AMERICAN FEDERALISM: MOSTLY *UN*CENTRALIZED CONSTITUTIONALLY, BUT SOMETIMES *DE*CENTRALIZED POLITICALLY

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I. *Introduction*

In considering the question of decentralization in the United States we must distinguish between the constitutional arrangements that allocate competence between the federal and state government on the one hand, and the extent to which, as a political matter, the United States President and Congress have decided to decentralize the exercise of their federal authority. In this sense, the American system of federalism is "*un*centralized" as a matter of *legal*, constitutional structure. On the other hand, in many respects, the American system is "*de*centralized" as a matter of federal *political* decision, with the federal government voluntarily sharing a number of its powers with the states.

II. *Constitutional Structure*

The American federal constitution, like the national constitutions in most federal systems, is in important ways "incomplete" as a governing constitutional document.[1] According to Ivo Duchacek, "A federal nation is, as it were, an unfinished nation."[2] Space of varying amounts has been left in the federal nation's constitutional architecture to be filled by the

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[1] Donald S. Lutz, *The United States Constitution as an Incomplete Text,* 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 26 (1988); Donald S. Lutz, *From Covenant to Constitution in America Political Thought,*10 PUBLIUS: THE J. OF FEDERALISM, Fall 1980, at 101, 101-02.

[2] IVO D. DUCHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS 192 (1970).

The national constitutions in federal systems are substantially longer than those of unitary nations. *See* HENC VAN MAARSEVEEN & GER VAN DER TANG, WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY 54, 174-88 (1978).

constitutions and actions of the subnational units. Federal systems will differ in the extent to which the national constitution is incomplete, or in the amount of space they allot to subnational units. The further the national, or federal, constitution goes toward mandating the content of subnational constitutions, and competencies of subnational units, the more "finished" or "complete" it would be.

The origin of a nation's federal system can have substantial impact on a number of the questions. As Koen Lenaerts has noted, there are two basic models of federalism:

> *Integrative federalism* refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government with direct operation on the people inside its sphere of powers, is pursued under respect of the powers of the component entities, at least to the extent that the use by the latter of these powers does not revert into divisiveness...
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> *Devolutionary federalism*, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary State among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal concern is to organize diversity in unity.[3]

The basic concept of the American federal constitution, an example of integrative federalism, is one of limited, or delegated, powers granted by preexisting states coming together to form the national government. Most governmental authority, though, in the United States was retained by the states and never delegated to the national government. It is in this sense that I refer to the constitutional structure as "*un*centralized." Most powers are not, and never were, assigned to the central government. The American federal constitution does not contain a detailed list of competencies assigned to the states.

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[3] Koen Lenaerts, *Constitutionalism and The Many Faces of Federalism,* 38 AM. J. COMP. L. 205, 206 (1990).

Having stated that basic premise, however, it must be understood that certain powers were assigned by the federal constitution to the federal government (centralization) and certain other powers were withdrawn from the states (centralization). For example, Article I, section 8, clause 3 authorizes the federal government to regulate interstate commerce. Clause 4 authorizes the federal government to provide for naturalization and bankruptcy. Clause 1 permits the Congress to impose taxes and spend money for the "common Defense and general Welfare of the United States." This broad power has permitted the United States Congress to offer money to states and local governments in areas where it could not directly regulate their activities. If the states and local governments accept the federal funds, they must abide by the requirements thereby indirectly imposed by the federal government. This is an indirect form of centralization.[4] Finally, Article 1, section 8, clause 18 authorizes the national Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..." This provision has served to support an expansive view by the United States Supreme Court of the powers that have been delegated to the national government.

Together with the powers assigned to the national government, the American federal constitution also specifically denies certain powers to the states. For example, Article 1, section 10 prohibits states from entering into treaties, coining money, imposing import duties, or engaging in war. These prohibitions on *state* authority serve to reinforce the powers assigned to the *national* government in each of these areas.

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[4] *See* Lynn A. Baker and Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too Clever Congress Could Provoke it to do so,* 78 INDIANA L. J. 459 (2003). *See generally* RONALD L. WATTS, THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY (1999).

In summary, it is clear that the American constitutional system is one that is primarily "uncentralized." In other words, most governmental authority was never assigned to the national government, so in most areas, where government affects the daily life of the citizens, there was nothing "*de*centralize."

III. *Political Decentralization*

Having stated that the constitutional structure is primarily "uncentalized," in a *legal* sense, it is clear that over the years the national government has exercised its discretion to decentralize and share power with the states in a variety of the areas in which it is empowered to act. This is a *political* judgement rather than a matter of constitutional structure. Such political decisions to share power or assign duties to the state have been referred to as "devolution."[5]

The process of devolution in the United States has been cyclical, or resembling a pendulum swinging back and forth. As Dr. John Kincaid observed:

> During the past thirty years, we have witnessed the rise of the "new judicial federalism," which is now no longer new, as well as the coming and going of President Lyndon B. Johnson's Creative Federalism, Richard M. Nixon's New Federalism, Jimmy Carter's New Partnership, Ronald Reagan's New Federalism, George Bush's "Sununu Federalism," and Bill Clinton's New Covenant. Although U.S. Senator Charles S. Robb once observed that the quickest way to empty a room is to shout "federalism," recent presidents have all felt some need to promote a 'new federalism.[6]

Under this form of political, non-constitutional, decentralization or devolution, the President and Congress conclude that federal programs should be structured in such a way as to

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[5] *See* Richard Cole, Rodney Hissong and Enid Arvidson, *Devolution: Where's the Revolution?* 29 PUBLIUS: THE J. OF FEDERALISM 99 (FALL 1999).

[6] John Kincaid, *Foreword: The New Federalism Context Of The New Judicial Federalism*, 26 RUTGERS L. J. 913 (1995).

either *share* authority and financing with the state, or to *assign* authority to the state. In this way, responsibility for a wide variety of programatic areas, including unemployment compensation, public assistance for the poor, environmental protection, civil rights enforcement, and, more recently, homeland security have become matters of either partial or exclusive state responsibility. Because this authority comes from the federal Congress, the states are obliged to follow whatever procedural and substantive mandates that are included in the federal legislation devolving or decentralizing authority. When the national Congress includes such mandates, but does not provide the source of funding, the states often complain that responsibility has been "crammed down" on them without the resources to meet those responsibilities. The United States Supreme Court has ruled that federal laws imposing such mandates must at least be clearly understood by the states to impose legal requirements.[7]

When Congressional decentralization, or sharing of authority with the states moves from cooperation to coersion it is seen differently by the states.

> Coercive federalism, in contrast to cooperative federalism, refers to the increased propensity of the federal government to regulate state and local governments through mandates, conditions attached to federal aid, court orders, and preemption of state action.[8]

In recent years it does appear that the Congress has been moving from cooperation to coercion.[9]

There are many types of decentralization in federal programs. For example, the federal

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[7] *See* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981). *See generally* PAUL L. POSNER, THE POLITICS OF UNFUNDED MANDATES, WITHER FEDERALISM? (1998).

[8] Kincaid, *supra* note 6, at 933.

[9] *Id.*, at 937.

approach to collecting child-support money has been called "supervised devolution."[10] Here, federal framework legislation encourages experimentation by the states through financial incentives and penalties for compliance with federal goals or targets, as well as federal funding for demonstration projects.[11]

Of course, the federal and state interests in various decentralized programs may be quite different. For example, in surface transportation, the federal government's interests are in regulating interstate commerce and military preparedness, while the state and local interest is in their local responsibility for providing transportation services.[12]

It is difficult to guage American public support for devolution. Surveys show general, abstract support for moving responsibility away from the federal government, but when asked about specific areas of governmental responsibility they seem to favor a mix for involvement by the layers of government.[13]

IV. *Decentralization of Rights: The New Judicial Federalism In the United States*

Although universal or national rights seem to be the natural order, independent state constitutions offer opportunities to entrench certain rights–at least in some places–when the

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[10]Jocelyn Elise Crowley, *Supervised Devolution: The Case of Child-Support Enforcement*, 30 PUBLIUS: THE J. OF FEDERALISM 99 (Winter-Spring 2000).

[11]*Id.*, at 103.

[12]Bruce D. McDowell, *Introduction: Federalism and Surface Transportation*, 32 PUBLIUS: THE J. OF FEDERALISM 1 (Winter 2002).

[13]Lyke Thompson and Richard Elling, *Let Them Eat Marblecake: The Preferences of Michigan Citizens for Devolution and Intergovernmental Service-Provision*, 29 PUBLIUS: THE J. OF FEDERALISM 139, 152 (Winter, 1999).

nation or its highest court cannot agree on applying these rights. In this way, states can also serve as laboratories for rights experimentation.

The new judicial federalism may also have implications for democracies worldwide. Often, ethnic, religious and linguistic hostilities preclude consensus on common rights. However, entrenching even a few common rights in the national constitution is a step in the right direction that can foster the trust needed to break down barriers to the recognition of more universal rights.[14]

A. *Independent State Constitutional Rights*

During the past 25 years there has been a renewed interest in American state constitutional rights protections; the "new judicial federalism." States and state courts may not recognize *less* in the way of rights for their residents than is required by federal law. Federal law creates a national minimum of rights or–in the words of one state court–"the least common denominator" of rights protections.[15] But in the American federal system, states and state courts are permitted to recognize *more* rights protections for their residents than they are required to enforce as a matter of federal law. This makes for a fairly complex legal system, but it is one which provides a double source of protection for the individual rights of US citizens. The American system of dual federal and state courts may seem to be a necessary ingredient for such an expansive state constitutionalism, but the American lessons are relevant even in federal

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[14]John Kincaid and Robert F. Williams, *The New Judicial Federalism: The States' Lead in Rights Protection*, 65 JOURNAL OF ST. GOV'T 50, 52 (April-June, 1992).

[15]*Alderwood Associates v. Washington Environmental Council*, 635 P.2d 108, 115 (Wash. 1981). (Supreme Court interpretation of the Fourteenth Amendment "must operate in all areas of the nation and hence it invariably represents the lowest common denominator.")

systems which do not have separate state courts.

Interestingly, it was the late William J. Brennan, Jr. who, as a Justice on the US Supreme Court, emphasized this double source of protection in his famous 1977 *Harvard Law Review* article.[16] Brennan, a former New Jersey State Supreme Court Justice in the 1950s, called on state courts to be more aware of rights under their state constitutions because his own US Supreme Court was becoming more conservative and less protective of individual rights. Not only has the US Supreme Court's conservatism continued, but state courts have accepted Justice Brennan's invitation to "fill the vacuum" being left at the federal level. To date there are literally hundreds of cases where state supreme courts have interpreted state constitutions to provide more rights than recognized under the federal constitution. Often these state cases explicitly reject the prior conclusions of the US Supreme Court on the matter when it was presented as federal constitutional question! This is an extremely important, but still generally unrecognized, aspect of US constitutional federalism.

A federal constitutional arrangement such as America's which permits state constitutional rights beyond the national minimum standard results in a "rights landscape" that may be characterized by "peaks and valleys of rights protection" among the different component units. Such an approach, however, is a central feature of a federal system, with a variety of different legal rules in the component units.

Observations such as the following by the Alaska Supreme Court still may startle some American lawyers and judges, as well as observers from other countries, especially those who

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[16]William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

are accustomed to considering the US Supreme Court to be the exclusive American judicial body enforcing individual rights:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution...We need not stand by idly and passively, waiting for our constitutional direction from the highest court of the land.[17]

The power of state supreme courts to "go beyond" decisions of the US Supreme Court seems to contradict the fundamental understanding of the supremacy of the federal constitution. Unraveling this apparent paradox provides a number of lessons about US constitutional law:

- Identical state and federal constitutional language can have different interpretations, with state courts interpreting their state constitutional provisions to recognize more, but not less, constitutional protection than is provided by the US Supreme Court interpreting the federal constitution.
- Most of the protections of the federal Bill of Rights were modelled on the original thirteen state concepts of constitutional protection that predated the federal constitution. As Justice Stanley Mosk of the California Supreme Court noted:

  > It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon corresponding provisions of the first state constitutions, rather than the reverse.[18]

- The language of state constitutional provisions often is more detailed than that contained

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[17] *Baker v City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970).

[18] *People v Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975). Donald S. Lutz, *The State Constitutional Pedigree of the US Bill of Rights*, 22 PUBLIUS: THE JOURNAL OF FEDERALISM 19 (1992).

in the federal Bill of Rights. Such detail focuses attention on the text of the provision at issue and related provisions of the state constitution.

- State constitutions may contain individual rights having no analogue in the federal constitution. For example, equal rights provisions baring discrimination on the basis of sex, requirements of open access to courts for redress of injuries, rights of privacy, and specific protections for the incarcerated may be found in state constitutions but not in the federal constitution. Lawyers therefore often have wide-ranging opportunities under state constitutions for formulating novel arguments.

  Because of the absence of federal analogues, state courts necessarily have interpreted these constitutional provisions independently of US Supreme Court cases. Therefore, the state courts have developed a truly independent constitutional jurisprudence under some of these provisions. This body of law can provide an approach for state courts to emulate when they seek to develop an independent interpretation of state constitutional provisions that do have federal analogues.

- When the US Supreme Court interprets the federal constitution in cases challenging state laws, notions of federalism often constrain it in ways that do not affect state supreme courts. For example, when the Supreme Court declined to invalidate Texas' school finance law on equality grounds in *San Antonio Independent School District v Rodriguez*,[19] the Court revealed its concerns about federalism and deference to the states:

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[19]411 US 1, 44 (1973). See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978) (referring to federalism concerns as "institutional" rather than "analytical" limitation on Supreme Court's rulings). See also Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

Despite the fact that public schools in Texas were financed with local property taxes, leading to extreme inequalities based on the value of the property in different school districts, the Supreme Court refused the claim. Several state supreme courts, however, striking down school financing schemes despite *Rodriquez*, indicated their own lack of concern for the federalism issue.[20] State supreme court interpretations of their own constitutions have no binding force outside the state. They apply only within a single state. Of course, questions regarding the proper judicial function in reviewing actions of the other branches of government remain, but they are horizontal, intrastate matters without the additional vertical federalism concerns.

- The federal constitutional requirement of state action,[21] restricting federal constitutional challenges to only those actions of governmental officials, as opposed to private persons, may not be present in state constitutional protections.[22] Many state constitutional provisions grant positive rights in specific terms and therefore sometimes may also apply to non-governmental action.[23] The education finance cases referred to earlier are

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[20]See, e.g., *Serrano v Priest*, 557 P.2d 929 (Cal. 1976); *Robinson v Cahill*, 303 A.2d 273 (N.J. 1973), *cert. denied*, 414 US 976 (1973).

[21]See generally *Flagg Bros., Inc. v Brooks*, 436 US 149 (1978).

[22]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 (1990).

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

examples of positive rights interpretation.

- Constitutional doctrines long ago repudiated by the US Supreme Court may still be viable as matters of state constitutional law. The most important examples are "substantive due process" limitations on state statutes that interfere with contract rights in the field of economic regulation,[24] which many states still utilize, and the doctrine of non-delegation of legislative authority.
- State constitutions themselves can address the question of whether they should be interpreted to provide greater protections than the federal constitution. In 1974, for example, the voters in California adopted a state constitutional provision distinguishing the coverage of the state and federal constitutions: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[25] The next year, the California Supreme Court observed:

> Of course this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing law.[26]

Interpretations of a state constitution expanding upon federal constitutional protections are therefore not governed solely by the attitude of state courts. Textual changes to the constitution, as in California, can also influence courts' decisions. This aspect of the process of state constitutional lawmaking–textual textual change–can, however, be a two-way street. In 1979, just five years after ratifying the provision quoted above, the California voters amended

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[24] *Developments in the Law–The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498-99 (1982).

[25] Cal. Const. Art. 1, § 24.

[26] *People v Brisendine*, 531 P.2d 1099, 1114 (Cal. 1975).

Article I, section 7. The amendment prohibited California courts from going beyond the requirements of the federal equal protection clause of the Fourteenth Amendment in the use of pupil assignment and school busing remedies. The amendment was intended to overrule a long series of California decisions ordering such remedies in the absence of intentional segregation, a prerequisite under federal law.[27] The US Supreme Court upheld Proposition 1 against a federal constitutional challenge[28] illustrating the possibility of using amendments to the constitutional text either to stimulate or overrule independent state constitutional interpretations.

- As a procedural matter, a final decision of a state court is insulated from review by the US Supreme Court if the decision is based on an adequate and independent state ground.[29] Insulation results even if the case also decides a federal constitutional issue because the state ground would have been adequate to support the state court decision even in the absence of the federal ground. Interestingly, however, state courts are still slow – now almost two decades after the Supreme Court's clear pronouncement – to take advantage of the opportunity to insulate their decisions from Supreme Court review.[30]

Whether a state court should reject a US Supreme Court interpretation of a similar constitutional provision is a difficult question. Until now, most scholars have focused on courts

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[27] *Crawford v Los Angeles Bd. Of Educ.*, 102 S. Ct. 3211 (1982).

[28] Id.

[29] *Michigan v. Long*, 463 US 1032 (1983).

[30] Note, *Fulfilling the Goals of Michigan v. Long, The State Court Reaction*, 56 FORD. L. REV. 1041 (1988).

that have already done so.[31] The following questions are still confounding US state judges and lawyers: How can courts make this decision and how can counsel develop meaningful arguments addressing this question? Should a state court resolve state constitutional issues before it resolves federal issues? What is the value of uniform, nationwide rules on rights protections?

B. *The Mistaken Premise of United States Supreme Court Correctness*

Most of the methodological problems state courts encounter when interpreting state rights provisions which are analogous to those contained in the federal Bill of Rights arise – in Oregon Justice Hans Linde's words – from:

> "the *non sequitur* that the Unites States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions."[32]

The often unstated premise that US Supreme Court interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions is simply wrong. But it still exerts a significant amount of intuitive force upon US lawyers and judges grappling with problems of state constitutional interpretation. It is important, therefore, to understand the sources of this mistaken premise.

First, the premise is based on a conception of the power and authority of the US Supreme Court in the American legal system. Most judges and legal practitioners, as well as members fo the media, formed their attitudes about the US Supreme Court when it was *recognizing* rights.

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[31] Ronald K.L. Collins and David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217-18 (1988).

[32] *State v. Kennedy*, 666 P.2d 1316, 1322 (Or. 1983).

Federal constitutional decisions recognizing new constitutional rights are extremely powerful. Under the Supremacy Clause, these decisions have the power to reach into every single state trial court in the country because state judges must follow them. Based on this experience, it is an odd feeling for lawyers and state judges to think about having a "choice" as to whether they should follow decisions of the US Supreme Court. But, in fact, state courts do have a choice as to whether to follow decisions rejecting asserted federal constitutional rights.

It is critical to remember that it is very different fro the Supreme Court to hold that people *have* certain rights that must be respected under the federal constitution than for it to hold that people *do not have* such rights. Because both are decisions of the US Supreme Court, however, judges and lawyers "feel" both kinds of decisions should have the same force. Upon closer examination, however, it is clear that just because some action is not prohibited by the federal constitution, it is not therefore automatically permissible under the state constitutions.

The justices of the US Supreme Court have been referred to as "teachers in a vital national seminar."[33] But their lessons, like those of all teachers, differ. When they teach us that the federal constitution does not provide certain rights, the issues are not foreclosed at the state level under the state constitution. Justice Brennan of the US Supreme Court advised:

> [S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state

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[33] Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193, 208 (1952).

guarantees.[34]

Despite the clear distinction between Supreme Court cases which recognize rights and those which do not recognize rights, there still remains a certain aura of correctness to all decisions of the US Supreme Court. This can, unfortunately, lead to what Nebraska Justice Thomas M. Shanahan called a "pavlovian conditioned reflex in an uncritical adoption of federal decisions....".[35] The only way to combat this mistaken premise – often so powerful it is like a reflex – is to understand clearly its origins and work to overcome its force upon the legal system.

V. *Conclusion*

The American experience with decentralized rights, or the new judicial federalism, may have real importance for those in other federal systems. John Kincaid recently observed:

> 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.
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> 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 levelling-up process.

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[34] Brennan, *supra* note 16, at 502.

[35] *State v. Havlat,* 385 N.W.2d 436, 447 (1986) (Shanahan, J., dissenting).

> 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.[36]

Comparative study, though, is a two-way endeavour. There is much for Americans to learn from the experience of other federal systems with subnational constitutions. Such reciprocal information is the basis for studying comparative subnational constitutional law.

A provision of the Constitution of the City of Buenos Aires illustrates this point. Article 11 prohibits discrimination on the basis of, among other things, "sexual orientation." Based on this clause, the legislature enacted a "Civil Union Law," which, although controversial, has gone into effect.[37]

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[36] John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 946-47 (1995).

[37] *See* Laura Saldivia, *The Constitutional Protection of Sexual Minorities in Argentina*, 9 SW. J. L. & TRADE IN THE AMERICAS 332, 352-54 (2002-2003).