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JURISTOCRACY IN THE AMERICAN STATES?

ROBERT F. WILLIAMS*

This Symposium is aimed at discussing Ran Hirschl's book on "juristocracy."¹ Hirschl performed a very important study of the highest courts in four countries, not including the United States, and concluded that their records of progressive, distributive, social-change decisionmaking has not been very good.² As several conference participants observed, Hirschl avoided the usual "America-centrism" dominating studies of judicial review. But studies of judicial review also tend to be "national-centric" in the sense that they focus exclusively on federal high courts and do not examine state or subnational courts in those few countries where they exist. What might be said about the highest courts in states within federal systems? Here are some preliminary (albeit America-centric) observations.

In the last quarter of the twentieth century, American state courts emerged as major policymakers, taking their place alongside federal courts as important judicial actors in governmental lawmaking. This statement is not intended to raise the "parity" debate as to whether state courts are equal to federal courts in protecting constitutional rights.³ Rather, it is intended to point out the transformation that many state courts have gone through in the fairly recent past and continue to go through today. After all, it has not been long that a conservative American president attacking "activist judges" could have been referring to state judges!

The decision on same-sex marriage by the Supreme Judicial Court of Massachusetts⁴ may be the most broadly influential state court decision, in a wide variety of ways, in recent memory.⁵ It, to-

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1. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

2. *Id.* at 150-51.

3. See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

4. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

5. See generally Lawrence Friedman, *The (Relative) Passivity of Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 1 (2004). The *Goodridge* majority opinion by Chief Justice Margaret Marshall (originally from South Africa) made use of constitutional rulings

gether with an earlier Vermont decision,⁶ can certainly be viewed as a progressive, and even redistributive, constitutional, albeit state constitutional, ruling. Both cases involved a major focus on both economic and social discrimination against same-sex couples.⁷ These decisions are, however, simply illustrative of how state courts in many jurisdictions have developed into major policymaking branches of state government.

American state courts, not long ago, were seen as institutions primarily concerned with private and criminal law adjudication, operating in a rather narrow, precedent-bound manner.⁸ This began to change a bit with the plaintiff-oriented, nonconstitutional innovations in substantive tort law that were developed by state courts beginning in the 1960s.⁹

Studies have now shown a major transition in the work of state supreme courts.¹⁰ One of these studies concluded that even by the late 1970s, state supreme court justices “have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.”¹¹

from Canada. *Goodridge*, 798 N.E.2d at 969. Chief Justice Marshall explained her reliance on constitutional materials from other countries in Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn from Their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004). See also *Sterling v. Cupp*, 625 P.2d 123, 131 n.21 (Or. 1981) (relying in part on international human rights norms to prohibit the mistreatment of prisoners); *Pauley v. Kelly*, 255 S.E.2d 859, 863 n.5 (W. Va. 1979) (citing the Universal Declaration of Human Rights in recognizing education as a fundamental right); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 513-15 (3d ed. 1999) (discussing the *Sterling* and *Pauley* courts’ reliance on international human rights norms).

6. *Baker v. State*, 744 A.2d 864 (Vt. 1999); see also Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001) [hereinafter *Old Constitutions and New Issues*].

7. *Goodridge*, 798 N.E.2d at 963-68; *Baker*, 744 A.2d at 883-86.

8. Of course, state courts did strike down, in *Lochner*-like fashion, many Progressive Era statutes around the turn of the last century. Many progressives who distrust the potential of judicial review base that distrust on fear of a return to those days.

9. G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 34-40 (1988).

10. See, e.g., Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 817-18 (1981) (documenting a trend of increasingly elaborate state court opinions); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 152-55 (1977) [hereinafter Kagan et al., *The Business of State Supreme Courts*] (describing a shift in the focus of state supreme courts from commercial to noncommercial cases); Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 998-1001 (1978) (suggesting that changes in the structure of state courts have allowed them to focus more on social and economic cases).

11. Kagan et al., *The Business of State Supreme Courts*, *supra* note 10, at 155.

Probably the most important development reflecting the emergence of state courts as policymakers has been the "new judicial federalism."¹² The new judicial federalism dates from the early 1970s and, of course, cannot be described as "new" anymore.¹³ Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the federal constitution. In addition, scholarly publications by state judges have helped develop the doctrines included within the new judicial federalism.¹⁴

These developments have made it very clear that, with respect to federal constitutional rights, decisions of the United States Supreme Court may be divided into two categories: (1) those that find in favor of rights claimants and therefore must be enforced throughout the country under the Supremacy Clause; and (2) those that find against rights claimants, determining that there are no enforceable federal constitutional rights and effectively leaving the matter to the states.¹⁵ This latter category of decisions leads to the argument that the United States Supreme Court has not been very progressive or distributive. The recognition that when the United States Supreme Court declines to recognize federal constitutional rights it is, quite literally, leaving the matter to the states has encouraged a generation of state judges to enter the realm of constitutional discourse about rights. The United States Supreme Court, as well as individual Justices, have reminded state courts of this opportunity many times.¹⁶

Not surprisingly, it appears that the model of constitutional policymaking in the realm of civil liberties established by the United States Supreme Court beginning in the 1950s (albeit not overly progressive, positive, or distributive) may have actually stimulated the later, similar involvement of state courts. In the words of G. Alan Tarr:

12. See generally Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. vii (1996). This portion of the Essay draws from Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211-12 (2003) [hereinafter *The Third Stage of the New Judicial Federalism*].

13. Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, vi (1984).

14. *The Third Stage of the New Judicial Federalism*, *supra* note 12, at 211.

15. *Id.* at 212; Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 165-71 (1987).

16. See, e.g., *Brown v. Texas*, 522 U.S. 940, 942-43 (1997) (Stevens, J., respecting the denial of certiorari); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

[W]hen the Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the proceeding decades had laid the foundation for the development of state civil liberties law.

This, in turn, suggests that, paradoxically, the activism of the Warren Court, which was often portrayed as detrimental to federalism, was a necessary condition for the emergence of vigorous state involvement in protecting civil liberties.¹⁷

This still-relatively-new participation of state courts in civil liberties dialogue has spawned an extremely wide literature,¹⁸ as well as a very interesting array of methodological approaches to the question of when and how state courts should interpret their state constitutions to provide more rights than the federal constitution.¹⁹ The many approaches to methodology respond to the central jurisprudential question of the new judicial federalism. Tarr has noted that, in contrast to the great question in federal constitutional law about the legitimacy of judicial review itself, the central question in state constitutional law concerns the legitimacy of state constitutional rulings that diverge from, or go beyond, federal constitutional standards.²⁰ Is this form of state court "jurisdictional redundancy," to use Robert Cover's term, a good thing?²¹ Is it legitimate? One of the key features of this methodology/legitimacy debate is the attempt by state judges to develop seemingly objective criteria to govern them in deciding whether to diverge from federal constitutional minimum standards.²²

The emergence of state constitutional law as an important element of state courts' dockets began with criminal procedure decisions,²³ reacting to the United States Supreme Court's more grudging views of these guarantees at the federal level, but moved quickly into

17. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 *PUBLICUS: J. FEDERALISM*, Spring 1994, at 63, 73.

18. E.g., Susan King, *State Constitutional Law Bibliography: 1989-1999*, 31 *RUTGERS L.J.* 1623 (2000).

19. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 *NOTRE DAME L. REV.* 1015, 1018-26 (1997).

20. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 174-75 (1998).

21. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interests, Ideology, and Innovation*, 22 *WM. & MARY L. REV.* 639, 639 (1981).

22. *The Third Stage of the New Judicial Federalism*, *supra* note 12, at 218-19.

23. See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Criminal Law*, 63 *TEX. L. REV.* 1141, 1144-55 (1985) (documenting the rise of state constitutional criminal law).

other important areas such as school finance litigation,²⁴ free speech claims under circumstances where there was not enough state action to invoke the First Amendment,²⁵ abortion,²⁶ and—most recently—to gay rights and same-sex marriage.²⁷ State court involvement in these areas of law has, in some cases, resulted in a backlash that manifests itself in proposed amendments to state constitutions to overrule specific decisions or to link judicial interpretation of state constitutional rights to United States Supreme Court interpretation of the analogous federal constitutional provision.²⁸ Further, there have been attempts to defeat state judges at the polls and attacks on state courts themselves.²⁹

A number of areas of state constitutional litigation can be seen as progressive and distributive. Major, although not-yet-completely-successful changes, as well as billions of dollars, have been redirected to poor school districts as a result of school finance litigation that is impossible under federal constitutional law.³⁰ A number of state supreme courts have ordered the funding of abortion under Medicaid³¹ despite a United States Supreme Court decision rejecting this claim

24. See, e.g., Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, XXXIII LAND & WATER L. REV. 281, 289-91 (1998) (observing that state courts recognized education as a fundamental right under state constitutions while the Supreme Court refused to do so under the U.S. Constitution); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 829-31 (1998) (noting how states have taken the lead role in public education litigation since the Supreme Court refused to characterize education as a fundamental right).

25. See Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property: Where Won't We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 589, 589-90 (2002) (commenting on the states' role in deciding free speech on private property disputes under state constitutions since the Supreme Court has been unwilling to recognize federally protected rights).

26. E.g., *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Planned Parenthood League of Mass., Inc. v. Att'y Gen.*, 677 N.E.2d 101 (Mass. 1997); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000); see also Rachel Weissmann, *What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions*, 1999 N.Y.U. ANN. SURV. AM. L. 129, 143-46 (arguing that state constitutions may provide an alternative means of protecting abortion rights).

27. See *supra* notes 4-7 and accompanying text.

28. *The Third Stage of the New Judicial Federalism*, *supra* note 12, at 215-19.

29. *Id.* at 217.

30. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (ordering expenditures "to assure funding of education in poorer urban school districts"); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1243-44 (Wyo. 1995) (finding Wyoming's public school finance system unconstitutional).

31. E.g., *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of State of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va.

under the federal constitution.³² Several state constitutions affirmatively recognize, and state courts enforce, the right to collective bargaining.³³ Finally, there have been numerous examples of state constitutional litigation in which state courts order remedies against private sector defendants where the federal courts would find no state action.³⁴

Burt Neuborne has argued that state courts are better equipped than federal courts to enforce state constitutional affirmative rights.³⁵ Noting the distinctions between federal and state constitutions and judicial review, he relied on the presence of more positive rights texts, the broader lawmaking function of state courts (“generative ethos”), local flexibility, and the “democratic imprimatur” of state judges chosen by the electorate to argue that state courts were more suited to enforcing positive rights.³⁶ Lawrence Sager made a similar point.³⁷ Helen Hershkoff has urged an approach to judicial interpretation and enforcement of state constitutional positive rights that differs from federal constitutional interpretation.³⁸ Hershkoff has also set forth a compelling case for the adoption of new positive rights by state constitutional reformers—a recommendation clearly not aimed at courts.³⁹

1993). *Contra Doe v. Dep’t of Soc. Servs.*, 487 N.W.2d 166 (Mich. 1992); *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114 (Pa. 1985).

32. *Harris v. McRae*, 448 U.S. 297 (1980).

33. *E.g.*, *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003, 1003 (N.J. 1989); Richard A. Goldberg & Robert F. Williams, *Farmworkers’ Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 731-32 & nn.10-15 (1987).

34. *E.g.*, *Hill v. NCAA*, 865 P.2d 633, 641-44 (Cal. 1994); *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 598-600 (Cal. 1979); *N.J. Coalition Against the War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760-62 (N.J. 1994); *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1172-74 (N.Y. 1978); John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 822-23 (1990).

35. Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 891 (1989).

36. *Id.*

37. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973-76 (1985).

38. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136-38 (1999); *see also* *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986) (applying heightened scrutiny to classifications restricting welfare benefits because of the positive rights found in the Montana Constitution); *Tucker v. Toia*, 371 N.E.2d 449, 451-53 (N.Y. 1977) (relying on the positive rights found in the New York Constitution to strike down a limitation on public assistance even though the legislature had a rational reason to enact the limitation).

39. Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 805-09 (2002).

There is evidence, at the state level, of a form of “popular constitutionalism” or legal mobilization that takes place outside the courts.⁴⁰ In other words, as noted earlier, state constitutional rulings can be overturned by the electorate amending the state constitution. Douglas Reed has noted this element of state constitutional law (which he distinguishes from federal constitutional law), concluding that “[t]he interpreter of state constitutions, under popular constitutionalism, is less likely to be a judge and more likely to be a mobilized and politically active citizenry.”⁴¹ In fact, the events in Vermont seem to bear out his description of effective “legal mobilization”:

A key test of popular constitutionalism’s capacity to resolve the claims of gays and lesbians lies in the political majority’s ability to reconstruct the language of a constitutional right to equal marriage as a negotiable interest that can be traded within a framework of majoritarian policy-making. The political trajectory of the struggle indicates that this has already happened.⁴²

The compromise Civil Union Act passed by the Vermont Legislature represents the translation of judicially determined rights into an “interest” subject to negotiation and compromise.⁴³ The court’s decision clearly facilitated this outcome.⁴⁴ Of course, the opposite result took place in Hawaii and during the 2004 election in a number of other states.⁴⁵

As John Kincaid has observed, federal constitutional arrangements, such as America’s, which permit state constitutional rights (including positive rights) beyond the national minimum standards, result in a “rights terrain” that may be characterized by “peaks and valleys of rights protection” among the different component units.⁴⁶ Such an approach is a central feature of a federal system, with a variety of different legal rules in the component units. Kincaid explained:

40. See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 901-31 (1999) (documenting popular movements in Oregon and Hawaii advancing gay rights and same-sex marriage). This portion of the Essay draws from *Old Constitutions and New Issues*, *supra* note 6, at 102-03.

41. Reed, *supra* note 40, at 875.

42. *Id.* at 919.

43. *Old Constitutions and New Issues*, *supra* note 6, at 103.

44. Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249, 1257-58, 1264-66 (2004).

45. See Reed, *supra* note 40, at 924-31 (documenting popular attempts to amend Hawaii’s constitution in an effort to prevent same-sex marriage).

46. John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 946 (1995).

Given that it is increasingly necessary to think globally while acting locally, it is pertinent to suggest that this American experience with the new judicial federalism . . . may have useful implications for an emerging federalist revolution worldwide. . . . The new judicial federalism, moreover, is situated at a critical intersection between individual rights and local autonomy, a matter of increasing importance and conflict in the post-Cold War era.

. . . .

The new judicial federalism, however, suggests a model that would enable rights advocates to continue pressing for vigorous national and even international rights protections, while also embedding in regional constitutions and local charters rights that cannot be embedded in the national constitution, effectively enforced by the national government, or enforced only at minimal levels. Such an arrangement would produce peaks and valleys of rights protection within a nation, but this rugged rights terrain is surely preferable to a flat land of minimal or ineffectual national rights protection. The peak jurisdictions can function, under democratic conditions, as rights leaders for a leveling-up process. In an emerging democracy culturally hostile to women's rights, for example, such an arrangement could embolden at least one subnational jurisdiction to institutionalize women's rights, thus establishing a rights peak visible to the entire society without plunging the nation into civil war or back into reactionary authoritarianism.⁴⁷

Courts in a number of countries built on constitutional federalism, such as Germany,⁴⁸ Switzerland, South Africa,⁴⁹ Australia,⁵⁰ Canada, Mexico, and Argentina are beginning to take note of their

47. *Id.* at 944, 946-47. See also FEDERALISM AND RIGHTS (Ellis Katz & G. Alan Tarr eds., 1996) and Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457 (1997), for an in depth discussion of the relationship between federalism and the protection of individual rights.

48. See PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 73-99 (1997); Arthur B. Gunlicks, *State (Land) Constitutions in Germany*, 31 RUTGERS L.J. 971, 993-96 (2000) (discussing social rights emanating from state constitutions in Germany); Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 310-13 (1999) (commenting on the social welfare provisions of state constitutions in Germany).

49. See Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961, 962-63 (2000) (tracing the recent development of subnational constitutions in South Africa); Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625, 641-59 (1999).

50. See Cheryl Saunders, *Australian State Constitutions*, 31 RUTGERS L.J. 999, 1001-09 (2000).

subnational constitutions and the potential contained in them.⁵¹ It is possible that constitutional developments outside the courts will follow.

In a different area of state constitutional policymaking, state courts have served as the first line of defense (as opposed to their more familiar fall-back, second line of defense) against a whole range of state "tort reform" legislation.⁵² In the area of tort reform, because there are no associated federal constitutional claims realistically available for constitutional attacks on state tort reform statutes, state constitutions generally provide the only available set of arguments. State constitutional arguments to invalidate tort reform measures range from general separation of powers (judicial); specific judicial powers, such as rulemaking for practice and procedure; jury trial rights (Seventh Amendment not applicable to the states); open court and right to remedy; legislative procedure, such as single-subject rules; and state due process and equal protection.⁵³ Several state constitutions contain specific provisions such as the following from Kentucky: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."⁵⁴

The Kentucky Constitution provides further: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."⁵⁵ Such provisions may obviously prove extremely useful in blocking tort reform measures such as damage caps as they call on state courts to simply enforce, rather than create, constitutional policy. State constitutional decisions striking down tort reform measures

51. Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 953-58 (2000); see also Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 15-16 (G. Alan Tarr, Robert F. Williams, & Joseph Marko eds., 2004).

52. Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 897-99 (2001).

53. *Id.* at 897-98.

54. KY. CONST. § 54; accord ARIZ. CONST. art. II, § 31; ARK. CONST. art. V, § 32; N.Y. CONST. art. I, § 18; OHIO CONST. art. I, § 19a; UTAH CONST. art. XVI, § 5; WYO. CONST. art. X, § 4.

55. KY. CONST. § 241; see, e.g., *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) (invalidating statutes limiting tort actions against home contractors because of the Kentucky Constitution). The Arizona Constitution contains a similar provision. See ARIZ. CONST. art. XVIII, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.").

seem to at least preserve the distributive justice features of the modern American tort system.

In addition to the direct conflict over tort reform measures, the litigation “war” over the state constitutional validity of state tort reform statutes has apparently had an important collateral effect on campaign financing of judicial elections at the state level.⁵⁶ Judicial elections have become much higher-visibility affairs in some states.

A number of the tort reform cases turn on perceived intrusions by the legislature into judicial power. In analyzing judicial power under modern state constitutions, Adrian Vermeule has made a very important distinction between “freestanding judicial power” and “specific constitutional provisions that protect or regulate the judiciary’s authority and jurisdiction.”⁵⁷ The former category is the general concept of judicial power arising from a state constitution’s assignment of this power to the courts in the judicial article.⁵⁸ The latter category covers the more specific state constitutional grants of authority to the judiciary, such as the judicial rulemaking power, the power to regulate the practice of law, and the prohibition on legislative reductions of judicial compensation, as well as the individual’s right to a jury trial and a remedy for injuries.⁵⁹

Vermeule surveyed a number of state cases purporting to exercise freestanding judicial power (he did not analyze specific judicial power cases) and concluded that the cases he examined reflected the courts’ “paranoid style,” including a “tendency to rhetorical excess, in particular a certain belligerence and defensiveness.”⁶⁰ He further concluded that they “sweep beyond any defensible conception of judicial power.”⁶¹ This led him to propose that freestanding judicial power claims be considered nonjusticiable.⁶²

Recently, John Fabian Witt has reminded us that there was an earlier, more plaintiff-oriented wave of tort reform statutes toward the

56. See Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. REV. 263 (2000); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 655 (1999) (noting that trial lawyers compete against business interests in an effort to influence judicial elections); Sean Reilly, *Doin’ the Bench Shuffle: Tort Reform Republicans Now Sit on Ala. High Court*, A.B.A. J., Nov. 1999, at 26, 26 (describing the recruitment of pro-business judges in Alabama beginning in 1994).

57. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 357 n.1 (2001).

58. *Id.* at 359.

59. *Id.* at 357 n.1.

60. *Id.* at 360, 387.

61. *Id.* at 360.

62. *Id.* at 361.

end of the nineteenth century and the beginning of the twentieth century.⁶³ These statutes directed reform from what would now be considered the plaintiffs' side, rather than from the defendants' side as is the case currently. These were liability laws imposed on employers and the railroads (including liability for damage caused by engine sparks and destruction of cattle) and workers' compensation statutes.⁶⁴ The courts' actions in striking down or limiting a number of these laws brought a strong negative reaction from both the public and the legislatures and a number of political attacks on the state judiciary, particularly when they stood in the way of workers' compensation.⁶⁵ Witt issued a cautionary note about the possibility of a new backlash against the state courts currently involved with tort reform litigation.⁶⁶ In fact, as noted above, such a backlash has already begun in some states, where major political efforts to unseat judges have been undertaken, causing judicial election costs to skyrocket.⁶⁷

Political scientists have begun studies attempting to challenge the accepted wisdom that it is judicial independence that supports innovation and activism in the judiciary.⁶⁸ One such study concluded that "systemic factors that isolate state courts of last resort from political pressures decrease the propensity of these institutions to act in a countermajoritarian fashion."⁶⁹ This tentative finding, contrary to what we have thought before, has obvious implications for analyzing the involvement of elected state judges in judicial review. State courts are not simply "little" versions of the federal courts. For example, a large majority of state judges face the electorate in either partisan, nonpartisan, or merit-retention elections.⁷⁰ The range of powers allocated to the judicial branch under state constitutions differs both quantitatively and qualitatively from the "judicial power" enumerated in Article III of the U.S. Constitution. One of the most important innovations in state court structure in the twentieth century is the advent of intermediate appeals courts, which are often the courts of last

63. John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. (forthcoming 2005).

64. *Id.*

65. *Id.*

66. *Id.*

67. See *supra* note 56 and accompanying text.

68. James P. Wenzel et al., *Legislating from the State Bench: A Comparative Analysis of Judicial Activism*, AM. POL. Q., July 1997, at 363, 363; see also James N.G. Cauthen, *Judicial Innovation Under State Constitutions: An Internal Determinants Investigation*, 21 AM. REV. POL. 19, 35-36 (2000); James M. Lutz, *Regional Leaders in the Diffusion of Tort Innovations Among the American States*, 27 PUBLIUS: J. FEDERALISM, Winter 1996, at 39, 42-43.

69. Wenzel et al., *supra* note 68, at 376.

70. *Id.* at 377 n.3.

resort for many matters, thereby freeing state supreme courts from some of the pressure of caseloads and to focus more on broad policy rulings.⁷¹ This structural change is a major contributing factor to state supreme courts' emergence as policymakers. For example, when the 1947 New Jersey Constitutional Convention revised the judicial article, it designed the state supreme court on the model of the United States Supreme Court.⁷² This would have been unheard of fifty years earlier. The New Jersey Supreme Court, based partly on its structure and partly on gubernatorial appointment practices, has become one of the leading policymaking state supreme courts in the country. It exercises its powers to make policy, like many other state courts, not only through constitutional adjudication but also through statutory interpretation, common-law cases, and rulemaking.⁷³ In fact, rights decisions in state high courts that are more protective than federal constitutional law are not only based on state constitutions but may also be based on common law or statute.⁷⁴

State courts' institutional position in state government is different from the Supreme Court's position in the federal system.⁷⁵ The relationship between state supreme courts and state legislatures, therefore, is different from the Supreme Court's relationship to Congress. Beginning soon after independence, the balance of power between state legislatures and judiciaries has been gradually shifting, increasing judicial authority at the expense of legislative authority.⁷⁶

Further, the typical state court's judicial function is different from the Supreme Court's. For example, state courts have traditionally performed much nonconstitutional lawmaking. As Justice Hans Linde of Oregon observed:

When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in

71. See generally Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1200-02 (1978) (discussing the role of intermediate appellate courts on state supreme court decisionmaking); Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, 33 STAN. L. REV. 951, 961 (1981) (concluding that structural changes to state appellate courts influence the style of opinions).

72. See TARR & PORTER, *supra* note 9, at 186-196 (tracing the development of the New Jersey Supreme Court).

73. *Id.* at 233-36.

74. Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 750-52 (1992).

75. This portion of the Essay draws from Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of the State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 397-99 (1984) [hereinafter *In the Supreme Court's Shadow*].

76. *Id.* at 397.

contracts of adhesion, its action is rarely attacked as “undemocratic.” Nor is this judicial role peculiar to matters of common law subject to legislative reversal. The accepted dominance of courts in state law extends to their “anti-majoritarian” role in review of their coordinate political branches in state and local governments.⁷⁷

Linde has further pointed out that state courts are much more often involved in intra-governmental power and policy disputes to a degree never seen at the federal level.⁷⁸

Many state supreme courts create law through rulemaking powers.⁷⁹ They also exercise various “inherent powers,” usually at the expense of the legislative branch.⁸⁰ Once thought to be legislative in nature, these powers have devolved upon state judiciaries during the past century.⁸¹ State courts are arguably closer to state affairs and more accountable than federal courts.⁸² Standing and other justiciability barriers are usually lower at the state level.⁸³

The texts of state constitutions may provide for state judicial review of legislative and executive action. For example, the Illinois Constitution prohibits the legislature from enacting “special” laws where general laws can be made applicable and states that “[w]hether a general law is or can be made applicable shall be a matter for judicial determination.”⁸⁴ This is certainly true with respect to state supreme courts’ advisory opinions.⁸⁵ Interestingly, when state supreme courts issue advisory opinions they act more like European constitutional courts than the United States Supreme Court. In fact, judicial review

77. Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

78. Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Difference!*, 46 WM. & MARY L. REV. 1273, 1274-75 (2005).

79. Jeffrey A. Parness, Correspondence, *Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319, 1319-20 (1979).

80. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1000-02 (2004).

81. *In the Supreme Court's Shadow*, *supra* note 75, at 399.

82. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1351 (1982).

83. Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1834, 1852-68 (2001); Hans A. Linde, *Structures and Terms of Consent: Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability?*, 20 CARDOZO L. REV. 823, 834-35 (1999).

84. ILL. CONST. art. IV, § 13 (emphasis added); *see also* COLO. CONST. art. II, § 15 (stating that property may not be taken for public or private use without just compensation and that “the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public”).

85. *See* Hershkoff, *supra* note 83, at 1844-52 (noting the ability of state courts to issue advisory opinions).

itself was a phenomenon of state law well before *Marbury v. Madison*.⁸⁶ Also, contrary to the federal experience, most judiciary provisions of state constitutions have been revised and ratified in the past century without a serious struggle over the exercise of judicial review.⁸⁷

These observations are provided not to support a claim that American state courts are somehow better than the American federal courts, to defend state courts, or to contend that state courts are better at governing than state legislatures. Rather, the point is that they are different. State courts and state constitutional law are much less studied than their federal counterparts. Any complete evaluation of juristocracy must take account of the evolving role of these sub-national courts here and abroad.

86. 5 U.S. (1 Cranch) 137 (1803); William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1169-70 (1972).

87. *In the Supreme Court's Shadow*, *supra* note 75, at 401.