

# A Difference That Makes a Difference

## The New Judicial Federalism



**A** century ago, state supreme courts were described as being so quiet that “you could hear the justices’ arteries clog.”<sup>a</sup> No one says this today, and the new judicial federalism is one big reason that is so.

This no longer so “new” doctrine describes a new-found reliance on state constitutions to protect those rights not covered by the U.S. Constitution. Under the principles of federalism, each state has its own justice system—distinct from those of its neighbors and from the federal system—and its own constitution. The U.S. Constitution is the supreme law of the land, and no state court can interpret its own state’s constitution in a way that limits rights secured by the federal charter. States are free, however, to interpret their own constitutions any way they like, except for that single proviso.

For most of the country’s history, state constitutions were overlooked. Rarely did the courts rely on them to overturn state laws, especially on the basis of civil rights. But starting in the early 1970s, state supreme courts increasingly began to use state constitutions as independent sources of rights. By 1986, U.S. Supreme Court justice William J. Brennan characterized the “rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions [as] . . . probably the most important development in constitutional jurisprudence in our time.”<sup>b</sup>

In many legal areas, the actual impact of judicial federalism on civil liberties has not been all that sweeping. It is still true that most state court judges continue to interpret state constitutions in lockstep with interpretations of the U.S. Constitution. One scholar found, however, that in about one out of every three constitutional decisions, state courts extended rights beyond federal

levels.<sup>c</sup> In some areas, such as the interpretation of the right to exercise religion freely and in search-and-seizure rulings, state courts, relying on their own constitutions, have continued to grant rights after the U.S. Supreme Court’s interpretation of the Constitution took a more conservative and restrictive turn.

In other cases, state courts rely on unique constitutional provisions. For instance, state constitutions, unlike the federal document, often commit state governments to the achievement of particular policy ends. The New Jersey constitution requires a “thorough and efficient system of free public schools,” the Illinois constitution requires the state to “provide and maintain a healthful environment for the benefit of this and future generations,” and the New Mexico constitution requires the state to provide bilingual education. Relying on explicit provisions such as these, state supreme courts have ordered legislatures to restructure the way they finance public education when inequalities are so extreme that they rise to the level of a state constitutional violation. In a novel case, a California state trial court judge held in 2014 that the practice of granting lifetime tenure to public school teachers violated students’ state constitutional right of equal access to a public education.

Today, the new judicial federalism is well established, with more and more cases raising state constitutional issues and sparking a renewed interest in these once-overlooked documents. State supreme court justices are more likely now to take a fresh look at their own constitutions than to slavishly follow the interpretations of the U.S. Supreme Court. Activists also have focused more attention on state constitutions, mounting campaigns to amend them to either extend or curtail rights.

<sup>a</sup>G. Alan Tarr, “The New Judicial Federalism in Perspective,” *Notre Dame Law Review* 72 (1997): 1097.

<sup>b</sup>William J. Brennan, “State Constitutional Law,” *National Law Journal* 9 (September 29, 1986): S-1.

<sup>c</sup>James N. G. Caution, “Expanding Rights Under State Constitutions: A Quantitative Appraisal,” *Albany Law Review* 63 (2000): 1183, 1202.