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Stanley H. Friedelbaum

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JUDICIAL FEDERALISM: CURRENT TRENDS AND LONG-TERM PROSPECTS

STANLEY H. FRIEDELBAUM*

I. INTRODUCTION AND RETROSPECTIVE

CHARACTERIZATIONS of the United States Supreme Court, a collegial body whose members are protected by constitutional tenure and are served by a venerable tradition of independence, are difficult to adduce with any degree of precision or protracted dependability. The Court is a tribunal capable at times of strange alliances and puzzling enigmas, such as those in the flag desecration cases of 1989 and 1990—decisions that brought the nation to the brink of crisis and the possible attenuation of guarantees of expressive freedom by constitutional amendment. Yet, notwithstanding sporadic aberrations attributable to unexpected coalitions, the Rehnquist Court must be treated as a discrete entity, no longer at a crossroads or in a transitional state like its predecessor. Unlike the moderation and gradualism that marked much of the work of the Burger Court, the current array of Justices appointed by Presidents Ronald Reagan and George Bush appears committed to the crafting of different goals and the effectuation of an activist agenda for realizing them. Guidelines being devised by the Court seem linked to a largely unavailing quest for "original intent," an adjudicatory yardstick long thought to have been abandoned, and to projected movements intended to foster political conservatism. 2

The status of judicial federalism needs to be assessed within this context of changing patterns. What initially began as occasional ventures in state-oriented decision making became a serious alternative stratagem that could not readily be dismissed over a period of two decades. State constitutional law provides important options for advo-

* Professor of Political Science, Rutgers University; A.B., 1947, Brooklyn College; A.M., 1948, Rutgers University; Ph.D., 1955, Columbia University.


2. The Rehnquist Court may best be known for its dramatically negative reformulation of criminal law standards and for its recurring departures from established precedents. See Payne v. Tennessee, 111 S. Ct. 2597 (1991) (doctrine of stare decisis does not require the Court to follow precedent).
icates bent on achieving victory in an era when many of the federal courts no longer reflect the *avant-garde* views of the Warren years. Indeed, any major judicial pronouncement in support of identifiably liberal causes is likely to be found in the appellate courts of the states. In 1986, the Supreme Court made known its aversion to an extension of liberty interests beyond the boundaries of the constitutional text.\(^3\) Whether such a view may properly be regarded as a return to old-fashioned restraint or to a recently embraced negative activism, the "new" judicial federalism emerges as the most promising means of promoting libertarian progress and innovation.

That state constitutions historically have offered feasible counterpart choices within the framework of American federalism is undeniable.\(^4\) But the centripetal drift of power and functions during the middle decades of the twentieth century militated against any realistic reliance on states as effective sources of judicial inventiveness. With the Great Depression and public receptiveness to rapidly expanding federal authority, the states languished amidst proposals for a newfound regionalism that, it was claimed, would better serve the national interest.\(^5\) State courts were not considered dynamic or reliable agencies of decisionmaking.\(^6\) A reversal of outlook had to occur before judicial federalism would be able to assume its now familiar role, offering not only practical alternative routes but also, at times, preferential adjudicatory instruments in the overall structural design.

If the years of World War II represented the nadir of state vigor and prestige, what ensued in the aftermath of global conflict set the stage for a major renaissance. Revulsion over the vast bureaucratic morass that had been created by wartime mobilization was followed by steps to revive the states as centers of accountability and participation. Yet, as the states began to take on a more vibrant identity, the capacity and performance of outdated judicial systems failed to keep pace with other aspects of internal upgrading. More auspiciously, a number of states moved to revise obsolete constitutions. Some of the constitutions, overburdened by excessive attention to minutiae, had


\(^6\) Benson, *supra* note 5.
resembled statute books rather than models reflecting the state's fundamental law.  

Fears of possible state extinction, whether well-founded or fanciful, supplied a compelling incentive for reform. The adoption of new constitutions, whenever campaigns were successful, often gave rise to significantly inventive devices. The admission of Hawaii and Alaska as states served as an encouraging sign, nurturing support for statehood and for the future of a Union in which the historic role of states, now strengthened by redemptive efforts, was assured and substantial growth was projected.

During the 1950s, judicial interpretations of state constitutions, premised on time-honored principles of independent and adequate state grounds, added little to foster the image of state autonomy in the fashioning of safeguards apart from the national Constitution. Occasionally, positive judgments derived from the wording of recently revised state constitutions, but the results, translated into the idiom of litigation, were not usually dramatic or extraordinary in their impact. The Supreme Court was often portrayed as a body possessed of antistate predilections. Over the years, there had been exceptions as evidenced when, in the late 1930s, the famous Erie doctrine proclaimed an end to a much-berated federal common commercial law. Federal courts in diversity proceedings were to act, in effect, as surrogates for state courts, following the state's decisional as well as statutory law.

While the potential existed for a meaningful judicial federalism, its realization remained beyond immediate attainment. The excesses of the McCarthy period and their adverse effects upon freedom of expression and other libertarian guarantees were not often redressed by state courts relying upon counterpart provisions of state constitutions. Nor did state courts in the Old Confederacy exhibit exemplary behavior in their efforts to thwart the effects of Brown v. Board of Education and its progeny. The Supreme Court resorted to a draco-

7. Developments in the federal system are well chronicled and analyzed in WILLIAM B. GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT, AND CURRENT STATUS (1964).
8. Id. at 153.
9. Id.
10. See Monrad G. Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 VAND. L. REV. 620 (1951). State court guardianship of First Amendment freedoms was said to be disappointing. Paulsen concluded: "If our liberties are not protected in Des Moines the only hope is in Washington." Id. at 642.
nian ruling in *Cooper v. Aaron*\(^\text{13}\) to counter state schemes of "violent resistance" to desegregation. State courts were not distinguished by their responses during a period of crisis marked, in this instance, by the deployment of federal troops to restore order when a federal court's desegregation ruling was met by defiance and widespread resistance.

An exception to the generally depressing conduct of the state courts occurred in respect to efforts to link eligibility for federally aided housing to positive declarations of loyalty. Several state courts rejected the attachment of such conditions as the "price" that citizens might be compelled to pay before securing access to public benefits.\(^\text{14}\) The dangers of subversion, the judges averred, did not warrant the level of compulsion and the sacrifice of rights required.\(^\text{15}\) In holding unconstitutional a resolution of a local housing authority, the Supreme Court of Wisconsin found no "clear and present danger" to societal interests when measured against the surrender of First Amendment rights expected.\(^\text{16}\) Similarly, the Supreme Court of Illinois set aside a comparable provision as violative of due process.\(^\text{17}\) Despite these positive efforts to rectify a doleful record during a stressful period, the state courts generally acted by resorting to federal constitutional safeguards.

Increasing, albeit infrequent, expressions of vitality by a scattering of state judiciaries continued to appear during the 1960s. A noticeable advance occurred in the area of legislative apportionment and redistricting, which the Supreme Court had placed beyond the bounds of judicial intervention by an expansion of the doctrine of political questions and by warnings about a "political thicket" that courts should not enter.\(^\text{18}\) The New Jersey Supreme Court had the temerity to spurn such threats when in 1960 it ordered the State Legislature to undertake congressional redistricting.\(^\text{19}\) Admittedly, other state courts did not pursue similar paths in this highly politicized zone and, following the Supreme Court's landmark decision in *Baker v. Carr*,\(^\text{20}\) much of the work of implementation fell to the federal courts. Nevertheless, the possibility existed that a new surge of activism might be imparted to

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\(^{13}\) 358 U.S. 1, 15 (1958).

\(^{14}\) Lawson v. Housing Auth., 70 N.W.2d 605 (Wis.), *cert. denied*, 350 U.S. 882 (1955).

\(^{15}\) Id. at 615.

\(^{16}\) Id. at 614.

\(^{17}\) Chicago Housing Auth. v. Blackman, 122 N.E.2d 522 (Ill. 1954).

\(^{18}\) See Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J., plurality opinion).


\(^{20}\) 369 U.S. 186 (1962).
the state courts, which were thenceforth armed with Fourteenth Amendment equal protection weaponry and a marked relaxation of the impediments long posed by the doctrine of political questions.\(^{21}\)

Completion of the “nationalization” of the Bill of Rights emerged as one of the significant accomplishments of the Warren Court. Notions of “ordered liberty”\(^{22}\) and similar formulas were intended to establish an objective basis for the application or disavowal of specific freedoms implicit in Fourteenth Amendment due process. A postwar debate among the Justices over selective absorption versus outright incorporation of segments of the Bill of Rights resulted in inconclusive findings.\(^{23}\) It was incorporation that ultimately came to prevail in one of the major judicial reworkings of federal-state relations in the nation’s history. Law enforcement officials and state appellate judges did not always look upon these developments with approval or admiration.\(^{24}\)

With the culmination of the process effecting a nationalization of the Bill of Rights, the enhancement of federal authority discouraged—at least temporarily—any widespread resort to state declarations of rights. Practitioners more often turned to the national Bill of Rights whenever pertinent questions arose. A penchant for federal remedies dominated the pleadings of advocates as well as the resulting opinions, even when the case originated in the state courts. During the Warren years, an activist Supreme Court appeared committed to the expansion of national guarantees in an atmosphere reflective of doubts about the state judiciaries’ ability to pursue a vigorous and effective decisional course premised solely on state constitutions.\(^{25}\)

All the same, nationalization, viewed in a different, more positive light, might well have been looked upon as a stage preparatory to a greater dependence upon state-derived guarantees. If the national Constitution offered a fail-safe, baseline support mechanism that es-


\(^{23}\) The polemical nature of the debate was evident in the fervent arguments advanced by the principal protagonists, Justices Black and Frankfurter, in *Adamson v. California*, 332 U.S. 46 (1947). See also Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965).


tablished an irreducible level of protection, what objection could there be to state experimentation above this floor? Any dangers of retrogression or "backsliding" were mitigated by the bedrock of the Bill of Rights, applied through the Fourteenth Amendment as the catalytic agent, coupled with the abiding bulwark of the Supremacy Clause. Thus, it could be argued, nationalization need never lead to the abandonment of state analogues. Instead, the innovative language of the state constitutions offered opportunities hitherto unforeseen in states whose legacies as "laboratories" had long been noted, but whose potential had never been fully investigated. The ironic results of nationalization merited additional inquiries in a multiform federal system possessed of creative, albeit undeveloped, byways.

The advent of the Burger Court brought with it a renewed emphasis on state courts as significant agencies of conflict resolution and on state constitutions as sources of doctrinal invention. Changing judicial personnel, led by Chief Justice Burger, welcomed the revival of a workable judicial federalism. Conservatives generally took the revival to be a positive affirmation of political faith. Not to be outdone, the Court's holdover liberal bloc considered judicial federalism a pragmatically necessary recourse in a tribunal far less disposed to launch new-found ventures than the Warren Court.

Why the state courts, in increasing numbers, began a concomitant move in this unaccustomed direction remains problematic. Justice Brennan, who became one of the principal proponents of state judicial activism, admitted that it was not "easy to pinpoint why state courts are beginning to emphasize the protections of their States' own Bill of Rights." He attributed it largely to the newly conservative paths being followed by the Supreme Court, but the simplicity of a mere reactive response is not persuasive. A drift toward activism was already under way in a number of states. As the movement gathered

29. When, in a Fourth Amendment case, the Supreme Court reversed a state court's "liberal" findings, Justice Marshall, dissenting, reminded the state tribunal that it could reach "the result it did under applicable state law." Texas v. White, 423 U.S. 67, 72 (1975).
momentum, a bandwagon effect took hold and spurred other states to join, especially when such trailblazers as California, New Jersey, New York, Oregon, Hawaii, and Alaska led the way.\textsuperscript{31}

II. THE RENASCENT DECADES: A TRANSFORMATION IN PROGRESS

A. Public Education

A plethora of noteworthy state cases has marked the 1970s and succeeding decades. Significant points of origin are not readily discernible in a movement of such broad scope and geographic diversity, but important beginnings lay in the area of educational financing and entitlements. Public education, traditionally a state responsibility with guarantees incorporated explicitly in state constitutional provisions, recurrently has come to the fore as a source of litigation. Yet, it must be recalled, early efforts to redress claimed funding disparities were not left exclusively to the states in an era still governed by a reliance on the national Constitution as a primary source of relief. Highly divisive questions of local financial support and its consequences came before the Supreme Court in \textit{San Antonio School District v. Rodriguez}.\textsuperscript{32} But a definitive resolution of the problem remained outside the purview of the federal courts as a majority declined to proceed beyond previously established precedents and restraints.

Justice Powell, writing for the Court in \textit{Rodriguez}, denied that the challenges of Mexican-American parents of children in San Antonio's Edgewood school district could be sustained under existing criteria. At issue was the continuing validity of Texas' system of financing public education, with its heavy reliance on local property taxation and its allegedly negative impact on the impoverished. Justice Powell refused to characterize wealth or its absence as a suspect classification subject to strict scrutiny. Nor did he find convincing arguments that education constituted a "fundamental interest" under equal protection analysis.\textsuperscript{33} Instead, Justice Powell held that education did not enjoy explicit protection under the Constitution. Standing alone, he maintained, it would not cause a departure from the usual standards of review in economic and social regulatory cases.\textsuperscript{34} Conforming to such

\textsuperscript{31} An amendment to the California Constitution, adopted in 1974, declared that rights guaranteed by the state charter were not "dependent" on those provided by the federal Constitution. \textit{Cal. Const.}, art. I, \textsection 24. The Supreme Court of California made reference to its role as a court of "last resort" in respect to the fundamental liberties of its citizens, subject only to the proviso that it not restrict federal guarantees. \textit{People v. Longwill}, 538 P.2d 753 (Cal. 1975).

\textsuperscript{32} 411 U.S. 1 (1973).

\textsuperscript{33} \textit{Id.} at 18.

\textsuperscript{34} \textit{Id.}
standards, the Court followed conventionally permissive guidelines, adhering to the view that the Texas school finance plan was rationally related to a legitimate state purpose.  

Often overlooked but more consequential than the central sections of the opinion in *Rodriguez* was Justice Powell’s recognition of an ongoing national debate concerning questions of school finance. His self-styled "cautionary postscript" warned that federal intervention might cause an "upheaval" in public education while not helping the poor and racial minorities, especially in core-city districts. Justice Powell added that the Court’s action ought not to be viewed as "placing its judicial imprimatur" on the status quo. He recognized the need for reform in systems heavily dependent on local property taxes. But, he counseled in closing, solutions had to be found in the democratic process.

Two years before the Supreme Court’s ruling in *Rodriguez*, California’s highest court had invalidated the state’s school financing arrangements in *Serrano v. Priest*. Subsequently, in light of the negative response in *Rodriguez*, the California court went on to reaffirm its rationale with an altered basis for intervention premised on state equal protection. Strict scrutiny criteria were reinstated with guarantees linked to a method of analysis different from that required by federal standards. If Justice Powell’s cautionary postscript had not succeeded in encouraging reform by state legislators, it had served as an invitation to renewed judicial intervention founded in state constitutional formulas.

Similarly, the Supreme Court of New Jersey declared the state’s system of financing public education unconstitutional in *Robinson v. Cahill*, the first version of which was decided in 1973. The mandate for equal educational opportunity rested not in an equal protection clause or its equivalent, but in an archaic section of the state constitution requiring support of a "thorough and efficient" system of public schools.

Succeeding school finance cases have been legion. The Supreme Court of Connecticut found education to be a fundamental right, thus departing substantially from the prevailing opinion in *Rodriguez*.

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35. *Id.* at 40-44.
36. *Id.* at 56.
37. *Id.* at 58.
38. *Id.* at 56-59.
42. *Id.* at 285.
More recently, the Supreme Court of Texas, in *Edgewood Independent School District v. Kirby*, invalided the controversial system of financing public schools sustained earlier in *Rodriguez*. It did so on state constitutional grounds based upon the failure of the system to meet a prescribed "efficiency" standard for the schools—one avowed to be "essential" for a "general diffusion of knowledge." The court said that linkage existed between efficiency and equality, with districts required to have "substantially equal access to similar revenues per pupil at similar levels of tax effort." Building on *Robinson v. Cahill* and its progeny, the Supreme Court of New Jersey returned to the consideration of school financing themes in *Abbott v. Burke*, requiring an equalization of per pupil expenditures between the impecunious urban districts and the "affluent" suburbs, but without the confrontational politics evidenced two decades earlier. Both in Texas and in New Jersey, the processes of implementation remained clouded in contention. Prolonged and often inconclusive exchanges threatened to upset fragile political balances and, in some respects, to unsettle the stability of existing fiscal arrangements and revenue sources affecting the state's economy.

**B. Privacy**

While educational issues have displayed an historic linkage to the states, a right to privacy, though not as securely rooted, exhibits many of the same characteristics derived from recently adopted state constitutional provisions and amendments. Supreme Court decisions related to privacy have generally been restricted to specific categories touching upon such matters as procreation, marriage, and family living. A series of cases attest to federal protection of rights of intimate association affecting heterosexual relations and are predicated on a limited recourse to an updated version of substantive due process. Whether such precedents will survive without modification is doubtful in view of the Court's changing personnel and expressed attitudes. The decision in *Bowers v. Hardwick* casts serious doubt on any expansion of concepts of personal autonomy in light of a majority's distaste for "judge-made" constitutional standards. These standards make the

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44. 777 S.W.2d 391 (Tex. 1989).
45. *Id.* at 394.
46. *Id.* at 397.
Court "most vulnerable and [come] nearest to illegitimacy." With the exception of the Cruzan right-to-die case that the Court unexpectedly agreed to review—and that added little of substance to the prevailing body of applicable law—the future of privacy rights and their further articulation seems to rest largely in the states.

A number of state constitutions, especially those recently adopted or amended, contain specific privacy provisions that extend guarantees beyond Fourteenth Amendment due process. The wording selected, in part, is reminiscent of the Declaration of Independence and references to "inalienable rights." For example, Florida's defense of privacy interests centers about each person's "right to be let alone and free from governmental intrusion into his private life." In this context, state courts have construed the constitutional text apart from or in addition to what might be deduced from federal decisions. The latter are generally fragmentary and not often as promising as state precedents. This need not always be so in view of the breadth of the liberty segment of the due process clause and the opportunities for growth that it offers inventive jurists. But, if the Rehnquist Court majority's views can be accepted as indicative of future developments, little can be expected beyond what has been previously set forth in the decisional law. In fact, current precedents may be eroded, if not wholly overturned.

If federal notions of privacy exhibit few signs of sustained growth, contention continues to revolve about established doctrines and their prospects in a Court increasingly hostile to the development and maintenance of judicially-created rights. Two recent Supreme Court nominees became embroiled in disputes over the protective framework that traditionally safeguards individuals from deprivations of liberty without due process of law. In particular, the battle has centered around the right to abortion and the measure of constitutional security that attaches in light of persistent attacks barely stopping short of a direct assault on the right itself. The Senate's advise and consent role, espe-

50. *Id.* at 194.
cially in the confirmation hearings, has served as a maelstrom of opposing viewpoints and queries enmeshed not only in partisanship, but also in a national debate so intense that it often defies accepted political guidelines and loyalties. Because of a divisive and emotional record on both sides, there has been a greater reliance on the state courts as fora to preserve what growing numbers of advocates perceive as impending repudiations in the federal courts of rights formerly sanctified by expansive readings of the Constitution.\(^5\)

Many of the early privacy cases in the state courts focused upon rights of bodily integrity when physicians and other health-care providers sought to compel procedures contrary to the wishes of afflicted persons. Central to judicial decision making in this sphere of privacy is a common law right of medical self-determination that makes the patient the final and definitive source in the resolution of questions related to the patient's well-being or, in some instances, to the patient's survival. A New Jersey case, \textit{In re Quinlan},\(^6\) established the basis for subsequent decisions, but it did not affirm any right to die. The decision to terminate life support fell to the father, acting on behalf of his daughter. Additionally, the decision was predicated on her persistent vegetative state, the medical prognosis of an irreversible condition with no realistic hope of recovery, and agreement by a hospital ethics committee that the outlook was hopeless for the patient’s return to a cognitive existence. The relief granted was based on federal, not state, constitutional grounds.\(^6\)

There followed a succession of cases raising comparable questions in different contextual settings. One of the most noted of the post-\textit{Quinlan} series was \textit{Superintendent of Belchertown State School v. Saikewicz},\(^6\) involving an elderly, retarded person suffering from leukemia. The Supreme Judicial Court of Massachusetts, construing rights of privacy and of informed consent, opted for the nonadministration of chemotherapy because the issue was “not whether, but when, for how long, and at what cost to the individual” life might be fleetingly prolonged.\(^6\) In so ruling, the court held that incompetent persons possess the same rights as those extended to competent individuals. The patient’s assumed “judgment” was that the withholding of treatment represented what the patient’s views would have been in the circumstances.

\begin{itemize}
  \item \(^5\) Lewis, supra note 56.
  \item \(^6\) Id. at 662-64.
  \item \(^6\) 370 N.E.2d 417 (Mass. 1977).
  \item \(^6\) Id. at 426.
\end{itemize}
To the contrary, New York’s highest court rejected the line of reasoning pursued in Saikewicz when, in In re Storar, it declined to authorize nonadministration of remedial medical procedures and techniques to a middle-aged, severely retarded patient suffering from bladder cancer. An age difference existed, but it is not clear that the New York court found this to be a critical factor in the decision reached. The court noted that, because of the individual’s long-term incompetency, it was improper to attempt a determination whether, had he been competent, he would have elected to discontinue potentially life-extending treatment. Because the measures required could be undertaken without causing excessive pain, the court reasoned, it was inappropriate to allow a person to die because a close relative considered it a preferable course for one whose malady was incurable.

The New Jersey Supreme Court subsequently stressed a common law right to self-determination and adherence to the doctrine of informed consent. Competency in making a rational and considered choice loomed as the most significant factor in right-to-die cases as the court took as its guiding principle that “competent persons generally are permitted to refuse medical treatment, even at the risk of death.” Subsequent New Jersey decisions used a sliding scale dependent upon the circumstances presented, the age of the patient, and life expectancies. Three 1987 decisions emphasized elements of flexibility, but determining patient intent and applying the doctrine of substituted judgment in specific circumstances remained open to varying levels and modes of interpretation.

The cases noted were cited and considered by the Supreme Court in Cruzan v. Director, Missouri Department of Health, Missouri’s right-to-die case. Writing for the Court, Chief Justice Rehnquist reviewed at some length these state cases as important sources for doctrinal analysis and projection. He acknowledged the advantages and even the primacy of the state courts as expositors in this perplexing field, beset by formidable moral and ethical choices. He observed that state courts could draw upon state constitutions, statutes, and common law—sources not generally available to the Supreme Court.

What Chief Justice Rehnquist did concede, in explicit terms, was that a protected liberty interest to refuse unwanted medical treatment

64. Id. at 73.
68. Id. at 2847.
could be extracted from earlier decisions.\textsuperscript{69} As Justice O'Connor stated in a concurring opinion, because of inextricable links between physical freedom and self-determination, state incursions into the body have been held to be repugnant to due process liberty. Such interests, she concluded, should be entrusted to the "laboratory" of the states to which the "more challenging task of crafting appropriate procedures" for safeguarding them should be assigned.\textsuperscript{70}

Inquiries concerning the nature of bodily integrity extended to abortion decisions involving, as they ineluctably did, the fate of the developing fetus. In some instances, the state courts were willing to move beyond the bounds of \textit{Roe v. Wade}\textsuperscript{71} in providing assistance to indigent women where federal aid proved to be unavailable. When Congress substantially reduced support for state programs funding abortions for those in need, the Supreme Court refused to offer any remedial relief. A woman's fundamental right to an abortion remained undisturbed, the Court made clear in \textit{Harris v. McRae},\textsuperscript{72} but the means of realization in many cases were unavailing. Therein lay the role of the states if, in fact, the financial gap created was to be filled.

A reliance on the state counterpart of due process prompted the Supreme Judicial Court of Massachusetts to require provision for abortion as one of the options available to women in weighing their reproductive alternatives. If the Legislature offered public funds for those carrying fetuses to full term, the court declared in \textit{Moe v. Secretary of Administration},\textsuperscript{73} it was obligated to grant like benefits to women aborting. Once the decision was made to subsidize childbearing or health care generally, due process required that there be "genuine indifference" in providing accessibility to the necessary resources.\textsuperscript{74} To do otherwise, the majority argued, would be discriminatory.\textsuperscript{75} Nor did the preservation of life, an acknowledged state interest, serve to outweigh the significance of the individual rights at stake.

The Supreme Court of California, in \textit{Committee to Defend Reproductive Rights v. Myers},\textsuperscript{76} arrived at a similar conclusion, but it achieved the result by way of a different predicate. A right of privacy emerged, linked to a concept of procreative choice that forbade any

\textsuperscript{69} \textit{Id.} at 2852.  
\textsuperscript{70} \textit{Id.} at 2859.  
\textsuperscript{71} 410 U.S. 113 (1973).  
\textsuperscript{72} 448 U.S. 297 (1980).  
\textsuperscript{73} 417 N.E. 2d 387 (Mass. 1981).  
\textsuperscript{74} \textit{Id.} at 389.  
\textsuperscript{75} \textit{Id.} at 402.  
\textsuperscript{76} 625 P.2d 779 (Cal. 1981).
legislative proscription of funding for elective abortions. The receipt of state benefits could not be conditioned on a woman’s compelled disavowal of a constitutionally guaranteed right. Despite discord on the court, the majority prevailed in preserving women’s rights by what a dissent termed “semantic legerdemain.”

During the beginnings of the Rehnquist Court, abortion rights have continued to be eroded at the periphery. The potential exists, however, for state courts to “recapture” what has been lost in the federal Supreme Court. The continued survival of Roe, enfeebled though it may be, makes ultimate, pivotal choices unnecessary at this time. But noncore elements are ripe for judicial determination as challenges multiply and emotional issues grow more fervent.

Decisions affecting procreative choice, though intimately linked to the highly charged issue of abortion, have exhibited significant ramifications in other areas as well. The origins of the abortion controversy are rooted in the nineteenth century, when such concepts as the “quickening” doctrine were instituted and later abandoned by state courts as descriptive of the severity of the criminal penalty to be imposed. Its consequences were expanded to encompass birth control devices as these emerged early in the twentieth century. More closely related to current scientific advances are questions of surrogate parenthood. Judicial inquiries have been slow to develop and to provide acceptable legal and constitutional guidelines. Neither statutory nor judicial remedies have kept pace with innovative techniques for noncoital reproduction.

Perhaps the most publicized of the surrogate parenting cases arose in New Jersey. The Baby M case posed many of the questions that affected the validity of surrogate contracts terminating the mother’s parental rights, the possible public policy conflicts posed in the circumstances, and the presumed rights advanced by the natural father. Despite the biological mother’s objections and her outward disavowal of the contract subsequent to her original agreement to surrender the child to the natural father and his wife, a lower court required specific enforcement in the best interests of the child. The natural mother was characterized in unusually derogatory terms while the biological father and his wife were described as nearly impeccable parents.

77. Id. at 807 (Richardson, J., dissenting).
New Jersey's highest court, in a sweeping reversal of the lower court's findings, outlawed surrogate parenting contracts unless voluntarily entered into and executed by the natural mother. Notably missing was extensive attention to constitutional issues that were treated, if at all, at the margin. Were there not state analogues comparable to the Thirteenth and Fourteenth Amendments? If so, why did one of the nation's most activist courts evade such issues? Was there not intrinsic invalidity and a violation of basic human rights attaching to any requirement, by contract or otherwise, that compelled a person to perform service and to function, in effect, as a vessel or conduit to "deliver" a human product that should be hers as a matter of personal autonomy? The New Jersey court touched upon these questions fleetingly, but novel issues of servitude were avoided. Instead, the justices described a right of privacy as controlling, with references to the "purchase of a woman's procreative capacity at the risk of her life" and to surrogacy as a "matter so private, yet of such public interest."

While the New Jersey court's resort to constitutional analysis was unexpectedly limited, the Baby M precedent served to discourage further growth of surrogate parenting as a viable alternative for infertile couples. The likelihood that surrogate mothers would bear children without recompense was improbable. To this extent, then, the judgment discouraged and all but ended any further efforts to revive this application of biotechnology. Yet the court's disinclination to grapple fully with such novel offshoots of privacy made for uncertainty and a doctrinal vacuum devoid of the innovative elements usually associated with judicial agenda-setting and problem-solving. Although there was no appreciable resort to state constitutional provisions in Baby M, an appeal to the United States Supreme Court never appeared to be a realistic choice or substitute for decision making in the state courts.

The Baby M decision, effectively invalidating surrogate parenthood, conveyed an ironic message with the award of custody of the child to the natural father and the adoptive mother. The surrogate mother's rights of visitation were preserved, but the New Jersey court claimed that in making the award, it had acted in the "best interests" of the child. Privacy interests were also implicated, but the court disclaimed the father's allegations of a constitutionally protected right of

82. 537 A.2d 1227 (N.J. 1988).
83. A review and preliminary analysis of the decision may be found in Surrogate Parenting: Reflections on Public Policy, Constitutionality, and Related Interests, in Stanley H. Fiedelbaum, Judicial Federalism and Related Developments: A Decade of Change in New Jersey 59 (1990).
84. Baby M, 537 A.2d at 1256-64.
procreative liberty.\textsuperscript{85} Almost a decade earlier, the same court in \textit{In re Grady}\textsuperscript{86} had examined "best interest" standards and procedures in assessing the proposed exercise of parental surrogacy rights in behalf of an incompetent young adult suffering from Down's Syndrome. Privacy interests once more were in evidence. In part, the determination rested upon a reexamination of precedents drawn from \textit{Quinlan} as well as from adoption and child custody cases.\textsuperscript{87}

More rancorous than the novel issues considered in \textit{Baby M} were the emotionally charged questions posed in \textit{Grady}. The parents of a nineteen-year-old noninstitutionalized woman, afflicted with severe mental retardation, had sought authorization to have their daughter sterilized. Despite apparent parallels, the New Jersey court declined to follow \textit{Quinlan} unreservedly toward the resolution of what it described as a "disturbing paradox."\textsuperscript{88} In effect, the court sought to reconcile a personal right to prevent conception and the right to make a meaningful and informed choice. Surprisingly, yet understandably on closer examination, sterilization was taken to be a more controversial remedy in the light of its history and other associated factors than was the decision to terminate life in \textit{Quinlan}.\textsuperscript{89}

Promotion of compulsory eugenic sterilization stemmed, in large measure, from the prevailing beliefs of the 1920s. Elimination of those deemed "unfit" by reason of heredity was looked upon as a social good to be fostered by the state.\textsuperscript{90} A Supreme Court case, \textit{Buck v. Bell},\textsuperscript{91} afforded legitimacy to the movement by sanctioning the application of a state's compulsory sterilization law to a mentally impaired woman confined in a state hospital. In a much-decried opinion of the Court, Justice Oliver Wendell Holmes recited the prevailing dogma in exceptionally strong terms. He declared that a feeble-minded inmate of a state institution might be sterilized without violating due process or equal protection to prevent society's "being swamped with incompetence."\textsuperscript{92} Holmes concluded starkly that "[t]hree generations of imbeciles are enough."\textsuperscript{93}

In light of the events of the 1930s (including countless atrocities and systematic genocide abroad), the Court revised its treatment of sterili-

\textsuperscript{85} \textit{Id.} at 1253-55.
\textsuperscript{86} 426 A.2d 467 (N.J. 1981).
\textsuperscript{87} \textit{Id.} at 473-76.
\textsuperscript{88} \textit{Id.} at 469.
\textsuperscript{89} \textit{Id.} at 472-73.
\textsuperscript{91} 274 U.S. 200 (1927).
\textsuperscript{92} \textit{Id.} at 207.
\textsuperscript{93} \textit{Id.}
It was in this context that the New Jersey court in *Grady* proceeded with care and some measure of trepidation in exploring the available options. The act of sterilization contemplated by the young woman's parents was characterized as neither voluntary nor compulsory. Even if, as the court conceded, the right to be sterilized fell within the ambit of privacy rights protected against undue interference by the state constitution, the complementary right to procreate called for rigorous inquiry. Consequently, the court departed from the *Quinlan* test in requiring close judicial supervision in the best interests of mentally incompetent persons to ensure that past abuses do not recur. A final determination was said to rest with a chancery court in the exercise of its *parens patriae* power to safeguard those unable to protect themselves because of an innate legal disability. A list of persuasive factors was stipulated, with the controlling criterion being "clear and convincing" proof that the incompetent person's best interests will be served by sterilization.

Apart from procreative and contraceptive choices, state courts have considered ancillary aspects not only of the reproductive act but also of sexual relations and preferences in a variety of settings. Antiquated fornication statutes have been held unconstitutional as deprivations of privacy rights under state constitutions. Moreover, several state courts have critically examined antisodomy statutes within a similar privacy context. But, in one of the most imaginative of these cases, the state court based its findings on federal rather than state constitutional grounds.

The decision in *People v. Onofre*, decided by New York's Court of Appeals, resulted in the invalidation of an antisodomy statute that had outlawed deviate sexual behavior and subjected it to the penalties of the criminal law. What emerged was a reworking of federal precedents toward the achievement of the desired end. Echoes of substantive due process reappeared by way of references to a "penumbral" right of privacy linked to what the state court took to be the outer

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95. 426 A.2d 467, 474-75.
96. *Id.* at 479-81.
97. *Id.* at 483.
100. *Id.*
limits of privacy interests. Why the court elected to act on federal constitutional grounds when state due process was available as an alternative recourse is unclear. Yet the positive outcome that resulted served as a reminder that a reliance on state constitutional provisions is not always the only road to innovative ends. The vagaries of federal constitutional explication, skillfully construed and, where necessary, artfully redesigned, offer opportunities for growth and creativity that should not be overlooked by state courts in their search for inventive techniques.

To like effect, the New Jersey Supreme Court, in *In re T.L.O.*, applied federal Fourth Amendment guidelines to student searches undertaken by public school administrators. State constitutional analogues might readily have been invoked if the justices had intended to immunize the decision—involving suppression of the evidence in a drug-related case—from federal review. The Supreme Court intervened and reversed the state court’s judgment, despite reliance on similar reasoning.

The California Supreme Court also invited federal review and reversal in the controversial *Bakke* "benign" discrimination case. Just as no compelling reason existed to rely on federal constitutional law in the New Jersey case, the California court did not have to select the Fourteenth Amendment’s equal protection clause as the fulcrum on which its findings turned. It is evident that the course followed in *Bakke* was purposeful—to prepare the way, if not to ensure, final disposition of the issues in the Supreme Court. That federal intercession resulted in a disturbingly ambivalent opinion does not obviate the intent of the prevailing state majority. The question of racial quotas, fraught with emotional as well as highly charged political overtones, apparently proved persuasive in this instance. It appears that an activist state court need not uniformly decide controversial cases on state constitutional grounds if, either on the basis of public policy considerations or political pragmatism, there is resolve to shunt the final adjudication to the nation’s highest court.

C. Age Discrimination

Lest it be assumed that the privacy cases presaged an unrelenting stream of decisions extending constitutional recognition and protec-

102. 415 N.E.2d at 942.
tion to persons vulnerable to discrimination by reason of physical or innate characteristics (as in racial and sexual cases), factors associated with age have never attained the status of fundamental rights or suspect classifications in federal constitutional law. The requirement of mandatory retirement at age seventy, particularly as it relates to state judges, has raised questions tied to equal protection and due process guarantees. The standard of review applied in Supreme Court cases has remained a rational relationship test. An act will not be invalidated if "any state of facts reasonably may be conceived to justify it." Those of advancing age do not constitute a suspect class; nor is the right to public employment a fundamental interest.

Federal courts tend to defer to state discretion in the administration of governmental services, including determination of the most able or qualified employees and those who best reflect contemporary viewpoints and the present societal makeup. All the same, current developments militate in favor of eliminating mandatory retirement based only on age. If judges are singled out for compulsory retirement at age seventy while other public officials are permitted to continue regardless of age, it is at least arguable that the constitutional guarantee of equal protection has been violated.

State cases have offered little, if any, evidence of greater protection, beyond the narrow holdings of the United States Supreme Court, with respect to age discrimination. The Supreme Court of Hawaii, long considered one of the most "progressive" of state tribunals, followed conventional patterns of decision making in Daoang v. Department of Education. When a state employee took exception to mandatory retirement, it sustained the law against equal protection challenges. The court found no infringement upon a claimed, but disavowed, fundamental right to work, and it pursued a rational basis test as the appropriate standard of review. It declined to undertake a rigorous examination of the state's objectives, holding instead that a reasonable basis existed for the assumption that physical and intellectual skills may suffer impairment because of advancing years.

110. EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988).
111. See Sabo v. Casey, 757 F. Supp. 587 (E.D. Pa. 1991) (section of the Pennsylvania Constitution as applied to judges more than 70 years old held to be unconstitutional).
113. Id. at 633. The case arose before Congress' enactment of amendments to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-631, and its extension to persons over age 40 and to public employees (except for stipulated categories).
114. Id. at 631-32.
A Supreme Court inquiry into mandatory retirement for state judges resulted in a renewed finding that, in constitutional terms, the requirement did not violate the equal protection clause. Admittedly, the focus involved application of the federal Age Discrimination in Employment Act to exclusionary definitions of employees, whether elected or high-ranking, including those appointed to policymaking positions. Apart from an examination of statutory requirements, however, there was no inclination to modify any assessment beyond the rational basis level.

That challenges premised on charges of age discrimination will not be perceptibly advanced by filings in state courts emerged from the California Supreme Court's ruling in Schmidt v. Superior Court, decided in 1989 by one of the nation's leading appellate courts. A state civil code provision had facilitated a mobile home park's imposition of a regulation limiting residency to persons aged twenty-five or older. The purpose was clear: to minimize security and other operating costs by restricting eligibility to mature residents who allegedly presented fewer problems. The court sanctioned no more than a rational basis test because age was said not to rise to the level of classifications linked to race or ethnicity. Given the minimal scrutiny, the policy adopted was deemed neither arbitrary nor irrational.

In regard to gender-based discrimination, state equal rights amendments have encouraged and actually given rise to a broad range of challenges linked to a strict scrutiny test of sexual classifications. Yet the outcomes have not always proved as rewarding as advocates had predicted. What has occurred is a blurring of lines of distinction between the sexes with respect to aspects of the marital relationship, the unisex treatment of and eligibility for alimony payments, and the abolition of interspousal immunity. New rules have set aside canards describing the "proper" role of the sexes and perpetuating stereotypes tied to Blackstonian definitions of marital unity.

117. Id. at 944-45.
Gender-related distinctions continue although, because of the adoption of state equal rights amendments, strict scrutiny has become more common as the accepted standard. The Supreme Court has declined to proceed beyond an intermediate scrutiny level that is less permissive than a rational basis test but not as compelling as a strict scrutiny test. Therefore sex discrimination has been subjected to a more searching constitutional examination than age-based bias. In practice, the principal remedies for gender and age discrimination continue to lie in statutory prescriptions, whether pursued in federal or state courts.

D. First Amendment

The course of expressive liberties and resorts to state versions of the First Amendment’s religion clauses have not been appreciably affected by recent revivals of state constitutional law. During the early decades of the nation’s history, the state courts played a more critical role when, with the Bill of Rights inapplicable to state proceedings, state constitutional provisions were more often relied upon as primary sources. The abolition of established churches in several states occurred in the 1830s and 1840s. Thereafter, particularly after the First Amendment was “absorbed” in the middle years of the twentieth century, state courts were prone to follow federal rulings as adjudicatory models. To this point, a reinvigorated judicial federalism has not given rise to notably innovative departures, though the potential for growth remains and one day may reach fulfillment.

Exceptions, where they have come to pass, have resulted largely from clearcut linguistic differences between federal and state clauses.

122. Craig v. Boren, 429 U.S. 190 (1976) (gender-based classifications must be substantially related to achievement of important government objectives) remains controlling. See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (policy of state-supported university of denying males the right to enroll in its nursing school violates equal protection); Rostker v. Goldberg, 453 U.S. 57 (1981) (selective service registration of only men does not violate due process); Michael M. v. Superior Court, 450 U.S. 464 (1981) (California statutory rape law under which only men could be held criminally liable does not unlawfully discriminate on the basis of gender.).

123. A “benign” use of gender-related classifications, linked to permissible affirmative action programs grounded on statutory premises, was sustained in Johnson v. Transportation Agency, 480 U.S. 616 (1987).


A textbook loan program, consistent with federal religion clause standards, was set aside by the Nebraska Supreme Court when weighed against provisions of the state constitution.\textsuperscript{126} At the same time, the results more often have proved to be inconclusive, if not ambivalent in their impact. The Supreme Judicial Court of Massachusetts assumed an unyielding position of negation in applying an "anti-aid" amendment to public monies assigned to nonpublic schools.\textsuperscript{127} By contrast, a Missouri state court sustained payments of tuition grants to students at public and private colleges despite a state constitutional prohibition more restrictive than First Amendment counterpart provisions.\textsuperscript{128} Nonetheless, the same court struck down as unconstitutional state efforts to use federal funds to provide instruction for elementary and secondary students in sectarian schools.\textsuperscript{129}

The proclivity of state courts to draw upon federal precedents, though not always with like results, was strikingly evident in the Sunday closing law cases. Since the Supreme Court's invention of a "family togetherness" motif in a series of 1961 decisions sustaining Sunday closing against establishment and free exercise challenges,\textsuperscript{130} the state courts have been faced with comparable claims, though they have been aimed at achieving more varied ends. Courts in New York and Pennsylvania premised findings of unconstitutionality on narrowly disguised concepts of equal protection tied largely to a galaxy of exceptions in the prevailing statutes. The validity of notions of a uniform day of rest emerged virtually unscathed.\textsuperscript{131} In New Jersey, the electorate was left with the ultimate decision in county-by-county referendum when the state's usually activist supreme court, for unexplained reasons, uncharacteristically deferred to legislative prerogatives and embraced federally devised standards.\textsuperscript{132}

\textit{E. Criminal Law}

Just as the state courts have largely followed guidelines established by the Supreme Court regarding expressive liberties and the religion

\textsuperscript{126} Gaffney v. State Dep't of Educ., 220 N.W.2d 550 (Neb. 1974).
\textsuperscript{128} Americans United v. Rogers, 538 S.W.2d 711 (Mo.), cert. denied, 429 U.S. 1029 (1976).
\textsuperscript{129} Mallory v. Barrera, 544 S.W.2d 556 (Mo. 1976).
\textsuperscript{131} Kroger Co. v. O'Hara Township, 392 A.2d 266 (Pa. 1978); People v. Abrahams, 353 N.E.2d 574 (N.Y. 1976).
clauses, similar patterns prevail in criminal law.\textsuperscript{133} It needs to be recalled that state judges often have had first-hand contacts with the criminal justice system either as prosecutors or as lower court personnel;\textsuperscript{134} that a majority of the cases that fill the dockets of state courts arise from the appeals of felons convicted of crimes of violence or of other types of reprehensible behavior;\textsuperscript{135} that the state courts are affected by a proximity to and a familiarity with the problems faced by law enforcement officers—problems that dim in a tribunal as remote as the Supreme Court; and that traditionally the development of the criminal law, both in its statutory format and content and its precedential output, has been committed substantially and, for much of the nation’s history, almost exclusively to the primacy of the states.

Departures from federal standards of the post-Warren Court years, when they occurred in the 1970s and 1980s, were still considered exceptional and essentially aberrational. For the most part, differences revolved around protections intended to narrow “unreasonable” searches and seizures and to defend rights against self-incrimination. Several newly activist state courts may have taken as their lodestars Justice Hugo Black’s advice that a state has power to “impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.”\textsuperscript{136} Yet there were relatively few federal cases that prompted a resort to independent state grounds. The so-called Robinson-Gustafson\textsuperscript{137} rule, justifying authority for a search on a custodial arrest, ranked high among the Supreme Court decisions that gave rise to contrary judicial intervention in a number of states.\textsuperscript{138} Similarly, the Supreme Court’s depreciation of the controversial exclusionary rule in \textit{Harris v. New York}\textsuperscript{139} led several state courts to take exception to what was considered a marked infringement of the rights of the accused.\textsuperscript{140} The Court’s dramatic action in a 1984 case,

\textsuperscript{133} A recent commentator reports that “two-thirds of the criminal rulings are endorsements, not repudiations” of Supreme Court decisions and that many “vanguard” state courts have “very high rates of approval of the output of the Burger/Rehnquist majority.” Barry Latzer, \textit{The Hidden Conservatism of the State Court “Revolution,”} 74 \textit{JUDICATURE} 190, 190-91 (1991).

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 191.

\textsuperscript{136} Cooper v. California, 386 U.S. 58, 62 (1967).


\textsuperscript{139} 401 U.S. 222 (1971).

\textsuperscript{140} See People v. Disbrow, 545 P.2d 272 (Cal. 1976); State v. Santiago, 492 P.2d 657 (Haw. 1971).
United States v. Leon,\textsuperscript{141} effected a modification of the exclusionary rule by introducing a good-faith exception. After Leon, evidence seized pursuant to an invalid warrant did not have to be excluded if the police could demonstrate a good faith reliance on the defective warrant. The New Jersey Supreme Court assumed a position of leadership in the criminal justice area when, three years later, it rejected the good-faith exception by reference to an ill-defined "historical perspective" that had the exclusionary rule "imbedded in our jurisprudence."\textsuperscript{142}

A more portentous source of conflict lay in continuing debates over capital punishment. From the early 1970s, when the Supreme Court of California found the death penalty violative of the state constitution's "cruel or unusual punishments" provision,\textsuperscript{143} to recent differences over similar issues, the questions raised have interjected a political component not often found in the wake of judicial decisions. The California case brought the court into conflict with the state's attorney general and resulted in its subsequent reversal by referendum.\textsuperscript{144} Recurrent conflicts with the electorate over capital punishment, in part, led to a marked change in judicial personnel and the end of the Bird Court in 1986.\textsuperscript{145}

Latent forces at work in otherwise activist state judiciaries may become more spirited in the criminal law area as a result of the Rehnquist Court's recent rulings. Indeed, the 1990-1991 term of the Supreme Court revealed a more decided anti-defendant animus than any that had manifested itself during the Burger years. A majority seemed determined to undo what some had viewed as the "revolution" initiated in the course of the Warren Court's nationalization of the Bill of Rights.\textsuperscript{146} What was most disturbing and what may provoke more lively state intervention were the precedents that were overturned, several of recent origin.\textsuperscript{147} The notion that state courts follow the Su-

\textsuperscript{141} 468 U.S. 897 (1984).
\textsuperscript{142} State v. Novembrino, 519 A.2d 820, 850-51 (N.J. 1987).
\textsuperscript{145} Chief Justice Rose Bird was removed by the electorate in 1986.
\textsuperscript{147} With respect to automobile searches, for example, the Court, in California v. Acevedo, 111 S. Ct. 1982 (1991), overruled a 1979 precedent, Arkansas v. Sanders, 442 U.S. 753 (1979). Cf. Florida v. Jimeno, 111 S. Ct. 1801 (1991) (Fourth Amendment not violated when a police officer who has permission to search a car opens a closed container that might reasonably contain the object of the search).
JUDICIAL FEDERALISM

The Supreme Court in most aspects of the criminal law no longer may be valid should current indicators continue to unfold and intensify.

F. Substantive Due Process

Avid attention to the protection and advancement of liberty interests, intended to safeguard a right of privacy, has often tended to obscure liberty in its more inclusive and historic sense. When property rights are commingled with liberty interests by way of Fourteenth Amendment due process, memories of a troubled era in the Supreme Court's history recur. Events of this period recall national trauma, having prompted serious attacks upon the Court's institutional integrity and established practices of judicial review. Mention of such dishonored precedents as *Lochner v. New York*, 148 *Coppage v. Kansas*, 149 and *New State Ice Co. v. Liebmann* 150 strikes a redolent note of substantive due process, suggestive of an un lamented past that vanished following the great judicial debacle of 1937-1938. For several decades thereafter, the Supreme Court moved resolutely to undo the negativism that had prevailed—embracing disavowals so emphatic that the review function in economic and social regulatory cases declined to the point of self-abnegation. 151 Legislative choices were recognized as paramount, aggressive interventionism was eschewed as nefarious and unconscionable, and a broad-based doctrine of deference controlled as the prevailing standard. 152

A halting return to substantive due process did not become noticeable until the late 1960s when sporadic references to the much-berated predicate were undertaken (seemingly when all else failed) to advance such libertarian causes as personal autonomy. 153 All the same, state safety measures continued to be accorded a broad degree of deference unless incursions upon federally guaranteed rights reached egregious levels. Restraints upon the police power of the states existed minimally, if at all, in assessments of legislative judgments. 154

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148. 198 U.S. 45 (1905).
149. 236 U.S. 1 (1915).
Court opinions exhibited little concern that the state regulatory function, virtually unrestrained in an era marked by judicial indulgence and abstention, might endanger “preferred” liberties.\textsuperscript{155} No more than a minimum rationality test was held to be acceptable, and any negative recourse to it was reserved for exceptional occasions. Only recently have there been indications of a credible effort to revive economic liberties as essential and defensible protective shields in the constitutional scheme.\textsuperscript{156} Similarly, an unremitting adherence to deference as an article of judicial faith has declined somewhat in a Court that has returned to some semblance of balance in its consideration of the states’ regulatory power.

What the Supreme Court acknowledged only reluctantly and episodically in regard to the review function never disappeared from the judicial arsenal of the states.\textsuperscript{157} In most cases, deference served as the dominant motif. But, in the absence of overt threats to institutional stability, state courts never surrendered the right to inquire, whether critically or not. It was still possible to charge violations of due process with some anticipation of a favorable result, particularly when unsavory lobbying activities could be cited and exposed to public view. In sum, negative interventionism in the states was never abandoned to the extent that it had become anathema among the post-1937 Supreme Court’s working options.

Although acclaimed as an activist-oriented tribunal, the New Jersey Supreme Court reflects the inherent ambivalence discernible in the economic regulatory area. A recent case, \textit{In re C.V.S. Pharmacy Wayne},\textsuperscript{158} raised issues of economic due process within the framework of regional shopping malls and the competitive patterns common to large chains of pharmacies. The state sought to prevent price wars to ensure the survival of available pharmacies and to maintain prevailing standards. To these ends, the statute in question prohibited premiums or rebates related to drug sales except in regard to trading stamps or discounts accorded persons sixty-two years of age or older. When Consumer Value Stores (CVS) engaged in price cutting for prescription drugs, the State Board of Pharmacy moved against a pharmacist for engaging in “grossly unprofessional conduct.”\textsuperscript{159} A fine imposed

\begin{itemize}
  \item \textsuperscript{155} United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).
  \item \textsuperscript{156} A cogent rationale is presented in Bernard H. Siegan, \textit{Economic Liberties and the Constitution} (1980).
  \item \textsuperscript{157} Classic accounts of earlier periods may be found in Monrad G. Paulsen, \textit{The Persistence of Substantive Due Process in the States}, 34 \textit{Minn. L. Rev.} 91 (1950) and in John A. C. Hetherington, \textit{State Economic Regulation and Substantive Due Process of Law}, 53 \textit{Nw. U. L. Rev.} 226 (1958).
  \item \textsuperscript{158} 561 A.2d 1160 (N.J. 1989).
  \item \textsuperscript{159} \textit{Id.} at 1161.
\end{itemize}
following an administrative hearing was vacated by the state's intermediate court, and the act was declared unconstitutional on grounds of irrationality and excessive vagueness, as well as more familiar tenets of economic due process.\textsuperscript{160}

When \textit{C.V.S. Pharmacy Wayne} reached the state supreme court, that court reversed, sustaining the law's validity against claims that it ran counter to principles of substantive due process.\textsuperscript{161} Application of a rational basis test resulted in an affirmation of the Legislature's actions under the state's police power. The level of scrutiny resorted to was minimal. To charges of economic protectionism, the court responded with denials that particular groups had been placed at a competitive disadvantage. Nor were the legislative classifications used found to be violative of equal protection safeguards. While the outcome paralleled federal precedents, the state court's style betrayed subtle differences—a propensity to delve into statutory content and context, to examine the purpose of the act, and to weigh the motivating factors that gave rise to it.\textsuperscript{162} Like results typify many of the state cases touching upon economic due process but, as a commentator has noted: "[R]eliance on explicit provisions of the state constitution can provide a sound basis for the exercise of judicial review without the appearance of a substitution of judicial value judgments."\textsuperscript{163}

\textbf{G. Contract Clause}

The Supreme Court's occasional reversion to the techniques of substantive due process led to incongruities within settings long thought not to be susceptible to major judicial incursions. Of particular interest was the revival of the Contract Clause in a series of cases extending from 1977 to the mid-1980s. In an incipient decision in an area that had been dormant for almost half a century, \textit{United States Trust Company of New York v. New Jersey}\textsuperscript{164} reestablished the Contract Clause as an operative part of the Constitution. It mattered not whether, as the Court phrased it, the "protection of contract rights comports with current views of wise public policy."\textsuperscript{165}

While the majority in \textit{United States Trust} acknowledged the propriety of deferring to the judgments of state legislatures, it noted that the

\begin{itemize}
\item \textsuperscript{160} 541 A.2d 242 (N.J. Super. 1988).
\item \textsuperscript{161} 561 A.2d at 1164-65.
\item \textsuperscript{162} \textit{Id.} at 1166-67.
\item \textsuperscript{163} Susan P. Fino, \textit{Remnants of the Past: Economic Due Process in the States}, in \textit{HUMAN RIGHTS}, supra note 125, at 156, 158-59.
\item \textsuperscript{164} 431 U.S. 1 (1977).
\item \textsuperscript{165} \textit{Id.} at 16.
\end{itemize}
reserved power doctrine revealed a different basis when a state impaired the obligation of its own contracts. The emergent standard substituted a variable measure of judicial intervention for the vagaries of due process. A "reasonable and necessary" test was devised to determine whether impairment served a significant public purpose. To a limited extent, the doctrine of deference was made to yield to inquiries into legislative objectives. The choice among policy alternatives no longer lay within the almost unfettered discretion of the states as policymakers. Court-inspired appraisals of societal needs were substituted to a degree rarely seen since the 1930s.

The results represented an intrusion that, Justice William Brennan warned in dissent, might entail "enormous institutional and social costs." He described the prevailing opinion as a substantial misrepresentation of the course of contemporary constitutional jurisprudence and the portrayal of the Contract Clause as "wooden." Brennan depicted the reasonable and necessary test as a "most unusual hybrid" and as "schizophrenic" in its impact. If Brennan's recourse to hyperbole was not seriously considered as projecting a major turnabout, it seemed equally careless to dismiss the Court's venture into economic activism as no more than a random deviation from accepted practices.

Subsequent federal cases reflected less intrusive guidelines than those set out in United States Trust and its doctrinal offshoot, Allied Structural Steel Co. v. Spannaus. The latter, if anything, extended the reach of the Contract Clause to private contracts. Beyond Spannaus lay a period of retrenchment as the Court began to reappraise what the dissenters had pointed to as a revival of queries reminiscent of a rancorous past. The possibility of a restatement, attributable to the majority opinion in Spannaus, reached partial fruition in Energy Reserves Group v. Kansas Power and Light Co. When the state has not sought to modify its own contractual obligations, the Court declared, deferential principles generally apply, premised on standards of review traditionally linked to economic and social regulatory schemes.

166. Id. at 23-25.
167. Id. at 29.
168. Id. at 62 (Brennan, J., dissenting).
169. Id.
170. Id. at 54 n.17.
Succeeding decisions, representing a cross-section of the Court, continued to bring the Contract Clause to a less incursive level than that which might have been anticipated from a reading of *United States Trust*. An intermingling of Contract Clause and Fifth and Fourteenth Amendment due process predicates presaged a return to deferential review, although a reservation persisted distinguishing private from governmental obligations. All the same, a spirit of moderation ensued. The reemergence of the Contract Clause and due process variations as independent devices endured. But they served as less pervasive substitutes than much-condemned, direct applications of economic due process. Fears of a recurrence of extravagant displays of judicial negativism receded and were rendered increasingly remote in a Court basically committed to deference. The latter seemed likely to prevail, albeit without a boundless presumption of validity—a presumption that no longer could be perceived as obligatory.

Initially, the Supreme Court's return to the Contract Clause evoked visages of a like revival in the state courts. Indeed, in *Flushing National Bank v. Municipal Assistance Corp.*, the New York Court of Appeals had already acted to invalidate a state moratorium statute, postponing the payment of principal on short-term municipal bonds. The state's highest court moved to preclude federal intervention by ruling on independent state grounds, and the outcome seemed to place an inordinate burden on a beleaguered city threatened with impending default. The sanctity of private property rights was sustained by reliance on a "faith and credit" provision of the state constitution. Yet the judgment, it appeared, was less expressive of a probusiness philosophy than a desire to ensure the survival of investor confidence by eschewing a cavalier resort to a moratorium—a temporary nostrum of dubious long-term efficacy or value.

Apart from the New York court's findings in the *Flushing Bank* case, there was a disposition in the state courts to follow federal decisional law, as it has developed since *United States Trust*, in resolving contract impairment disputes. A sampling of cases reveals little interest in shifting to state analogues as predicates of decision making.

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175. *Id.* at 851.
Nor was any concerted effort made to insulate the results from federal review. The motivating factors that encouraged state constitutional activism regarding libertarian causes were missing with respect to the Contract Clause and its state-related counterparts. Federal models apparently served the exercise of the state's police power and its application in diverse settings. It is doubtful that more stringent standards will be pursued in the foreseeable future. To the same degree that state substantive due process decisions have replicated the federal Supreme Court's analytical framework, contract clause holdings, of varied impact and premised on changing federal precedents, have conformed to deferential patterns traditionally linked to the economic and social regulatory sphere.

III. Concluding Observations

As the preceding survey reveals, the past several decades have witnessed a remarkable devolution of judicial power and leadership to the state courts. American constitutionalism no longer may be regarded in monolithic terms, centering almost exclusively on the Supreme Court's work. Instead, the rich diversity as well as less auspicious displays associated with developments in the federal system have become abundantly evident. An historic reliance on the state courts, dating from the early years of the Republic and predating the impressive hegemony of the Supreme Court, in some ways has been revived, though the issues and questions raised reflect an era decidedly different from its predecessor. The Framers, despite their much-noted clairvoyance, would have difficulty in reconciling contemporary notions with late eighteenth century beliefs and constitutional texts. What might be familiar is the basic institution of judicial review; though its current breadth, the range of problems that it treats, and its ramifications for the formulation of public policy would not be readily recognizable. Nor would any characterization of state courts as agenda-setters fall within their reading of constitutionally derived or defensible precepts.

More intelligible to the Framers would be a judicial dedication to the protection of property, embodying liberty interests as they were known at the time. Yet the activism of contemporary state courts extends only minimally, if at all, to updated versions of a property-oriented economic due process. To the contrary, there is a tendency to

follow almost undeviatingly the deferential patterns attributable to the Supreme Court. Why, it may be asked, does this propensity exist when the state courts are in a position to assess more intimately and critically than the federal Supreme Court what may have gone awry in the executive-legislative process, particularly transgressions involving special interests? There is no legacy of crisis in the states comparable to the events that threatened to compromise the institutional status of the Supreme Court in the late 1930s. Indeed, during the 1940s and early 1950s, a number of state appellate courts did take on an interventionist posture, at times marked by opinions making reference to substantive due process precedents abandoned earlier by the Supreme Court. It is not clear why most of the state courts have been disinclined to reassume such responsibilities. Doubtless creative contributions—not necessarily or intrinsically negative in their reach—could be made without the incurrence of liabilities analogous to those linked to social Darwinism and its errant repercussions.

If, in fact, the recent resuscitation of state constitutional law was reactive to the lack of expansive civil liberties initiatives in the Burger Court, the continued, well-nigh paramount attention of many of the state courts to the enhancement of libertarian interests still remains enigmatic. The nationalization of the Bill of Rights during the Warren years ought to have put to rest any doubts concerning the protection of freedom, whether in state or federal courts. As a result, a recurrent reliance on state counterpart safeguards might be taken to signal an assault, however subtle or unintended, upon the preeminence of the Bill of Rights and a general downgrading of national constitutional guarantees. The danger always exists that, at times, a resort to independent state grounds may be a subterfuge to undermine individual rights by negating opportunities for appeal to the federal courts.

There are also suspicions, perhaps remote, of a return to provincialism in the development of American constitutional law. Will this encourage irresponsibility on the part of the Supreme Court? Are state judges being invested with or grasping for excessive power? Are they motivated by an animus against centralization and a distaste for the inroads upon the federalism of yesteryear rather than an undesigning interest in promoting a dynamic constitutional order? Should the range of rights available to a litigant depend upon happenstance, that is, the accident of a person's state of residence at the time that a suit is instituted? Will this, where possible, lead to "forum-shopping," much in the manner of pre-Erie corporate maneuvers in diversity.

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proceedings? Are liberties, unlike economic arrangements, to be subject to persistent state experimentation even though diminution has been presumed to be precluded by the nationalization process? Is there reason why, in the past, preferences have been expressed for federal constitutional and statutory protection even when the moving party is the apparent loser? Or are Americans no longer willing to sacrifice for the primacy of a federal holding?

Critical repugnance to what some perceive to be an ultra-conservative Rehnquist Court may result in a fundamental alteration of the nation's constitutional development. But a calculated shift to the state courts, premised primarily on dissatisfaction with the views of sitting Justices, ought not to be seriously advanced as a determinant of long-term directions. To do so places in jeopardy the probity of judicial review as it has evolved over two centuries of constitutional history. The values of national dominion in a constitutional sense outweigh any temporary gains that may be realized if state courts are made to serve merely as mechanisms of evasion, in effect, to "reverse" unpopular Supreme Court decisions. There is a need for state courts to provide principled, reasoned opinions, not result-oriented decisions designed solely to achieve particular ends. If state courts are to be the initial sources in support of rights derived from state constitutions, the quest for "neutral" principles takes on added significance.

Notwithstanding these animadversions, the future prospects of state constitutional law seem bright in a federal system that for too long has neglected essential components of judicial federalism. As an ill-conceived displacement of federal judicial authority is untoward and counterproductive, so the earlier view of state courts as supplicants made for an improper and artificial imbalance. An era of mutual, interactive fulfillment lies ahead. It is only in a spirit of cooperation that the best products of American constitutionalism will be realized.

State appellate courts, drawing upon a vast storehouse of historical and contemporary resources predicated on state constitutions and precedents, are strategically well-suited to provide creative solutions to a broad range of nascent problems. Amendments to state constitutions reflect more speedily the fluctuating views of American society than do infrequent alterations of the national Constitution limited, for the most part, to procedural and structural changes. Rights of privacy, environmental protection provisions, equal rights guarantees, and other innovative reforms have been found in recent additions to state constitutions.}

180. Linde, supra note 25.
Because many state judges are elected and serve for fixed terms, they are hypothetically more accountable to the people than are the Justices of the Supreme Court. Consequently, the democratic impetus comes into play, providing links to the popular will. The adverse side of what at first appears to be a positive advantage lies in this very proximity to the electorate, thereby promoting fears of politicized judges prone to adopt ephemeral schemes that may menace constitutional rights.

Initiative and referendum mechanisms, where they exist, pose additional threats to an activist judiciary bent on advancing causes that prove to be unpopular. While the initiative and referendum has not been as damaging to individual rights and liberties as opponents often charge, the danger always exists that the independence of the state courts may be undermined. Popular democracy in California has had baneful effects upon an acclaimed court system, though the judges have demonstrated notable resourcefulness in skirmishes to ensure that they remain significant expositors of the constitution and statutes. Safeguards need to be introduced to place individual rights and liberties beyond the ken of the initiative and referendum. Otherwise, the threat persists that the procedure can provide a general warrant to invade previously inviolable spheres of activity or to undo doctrinal pronouncements. Such a misuse of the initiative and referendum, substituting popular whims for considered judgments, may encourage a negative reaction to the basic device itself when passions have subsided and reason and moderation once again have prevailed.

If state courts are to prosper as significant decision makers, judges must be wary of resorting to tempting but potentially pernicious artifices. Purposeful efforts to divert explosive issues to the Supreme Court, though perhaps expedient, ultimately defile the state courts and render their pronouncements less credible and enduring. State courts have artfully used federal precedents to break new ground or to strengthen what has been projected. But an overt ruse compromises

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184. See, e.g., Bakke v. Regents of the University of California, 553 P.2d 1152 (Cal. 1976).

the status of a state court and weakens time-honored traditions of accommodation and comity in the federal system.

To like effect, repeated, open clashes between the state's highest court and the federal Supreme Court ought not to be indulged cavalierly. State judges are ill-advised to reject, without compelling cause, the findings of the Supreme Court in cases incontrovertibly similar in their constitutional bases, scope, and factual details. Otherwise, departures from federal norms may prove to be excessively venturesome and costly. Officiously contrary results, like those in the 1990 New Jersey garbage disposal case,\(^8\) squander reserves of public trust and good will. The fabric of judicial review, sustaining occasional thrusts of judicial activism, may be needlessly jeopardized as a result. Overt clashes ought to be selective in their reach and limited to cases where the gravity of the interests at stake merit such actions.

If the development of theoretical and methodological foundations is made to serve as one of the principal criteria of the status of state constitutional law, much remains to be accomplished. Pragmatism and strong tendencies toward result orientation continue to provide the salient guidelines for judicial decision making. Suggestions for a *modus operandi* range from a "first things first" standard\(^{187}\) that emphasizes the primacy of state courts and state constitutions to more sophisticated decisional yardsticks. As a point of origin, the "plain statement rule," in relation to the nature of the precedents cited and relied upon, was set forth in 1983 by the Supreme Court in *Michigan v. Long.*\(^8\) \(^{188}\) A decision premised on independent state grounds, the Court declared, must be based explicitly on an interpretation of the state constitution. Federal precedents may be considered so long as they do not "compel" the results reached.

Beyond such hints lie more ambitious efforts intended not only to meet the requirements of *Michigan v. Long,* but also to establish neutral criteria as the basis for the extension of rights more expansive than those provided in the federal Constitution. The process must be articulable, reasonable, and reasoned. To this end, Justice James Andersen of the Supreme Court of Washington fashioned the *Gunwall*\(^\)\(^8\)\(^{189}\)

\(^{187}\) Linde, supra note 25.
\(^{188}\) 463 U.S. 1032 (1983). *Cf.* Coleman v. Thompson, 111 S. Ct. 2546 (1991) (Presumption that state decision is based on federal grounds does not apply to dismissal of state court appeal, thus permitting federal habeas review.); Harris v. Reed, 489 U.S. 255 (1989) (Plain statement rule applies to federal habeas proceedings so that procedural default does not bar consideration of federal claim on review unless the state court explicitly states that its judgment rests on state law.).
\(^{189}\) State v. Gunwall, 720 P.2d 808 (Wash. 1986). For a cogent review of the *Gunwall* stan-
standards establishing nonexclusive criteria built around the state constitutional text, differences in counterpart provisions, historical data that support independent state grounds, structural differences between national and state constitutions, and local traditions and concerns promoting diversity. So-called "divergence" criteria and attempted applications appeared in a dissent in the New Jersey garbage disposal case, but their effectiveness remains problematic. In sum, the effort to define and to follow "neutral principles" remains as elusive in state constitutional law as it has in federal constitutional law.

Apart from such glimmers of "principled" adjudicatory techniques espoused intermittently in the case law and in the literature, the most compelling test lies in the success or failure of judicial federalism. State constitutional law does not exist as a discrete entity provincially derived and separately maintained. It is a part of the American experiment in constitutionalism (especially its federalist components) as it has manifested itself during the past two centuries. Its major contributions require an appropriate balance between the nationalization of American law, as reflected in the Supremacy Clause of Article VI of the Constitution and its decisional progeny, measured against the values of a diverse jurisprudence rooted in the states. The notion of a sharply competitive scheme, matching state courts as rivals against federal courts, can only be counterproductive. In a collaborative spirit, the creative contributions of both can best be brought to fruition. Neither a narrow parochialism nor an excessive centralization will facilitate the unusual spurts of energy, resourcefulness, and innovation that distinguish a variegated system.

Two examples provide measures of the efficacy of the system in the last decade of the twentieth century. The flag burning cases, referred to in the introduction to this Article, represented valuable state contributions to judicial federalism absent the intervention of the Supreme Court. There was no cause for federal decisions in 1989 and 1990, both of which added minimally, if at all, to First Amendment doctrine. The Court of Criminal Appeals of Texas had adequately...
dealt with the questions raised\textsuperscript{194} by an adroit resort to accepted principles of expressional freedom. In relation to personal autonomy, should the Supreme Court expressly overrule \textit{Roe v. Wade},\textsuperscript{195} the state courts (and legislatures) will confront a major test of their ability to respond to controversies touching upon political and emotional issues of the first magnitude. Will the devolution of powers and functions to the state courts, so often acclaimed as the "new" federalism, prove adept in meeting such a challenge? Alternately, is there danger of a return to an unbridled divisiveness that will threaten, once again and perhaps more pointedly, the essential unity of the nation as a fount of basic liberties and rights? Future events may well afford opportunities for a determination of the effectiveness of judicial federalism in its finest or least laudable hour.

\textsuperscript{195} 410 U.S. 113 (1973).