

### *Symposium on The New Judicial Federalism: A New Generation*

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Paul W. Kahn

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STATE CONSTITUTIONALISM  
AND THE PROBLEMS OF FAIRNESS

PAUL W. KAHN\*

State constitutionalism has always seemed a poor step-sister to federal constitutionalism. When the federal courts were robust in their review of state law, no one thought too seriously about the problem of state constitutional review. To the degree that anyone worried about federalism, they worried about federal interference with the state legal processes.<sup>1</sup> Not more judging, but less—from whatever source—was the concern of those who spoke in favor of federalism. A profound change in the character of federal constitutionalism has occurred in the last generation. Modern recourse to state constitutionalism is a complex reaction to this change.<sup>2</sup>

There are a number of reasons for this change. In part, it is simply a political change brought about by the success of conservative Republicans. In part, it is a response to the constitutional activism of the Warren Court. Perhaps these are normal cycles of judicial activism. In part, it is a product of the profound theoretical difficulties, nursed in the academy, of providing a justification for judicial review: the problem captured in the phrase “the countermajoritarian difficulty.” And, in part, the receding of the federal courts reflects the fact that we live in a less generous time. The courts’ constituency, after all, is often those who are least favored by the political process. They

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\* Nicholas deB. Katzenbach Professor of Law, Yale Law School. Thanks are due to Andrew Moffit for help with the research on this article. This article is a revised version of a paper originally presented at the Appellate Judges Seminar of the Institute of Judicial Administration at NYU School of Law in June 1995.

1. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Samuels v. Mackell*, 401 U.S. 66, 69 (1971) (“a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury.”). See also Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1 (1985).

2. Justice Brennan’s 1977 article, exhorting state courts to adopt a more activist position in defense of individual liberties, is often taken as the starting point of a new scholarly attention to state constitutionalism. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]. His article spawned a scholarly debate on the evolution of state constitutionalism. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*]; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399 (1987); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988); Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

make demands for equality and justice that are redistributive at their core. In the end, the courts can only appeal to our sense of fairness to support remedies that are often extremely expensive.

Fairness is that popular moral ideal which sustains an active judicial role in a democratic society. We think it appropriate for the courts to check the majoritarian branches because we realize that majorities can be terribly unfair. Courts are popularly respected to the degree that they are perceived to be making us a more fair people. Fairness is often embodied in the ideal of "the rule of law." It is the courts' role to temper politics by law. The federal judicial activism of the last generation moved under a banner of fairness: fairness to the victims of prejudice; fair constraints on the government's prosecution of the individual; and fair constraints on the power of government itself.<sup>3</sup>

A robust judicial role requires a robust conception of fairness. Accordingly, state constitutionalism is not just a structural issue of federalism; it is deeply related to our political and ethical values as well. State courts, no less than federal, must make a claim to fairness. The skeptics in the state-constitutionalism debate generally believe that our ideas of fairness are national, not local.<sup>4</sup> To them, fairness cannot mean different things in different states.

A government can be judged unfair either because of the values it pursues or because it acts in an arbitrary manner. The first form of unfairness reflects substantive disagreement over the correct public values; the second reflects disagreement with particular efforts to apply common values. We criticize government when it acts on prejudice against particular groups or interests. We also criticize government when it fails to pursue its ends in a reasonable manner, or treats people in an arbitrary or capricious manner. The federal courts are well-structured to respond to the first dimension of fairness, but not to the second. The state courts have just the opposite strengths and weaknesses. To appreciate this difference is to understand state constitutionalism as coordinate with—rather than subordinate to or in place of—federal constitutionalism.

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3. Characteristic of such a general norm of fairness is, for example, the classic language of Justice Harlan:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

4. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 827-30 (1991).

The state constitutionalism debate, however, has tended to focus only on the first form of unfairness—that going to fundamental moral issues. There have been good reasons for this, even though it produces only a partial vision of judicial roles. Unfortunately, this focus has produced a set of expectations about state constitutionalism that is out of sync with larger developments in the legal and political culture. There is a danger that a failure of state constitutionalism in this dimension will lead to a failure to appreciate the possibilities for state courts in the second dimension of fairness.

We are now in a period in which many conceptions of public value are deeply contested. Our political divisions are deep because we are deeply divided in our ideas of what can be demanded of government and what government can demand of us. Not too long ago, there was substantial agreement on who were the victims of prejudice and what government owed to those victims. There is no longer any such agreement. Today, many understand the problem of fairness to be located not in the burdens suffered by poor minorities, but rather in affirmative action.<sup>5</sup> We argue about whether the conditions of equality have not yet been met, have already been met, or have been overshot.

The same can be said about due process and liberty. Have we overshot the mark in our efforts to be fair to criminal defendants? Have we gone so far as to victimize the victims?<sup>6</sup> Does our criminal justice system remain systematically biased? Perhaps our most contested value is liberty. For a generation, a battle has been waged over the relative places of individual liberty and community. Every move in one direction is countered by an equal and opposite reaction. Think of our debates over pornography, abortion, public education and gay rights.<sup>7</sup>

To say that we, as a society, are deeply divided over our understanding of public values is not to say that each of us is divided. As individuals, we have strongly held views. As a society, however, we are unable to reach a consensus.

5. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (holding that all racial classifications, including those used to pursue affirmative action, are subject to strict scrutiny).

6. See, e.g., Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

7. Compare NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS* (1995) and ANDREA DWORKIN & CATHERINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1992); *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, J., concurring) and *Bowers*, 478 U.S. at 199-214 (Blackmun, J., dissenting); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 537-60 (1989) (Blackmun, J., dissenting) and *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873-85 (1992) (Scalia, J., concurring in part, and dissenting in part).

We understand how to decide among alternatives: We vote.<sup>8</sup> However, we do not know how to convince the losers that they should reconsider their own views.<sup>9</sup> Politics is seen as a zero-sum game, in which there are losers and winners. Perhaps this is why so many of our most public trials end with juries refusing to convict defendants who appear obviously guilty under the law. Jurors do not see a difference between law and politics: In politics everyone can appear as a victim.<sup>10</sup>

For the generation of post-*Brown* constitutional scholars, there was hope that the Supreme Court could lead the nation in a sort of continuous "seminar" on the demands of fairness.<sup>11</sup> The Court was to build a principled consensus about what fairness required. This aspiration has slipped away. The Court's most controversial decisions have either remained controversial or spawned a line of cases that have taken us to the edge of seemingly irresolvable controversy. *Brown* may not be controversial, but affirmative action is. *Roe* remains deeply contested, as is the Court's treatment of religious groups.<sup>12</sup> Criminal due process jurisprudence—including capital punishment—is wholly unsettled.<sup>13</sup>

In the face of these deep conflicts, the federal courts have had a double reaction. In part, they have withdrawn. They reason that if reasonable people can differ over the demands of fairness, then choices must be left to the political process. Deep divisions cannot be resolved by the courts because the courts do not have the moral resources to resolve them in a way that will be viewed as fair.<sup>14</sup> Different judges will draw the line at different places, but, on the

8. That even voting raises problems of fairness is, by now, commonplace. See generally KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1990).

9. See generally ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

10. See George Fletcher, *Convicting the Victim*, N.Y. TIMES, Feb. 7, 1994, at A17.

11. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH; THE SUPREME COURT AT THE BAR OF POLITICS* 26-28 (1986). See also Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

12. See *Rosenberger v. Rector*, 115 S. Ct. 2510 (1995) (finding denial of university funds to a Christian student newspaper amounted to viewpoint discrimination).

13. For a discussion of capital punishment jurisprudence, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987).

14. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

*Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986).

whole, we see an increasing judicial constraint.<sup>15</sup> Where they have not withdrawn, the federal courts have themselves sought to balance conflicting interests: e.g., more accommodation of religion, more protection of those affected by affirmative action, less protection of criminal defendants, more accommodation of those who would limit access to abortion.<sup>16</sup> In both respects, the Court is responding to public, normative controversy: it either allows disputes to reach their own political balance or searches for that balance itself. It does not see itself in a position to choose one side or the other in the debates that fundamentally divide the public.<sup>17</sup>

This same attitude is reflected in the debate over methodology and principles of interpretation. If the courts are not sure about what fairness means or requires, they are unlikely to resort to moral norms to resolve legal controversies. They will be more interested in assigning responsibility to text or to history.<sup>18</sup> Neither in *Brown* nor in *Roe* did the Court worry much about text, history, or original intent. In each, the Court responded to a fundamental claim of fairness: fairness to blacks and fairness to women. Such decisions are increasingly unlikely to come from the Supreme Court. It is not that the Court lacks the stature to take dramatic action against the representative institutions of government. It does not, after all, hesitate to strike down federal and state laws. The Court's extraordinary recent decisions on the reach of the Commerce Clause, term-limits, and takings are evidence of this.<sup>19</sup> Increasingly, however, it does not want to exercise moral leadership.

15. There has been a dramatic decline in the number of cases decided by the Supreme Court in recent years. In the 1993 Term, for example, the Supreme Court disposed of 96 cases by written opinion and 67 cases by per curiam or memorandum decisions. *The Supreme Court - Leading Cases*, 108 HARV. L. REV. 139, 376 (1994). In the 1984 Term, the Court disposed of 175 cases by written opinion and 91 cases by per curiam or memorandum decision. *The Supreme Court - Leading Cases*, 99 HARV. L. REV. 120, 326 (1986). And in the 1974 Term, the Court disposed of 159 cases by written opinion and 177 cases by per curiam decision. *The Supreme Court - 1974 Term*, 89 HARV. L. REV. 49, 278 (1975).

16. See *Rosenberger v. Rector*, 115 S. Ct. 2510 (1995); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *United States v. Leon*, 468 U.S. 897 (1983).

17. On the variety of forms of judicial balancing and their problems, see Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987). Even where the Court has seemed to take a firm position — e.g., in its scrutiny of affirmative action, see *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) — it has left a good deal of room for balancing interests in future cases. See Jeffrey Rosen, *Make Up Our Mind, Justice O'Connor*, N.Y. TIMES, Dec. 26, 1995, at A21.

18. See William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

19. See *United States v. Lopez*, 115 S. Ct. 1624 (1995); *U.S. Term Limits, Inc., v. Thornton*, 115 S. Ct. 1842 (1995); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The turn to state constitutionalism has been a response to this collapse of normative consensus. The initial turn to the state courts, represented most vividly in Justice Brennan's 1977 article, was a response to the closing of the horizon of possibility in the federal courts.<sup>20</sup> Brennan had an intimation of the way in which federal constitutionalism was developing. He was eager to preserve the judicial ideals of the 60s and 70s. State constitutionalism represented a kind of forum shopping for liberals. In part, this has been a successful political strategy.<sup>21</sup>

Even if the practice of state constitutionalism has been driven by a kind of forum shopping, ironically its justification appeals to the same pattern of contested values that has had such a profound effect upon the Supreme Court. If the meaning of fairness is deeply contested, then there is room for different communities to reach different outcomes. Courts in diverse political communities will resolve these value controversies differently. This is the view behind the rhetoric of "state experimentalism" or states as "the laboratories of democracy." State constitutions represent different value choices by independent communities that may choose to differ with each other.<sup>22</sup> Thus, the turn to state constitutionalism is itself a part of this pattern of contested values.

Yet if state courts are to respond to this opportunity, they must not have the same reaction to the ongoing and seemingly irresolvable debate over fairness that the federal courts have had. They cannot again defer to the political process. Justice Brennan was right: state courts are important when they do what the federal courts refuse to do. Despite his hopes—and those of many others—the state courts are more, not less, likely than the federal courts to respond in just this way to fundamental normative controversy. This is the paradox of state constitutionalism: fundamental values may appear even more conflicted at the local than at the national level. Nevertheless, where such a controversy does not arise, state constitutionalism can indeed be more vigorous than its federal counterpart.

Many who turned to state constitutionalism expected it to continue the project of advancing fairness for the least well off: the poor, the minorities, the ill, and the disadvantaged. For just this reason, the symbol of state

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20. Brennan, *State Constitutions*, *supra* note 2.

21. For example, after *Bowers v. Hardwick*, 478 U.S. 186 (1986), there was a successful challenge to an anti-sodomy statute in the Kentucky Supreme Court. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Despite the defeat in federal court of a challenge to state funding of public education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), plaintiffs have found success in numerous state courts. These cases are discussed below. For the complete list of state school finance cases, see *infra* note 31.

22. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

constitutionalism has been the school-funding litigation that arose in response to *San Antonio Independent School District v. Rodriguez*, in which the Supreme Court rejected an equal protection challenge to resource disparities among Texas public schools.<sup>23</sup> The fair design of state-funded programs is a problem likely to gain in importance. The political momentum is on the side of devolution of program responsibilities to the states. Unrestricted block grants are likely to replace federal programs that provided funding under a robust set of regulations specifying the dimensions of a fair distribution. State courts will have more responsibilities, not just because the federal courts are leaving them more to do, but because Congress is giving the states more to do.

Yet, Justice Brennan's hopes for state-constitutionalism are bound to be disappointed. With some exceptions, state courts have not taken up the task of laying out a vision of fairness to the least powerful. State courts surely have the constitutional authority to do so, but is it reasonable to expect this of them?<sup>24</sup> The structure of the institutional arrangements within which they labor does not encourage them to address deep conflicts over fundamental principles of fairness.

The structural weaknesses confronting state-constitutionalism are of two types: problems in the status of state constitutions and problems in the integrity of the courts. Both weaknesses have a common source. State courts are closer to the people than are the federal courts. This is a legacy of nineteenth century populism, which never reached the federal courts.<sup>25</sup> Ironically, closeness to the people weakens, rather than strengthens, a court's performance of the function of judicial review.

It is a truism that judicial review is countermajoritarian. Much academic scholarship has been devoted to trying to prove that, despite appearances, this is not so. Nevertheless, the fact is that judicial review remains extremely vulnerable to democratic politics. The changing nature of the federal courts reflects some of this vulnerability. At the state level, the courts are far more vulnerable.

State constitutionalism begins from a weak textual base. When a court stands on the state constitution against a present expression of a political majority, how firm is its footing? Can a state constitution be treated as a repository of fundamental values that represent a community consensus on what fairness requires? Surely, it is hard to say that state constitutions are more so

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23. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

24. See generally Kahn, *supra* note 2, for a discussion on the authority of the state courts.

25. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

than the federal constitution. However, the federal constitution has appeared inadequate in just this dimension. Equality, due process, and liberty are no more clear when set forth in a state constitution than in the federal constitution. They remain abstractions that require interpretation. They necessarily remain open to conflicting interpretations.

The history of these texts, when available, is rarely helpful. History will no doubt show a commitment to values of fairness. The contemporary debate, however, is not over that commitment, but over the meaning of the values to which all are committed. Nor is there a rich tradition of judicial precedents upon which to draw in interpreting state constitutions. Until quite recently, most state courts interpreted their constitutions, if at all, in "lockstep" with federal court interpretations of analogous federal provisions.<sup>26</sup>

True, some state constitutions have specific substantive provisions—for example on education—that have played a major role in recent litigation. Yet, virtually the same language has supported widely disparate results among the state courts. Almost every state constitution mentions public education.<sup>27</sup> No one would deny that education is important, but is it helpful to say that the commitment to education differs among the states because of variations in state constitution education clauses?<sup>28</sup> What state does not put education at the top

26. See Brennan, *The Bill of Rights and the States*, *supra* note 2, at 550-51; Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988). Wisconsin Supreme Court Justice Shirley Abrahamson has noted that, "It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution." Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 964 (1982).

27. Every state constitution, except that of Mississippi, includes an education clause, requiring provision of free public education. William Thro has classified the education clauses into four categories, varying with their degree of affirmative expression of a legislative duty to provide education. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661-70 (1989). Success in litigation has not generally corresponded to a state's ranking on this scale. States with similar education clauses have met vastly different results in state courts. The Supreme Court of New Jersey, for example, has consistently struck down its school finance system because of a failure to provide "thorough and efficient" education, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), while the Colorado Supreme Court upheld its school finance system because it was providing "thorough and uniform educational opportunities." *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982).

28. Although many states have the same or similar language in their education clauses, the text has no predictive value with regard to the level of funding per pupil devoted to education in each state. This is readily apparent from a comparison of the expenditure levels of two states with very similar state constitutional educational clauses: New Jersey and Kentucky. New Jersey's constitution guarantees a "thorough and efficient" system of education. N.J. CONST. art. VIII, § 4. New Jersey averaged \$8,439 per pupil expenditures for 1989-90. Kentucky's constitution guarantees an "efficient" system of education. KY. CONST. § 183. Average expenditures were \$3,793 per pupil in 1989-90. Allen Odden, *School Finance Reform in Kentucky, New Jersey and*

of its agenda? The Kentucky Supreme Court, for example, recently relied on a constitutional mandate to create "efficient" public schools to require equalization among districts.<sup>29</sup> Ordinarily, we think of efficiency and equality as conflicting norms. Not so in Kentucky? I do not want to suggest that the decision was wrong. I want to question whether the Kentucky court was in a different position from the other courts because of the presence of a "textual commitment."

In many ways, the school cases are the easiest of tough cases. Most people would agree that a public education system that provides few opportunities to some, while providing great opportunities to others, is unfair. This perception explains the quick response of some state courts to the *Rodriguez* decision in 1973. California, Connecticut, and New Jersey, among others, pushed ahead under their state constitutions, finding that they provided what the federal constitution lacked.<sup>30</sup>

The issue has now been litigated in more than half the states.<sup>31</sup> It is

*Texas*, 18 J. EDUC. FIN. 293, 294 (1993).

29. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

30. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

31. For examples of where school finance plaintiffs were successful, see *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993); *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980). For examples of where school finance plaintiffs were unsuccessful, see *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973) (en banc); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Blase v. State*, 302 N.E.2d 46 (Ill. 1973); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App.), *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116 (Or. 1991); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Northshort Sch. Dist. No. 417 v. Kinneer*, 530 P.2d 178 (Wash. 1974) (en banc); *Kukor v. Grover*, 436

extraordinarily hard to find significant differences among the cases to explain the outcomes. Outcomes do not seem to depend upon differences in the state programs. Nor are the different outcomes explained by differences in constitutional text, history, or some legal measure of the importance of education within each state. Why then should the rule of law require one outcome in one state and a different outcome in a neighboring state?

The real differences, I suspect, do not have much to do with differences in the legal resources. Rather, successful litigation has more often been the product, not the cause, of a political consensus that the schools need fundamental change. When the political will is there, courts have proven useful in mobilizing a response to the problem. They do not usually stand against the political branches, but alongside them in a common endeavor. In Connecticut, for example, a successful funding case was filed only after a Governor's commission had publicly condemned the state finance system.<sup>32</sup> In Kentucky, as well, the litigation was an aspect of an emerging political consensus on the need for radical change.<sup>33</sup> Without such consensus, a state court has limited ability to confront state political institutions.

New Jersey, a state whose court has been most aggressive in pursuing educational equality, provides an example of the complexity of political resistance to an unpopular decision and of the limited judicial means of response on the state level. The New Jersey Supreme Court first declared the state educational funding system unconstitutional in 1973.<sup>34</sup> In 1994, more than twenty years later, the court held yet again that the state funding system remains unconstitutional.<sup>35</sup> A series of decisions in between have not been enough to convince or silence anti-tax forces in the state, which have repeatedly defeated legislative efforts to meet the court's mandate.<sup>36</sup> Indeed, the state legislature's most recent response to the funding problem increased disparities among school

N.W.2d 568 (Wis. 1989); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

32. See Wesley W. Horton, *Memoirs of a Connecticut School Finance Lawyer*, 24 CONN. L. REV. 703, 706 (1992).

33. See Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 368 (1991). Former Kentucky Governor Bert T. Combs remarked that there was "no question that the state educational system was in imminent danger of becoming the weakest in the country." *Id.*

34. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (*Robinson I*).

35. *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994) (*Abbott III*).

36. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (*Abbott II*); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985) (*Abbott I*); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) (*Robinson V*); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) (*Robinson IV*); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975) (*Robinson III*); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973) (*Robinson II*).

districts.<sup>37</sup> Two generations of school children have passed through a system already held unconstitutional.

The New Jersey constitution does indeed mention education. I am sure there is no debate in New Jersey over the importance of education or over the state's obligation to provide public education. But how is this value to be balanced against other values, especially when it means taking money from some and giving it to others? On what ground does a court stand when it goes beyond the pronouncement of a fundamental value to the evaluation of particular funding programs?

Despite its constitutional decisions, the New Jersey Supreme Court has been typical in its reluctance to intervene directly in the legislative process. The result has been decades of delay. Instead of generating consensus, the court's decisions have generated oppositional politics at the legislative and executive levels. How many state courts would take on this battle? How many are strong enough to sustain it for twenty years?

The vulnerability of the state courts to the political process is often palpable in these state education cases. In Oregon, the voters amended their constitution in such a way as to secure disparate local funding of the schools, while a challenge to the funding system was pending.<sup>38</sup> The consequences of popular, constitutional politics reach their extreme in California. An early decision of the California Supreme Court sustaining a challenge to the funding of public education contributed to the passage of Proposition 13, which severely limited the tax resources available to the schools.<sup>39</sup> No one, we need to remember, submitted *Brown v. Board of Education* to a popular referendum.

37. See Margaret E. Goertz, *School Finance Reform in New Jersey: The Saga Continues*, 18 J. EDUC. FIN. 346, 363 (1993) (noting that "[s]pending disparities between most of the special needs districts and wealthy districts widened").

38. See *Coalition for Equitable Sch. Funding, Inc. v. Oregon*, 811 P.2d 116 (Or. 1991).

39. After the California Supreme Court struck down the state's school finance system for a second time in *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977) (*Serrano II*), the California legislature responded with Assembly Bill 65. Signed by Governor Jerry Brown, this bill would have increased the level of expenditures for school districts, and required each district to raise property taxes. See Donald W. Crowley, *Implementing Serrano: A Study in Judicial Impact*, 4 LAW & POL'Y Q. 299, 312-24 (1982). Before the bill could take effect, the "tax revolt" forces in California offered Proposition 13, an amendment to the California Constitution, which was overwhelmingly approved by the state's voters. See Frank Levy, *On Understanding Proposition 13*, 56 PUB. INTEREST 66 (1979). The impact of Proposition 13 is clear. In 1970, California ranked 11th among states in public school spending per pupil, but by 1990, it had fallen to 30th. See Joseph T. Henke, *Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13*, 21 U.S.F. L. REV. 1 (1986).

Questions of fairness in this country often involve race, as much as money. Race in America touches our deepest nerves and our deepest controversies. I know of no state constitutional case which has moved beyond federal law with respect to this problem. If *Rodriguez* set the measure for state constitutionalism on the issue of financial redistribution, then *Milliken* set the measure with respect to race.<sup>40</sup> In *Milliken*, the Supreme Court established the local school district as the boundary of most remedial plans.<sup>41</sup> While a number of state courts have rejected as unfair the Supreme Court's conclusion in *Rodriguez*, none to my knowledge has rejected the limits of *Milliken*. What would it take for a state court to find in its constitution an ideal of racial equality that required government to intervene to prevent movement toward *de facto* apartheid?<sup>42</sup> State constitutions simply do not have the integrity, legitimacy, and authority to support the courts were they to pursue such a radically controverted claim of fairness.

A recent Connecticut case illustrates this situation. Some years ago, the Connecticut court negotiated a school funding case.<sup>43</sup> It required some redistribution of income to the poorer districts in the state. Just as the state was responsible for the district lines that created these wealth inequalities, it was responsible for the effects of those lines on the racial composition of the schools. Yet the lawsuit challenging this system of segregated schooling was thrown out by the district court.<sup>44</sup> The court saw no analogy between wealth and race. In dismissing the case, the judge relied wholly on federal constitutional standards of state action.<sup>45</sup> The court failed even to address the state constitutional claims, including plaintiffs' argument that the state constitution reached *de facto* segregation in the public schools.<sup>46</sup>

When values are deeply contested, a state court cannot easily draw on its own moral authority. Neither is it likely to get much help from the constitutional text. What is really specific in a constitution is more likely to be a sign of entrenched interests than of a consensus on values. Think of the

40. *Milliken v. Bradley*, 418 U.S. 717 (1974).

41. *Id.* at 741-45.

42. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1843 (1994).

43. *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

44. *Sheff v. O'Neill*, No. 89-03609775, 1995 Conn. Super. LEXIS 1148 (Conn. Super. Ct. Apr. 12, 1995).

45. *Id.* at \*80-87.

46. *Id.* at \*87. The Connecticut Supreme Court recently heard oral arguments in the appeal of *Sheff*. Moments after the court began, Justice Borden asked, "I don't think anybody disagrees that [racial] diversity is good for society and the educational process. The question is, is that required by the constitution?" Robert A. Frahm, *Justices Go to Heart of Sheff Case: Does Constitution Require Racial Diversity in Schools?*, HARTFORD COURANT, Sept. 29, 1995, at A1.

protection that slavery received in the original national constitution. State constitutions are rife with protection for particular interest groups.<sup>47</sup> Placing these provisions in the constitution puts them beyond the reach of the courts. A court that labors under such threats is a less powerful court.<sup>48</sup>

An easily amended constitution may represent only a temporary resting place in an unsettled debate over public values. Such a constitution does not stand dramatically apart from ordinary politics. Unless a constitution looks like a settled repository of fundamental values, a court's rejection of a current political consensus may itself look unfair. A court is unlikely to have more legitimacy in a democratic political order than the constitution upon which it draws. A constitutional decision must not look simply like a victory for the more securely entrenched political interests—even if that is what it is.

The modest character of state constitutionalism does not reflect a failure of individual judges to seize an opportunity. The problems are not personal but structural. The argument has been made that because state constitutions are generally of more recent vintage and are more easily amended than the federal constitution, they provide a more vital democratic legitimacy to judicial review.<sup>49</sup> In theory, such popular checks could embolden a court to take risks, to allow its vision of fairness publicly to compete and to receive a kind of popular legitimation from its own survival. However, it usually does not work this way. To adjudicate under the threat of popular politics is to be reminded of the countermajoritarian burden of judicial activism. It is a reminder of the contested character of what it means to be fair. It serves, therefore, as yet another force pushing toward judicial deference to political decisions.

If text and history do not support a vigorous state constitutionalism in the face of popular resistance, neither does the independence of the state judges.

47. As Gardner has pointed out, "the New York Constitution contains a provision specifying the width of ski trails in the Adirondack Park. The California Constitution specifies the way in which taxes are to be assessed on golf courses. The Texas Constitution provides for banks' use of 'unmanned teller machines.'" Gardner, *supra* note 4, at 819 (footnotes omitted).

48. After the New Jersey Supreme Court struck down the school finance system again in 1990 because it failed to provide a "thorough and efficient" education to all public school students, *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (*Abbott II*), the education committees of the New Jersey Legislature took steps toward amending the New Jersey Constitution to eliminate this requirement. The proposal would have simply removed the words "thorough and efficient" from the New Jersey Constitution. One sponsor of the bill noted that it was intended to make the Legislature responsible for providing educational opportunities, while removing the courts from the school finance issue to the greatest extent possible. Wayne King, *Shift in School Fund Plan Gains in Trenton*, N.Y. TIMES, June 30, 1992, at B4. This proposal was never formally considered by the New Jersey Legislature as a whole.

49. See Linde, *supra* note 22, at 192; Vito Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431 (1987).

State judges are almost all appointed for limited terms. Many are subject to recall elections early in their terms. Some are subject to recall at any point.<sup>50</sup> Most do not have an independent stature that will support them in moments of deep controversy. They are unknown to the larger community before they reach the bench, and largely unknown even after.

In all of these ways, the political order sends a signal to judges that they are part of the political process, not separate from it. Just because state courts are closer to the political process, state judges cannot easily make a claim to represent a popular sovereign that stands apart from ordinary politics. This may not matter when there is substantial consensus on fundamental values, but it matters a great deal when no such consensus exists. It underscores the message that politics, not law, is the only forum for the resolution of our deep disagreements.

Regardless of our hopes, we should not expect state courts to resolve those fundamental problems of fairness left open by the federal courts. It does not follow, however, that we should abandon expectations for a vigorous state constitutionalism. That state justices are part of the political process explains a seeming anomaly in state constitutionalism. Much more than federal courts, state courts are willing to strike down state and local regulations under a weak standard of minimum rationality.

When the Supreme Court holds state action to be subject only to a rationality test, it almost invariably means that it is finding for the state. The Court will indulge in wild speculation to construct hypothetical grounds in support of state practices.<sup>51</sup> State courts are much more confident in identifying irrational practices. Standing within the political process, they have a clearer view of what the state-house is up to. They know "arbitrary and capricious" action when they see it. While state courts may not be prepared to take up moral leadership, they are prepared to pursue this form of corrective justice. This is an important form of fairness and a necessary part of the rule of law.

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50. The 1986 defeat of three sitting California Supreme Court justices, including Chief Justice Rose Bird, is the most noteworthy recent episode of removal politics. See John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). For a complete description of the judicial appointment and removal processes of each state, see *The Council of State Governments, in THE BOOK OF STATES 185-99* (1994).

51. The legislature is not required to "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). The Court will accord a presumption of validity to a statute and place the burden on those "attacking the legislative arrangement to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

A review of state equal protection jurisprudence is quite startling to those accustomed to the federal courts' application of the rational basis test. Time and again, state courts hold measures unconstitutional on the ground that they are simply irrational. The measures recently found irrational include, for example: a Kansas statute altering the rules of evidence for personal injury claims in excess of \$150,000;<sup>52</sup> a Vermont statute denying the spouse of a person injured at work and covered by workmen's compensation a cause of action against the tortfeasor for loss of consortium;<sup>53</sup> a Massachusetts law that charged an additional fee to those who retained an attorney in order to appeal a workmen's compensation case;<sup>54</sup> a South Carolina zoning decision denying a permit to build a dock when neighbors had been granted permission;<sup>55</sup> and an Ohio statute providing different distributions to spouses of firefighters killed in the line of duty depending on whether they had dependent children.<sup>56</sup> We even find a court sustaining an as-applied challenge to a Vermont tax law that failed to provide a particular state-tax credit to an individual.<sup>57</sup> Each of these decisions is unimaginable in federal court.<sup>58</sup>

A recent Texas case provides a vivid example of this divergence in minimum-rationality jurisprudence. The Texas Supreme Court struck down as irrational a statute that denied a tax designation of "open-space" land to property owned by nonresident aliens.<sup>59</sup> The very same statute, however, had previously been upheld against a federal equal protection challenge.<sup>60</sup> The two cases demonstrate "how much less deferential the Texas test is than its federal counterpart."<sup>61</sup>

A kind of bifurcation of judicial roles between federal and state courts may be emerging. The federal courts have the institutional stature and structural legitimacy to make judgments that take sides in our deepest value controversies. They have in the past demonstrated this capacity, even if at the present moment they are not willing to exercise it. In all of the ways in which state courts are vulnerable to politics, federal courts are not. The federal Constitution has a mythic quality as a repository of fundamental values. That quality is sustained

52. *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993).

53. *Lorrain v. Ryan*, 628 A.2d 543 (Vt. 1993).

54. *Murphy v. Commissioner of Dep't of Indus. Accidents*, 612 N.E.2d 1149 (Mass. 1993).

55. *Weaver v. South Carolina Coastal Council*, 423 S.E.2d 340 (S.C. 1992).

56. *Roseman v. Firemen & Policemen's Fund*, 613 N.E.2d 574 (Ohio 1993).

57. *Oxx v. Vermont Dep't of Taxes*, 618 A.2d 1321 (Vt. 1992).

58. For additional state supreme court decisions holding classifications irrational, see *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597 (Ohio 1994); *Verzi v. Baltimore County*, 635 A.2d 967 (Md. 1994); *Arneson v. State*, 864 P.2d 1245 (Mont. 1993).

59. *HL Farm Corp. v. Self*, 877 S.W.2d 288 (Tex. 1994).

60. *Alexander Ranch v. Central Appraisal Dist.*, 733 S.W.2d 303 (Tex. Ct. App. 1987).

61. *HL Farm Corp. v. Self*, 877 S.W.2d 288, 294 (Tex. 1994) (Doggett, J., dissenting).

by a rich history of precedents upon which the courts may draw. The federal Constitution is not easily amended. Indeed, the idea of amendment is politically disfavored. Federal judges often have substantial reputations as individuals. They are appointed for life. They are not subject to popular recall and their decisions are not subject to repeal through popular referendum. In confrontations with Congress or the states, federal judges are accustomed to seeing compliance with their orders. Resistance is not unheard of, but it is extraordinary. In all of these ways, the institutional structure distinguishes law from politics. Once the distinction is accepted, law can claim the moral high ground against the “merely political.”

The Supreme Court also has the advantage of representing the larger political community against the states. When the Court declares a state statute unconstitutional, we imagine the state to lie outside of a national consensus. This shifts the moral burden to the state and does so in a way consistent with our intuitions about majoritarian politics. For this reason, it is always easier for the Court to declare state, rather than federal, actions unconstitutional. The Court appeals to our sense of national identity to hold state identity in check.

Despite its substantial powers, the Supreme Court does not have the ability to make judgments about the rationality of local political choices. State courts may not have the stature to resolve fundamental controversies, but they can more easily keep the ordinary political processes within the bounds of reason. This may actually be a reasonable division of responsibilities between state and federal courts. If this is so, the much-debated problem of state constitutionalism may really be a problem with the federal courts. It may be not that the state courts are failing to meet an appropriate standard of judicial activism, but that the federal courts are failing in their responsibilities.

In the end, we can hope, but we should not expect the state courts to perform a role that only the federal courts can perform. We can nevertheless demand of the state courts that they police the rationality of state choices. State courts, more than the federal courts, will know when the political branches are failing to act with minimum consistency and decency. This—no less than the fundamental problems of equality, liberty, and due process—is a matter of fairness.