<sup>208</sup> *Holmes*, 2002 WL 1809079, at \*2.

<sup>209</sup> See *Lupu & Tuttle, supra* note 199, at 958 ("Florida's constitution indeed provides ammunition to the anti-voucher side, but . . . Florida is far from unique.").

<sup>210</sup> Though the right to separation of church and state is not as readily conceived of as an individual right as the right to marry or, indeed, the right to exercise one's religion, it is logically correct to think of protection against state entanglement with religion offered by the Establishment Clause as the federal right in this area, and the protection offered by state Blaines potentially going above this floor.

<sup>211</sup> See *supra* notes 184–188 and accompanying text.

became so intense as to provoke a flurry of constitutional amendments to remove the prohibitions.<sup>212</sup> In the religion area, however, the tension between the two clauses raises the potential that state Blaines, if extended too far, might violate the First Amendment's Free Exercise Clause.<sup>213</sup>

The issue was lurking prominently in the background in *Locke v. Davey*,<sup>214</sup> in which the Supreme Court reversed the holding of the Ninth Circuit that Washington State's Promise Scholarship program violated the First Amendment's Free Exercise Clause.<sup>215</sup> Under the program, qualified students received scholarships to attend institutions of higher learning within the state, with the proviso that no funds would be expended on behalf of a student pursuing a degree in theology.<sup>216</sup> The Ninth Circuit reasoned that, under the Supreme Court's decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>217</sup> and *McDaniel v. Paty*,<sup>218</sup> the scholarship program, which was not neutral toward religion, would be constitutional only if it passed strict scrutiny.<sup>219</sup> In concluding that strict scrutiny was not satisfied,<sup>220</sup> the Ninth Circuit expressly rejected the state's asserted compelling interest in compliance with its constitution.<sup>221</sup> Instead, it found that "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the federal Constitution—is limited by the Free Exercise Clause."<sup>222</sup>

The Ninth Circuit's approach left little, if any, room for judicial federalism in the Establishment Clause area.<sup>223</sup> Recognizing the enor-

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<sup>212</sup> See *supra* Part III.A.

<sup>213</sup> See Duncan, *supra* note 202, at 498–502 (arguing that "State Blaines would typically violate the religious non-persecution principle of the First Amendment").

<sup>214</sup> 124 S. Ct. 1307 (2004).

<sup>215</sup> *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002), *rev'd*, 124 S. Ct. 1307 (2004).

<sup>216</sup> See WASH. REV. CODE § 28B.10.814 (2004).

<sup>217</sup> 508 U.S. 520 (1993) (finding that law burdening religious practice that is non-neutral and of general applicability must pass strict scrutiny).

<sup>218</sup> 435 U.S. 618 (1978) (holding that state law disqualifying clergy members from being delegates to constitutional convention violated minister's right to free exercise).

<sup>219</sup> *Davey*, 299 F.3d at 753.

<sup>220</sup> *Id.* at 758.

<sup>221</sup> Washington has been called "the best-known example of a state with a still-robust Separationist approach." Lupu & Tuttle, *supra* note 199, at 961; see also WASH. CONST. art. I, § 11 (prohibiting any expenditure of public funds for sectarian purposes); Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989) (interpreting Washington's Blaine Amendment strictly on similar facts to those of *Locke*.).

<sup>222</sup> *Davey*, 299 F.3d at 759 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

<sup>223</sup> Indeed, the Ninth Circuit relied on *Zelman* to suggest that the fact that public funding reached religious schools only indirectly, and as the result of independent choice, weighed against finding a compelling state interest in obeying a state constitutional mandate. *Davey*, 299 F.3d at 760. This analysis suggested that faithfulness to a state constitu-

mous consequences for state Blaines should the Supreme Court agree, Professors Lupu and Tuttle argued that the Supreme Court's decision in *Locke* should consciously strive to provide states with room to formulate their own "constitutional policy of church-state relations."<sup>224</sup>

The Supreme Court, in deciding *Locke*, found that strict scrutiny was inappropriate because the Ninth Circuit had misread its Free Exercise precedent.<sup>225</sup> It is noteworthy, however, that much of its opinion hints at the case's implications for independent state constitutionalism. The Court, for example, after noting that "the statute simply codifies the State's constitutional prohibition" on funding religious endeavors,<sup>226</sup> reiterated that there is "room for play in the joints" between the federal religion clauses despite the tension between them.<sup>227</sup> The ruling thus made continued judicial federalism in this area possible; it is only within that "room for play in the joints" that state courts may, consistent with the Supremacy Clause, engage in judicial federalism. *Locke* is fully consistent with the Rehnquist Court's demonstrated commitment to a federalism in which states are accorded significant policymaking latitude.<sup>228</sup> The Court's opinion, however, does not definitively clarify *how much* room exists for state constitutionalism between the two religion clauses. For instance, though the Court accepted that "the differently worded Washington Constitution draws a more stringent line than that drawn by the U.S. Constitution" on Establishment Clause issues, it stressed the fact that Washington's anti-establishment interests were at their highest on the facts before it.<sup>229</sup> Because of the Court's seeming solicitude for state discretion in matters of funding, *Locke* could be read to indicate that state Blaines may properly be invoked to invalidate school voucher programs. The decision, however, left the door open to some extent

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tion's Blaine Amendment will *only* constitute a compelling interest for strict scrutiny purposes when its scope is no broader than that of the federal Establishment Clause.

<sup>224</sup> Lupu & Tuttle, *supra* note 199, at 965–66. *But see*, Duncan, *supra* note 202, at 572, 579–80 (arguing that states are not entitled to latitude in exceeding federal Establishment protection if they violate Free Exercise clause).

<sup>225</sup> *Locke*, 124 S. Ct. at 1307, 1312–13.

<sup>226</sup> *Id.* at 1310.

<sup>227</sup> *Id.* at 1311 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970)).

<sup>228</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Violence Against Women Act exceeded Congress's power under Commerce Clause and that states are proper regulators of conduct it covered); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that, under principles of state sovereignty, unconsenting states are not subject to suit in their own courts); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Eleventh Amendment does not permit Congress to use its Article I powers to abrogate state sovereign immunity to suits in federal court); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Gun Free Schools Act exceeded Congress's power under Commerce Clause and that states are proper regulators of conduct it covered).

<sup>229</sup> *Locke* at 1313–14.

by focusing on historic antipathy toward state funding of the clergy reflected in many state constitutions.<sup>230</sup> It therefore remains to be seen whether *Locke* will extend beyond its precise holding that the funding of studies for the ministry, such as those Davey wished to undertake, is among those "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."<sup>231</sup>

Though *Locke* is a victory for advocates of judicial federalism in the Establishment Clause area, the Court may well uphold federal Free Exercise claims similar to Davey's in other contexts where a state's anti-establishment interests are less compelling or less historically rooted, perhaps including school voucher programs. Such an interpretation of the supreme federal law would trump contrary state provisions. The Free Exercise Clause thus remains a meaningful potential limitation on the use of state Blaines to prevent the use of public funds at religious schools.

#### IV

#### JUDICIAL FEDERALISM: LEGITIMACY THROUGH LIMITATION

Judicial federalism, checked by appropriate limitations, is an extremely helpful means of infusing American law with greater vitality by permitting the simultaneous development of multiple constitutional approaches to similar issues.<sup>232</sup> The recent case law concerning same-sex marriage, for example, allows the Supreme Court and the high courts of other states to measure the logical force of their own precedents against the approaches taken in Vermont and Massachusetts.

The current experience in Massachusetts further illustrates the kind of state-by-state social experimentation that judicial federalism advocates point to as a major benefit of independent state constitutional interpretation.<sup>233</sup> Support for gay marriage varies significantly among American states, with residents of Massachusetts among those least opposed.<sup>234</sup> A regime in which novel constitutional protections

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1311. Indeed, the Court expressly stated that it "need not venture any further into this difficult area" because "[i]f any room exists between the two Religion clauses, it must be here." *Id.* at 1315.

<sup>232</sup> See Marshall, *supra* note 42, at 1641–1642 (noting state judges' frequent practice of looking to decisions of other states as well as federal decisions when confronted with novel questions of law).

<sup>233</sup> See *supra* text accompanying notes 49–53.

<sup>234</sup> See *supra* note 178 and accompanying text.

are first extended in those states where the population is least resistant enables those states to serve, as Justice Brandeis noted, as social laboratories for other jurisdictions to observe carefully, and perhaps to emulate.<sup>235</sup>

Though judicial federalism will have its greatest effect if it is so widespread as to prompt the Supreme Court to abandon its prior position on a constitutional issue,<sup>236</sup> transforming the law of a few innovative states into the law of the entire nation, it is not a failure if states simply continue to disagree. Diversity of social policy is, after all, frequently cited as one of the main advantages of federalism.<sup>237</sup>

The limitations of judicial federalism, moreover, actually serve to legitimate the practice. For example, while the democratic accountability that results from the relative ease of amending state constitutions might make it less likely that state judges will make bold yet unpopular decisions protecting individual rights,<sup>238</sup> or that such decisions will long remain the law of the state, it has the benefit of removing, to some extent, the taint of countermajoritarianism that plagues many federal court opinions<sup>239</sup> and thus enhances the legitimacy of those decisions that survive.<sup>240</sup>

The controversial nature of the *Goodridge* decision virtually ensured that the legislature, and perhaps the people, of Massachusetts would be heard on the issue. Indeed, despite *Goodridge* and the

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<sup>235</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>236</sup> See *supra* note 134.

<sup>237</sup> See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that policy diversity is advantage of federalism); see also Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1236-37 (1994) (arguing that diversity due to federalism allows citizens to "'domicile-shop' for [the] place with the most appealing bundle of local laws, customs, and attitudes"); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (arguing that citizens can choose to live in locale with policies best matching their preferences).

<sup>238</sup> The decision of the Vermont Supreme Court in *Baker v. State* may reflect this idea. Chief Justice Amestoy's majority opinion, which stopped short of requiring same-sex marriage and suggested civil unions as a compromise, noted the "instructive events" in Hawaii, where a state court decision requiring gay marriage was overturned by constitutional amendment. *Baker*, 744 A.2d 864, 886, 888 (Vt. 1999). Justice Johnson argued that the court's failure to grant a marriage license to the plaintiffs was an abdication of the court's duty to redress violations of constitutional rights. *Id.* at 898 (Johnson, J., concurring in part and dissenting in part).

<sup>239</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 334, 334-36 (1998) (noting legitimacy problem of federal judiciary, "a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions").

<sup>240</sup> See Utter, *supra* note 36, at 20-21, 47-49 (noting that political accountability of state court judges gives their decisions more democratic legitimacy than federal decisions). Given the high likelihood that controversial decisions would result in proposed amendments, it is almost certain that the political branches, if not the people, would be able to weigh in on the issue. See *infra* note 241 and accompanying text.

*Advisory Opinions*, the future of same-sex marriage in Massachusetts is far from clear.<sup>241</sup> Though constitutional amendment in the states might not always take place with the type of measured reflection that many deem desirable,<sup>242</sup> it does help to ensure that state constitutions are charters more truly reflective of the ever-developing values of a democratic body politic,<sup>243</sup> and the very fact of innovative state court decisions educates citizens about state constitutional processes, which is itself a positive consequence.

The Vermont Supreme Court's perhaps strategic decision to defer to a compromised legislative remedy in *Baker v. State* raises an important question about the judicial role in state constitutional cases: Is it appropriate for courts to structure a remedy for the express purpose of minimizing the likelihood that it will be overturned by amendment?<sup>244</sup> Yet the Vermont decision too was subject to reversal by amendment; the fact that an effort to do so failed<sup>245</sup> demonstrates that *Baker*, and its remedy of civil unions, enjoys a substantial degree of democratic legitimacy within Vermont.

Likewise, judicial federalism's limitations mitigate some of its troublesome aspects, such as its potential to create lack of uniformity in the law. The federal supremacy issue implicated in the religious funding area illustrates this: The Free Exercise Clause, designed by

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<sup>241</sup> The Massachusetts legislature has already approved an amendment to overturn *Goodridge*. See *supra* note 174 and accompanying text. Should the proposed amendment pass the legislature in 2005 as well, the people of the Commonwealth will vote on it in a referendum. MASS. CONST. amend. art. XLVIII.

<sup>242</sup> See, e.g., Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2136 (1996) (noting Madison's belief that excessive ease of constitutional amendment would enflame passions, and not reason, of public); Theodore C. Sorenson, *The American Constitution: Basic Charter or First Draft?*, 40 ARIZ. L. REV. 709, 714 (1998) (criticizing overly political nature of many state constitutional amendments and suggesting that federal Constitution is revered in part because it is difficult to amend).

<sup>243</sup> Professor Gardner has argued that the fact that state constitutions do not ably fit this role is crucial to true "constitutionalism." Gardner, *supra* note 75, at 768–70, 814–22.

<sup>244</sup> Justice Johnson argued in *Baker* that the "truncated remedy . . . abdicates this Court's constitutional duty to redress violations of constitutional rights." 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part). For arguments that deference to the legislature is appropriate in such circumstances, see Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381, 390–91 (2002); Michael Mello, Essay, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 181 (2000).

It has often been argued that the genius of Chief Justice John Marshall's opinion in *Marbury v. Madison* was its avoidance of direct conflict with the political branches, then dominated by Jeffersonian Republicans, while simultaneously asserting the power of judicial review and rebuking Jefferson for his failure to deliver *Marbury*'s commission. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 25–26 (1960) (characterizing *Marbury* as "masterwork of indirection" designed to enhance judicial power while avoiding conflict with executive which might weaken judiciary).

<sup>245</sup> See *supra* note 127 and accompanying text.

the Framers to be supreme over contrary state law, serves as an ever-ready check to limit the balkanization that critics of judicial federalism fear.<sup>246</sup> Although the Supreme Court's decision in *Locke* demonstrated that room for individual state policymaking exists between the federal religion clauses, the Free Exercise Clause still represents a very real limit on its potential extent.

Moreover, while not every state constitutional provision involves an area of law where two federal guarantees are in tension with each other as the religion clauses are, many state constitutional decisions involve issues that may be preempted by federal legislation. Such federal legislation reflects a national political consensus, as do the decisions of the Supreme Court to a significant extent.<sup>247</sup> The Supremacy Clause, by privileging that national consensus in many (though not all) instances over contrary state policy, makes it unlikely that judicial federalism will plunge the nation into an "Articles of Confederation time warp."<sup>248</sup>

The controversy following *Goodridge* and other gay marriage cases reveals other checks on a state court's ability, through judicial federalism, to pose a serious threat to national consensus. For instance, other states with contrary policy preferences might respond with legislation or constitutional amendments of their own. Dozens of states did so in the aftermath of the decisions in Hawaii, Alaska, and Vermont:<sup>249</sup> Ohio joined their ranks within two days of the *Advisory Opinions* in Massachusetts, adopting a law refusing to recognize same-sex marriages from other states.<sup>250</sup> The ultimate, though less likely, trump card by which national consensus may prevail is a federal constitutional amendment. Indeed, movement for a federal amendment banning gay marriage intensified, gaining the support of

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<sup>246</sup> See *supra* notes 84–88.

<sup>247</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS* 20–22 (1962); Finley Peter Dunne, *The Supreme Court's Decisions*, in MR. DOOLEY'S OPINIONS 26 (1901) ("No matter whether th' constitution follows th' flag or not, th' supreme court follows th' illiction returns.").

<sup>248</sup> *People v. Scott*, 593 N.E.2d 1328, 1348 (N.Y. 1992) (Bellacosa, J., dissenting).

<sup>249</sup> Christopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & POL'Y 1, 1–3 (2002) (listing state laws banning recognition of some same-sex relationships). In 1996, responding to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), Congress also passed, and President Clinton signed, the Defense of Marriage Act (DOMA), absolving states from the duty to recognize same-sex marriages from other jurisdictions. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)).

<sup>250</sup> Spencer Hunt, *Taft Signs Gay Marriage Ban*, CINCINNATI ENQUIRER, Feb. 7, 2004, at B1.

President George W. Bush,<sup>251</sup> and prompting *The Boston Herald* to publish an editorial accusing the Supreme Judicial Court of setting back, on net, the cause of gay rights.<sup>252</sup>

### CONCLUSION

Independent state constitutional interpretation is an extremely useful feature of the American legal system. It does not demonstrate disrespect for the Supreme Court or endanger the federal Constitution,<sup>253</sup> but rather reflects the duty state judges have to interpret their own constitutions, and the “genius of [the Framers’] idea that our citizens would have two political capacities, one state and one federal.”<sup>254</sup>

Judicial federalism may, as in the period between *Bowers v. Hardwick* and *Lawrence v. Texas*, help to clarify the Supreme Court’s understanding of the U.S. Constitution, or it may simply provide for a diversity of policies befitting such a diverse federal nation. Under either scenario, judicial federalism, as it is practiced, and as it must be practiced, provides for development of legal rules in a rapidly changing society in an incremental, state-by-state manner.

Moreover, the very limitations inherent in judicial federalism that might seem to diminish its promise as a tool for legal change ultimately save it, by providing sufficient checks to prevent any state court from moving too far ahead of the state’s people or the country at large. Judicial federalism, therefore, serves as a highly palatable means of helping American law to evolve, and thereby fill the law’s need to be “stable but not static.”<sup>255</sup>

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<sup>251</sup> Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

<sup>252</sup> Editorial, *Gay Rights at Risk and SJC’s the Cause*, BOSTON HERALD, Feb. 12, 2004, at 36. The Gallup Organization found that support for criminalizing sexual relations between consenting same-sex partners rose from thirty-five percent in early May 2003 to forty-nine percent in January 2004 in the United States, a result partially attributable to the backlash against *Goodridge* and the Supreme Court’s decision in *Lawrence*. See Carroll, *supra* note 175 and accompanying text.

<sup>253</sup> Barry Latzer, *A Critique of Gardner’s Failed Discourse*, 24 RUTGERS L.J. 1009, 1017 (1993) (arguing that there is no “imminent danger” that state constitutionalism will “subvert” federal Constitution). But see Gardner, *supra* note 75, at 818 (“[S]tate constitutionalism is incompatible with national constitutionalism; indeed, the type of robust state constitutionalism advocated by New Federalism could pose a serious threat to the nationwide stability and sense of community that national constitutionalism provides.”).

<sup>254</sup> U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>255</sup> William P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 729 n.180 (1996).