

January 1982

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### Recommended Citation

Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW L.J. 951 (1982)  
<https://scholar.smu.edu/smulr/vol36/iss4/1>

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# REINCARNATION OF STATE COURTS

## Fifth Annual Roy R. Ray Lecture\*

by

Shirley S. Abrahamson  
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I AM honored to have been selected to deliver the Fifth Annual Roy R. Ray Lecture, named in honor of Professor Emeritus Roy R. Ray of this faculty, and to have the opportunity to speak with the faculty, students, and alumni of this distinguished university.

I speak today of a subject near and dear to me—state courts. I have been sitting on the highest court of the State of Wisconsin for six years, and I am eligible to sit for another twenty-two years. I have pondered long and hard about how to present state courts to you. My law clerk gave me what he considered sage advice. He said I should remember to be neither partial on the one hand nor impartial on the other.

The title of my lecture is, as you know, "Reincarnation of State Courts." The word reincarnation, like most words, has several meanings and usages. The one I use is that of a "rebirth." A major theme of this lecture is that in the 1980s there will, I believe, be a "rebirth" of the state courts, a rebirth in the sense of a renewed recognition of the significance of the work of the state courts. In the past three decades, when mention was made of courts, both the legal and academic communities and the public thought of federal courts. The 1980s will be the decade of the state courts. I think by the end of the 1980s a lawyer or academician might look at the state courts and say, "You've come a long way, Baby." The state courts have always been important, but it's taken some people in the legal world, including the state judges themselves, a long time to recognize this fact.

I deliberately chose to use the word reincarnation rather than the word rebirth so that I could conjure up the image of old concepts returning to the earth in new forms. The old concepts to which I refer are two recurring themes in American legal history, states' rights and individual rights.<sup>1</sup> Both states' rights and individual rights predate the founding of this coun-

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\* This Article is a revised and annotated version of the lecture delivered at Southern Methodist University School of Law, Dallas, Texas, March 5, 1982.

1. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, AMERICAN FEDERALISM: TOWARD A MORE EFFECTIVE PARTNERSHIP (1975); B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964); *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135-83 (1977); Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1017-29 (1966).

try. These two concepts return in the 1980s in new forms, called "new federalism" or "recycled federalism."<sup>2</sup> In judicial jargon new federalism describes a growing awareness in the state courts of the importance of state law, especially state constitutional law, as the basis for the protection of individual rights against state government. New federalism describes the willingness of state courts to assert themselves as the final arbiters in questions of their citizens' individual rights by relying on their own law, especially the state constitutions. New federalism is based on the premise that the federal Constitution establishes minimum, rather than maximum, guarantees of individual rights and that, in appropriate cases, state courts should independently determine, according to their own law (generally their own state constitutions), the degree to which individual rights will be protected within the state jurisdiction. Independent interpretation of the state's own constitution is part of the double security of having both federal and state bills of rights.

Legal literature has used the term new federalism to refer to the relationship of the federal and state courts before President Reagan popularized the term in his 1980 campaign. President Reagan proposes, as you know, decentralizing governmental activities so that many federally legislated and administered programs will be established and maintained by the states and localities. President Reagan's proposals have engendered intensive discussions about the proper alignment of power between the central government and the states. You will soon realize that many of the arguments relating to Reagan's new federalism have counterparts in my discussion of new federalism for the judicial branch.

In the 1980s it may very well be the state supreme court, not the United States Supreme Court, that will be the significant constitutional law court. And the state supreme court will be looking to its own law; it will be interpreting the state constitution, not the United States Constitution.

My theme then is the emerging role of state courts in relation to the federal courts and the emerging role of state law, especially state constitutional law, in relation to federal constitutional law.

In law school it is customary to use hypotheticals. I will follow precedent. Suppose that University Park, the municipality in which Southern Methodist University is located, has an ordinance requiring every speaker in the community who will address an audience of more than fifty persons to submit the text of his or her speech twenty-four hours in advance of the speech to obtain a license for the public gathering. I think you all recognize that this ordinance is in trouble. Let us suppose that the year is 1921, the tenth anniversary of the founding of Southern Methodist University, and I am here to speak on that occasion. What provision of law protects my right to speak?

If your answer is the first amendment to the federal Constitution you are

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2. "I detect a phoenix-like resurrection of federalism, or, if you prefer, states' rights, evidenced by state courts' reliance upon provisions of state constitutions." Mosk, *The State Courts*, in *AMERICAN LAW—THE THIRD CENTURY* 216 (B. Schwartz ed. 1976).

wrong. Although in the early part of the twentieth century a minority of Justices of the United States Supreme Court were pressing for recognition of free expression as a fundamental freedom guaranteed by the federal Constitution against state action, these Justices were the minority.<sup>3</sup> Having the dissenting Justices on your side doesn't mean you're right, nor does it mean you're wrong. It does mean, however, that you lose.

In 1921 I, the speaker, was not protected by the federal Constitution. I was nevertheless protected by article I, section 8, of the Texas Constitution, which guarantees that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject."<sup>4</sup> The freedom of speech and press provision of the Texas Constitution differs from the text of the first amendment.<sup>5</sup> In 1921 you and I would go to the Texas trial court to seek the protection of my rights under the state constitution.

Now suppose this was the year 1969, the forty-fourth anniversary of the founding of this law school. Here I am again, and University Park has, in the Vietnam years, reenacted its former ordinance. What provisions of law protect my right to speak? If this were 1969 you'd answer, without hesitation, the first amendment to the federal Constitution. This time you would be right. The dissenters obviously got some votes. And we would then be faced with the issue of what court to go to, state or federal. You and I could still go to the Texas trial court to seek protection of my rights under the federal Constitution. Remember that the state courts have the power, indeed the duty, to enforce the federal Constitution and federal law. The Texas judges take an oath, as I do, to support the federal Constitution. Article VI of the federal Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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3. See *Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting); *Patterson v. Colorado*, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting). In *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 543 (1922), the Court stated that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ."

4. TEX. CONST. art. I, § 8, provides:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

5. The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

For a discussion of the Texas Constitution of 1876 and its Bill of Rights, see Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919 (1957); Thomas & Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907 (1957).

Having a 1969 mind set we would probably have avoided the Texas trial court. We would probably have gone to the federal district court, believing it to be a more receptive forum for preservation of individual rights than is the state trial court.

Now it is 1982 and I have returned, older but not really surprised at my advanced age to find again that University Park has recently adopted a similar ordinance. Old fights don't stay won. What provision of law protects my right to speak in 1982? If you are a good constitutional lawyer your answer should be that my rights are doubly protected, protected by the Texas Constitution and protected by the federal Constitution. You might say we should talk about which constitution we want to rely upon. And now in 1982 we will again face the question of whether to go to federal or to state court.

In my hypothetical, the facts are the same in 1921, 1969, and 1982. The University Park ordinance, the Texas Constitution, and the United States Constitution are the same in 1921, 1969, and 1982. Yet the answers to the same question have changed. Why? This hypothetical reminds me of my teaching federal income tax at the University of Wisconsin Law School. I gave the same exam each year; I just changed the answers. To understand the 1921, 1969, and 1982 answers to my ordinance hypothetical, let's go back to our two themes—states' rights and individual rights.

We'll talk about states' rights first. I use the terms states' rights and federalism interchangeably. Both refer to the division of power between the central authority and the constituent jurisdictions. Throughout most of our country's history fundamentally different views have persisted about the nature of the American government: Is it a federal or national system? A federal system of government is one formed by the confederacy of several states that retain residual powers of government. In contrast to a federal government, a national government is a union of people under a single sovereign government.

In 1787, when the federal Constitution was drafted, a decision had to be made whether there would be a compact among state sovereignties or a union of the whole people. The decision was never made. Our Constitution is a compromise. Madison described the new government as partly national, partly federal.<sup>6</sup>

Our founding fathers left us with two governments, state and federal—two governments governing the same people in the same geographic territory. In addition to the division of powers between the federal and state governments, we have delegated the legislative, executive, and judicial functions to three separate branches of government. Thus we live in a country with a dual court system, federal and state, operating side by side. Conflict is endemic in the system. When we talk of new federalism, judicial federalism, we talk of the respective spheres of federal and state courts.

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6. Madison, *The Federalist No. 39*, in *THE ENDURING FEDERALIST* 164-68 (C. Beard ed. 1948).

The framers thought these conflicts could be tolerated, and the framers relied upon these conflicts to operate as checks and balances on the power of the governments. Setting up a government with these internal conflicts illustrates colonial America's distrust of government, and leads me to the second theme: individual rights.

Protection of individual rights by a formal constitution starts with the state constitutions, which predate the federal Constitution. Between 1776 and 1784 each of the original thirteen states adopted its own constitution, which asserted the principle that citizens' individual liberties were to be protected against government action. Formal bills of rights were part of many of the colonial charters and revolutionary declarations and constitutions.<sup>7</sup> During the months preceding independence, uniformity of state constitutions was debated but rejected in favor of the states calling conventions to draw up constitutions satisfactory to the respective states. Diversity was the politically realistic answer.<sup>8</sup>

From an historical standpoint state constitutions have a real significance. The draftsmen of the federal Constitution used the state constitutions and state experience as models for the federal Constitution. Strange as it seems, states formed after the drafting of the federal Constitution did not look to it as a model for their own constitutions. They looked to their territorial framework of government (like the Northwest Ordinance) or to the constitutions of their sister states.

Thus the 1848 Wisconsin Constitution, which is Wisconsin's first and only constitution, was patterned after the New York Constitution, because the Wisconsin Constitution was adopted by a convention in which New Yorkers were prominent.<sup>9</sup>

The present Texas Constitution dates back to 1876 and is the eighth constitution of this state.<sup>10</sup> The 1876 Texas constitution was based on the 1845 constitution and the constitutions of other states, particularly Pennsylvania and Louisiana.<sup>11</sup>

Although the state constitutions had bills of rights, the federal Constitution as originally drafted in 1787 had no bill of rights, no list of protections of individual rights. The Bill of Rights, the first ten amendments to the

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7. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 49-379 (1971).

8. Linde, Book Review, 52 OR. L. REV. 325, 334 (1973) (reviewing B. SCHWARTZ, *supra* note 7).

9. A. SMITH, *THE HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD* 653 (1973).

10. The 1824 Constitution of the Republic of Mexico recognized Coahuila and Texas as a single state and provided that each state should frame its own constitution. The state of Coahuila and Texas published a constitution in 1827. In 1832 Texas drew up a separate state constitution, which was not approved by the Mexican Congress. In 1836 the Republic of Texas adopted its own constitution. Texas was admitted to the Union with the constitution of 1845. In 1861 Texas amended its constitution to reflect Texas's transfer of allegiance. After the civil war a convention drafted and the voters approved the constitution of 1866. In 1869 the 1868 or Reconstruction Constitution was ratified by voters. In 1876 the present constitution was ratified by the voters. See 1 TEX. CONST. ANN. preamble (Vernon 1955); 2 C. WHARTON, *TEXAS UNDER MANY FLAGS* 230-31 (1930).

11. 1 TEX. CONST. ANN. preamble (Vernon 1955).

Constitution, was adopted by Congress on September 25, 1789, and ratified on December 15, 1791.

It was assumed at adoption that the Bill of Rights would limit only the federal government's exercise of power. There was no need to limit the states; the state constitutions did that. The assumption that the eight amendments limited only the federal government became constitutional doctrine in 1833 in the case of *Barron v. Mayor of Baltimore*,<sup>12</sup> an opinion written by Chief Justice John Marshall.

It was the Civil War amendments to the Constitution, the thirteenth, fourteenth, and fifteenth amendments, that wrote into the Constitution broad new guarantees of liberty and equality by which the federal government committed itself to protect citizens against states. Nationalism was the spirit of the Civil War.

Not long after the passage of the fourteenth amendment, however, it was argued in the *Slaughter-House Cases* of 1872<sup>13</sup> that the fourteenth amendment had the effect of blanketing in the original Bill of Rights as limitations upon state action. The United States Supreme Court rejected this theory. It refused to say that the fourteenth amendment protected a Louisiana butcher from a state-created monopoly in slaughtering.

It was not until 1925 in *Gitlow v. New York*<sup>14</sup> that the United States Supreme Court in a dictum recognized that the free speech guarantees of the first amendment applied to the states as a result of the fourteenth amendment.<sup>15</sup>

Thus for most of the history of this country—namely, for 138 years, from 1787 to 1925 (the date of the founding of this law school)—the federal Bill of Rights offered citizens little or no protection in their relations with the state and local governments. The individual state constitutions offered them those protections.

Armed with state law and the state constitution, and operating in an area that received little or no federal attention, the state courts could contribute to the development of preservation of freedom of expression and other rights guaranteed by the states' constitutions. From 1787 to 1925 the state constitution, not the federal Constitution, was the primary source of protection of individual rights. Remember, in 1921 when I came to University Park, I was protected by only the state constitution.

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12. 32 U.S. (7 Pet.) 242 (1833).

13. 83 U.S. (16 Wall.) 36 (1872).

14. 268 U.S. 652 (1925).

15. In *Gitlow* the Court said:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

268 U.S. at 666. In later cases the Supreme Court viewed *Gitlow* as settling the issue that the first amendment applied to the states through the fourteenth amendment. See, e.g., *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Fiske v. Kansas*, 274 U.S. 380, 386-87 (1927); *Whitney v. California*, 274 U.S. 357, 371 (1927).

The states' records in preserving individual rights in the years from 1787 to 1925 are not uniform within each state or from state to state. Some states, in some areas, have records of which they can be proud. In the area of appointment of counsel for indigent criminal defendants at public expense, the states' records are good, far ahead of the federal government's record.

In 1859 the Wisconsin Supreme Court in *Carpenter v. Dane County*,<sup>16</sup> as a matter of its own state constitutional law, required counties to appoint counsel for indigent felons at county expense. It was not until 1963, 104 years after the Wisconsin Supreme Court had acted, that the United States Supreme Court required, as a matter of fourteenth amendment due process, a state to provide counsel in state felony trials.<sup>17</sup> By the time the United States Supreme Court imposed this requirement, most states appointed counsel at public expense, as called for by state constitutions, state laws, or state practice. In *Gideon v. Wainwright* the United States Supreme Court was bringing the few laggards into line.<sup>18</sup>

In other areas of individual rights the states' records are sorry ones indeed. And many have said that the states' failure to protect individual rights in this period created a void, and voids, as you know, are generally filled.<sup>19</sup>

After *Gitlow* in 1925 the United States Supreme Court started filling the void. The year 1925 marks the end of the first stage of federalism and the beginning of the second stage. After 1925 the United States Supreme Court adopted the rationale that certain aspects of the Bill of Rights were so necessary to an ordered scheme of liberty that it was reasonable to conclude that they were encompassed within the fourteenth amendment and therefore were applicable to the states. The process of absorption began. As late as 1961, only twenty years ago, less than a handful of the twenty-four or twenty-five specific rights of the first eight amendments to the federal Constitution were held to be absorbed into the fourteenth amendment and applicable to the states. From 1961 to about 1970, however, the United States Supreme Court made many, but not all, of the provisions of the Bill of Rights applicable to the states. In a decade, the 1960s, the fourteenth amendment was used to impose national standards of fair procedure and equal treatment on states and localities.

As the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt. In the 1960s the United States Supreme Court went faster and probably farther than many of the state courts were willing to go. Not inclined to take the lead, state courts followed, some reluctantly, the lead of the United States Supreme Court. During the 1960s most law-

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16. 9 Wis. 274, 278 (1859).

17. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

18. *Id.*

19. See Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 790-91 (1981).



yers, academicians, and state courts tended to follow the decisions of the United States Supreme Court. They did not examine the state constitution to determine whether it afforded the same or greater rights.<sup>20</sup> The 1960s was the zenith of the second period of federalism and individual rights. The emphasis was on the central government. You remember that when I spoke in University Park in 1969 we viewed my rights as protected by the first amendment.

In the 1970s we find new faces on the United States Supreme Court bench. In 1976 the *New York Times* would write:

There was a time not so far distant when the United States Supreme Court was the staunch and ultimate defender of civil rights and liberties . . . [T]he Court [now] seems clearly to be beating a retreat from its once proud forward position in this delicate and difficult area of the relationship between citizen and state.<sup>21</sup>

I am not sure that there has been such a retreat. Certainly some decisions since 1970 have been highly protective of citizens' rights against both state and federal action. Nevertheless, Justice Brennan, writing in the *Harvard Law Review* in the spring of 1977, pointed out what he and others saw as two significant changes in the United States Supreme Court and its attitude toward individual rights.<sup>22</sup> First, Justice Brennan and others saw a retrenchment of the Supreme Court from its aggressive position in protecting the rights of citizens against both state and federal encroachments;<sup>23</sup> second, they saw the conscious barring of the door to federal courthouses by procedural devices to limit adjudication of claims against state action.<sup>24</sup> In the 1960s Justice Brennan spoke of the Bill of Rights as the primary source of constitutional liberty.<sup>25</sup> In the 1970s Justice Brennan repeatedly urged state courts to look to their own constitutions and to become a new "font of individual liberties."<sup>26</sup>

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20. One exception was *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 139, 121 N.W.2d 545, 548 (1963).

21. N.Y. Times, Mar. 31, 1976, at 40, col. 1.

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

23. *Id.* at 495.

24. *Id.* at 501.

25. See sources cited in Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass*, 82 DICK. L. REV. 273, 275 n.14 (1978); see also Sobeloff, *Federalism and Individual Liberties—Can We Have Both?*, 1965 WASH. U.L.Q. 296 (federal system justifiable when it operates to maximize the liberty of persons as against the central government).

26. Brennan, *supra* note 22, at 491. Justice Brennan continued:

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the

Personally, I do not view the United States Supreme Court developments in the 1970s as the result of ill motives or a conscious desire to limit individual rights. The present may be a time for the Court to digest the changes and fill in the details of earlier doctrine, rather than break new ground. There are good reasons for limiting access to the federal courts when their procedures duplicate fair and constitutionally sufficient state court procedures. Redundant procedures exhaust judge power, a precious and limited commodity, and may have the effect of limiting or diluting the quality of justice for all litigants. In any event, the purpose of this speech is neither to praise nor to condemn either the Warren or the Burger Court.

It is clear, in view of the recent decisional trends of the United States Supreme Court, that litigants will become more and more dependent upon their state courts in matters of civil liberties than they have in the recent past. Thus, in the 1980s we reach the third stage of the interrelation of federalism and individual rights. Once again we look to state courts and state constitutions. But there is a difference. In the 1980s, unlike pre-1925, the federal Constitution is a federal safety net for the protection of individual rights.

Thus, in 1982 when I speak in University Park and worry about the ordinance, I have double security for my rights—both the federal and state constitutions.

Let us move from my hypothetical free speech case to an actual case in the 1970s involving the individual's protection against unreasonable search and seizure. I speak of *Texas v. White*.<sup>27</sup> Mr. White was arrested by Amarillo police officers while he was attempting to pass fraudulent checks. He was taken to the police station and questioned. Although he refused to consent to have his auto searched, the police conducted a search and seized four wrinkled checks that corresponded to those he had attempted to pass. The fourth amendment to the United States Constitution protects individ-

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policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

*Id.* at 502 (footnote omitted); see also Brennan, *Guardians of Our Liberties—State Courts No Less Than Federal*, 15 JUDGES' J. 82 (1976).

The 1969 report of the Virginia Commission on Constitutional Revision noted the importance of the Virginia Bill of Rights as follows:

That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is, in the judgment of the Commission, no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and to the federal courts.

1969 REPORT OF THE COMM'N ON CONSTITUTIONAL REVISION, part III, at 86; see also Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969).

27. 423 U.S. 67 (1975).

uals against unreasonable searches and seizures. Article I, section 9 of the Texas Constitution, in language almost identical to that of the fourth amendment of the United States Constitution, prohibits unreasonable searches and seizures.

The Texas trial court found the search reasonable under the fourth amendment. The Texas Court of Criminal Appeals held that the warrantless search of the automobile violated the fourth amendment, but made no reference to the Texas Constitution or statutes.<sup>28</sup> The United States Supreme Court reversed the Texas court, saying the Texas court was wrong in its interpretation of the fourth amendment and the prior United States Supreme Court cases.<sup>29</sup> The Court sent the case back to the Texas Court of Criminal Appeals.<sup>30</sup> What does this tell us? It tells us that if the state court incorrectly predicts what the United States Supreme Court will do, the state court gets reversed.

Justice Thurgood Marshall dissented on the merits and further commented that "it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law."<sup>31</sup> On remand following Justice Marshall's suggestion, the Texas court considered whether state law could sustain the original opinion. The Texas court concluded that it would not look to the available state constitution.<sup>32</sup> It took a procedural way out, saying that "[a]t no time during the trial of this case did the appellant urge that Art. I, Sec. 9, of the Texas Constitution supported his motion to suppress," and "[i]t is fundamental that the grounds for reversal urged on appeal must comport with the objections made at trial."<sup>33</sup> Accordingly, the Court of Criminal Appeals affirmed White's conviction.

Consider Justice Marshall's message. If Texas wants to decide rules of evidence for Texas courts it can do so. If Justice Marshall were a lone dissenting voice crying out in the wilderness telling lawyers and state judges to turn to state law, to state constitutions, to determine how state courts should process state criminal cases, we might not pay him too much heed. But Justice Marshall is not alone. We know Justice Brennan agrees with him. And a majority, if not all, of the other Justices of the United States Supreme Court recognize that a state may, as a matter of its own law, impose greater restrictions on state action than the United States Supreme Court does under federal constitutional standards. Chief Justice Burger,<sup>34</sup> and Justices White,<sup>35</sup> Rehnquist,<sup>36</sup> and Stevens<sup>37</sup> have expressed

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28. *White v. Texas*, 521 S.W.2d 255, 258 (Tex. Crim. App. 1974), *rev'd per curiam*, 423 U.S. 67 (1975), *on remand*, 543 S.W.2d 366 (Tex. Crim. App. 1976).

29. 423 U.S. at 68.

30. 543 S.W.2d 366 (Tex. Crim. App. 1976).

31. 423 U.S. at 72.

32. 543 S.W.2d at 370.

33. *Id.* at 369.

34. *See California v. Green*, 399 U.S. 149, 171-72 (1970) (concurring opinion).

35. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972).

36. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974).

similar sentiments. Justice Sandra Day O'Connor, then judge of the Arizona Court of Appeals, acknowledged in the 1981 *William and Mary Law Review* that state courts are using their own state constitutions as a means of defining rights of criminal defendants and urged less federal court intervention in state court proceedings.<sup>38</sup>

The Burger Court has urged state courts to step forward and apply their own constitutional doctrine. The Burger Court has taken a states' rights stance. And the states' rights issue is as controversial in legal circles today as it was in the nineteenth century. Many resist the Burger Court's suggestion to base state court decisions on the state constitution.

The critics of new federalism are strange bedfellows. The critics are the nationalists, those who think power should rest with the central government. The critics are states' rightists who view the new federalism as a plot to enlarge protection of individual rights. The critics are the civil libertarians who see new federalism as a technique for the federal government to get out of the business of ensuring civil liberties and civil rights and who think it will be harder to persuade fifty state courts instead of one United States Supreme Court of the correctness of their position. The critics also include those who fear that the state judges cannot handle the task and that the job of protecting individual rights will not be done by either the federal or state courts if new federalism prevails.

There is, as you may know, a bias in the legal system against state judges. There is a myth that state judges play in the minor leagues of the American judicial system. The myth is that the best that can be said of many state judges is that they are buddies of the Governor whom the judge helped get elected. In contrast, so the myth goes, federal judges are competent students of the law and are sensitive to individual rights, even if they are buddies of the Senator or President whom the judge helped get elected. I do not take this criticism of state judges personally. I obviously believe individual judges should be judged on their individual merit, not on profiles or stereotypes.<sup>39</sup>

The fact is that the vast bulk of criminal litigation in this country is handled by state courts. The everyday burglar, robber, rapist, or murderer has violated state law and is tried in state court. Indeed, the bulk of all litigation in this country, civil or criminal, is handled by state courts. In Wisconsin, the federal judicial system is composed of six federal district judges, nine circuit judges of the Seventh Circuit, and the nine Supreme Court Justices. The Wisconsin court system has approximately 200 judges. The state judges are the workhorses. The state courts carry the heavy burden of dispensing justice. It is the state courts that interpret the rules people live by. It is the state judges, not the federal judges, who day in and

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37. *City of Mesquite v. Aladdin's Castle, Inc.*, 50 U.S.L.W. 4210 (U.S. Feb. 23, 1982).

38. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

39. For a defense of state judges, see O'Connor, *supra* note 38, at 812; see also Sumner v. Mata, 449 U.S. 539, 547 (1981); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

day out decide motions to suppress evidence that was allegedly unlawfully seized. It is the state judges rather than the federal judges who are probably best qualified to establish the guidelines for search and seizure of automobiles under the state constitution, subject, of course, to the federal safety net.

And finally among the critics of new federalism are many state judges. They fear that the state courts cannot take the heat that comes from deciding the tough individual rights cases. They worry that moving the arena of individual rights from Washington to the state capitals puts the constitutional issues closer to the public, who will become hostile to state court judges. A state judge in California says, "I am frightened about the reactions of the lay person."<sup>40</sup> He is concerned that the public accepts the United States Supreme Court as setting ultimate rules and will not accept the state court's exercising this power. He implies that state judges should be content to pass the buck to the United States Supreme Court on the difficult issues. Popularly elected state judges, he says, may have trouble resisting the popular and political pressures that may be adverse to individual rights. Federal judges with lifetime tenure are immunized from popular pressure and sentiment. There is concern that if the people are unhappy about a state court decision, they will amend the state constitution, which in many states may be relatively easy to do. If my memory is right, the death penalty was put into the California Constitution by the ballot in response to a decision of the California Supreme Court.

Regardless of the critics, and they make good points and raise difficult issues, the issue presented by Justice Marshall in *Texas v. White* and by the Burger Court is this: Do good lawyering and good judging in the 1980s require an analysis of the state constitution in addition to or in lieu of an analysis of the federal Constitution? My answer is an unequivocal "yes." But to aid you in evaluating my answer, I report, in keeping with the Wisconsin rules of open government and full disclosure, that a student note in a recent *Marquette Law Review* had the following comment about me and new federalism:

The most vociferous advocate of the new federalism on the Wisconsin court is Justice Abrahamson. In the most recent term of the court [1978], Justice Abrahamson has twice written concurring opinions in which she suggests that the Wisconsin constitutional provision against unreasonable searches and seizures should serve as the basis for determining the validity of warrantless searches.<sup>41</sup>

I should again make clear just what it is that the *Marquette Law Review* thinks I am advocating. I am suggesting a process, a process for lawyers to use in presenting cases involving individual rights and a process for state courts to use in deciding such cases. I join those who propose that the state

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40. Welsh & Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.-Oct. 1981, at 6, 33.

41. Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596, 604 n.49 (1979).

supreme courts should first examine state law, almost as a matter of routine, in cases in which individual rights are involved. If the court concludes that state law, whether statute, the exercise of the court's supervisory power, or the state constitution, protects the rights, the court should say so.<sup>42</sup> The case should be decided on the independent state grounds. If analysis of federal law would reach the same result, the holding can be further based on federal constitutional law. The court must make clear, however, that the federal rationale does not dictate the result of the case. Only by carefully and responsibly explicating the different bases for the state and federal rationales can the state court justify a decision as being on independent and adequate state grounds.

I want to make clear that I am not, I am *not*, advocating a result. I am advocating a process. Although both proponents and critics of new federalism see the doctrine as a technique to expand protection for individual rights and to avoid following decisions of the United States Supreme Court, new federalism does not necessarily work this way. The state court might decide that the state law provides the same protection as the federal Constitution, using the same rationale as the United States Supreme Court, or using different reasons, or that state law provides more protection than the federal Constitution. I suppose that the state courts might construe their constitution as providing a lesser degree of protection than the federal Constitution and that the state must apply the more rigorous command of the federal Constitution. My discussion should imply no preference for the decision to be made under the state constitutions. I suggest a process, not a result.

Many trace new federalism to the reaction against the Burger Court and charge that new federalism is just a euphemism for a result-oriented doctrine. But I remind you that looking to the state's law, usually the state's constitution, for protection of individual rights predates the Burger Court. State protection of individual rights is as old as the nation.

In 1968, while the Warren Court was intact, Professor Countryman urged the importance of a state bill of rights when talking to a constitutional convention redrafting a state constitution. He reasoned that not all the federal rights are applied to states through the fourteenth amendment; modern society needs additional guarantees not found in the United States Constitution, and the fourteenth amendment governs only state action, not private action. The fourteenth amendment governs state infringement on free speech or unreasonable search and seizure. State constitutions can govern private action; thus California's free speech constitution, unlike the first amendment, can be interpreted to protect high school students distributing hand bills at private shopping centers.<sup>43</sup>

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42. The state court, in lieu of, or in addition to, relying on the state constitution, may rely on a state statute, or use its supervisory authority over the administration of justice to formulate a state rule. Decisions based on the state statutes or on the court's supervisory power avoid the rigidities of a decision based on the state constitution.

43. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

In *Texas v. White* and other cases the United States Supreme Court is saying: State courts, look at your own state constitution. Whatever your view of the merits of new judicial federalism, I conclude that as lawyers and judges we must be alert to the concept, and we must deal with it. Professor Dawson writes in a recent *Texas Law Review*<sup>44</sup> that *Texas v. White* is not likely to be soon forgotten by the Texas bench or bar. His reading of the Texas cases decided after *Texas v. White* demonstrates that when the Texas Court of Criminal Appeals decides a fourth amendment issue in favor of the defendant, the court routinely attaches a citation to the Texas Constitution. He assumes that the lawyers cite the Texas Constitution. Professor Dawson does not detect any movement by the Texas courts to determine independently of United States Supreme Court determinations as to what Texas constitutional provisions mean for the criminal process in Texas. The Texas Constitution is cited, but not analyzed.<sup>45</sup> The Wisconsin Supreme Court similarly all too often treats its constitution in the same manner as the Texas courts.

Why don't the state courts turn to their own state constitution? It's a puzzle. The state courts do analyze and rely on their own constitution if there is no federal constitutional counterpart. They tend not to analyze their constitutional provision if there is a federal counterpart. I see several explanations. First, there is an understandable human tendency on the part of state judges to view a United States Supreme Court decision on a particular topic as the absolute, final truth. The Supreme Court said it; it must be right. Second, habit explains a great deal. In the 1960s and 1970s the lawyers and the courts got out of the habit of examining the state constitutional claim. They examined the federal claim and no more. Third, simplicity and ease. The fourteenth amendment establishes the minimum, the floor below which the state cannot move. If the state action passes the minimum requirement, the lawyer and court are loathe to go on. It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution.

It is not an easy task to decide the nature of the rights protected by the state constitution. State constitutional law is rarely taught in law school.<sup>46</sup> State constitutional law was not even taught at my law school in the 1950s, an era prior to the expansion of the fourteenth amendment. There are few contemporary works devoted to state constitutional law or to the subject of civil liberties under state constitutions.<sup>47</sup> There are, as far as I know, no

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44. Dawson, *State-created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 217 (1981).

45. *Id.* at 216-17.

46. Professor Levinson of Vanderbilt University School of Law advises me that the law schools' interest in state constitutional law has increased in recent years. At the January 1982 annual meeting of the Association of American Law Schools, a "standing room only" audience heard a panel discussion on state constitutional law.

47. See, e.g., C. BROWNE, *STATE CONSTITUTIONAL CONVENTIONS FROM INDEPENDENCE TO THE PRESENT UNION, 1776-1959* (1973); B. CANNING, *STATE CONSTITUTIONAL CONVENTIONS, REVISIONS, AND AMENDMENTS, 1959-1976* (1977); J. DEALEY, *GROWTH OF*

continuing legal education courses for the bar on state constitutional law. Judicial education courses are beginning to include some mention of this topic, but much time in judicial education courses is spent on a review of recent United States Supreme Court decisions.

In the past fifteen years or so numerous pieces have appeared in the law reviews on the concept of new federalism. And there are now appearing single state analyses of state constitutional law developments. There are excellent resource materials on the state constitutions, but they are not very well known to the bench or bar. There is an Index Digest of State Constitutions and a current compilation of state constitutions. In 1962 I worked on the prior editions of the most recent Index Digest and the compilation.<sup>48</sup> I am not a Shirley-come-lately to the scene of state constitutional law.

How am I as a state judge to decide what the state constitution means? I use the same techniques as I use to decide what any law means. I try to find the intent of the framers. First, I look at the language of the constitution. Then I go to the legislative history—the proceedings of the convention, the state constitutions upon which our constitution is based. I examine the earlier decisions of our court, the decisions of sister courts, and the decisions of the United States Supreme Court construing the same or similar provisions. The reasoning of other courts may be persuasive. I look at the peculiarities of my state—its land, its industry, its people, its history. Alas, it would be easier for me just to read the writings of the United States Supreme Court in the *United States Law Week* and follow the teachings. Why take the hard road when you can take the easy path?

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AMERICAN STATE CONSTITUTIONS (1915); C. KETTLEBOROUGH, THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA (1918); NAT'L MUN. LEAGUE, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968 (1970); NEW YORK STATE CONSTITUTIONAL CONVENTION COMM., CONSTITUTIONS OF THE STATES AND UNITED STATES (1938); B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1878); B. SCHWARTZ, *supra* note 7; W. SWINDLER, SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS (1973); F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909); S. YARGER, STATE CONSTITUTIONAL CONVENTIONS 1959-1975 (1976); David, *Our California Constitutions: Retrospections in This Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697 (1976); Graves, *State Constitutional Law: A Twenty-Five Year Summary*, 8 WM. & MARY L. REV. 1 (1966); Mázor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326.

48. See INDEX DIGEST OF STATE CONSTITUTIONS (R. Edwards ed. 2d ed. 1959); CONSTITUTIONS OF THE UNITED STATES—NATIONAL AND STATE (S. Abrahamson ed. 1962). In his foreword to the 1962 compilation, Professor Kernochan wrote:

The present Compilation, like the *Index Digest*, is part of a broad program of state constitutional studies jointly developed some years ago by the Brookings Institution, the National Municipal League and the Fund. In general terms, the program calls for preparation of basic research aids, studies and other materials designed to stimulate and assist civic groups, government officials, scholars and other interested persons to explore, to appraise and, hopefully, to reform a vital but neglected area of our government and law.

Kernochan, *Foreword* to CONSTITUTIONS OF THE UNITED STATES—NATIONAL AND STATE at v (S. Abrahamson ed. 1962).



I advocate the process of analyzing the state constitution because I think such analysis has positive advantages. One advantage of such analysis is diversity. We are at the same time a homogenous and an heterogenous culture, and we should have both a homogenous (national) and heterogenous (state) legal culture. We have uniform state laws like the commercial code. Yet, our states have different laws governing property, marriage, divorce, and torts. Your rights to recover in an auto accident depend substantially upon which state's law applies. All the differences in our state constitutions are not accidents of draftsmanship. Some of these differences reflect differences in our tradition. Texas's Constitution has an equal rights amendment; Wisconsin's Constitution does not.

When the federal Supreme Court decides a case limiting the powers of the states, the decision is one of national applicability and, hence, the Court is properly loath to establish a rule unless it can be implemented effectively nationwide. A state supreme court has more limited geographical responsibility. Moreover, the Supreme Court of the United States is the court most remote from the problems of everyday concern for the administration of justice within a state and is less able to make a determination of the practical appropriateness of a new rule. New federalism serves as a reminder to state courts that they should experiment with new approaches that, if successful, may later be applied nationwide by the United States Supreme Court. State experimentation serves to guide the Supreme Court in its determinations.

Some lawyers are bothered by this diversity, bothered that unreasonable search and seizure might mean one thing in Texas and another in Wisconsin. I am not disturbed; the minimal guarantee is the same in both states, the federal safety net. And uniformity in law, like some nationalized franchise restaurants, brings security of product, but offers no exciting surprises.

In addition to diversity, a second advantage I see to the new federalism is stability. When state courts indiscriminately blanket United States Supreme Court decisions into the state's jurisprudence by basing their holdings on federal law, the law of the state changes each time the United States Supreme Court changes its decisions.

Constitutional holdings of the United States Supreme Court can be volatile. They change more frequently than we generally assume. A recent article in the *Wisconsin Law Review*<sup>49</sup> points out that forty-seven constitutional holdings were reversed by the United States Supreme Court in the period from 1960 to 1979. Search and seizure of automobiles, the issue in *Texas v. White*, is an example of a field of federal constitutional law that is in a state of change. The rights of states' citizens in relation to their own state government can be protected from the vagaries and shifts of the United States Supreme Court.

In this connection I note that the exclusionary rule, the rule that evi-

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49. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. REV. 467.

dence seized illegally cannot be used at a state trial, was adopted by statute in Texas in 1925.<sup>50</sup> The statute is still on the books. The exclusionary rule was imposed on the states as part of the fourteenth amendment in *Mapp v. Ohio*<sup>51</sup> in 1961, thirty-six years after Texas adopted the exclusionary rule.

The exclusionary rule, as articulated in *Mapp v. Ohio*, is in substantial danger of being overruled. Even if the United States Supreme Court overturns the exclusionary rule, the rights of Texas and Wisconsin citizens would not be affected. The protections afforded by state statute in Texas and by the Wisconsin Constitution<sup>52</sup> independently protect the right of the people to be secure against unreasonable searches and seizures, regardless of the holdings of the United States Supreme Court.

Hence, whatever may be the virtues and flaws of the exclusionary rule, it can be preserved in the states of Wisconsin and Texas by the people of these states regardless of the shifting sands of federal doctrine. Judge Roberts of the Texas Court of Criminal Appeals made this very point in his dissent in *Gillett v. State*<sup>53</sup> in which he laid the foundation for an independent interpretation of the Texas Constitution.

The Wisconsin and Texas exclusionary rules can be preserved, because the federal courts do not have jurisdiction over cases that arise under state law or state constitutions. Thus the states may interpret their own constitutions and their own laws as they see fit, provided always that the states do not lessen the rights guaranteed by the federal Constitution. When a state decision interpreting its own statutes or constitution is more protective of a citizen's rights than the United States Supreme Court's interpretation of the federal Constitution, the federal court will not review the state court decision if it rests on "adequate and independent state grounds."<sup>54</sup> The reason for the federal court's not reviewing state decisions resting on adequate and independent state grounds is founded on the Constitution itself. In 1945 Justice Jackson in *Herb v. Pitcairn*<sup>54</sup> explained:

This court from the time of its foundation has adhered to the principle that it will not review judgements of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our 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.<sup>55</sup>

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50. The history of Texas's exclusionary rule is discussed in Dawson, *supra* note 44.

51. 367 U.S. 643 (1961).

52. See *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923).

53. 588 S.W.2d 361, 367 (Tex. Crim. App. 1979) (en banc); see Dawson, *supra* note 44, at 217-19.

54. 324 U.S. 117 (1945).

55. *Id.* at 125-26 (citations omitted).

By relying upon their own state constitutions, state courts are able to insulate their decisions from federal review. What are adequate and independent state grounds could be the subject of discussion for a substantial part of a course on federal jurisdiction.<sup>56</sup> Suffice it to say that new federalism can result in less federal judicial review of state court decisions.

Thus some oppose the new federalism, saying the state courts are thwarting and evading judicial review. Sounds wicked, unlawful. But it is not. It is entirely appropriate in our federal system for state courts to base their decisions on state law, free of federal intervention.

And the United States Supreme Court is in a way encouraging the courts to cut off its review. My case in point is one very close to University Park. On February 23, 1982, the United States Supreme Court decided *City of Mesquite v. Aladdin's Castle, Inc.*<sup>57</sup> This case was originally tried by the United States District Court for the Northern District of Texas at Dallas.<sup>58</sup> It went to the Fifth Circuit<sup>59</sup> and then to the United States Supreme Court. This case involves Pac-Man and Space Invaders. The City of Mesquite adopted an ordinance prohibiting children under the age of seventeen from playing coin-operated games unless accompanied by a parent or guardian. Aladdin's Castle sued in federal court for declaratory and injunctive relief on the ground that the age restriction impermissibly trammels the children's constitutional interest in associational freedoms. To put it into non-legalese, the children are saying they want to be with their friends.

The jurisdiction of the federal district court was based on diversity and federal questions. The federal court of appeals held the ordinance unconstitutional, apparently resting its decision on its interpretation of the Texas Constitution as well as the federal Constitution. The Fifth Circuit said:

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56. See *Oregon v. Kennedy*, 50 U.S.L.W. 4544, 4545, 4547 n.1 (U.S. May 24, 1982) (Stevens, J., concurring); *Delaware v. Prouse*, 440 U.S. 648, 652-54 (1979).

In his remarks to the American Judicature Society on Aug. 6, 1982, Justice Stevens was critical of the Court's unwillingness to allow state courts to make the final decision in cases in which the state court remains free to reinstate its prior judgment by unambiguously relying on state rather than federal law. Justice Stevens said:

The decision to review (and to reverse summarily without argument) a novel holding by a California intermediate appellate court concerning the burden of proof in an obscenity trial, or an equally novel holding by the Pennsylvania Supreme Court concerning a police officer's order commanding the driver of a vehicle to get out of his car after a traffic violation, are additional examples of the many cases in which the Court has been unwilling to allow a state court to provide one of its residents more protection than the Federal Constitution requires even though the state decision affected only a limited territory and did not create a conflict with any other decision on a question of federal law, and even though the state court had the power to reinstate its original judgment by relying on state law. A willingness to allow the decision of other courts to stand until it is *necessary* to review them is not a characteristic of this Court when it believes that error may have been committed.

Remarks by Justice John Paul Stevens, Annual Banquet of the American Judicature Society, San Francisco, California (Aug. 6, 1982).

57. 50 U.S.L.W. 4210 (U.S. May 24, 1982).

58. 434 F. Supp. 473 (N.D. Tex. 1977).

59. 630 F.2d 1029 (5th Cir. 1980).

"We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law."<sup>60</sup>

The United States Supreme Court concluded that it could not determine from the court of appeals' opinion whether the court of appeals placed independent reliance on Texas law or merely treated the Texas constitutional protections as congruent with the corresponding federal provisions. In other words, the United States Supreme Court couldn't tell whether the Texas Constitution provided an adequate and independent ground for the court of appeals' judgment. The United States Supreme Court held that it would not decide the novel federal constitutional question presented by *Mesquite* if Texas law provided independent support for the court of appeals' judgment.<sup>61</sup> So the United States Supreme Court remanded the case to the court of appeals to decide whether its opinion rested on Texas or federal law.<sup>62</sup>

Justice Stevens, writing for the majority, said some interesting things about state constitutional law. He said:

It is first noteworthy that the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent state supreme court decisions demonstrate, a state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), and cases cited therein. Because learned members of the Texas bar sit on the Court of Appeals for the Fifth Circuit, and because that court confronts questions of Texas law in the regular course of its judicial business, that court is in a better position than are we to recognize any special nuances of state law. The fact that the Court of Appeals cited only four Texas cases is an insufficient basis for concluding that it did not make an independent analysis of Texas law.<sup>63</sup>

Justice White and Justice Powell dissented from the remand. Their opinions question why the United States Supreme Court did not reach the merits of the issue.<sup>64</sup>

The *Mesquite* case tells us that federal courts can base their decisions on state constitutions, and the United States Supreme Court will not review interpretations of state constitutional law, whether the interpretation is made by the federal or state courts. Thus, federal courts can protect their

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60. *Id.* at 1038-39 (footnotes omitted).

61. 50 U.S.L.W. 4210, 4212 (U.S. Feb. 23, 1982).

62. *Id.* at 4213.

63. *Id.* at 4212.

64. *Id.* at 4213-15.

decisions from United States Supreme Court review by resting them on state constitutional grounds.<sup>65</sup> Of course, then the federal courts are subject to later "review" by the state courts on the state law issue.

As you can see, it is entirely appropriate for state courts to evade Supreme Court review by basing a decision on state law. On the other hand, it is not appropriate for state courts to object to the United States Supreme Court's establishing minimal national rights, the federal safety net. For new federalism to work, the United States Supreme Court and the state courts must maintain a healthy respect for the role each plays.

State court judges are not asking the United States Supreme Court to cease interpreting the fourteenth amendment. Let me give you an example of the state court judges being protective of the jurisdiction of the federal courts. As you know from the newspapers there are some twenty bills in Congress seeking to take away substantive jurisdiction of the federal courts in certain areas, including prayer in public schools, abortion, school busing, and sex discrimination in the armed services. These bills would also prohibit review by the United States Supreme Court of state court decisions in some of these areas.

A subcommittee of the State-Federal Relations Committee of the Conference of Chief Justices of the States studied these bills, not in terms of their constitutionality, but in terms of their policy. The subcommittee noted that these bills would have two results. First, the bills would make the existing Supreme Court interpretations in these taboo areas the law of the land forever. The bills would cast the existing federal constitutional law in concrete. Second, fifty state supreme courts would apply the federal Constitution in new fact situations without any single continuing unifying interpretation by the United States Supreme Court. A single interpretation of the Constitution is one thing, but fifty interpretations of one federal Constitution is another.<sup>66</sup>

The state chief justices are not happy about the bills. They suspect that Congress was going to give the state courts power, because Congress

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65. The *Mesquite* majority commented on avoidance of Supreme Court appellate review by the federal courts as follows:

Our dissenting brethren suggest that our "view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law," *post*, at 3 (Powell, J., dissenting). We are unwilling to assume that any federal judge would discharge his judicial responsibilities in that fashion. In any event, in this case we merely hold that the Court of Appeals must explain the basis for its conclusion, if there be one, that the state ground is adequate and independent of the federal ground.

*Id.* at 4213 n.18. For a discussion of *Mesquite*, see Nat'l L.J., Apr. 19, 1982, at 5, col. 1. See also *Schmidt v. Oakland Unified School Dist.*, 50 U.S.L.W. 3998 (U.S. June 21, 1982) (per curiam).

66. Subcommittee of the State-Federal Relations Committee, Report to the Conference of Chief Justices on Pending Federal Legislation to Deprive Federal Courts of Jurisdiction in Certain Controversial Areas Involving Questions of Constitutional Law, Conference of Chief Justices Midyear Meeting, Williamsburg, Virginia (Jan. 28-30, 1982); see also Statement of W. Ward Reynoldson, Chief Justice, Supreme Court of Iowa, before The Brookings Institution Fifth Seminar on the Administration of Justice, Williamsburg, Virginia (Jan. 31, 1982).

thought that state court judges would not enforce existing federal rights with the same vim and vigor as their sisters and brothers on the federal bench. The chief justices were somewhat offended, indeed miffed, in being so viewed by Congress. The state chief justices went on record questioning the wisdom of these bills.<sup>67</sup> The chief justices view the bills as a hazardous experiment on the vulnerable fabric of the nation's judicial system.

The terms federalism and states' rights are value laden. They conjure up images of secession from the national government, separatist movements, and retention of the status quo in face of change. Ironically, the modern version of new federalism calls upon the states, state courts, not merely to negate the federal influence, but to develop a body of state law for the protection of their citizens.

The new federalism proposed by the Burger Court makes life difficult for state judges, because it challenges them to make federalism work. To quote Chief Justice Burger: "The 50 states cannot exercise leadership in a national sense, but this does not mean they should not be allowed the independence and freedom that was plainly contemplated by the concept of federalism."<sup>68</sup> I concur.

I recognize that the practice of making every case a federal claim will die hard. I recognize that the practice of looking to the United States Supreme Court for all law will die hard. I recognize that it will take a long time before courts, as a matter of routine, look to their own state law, especially their own constitutions.

Nevertheless, I think we must begin to change our ways.

State constitutions are coming out of the archives into the legal literature and into the classroom. They are coming out of the literature and the classroom into the courtroom. State constitutions will go from the courtroom back into the legal literature and into the classroom, and maybe back to the courtroom, through the lawyers trained in the 1980s. And finally, state constitutions are beginning to come into popular consciousness through the media.<sup>69</sup> I think this is a good trend.

Today I carry with me from Wisconsin to Texas the admonition of Justice Smith of the Wisconsin Supreme Court in the 1855 case of *The Attorney General ex rel. Bashford v. Barstow*.<sup>70</sup> The justice's words in 1855 may serve state supreme courts well in 1982. Speaking of Wisconsin, he said: "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitu-

67. The Conference of Chief Justices adopted a resolution criticizing the bills pending in Congress at the 1982 Midyear Meeting.

68. Burger, *The Interdependence of Our Freedoms*, 9 AKRON L. REV. 403, 406 (1976).

69. See, e.g., Flaherty, "States' Rights" Are Our Rights, Too, 46 THE PROGRESSIVE, Feb. 1982, at 40; Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976 (Magazine), at 31, 98; Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1. On Sept. 20, 1982, *The National Law Journal* instituted a regular feature on state constitutional law to be written by Ronald K.L. Collins. See *The Move to Free State Courts from the 'Potomac's Ebb & Flow'*, Nat'l L.J., Sept. 20, 1982, at 28, col. 3.

70. 4 Wis. 567 (1855).

tions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours.”<sup>71</sup>

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71. *Id.* at 758.

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