1-1-1985

The State Constitutions and the Supplemental Protection of Individual Rights

Robert Allen Sedler
Wayne State University

THE STATE CONSTITUTIONS AND THE SUPPLEMENTAL PROTECTION OF INDIVIDUAL RIGHTS

*Robert A. Sedler**

The level of protection of individual rights afforded by state constitutions has been the subject of much academic and judicial debate. In this article, Professor Sedler compares the state constitution to the federal Constitution and suggests that the function of the state constitution is to supplement federal protection. He concludes that state constitutions have the potential to fill the gap in the protection of individual rights.

I. INTRODUCTION

THE state constitution is currently attracting a great deal of interest as a source of constitutional protection of individual rights.[1] It has been said that state constitutions have been "rediscovered,"[2] and there has been much academic[3] and judicial discussion[4] about reliance on the state constitution instead of the

*Professor of Law, Wayne State University. A.B., 1956, J.D., 1959, University of Pittsburgh. Valuable assistance in the preparation of this article was provided by Kevin Kohl, a third year law student at Wayne State University.

1. The term, "individual rights," may be broadly defined to refer to any individual interest that is hindered by governmental action. In this article, however, the term refers to rights that are *arguably* within the scope of constitutional provisions that, by their terms, are designed to protect individual rights against governmental action.

2. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Kelman, *Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413 (1981); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

3. In addition to the works cited in note 2, *supra*, see Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

4. Some of the judicial discussion takes the form of law review articles and

federal Constitution as the basis for challenging state laws or governmental action interfering with individual rights. This reawakened interest in the state constitution may be a reaction to the perceived "pullback" by the United States Supreme Court in extending constitutional protection to individual rights.[5] The purpose of this article is to put the matter of the state constitution as a source of constitutional protection of individual rights in perspective and to consider the function of the state constitution *in relation to the Federal Constitution* as a source of protection of individual rights in the United States today. It is submitted that the federal Constitution will continue to be the *primary* source of constitutional protection of individual rights in the United States. Moreover, the federal courts will continue to be the primary forum in which claims of constitutional violation of individual rights by state governmental action will be asserted. The function of the state constitution and of the state courts will be to *supplement* the protection of individual rights afforded by the federal Constitution, and to provide *additional* protection against state governmental action beyond that which the United States Supreme Court has found to inhere in the federal Constitution.

II. The Function of the State Constitution in Relation to the Federal Constitution as a Source of Constitutional Protection of Individual Rights

It cannot be disputed that the federal Constitution has long been relied on as the primary source of constitutional protection of in-

speeches. In addition to the writings of Justice Linde, *supra* notes 2 & 3, see Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731 (1978); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123 (1978); Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21 (1982); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983). Other times, it finds its way into judicial opinions. See the discussion by Justice Pollock, writing for the New Jersey Supreme Court, in Right to Choose v. Byrne, 91 N.J. 287, 299–301, 450 A.2d 925, 931–32 (1982) and the discussion by Justice Tobriner, writing for the California Supreme Court, in Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 262–63, 625 P.2d 779, 783–84, 172 Cal. Rptr. 866, 870–71 (1981).

5. *See* Brennan, *supra* note 2, at 495–501; Howard, *supra* note 3, at 874–79; Newman, *supra* note 4, at 21–23. As to the nature and extent of the perceived "pullback" by the United States Supreme Court, see generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi, ed. 1983).

dividual rights from state governmental action.[6] While the state courts had earlier afforded some protection to individual rights under state constitutions, the promulgation of the fourteenth amendment,[7] with its broadly-phrased and open-ended provisions,[8] established the federal Constitution as a potential source of sweeping limitations on the exercise of state governmental power designed to protect individual rights.[9] Fourteenth amendment challenges could be asserted in any case arising in the state courts, and a state court decision upholding state governmental action against a fourteenth amendment challenge was reviewable in the United States Supreme Court.[10] More significantly perhaps, the federal courts, rather than the state courts, became the primary forum in which claims of unconstitutional violation of individual rights by state governmental action were asserted. This resulted from the enactment of the Civil Rights Act of 1871,[11] which represented a "vast transformation of concepts of federalism," and which "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights, protect[ing] the people from

6. The overwhelming number of constitutional protection of individual rights cases decided by the United States Supreme Court, of course, involve challenges to state or local governmental actions.

7. See generally the discussion in E. Corwin, LIBERTY AGAINST THE GOVERNMENT 89–115 (1948). For an illustrative case, see Wynehamer v. People, 13 N.Y. 378 (1856) (state prohibition law, as applied to the sale of liquor owned at the time of the enactment of the law, is violative of the due process clause of state constitution).

8. See the discussion of the "majestic generalities" of the fourteenth amendment in Sedler, *The Legitimacy Debate in Constitutional Law: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 126–32 (1983).

9. Prior to the promulgation of the fourteenth amendment, there were relatively few cases where state governmental action interfering with individual rights was found to violate the federal Constitution. Discrimination against residents of sister states could be challenged under the privileges and immunities clause of article I, section 4. Certain interferences with contractual rights could be challenged under the "impairment provision" of article I, section 10. State economic regulation or taxation affecting interstate commerce could be challenged under the negative aspect of the commerce clause. But in the aggregate, challenges to state governmental action under the federal Constitution were relatively few.

10. Some of the early "landmark" fourteenth amendment cases came to the United States Supreme Court on review from the highest state court. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

11. 42 U.S.C. § 1983 (1982).

unconstitutional action under color of state law."[12] In practice, lawyers seeking to assert constitutional challenges to state governmental action would try, whenever possible, to bring their cases in the federal courts.[13] In the United States then, constitutional protection of individual rights against state governmental action has come to depend primarily on the federal Constitution and the federal courts.

At the same time, the state constitution and the state courts have always been available as an additional source of constitutional protection of individual rights. Questions of state constitutional law, as well as federal constitutional law, could be and were presented in cases originating in the state courts, such as criminal prosecutions and civil litigation between private persons. For example, prior to the "constitutionalization" of criminal procedure by the United States Supreme Court in the 1960's, some state courts had interpreted the state constitution as affording greater protection to criminal defendants than was required by the federal Constitution.[14] State courts could also invoke specific state constitutional provisions, having no analogue in the federal Constitution, to invalidate state governmental action.[15] State courts were also free to interpret broadly-phrased and open-ended provisions of the state constitution, such as the due process[16] and equal protection clauses, as affording greater protection to individual rights than was afforded by the Supreme Court's interpretation of the analogous federal provisions. Some state courts continued to rely on the due

12. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

13. Affirmative suits challenging state governmental action in the federal courts were made possible by the United States Supreme Court's holding in Ex Parte Young, 209 U.S. 123 (1908), to the effect that although the action of a state officer was a "state action" for fourteenth amendment purposes, a suit against a state officer was not a suit against the "state" for eleventh amendment purposes. For a comprehensive historical analysis of affirmative suits challenging state governmental action in the federal courts, see Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974).

14. For example, prior to Mapp v. Ohio, 367 U.S. 643 (1961), a number of state courts had adopted the exclusionary rule as a matter of state law. *See* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), and the listing of cases in the appendix to Wolf v. Colorado, 338 U.S. 25, 33–38 (1949).

15. Such a provision is an "open courts" provision, invoked to strike down a state guest statute. *See* Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932).

16. Sometimes the state constitutional guarantee is expressed in terms of "law of the land" rather than "due process of law."

process and equal protection clauses of the state constitution to invalidate governmental economic regulation[17] after the United States Supreme Court had taken a "judicial abstention" approach to economic regulation challenges.[18]

The point to be emphasized is that at the time the state constitutions were "rediscovered," they were not in a condition of quiescence. The state constitution had always been available as a source of constitutional protection of individual rights against state governmental action. In practice, the function of the state constitution had been to provide *additional protection* to individual rights, beyond that which was provided by the federal Constitution.

The respective functions of the federal and state constitutions as the basis of constitutional protection of individual rights in the United States will not change notwithstanding the "rediscovery" of the state constitution. This is so for two reasons. First, there is a finite quantum of protection to individual rights that can be extended under any constitution. The federal Constitution has already been interpreted as extending a substantial amount of constitutional protection to individual rights. Limitations on the exercise of governmental power designed to protect individual rights must be found in the text or internal inferences of a constitution,[19] and there are outer limits of permissible constitutional interpretation. Further constraints on the scope of constitutional protection of individual rights inhere in the nature of the judicial process.[20] Courts do not want to interpret the constitution in such a way that it will diminish public acceptance of the constitution as a limitation on governmental power and the court's role in defining the con-

17. See the discussion *infra* notes 49–52 and accompanying text.

18. See the discussion of "judicial abstention" in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

> When these [due process] cases were taken together with a companion series in which the equal protection clause was given a similarly permissive scope, there could be little doubt as to the practical result: no claim of substantive economic rights would now be sustained by the Supreme Court. The judiciary had abdicated the field.

Id. at 38.

19. As has been observed: "A decision limiting governmental power must be grounded in a limitation on governmental power contained in the Constitution." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981).

20. See the discussion in Sedler, *supra* note 8, at 118–19.

stitution.[21] Therefore, even if state courts were disposed to interpret state constitutions as broadly as possible, they would only be able to extend some additional degree of protection to individual rights beyond that provided by the federal Constitution. Thus, as a matter of substantive constitutional protection, it is impossible for the state constitution to supplant the federal Constitution as the primary source of constitutional protection of individual rights.

Second, the capacity of the state constitution to protect individual rights depends on the extent to which parties will choose to base their constitutional claims on the state constitution rather than the federal Constitution. While claims under the federal Constitution may be asserted in either the federal or state courts, claims under the state constitution may be asserted only in state courts.[22] Experience indicates that when given a choice,[23] parties invariably will try to present their constitutional challenge in the federal courts.[24] The reasons for the preference for the federal forum are obvious. Apart from the perceived greater competency of federal judges over state

21. *Id.* at 119–20.

22. The eleventh amendment precludes the federal courts from granting relief against state officials on the basis of state law. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). Therefore, a party seeking to assert a claim under both the federal Constitution and the state constitution would have to bring the suit in the state court.

23. The *Younger* doctrine ordinarily precludes utilization of the federal courts to assert a constitutional claim where the federal plaintiff is a party to a pending state criminal or civil proceeding. *See generally* Sedler, Younger *and Its Progeny: A Variation on the Theme of Equity, Comity and Federalism*, 9 U. TOL. L. REV. 681 (1978).

24. Thus, a party seeking to engage in a course of conduct prohibited by state law is likely to try to obtain an advance determination as to the law's constitutionality in the federal court rather than in the state court. *See, e.g.,* Steffel v. Thompson, 415 U.S. 452 (1974). The federal court must respect the plaintiff's choice of a federal forum, notwithstanding that the challenge is to the constitutionality of state governmental action. "[C]ongress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." Zwickler v. Koota, 389 U.S. 241, 248 (1967). Moreover, the federal courts may not invoke abstention on the ground that the challenged state action could be unconstitutional under an analogous provision of the state constitution. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976); Wisconsin v. Constantineau, 400 U.S. 433 (1971). Abstention is proper only where the challenged action could be unconstitutional under a provision of the state constitution specific to the state, such as one relating to the internal governance of the state. *See* Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975) (redistricting of justice of the peace districts might be violative of state constitutional provisions relating to the election of minor judiciary).

judges generally, constitutional challenges often will be controversial, and it is more prudent to bring such a challenge in the politically-insulated federal forum. Because federal judges are not popularly elected, they are not subject to the same kind of "public pressure" as are their state court counterparts.[25] Thus, a lawyer contemplating a constitutional challenge to state-imposed school segregation or to a state anti-abortion law, for example, or any other politically-charged matter, would be highly likely to choose a federal forum, because the chance of success is greater. Perhaps the most important aspect of the choice between a federal and a state forum relates to the matter of the "court of last resort." Since the United States Supreme Court can review only a limited number of cases, the realistic question for the lawyer initiating a constitutional challenge is whether it is better to have the "court of last resort" be a state appellate court or a federal court of appeals. Unless the highest appellate court of a particular state has shown itself especially disposed to extend constitutional protection to individual rights,[26] the lawyer will doubtless choose to bring the case in the politically insulated federal forum so that the "court of last resort" will be a federal court of appeals rather than a state appellate court.

The decision to choose the federal forum ordinarily will not be affected by the fact that the lawyer will be giving up any claim under the state constitution. Suppose that a lawyer is faced with a case of first impression, for example, a challenge to a law which prohibits a teacher from "advocating, soliciting, imposing, en-

25. As the author observed some years ago:

> The federal judge is a part of the local community and is subject to what could be called the 'cocktail party syndrome.' He is a member of the local 'establishment' and his social and personal relationships revolve around the same class of persons as do those of state court judges and state officials. He is subject to the charge of 'betrayal' if he upholds federal constitutional rights so as to lend support to an 'unpopular cause.' However, while he may be subject to social pressure, he is not subject to political pressure in the sense that unlike practically all lower court judges and many appellate state judges, he does not have to run for reelection. Moreover, he is not only more expert in the relevant constitutional doctrines, but has still another public to face, that of his brethren on the federal bench.

Sedler, *The* Dombrowski*-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 KAN. L. REV. 237, 254 (1970).

26. The California Supreme Court has been, for example, a court inclined to provide extensive constitutional protection to individuals.

couraging or promoting public or private homosexual activity."[27] If the lawyer brings the challenge in the state court, the lawyer has potential state constitutional claims, such as that the law is violative of a specific state constitutional provision,[28] or the free speech provision of the state constitution, as well as a first amendment claim. If the suit is brought in the federal court, there is only the first amendment claim. Yet, it would be expected that the lawyer would bring the suit in federal court, because the constitutional claim is more likely to be sustained in the politically-insulated federal forum. If the federal judge invalidates the law, the judge may be denounced in the local press as being "soft on homosexuality," but unlike the state court judge, that charge cannot be used by an opponent in the next judicial election. Similarly, since review in the United States Supreme Court can never be assumed,[29] and state appellate court judges are subject to these same influences, the lawyers would rather have the "court of last resort" be the federal court of appeals rather than the state appellate court. Federal courts are perceived as the more effective vehicle for protection of individual rights which causes lawyers asserting constitutional claims to utilize federal courts in preference to the state courts whenever possible.[30] And lawyers will ordinarily do so even at the price of abandoning possible claims under the state constitution. The preferred utilization of federal courts to assert constitutional claims further reduces the capacity of the state constitution to serve as a source for protection of individual rights.

The capacity of the state constitution to serve as a source for the constitutional protection of individual rights in comparison to the federal Constitution is necessarily limited. It is limited first by the fact that there is a finite quantum of constitutional protection afforded to individual rights and the federal Constitution has already been interpreted as extending a substantial amount of constitutional protection to individual rights.[31] This protective capacity

27. *See* Oklahoma City Bd. of Educ. v. Nat'l Gay Task Force, 729 F.2d 1270 (10th Cir. 1984), *aff'd. by divided court*, 53 U.S.L.W. 4408 (March 26, 1985).

28. Such a provision is one relating to the internal governance of the state. *Cf. Harris County Comm'rs Court*, 420 U.S. at 77.

29. In the case at issue, review was granted at the instance of the state after the lower courts had declared the law unconstitutional.

30. See the discussion in Sedler, *supra* note 24, at 254–55.

31. Suppose, for example, that a state criminal defendant moves to suppress the introduction of evidence on the ground that it was obtained by an illegal search or

of the state constitution is also limited by the fact that the federal court generally will be the preferred forum for the assertion of constitutional claims. As new kinds of constitutional claims arise, it is far more likely that they will be asserted in the federal courts under the federal Constitution than in the state courts under the state constitution.

Thus, the state constitution will continue to supplement the federal Constitution as a source of constitutional protection of individual rights. This supplemental function is reflected in the cases involving challenges to deprivation of individual rights under the state constitution that are being brought in the state courts today. An analysis of such cases reveals that a challenge under the state constitution in the state courts[32] generally will be asserted only where it is clear that such a challenge under the federal Constitution has proved or is likely to prove to be unavailing. In practice, there are relatively few "first impression" constitutional challenges in state courts. Typically, after a particular challenge under the federal Constitution, such as one to inequality of state financing of public education,[33] or to the denial of medicaid funding for abortion,[34] has been rejected by the United States Supreme Court, the same constitutional challenge is made under the state constitution in the state court. Or, after the United States Supreme Court has made it clear that the federal Constitution cannot be relied on effectively to challenge certain kinds of state governmental action, such as economic regulation,[35] or gun control,[36] parties will then resort to the

seizure. The state court will invariably consider the fourth amendment question first, because of its extensive interpretation by the United States Supreme Court. Only if there has been no fourth amendment violation will the state consider whether the search or seizure was violative of the analogous state constitutional provision. *See, e.g.*, People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975).

32. We are generally excluding from our consideration state constitutional claims involving the rights of criminal defendants. Here, the challenge must initially be asserted in the state courts, so it may be assumed that state constitutional claims will be asserted together with federal constitutional claims. For a discussion regarding the extent to which state courts have interpreted the state constitution as providing greater protection for criminal defendants than is provided under the federal Constitution, see generally *Developments—State Constitutional Law*, 95 HARV. L. REV. 1324, 1370–84 (1982) [hereinafter cited as *Developments*].

33. *See infra* notes 138–48 and accompanying text.

34. *See infra* notes 180–87 and accompanying text.

35. *See infra* notes 43–44 and accompanying text.

36. On the subject of the state constitution and the right to bear arms, see general-

state constitution to challenge those kinds of state governmental action. While the number of cases presenting challenges under a state constitution in state courts is increasing, the cases usually present challenges that would not be recognized under the federal Constitution.[37] A "first impression" constitutional case in the state courts is likely to be one that could not be brought initially in the federal courts, such as one arising in civil litigation between private parties.[38] As a practical matter, the real issue in most cases involving constitutional challenges under the state constitution is whether the state court will reach a different result under the state constitution than the United States Supreme Court has reached under the federal Constitution. In this sense, it is fair to say that state constitutional law in practice is "reactive" to federal constitutional law.[39]

To say that the function of the state constitution as a source of protection of individual rights is to supplement the protection afforded by the federal Constitution is not to suggest that this function is insignificant. While there is a finite quantum of constitutional protection that may be afforded to individual rights, and while the federal Constitution has been interpreted as extending a substantial amount of protection to those rights,[40] there is still a *gap in the protection* that the state constitutions may fill. There are certain kinds of constitutional challenges, such as challenges to state economic regulation, or to general classifications involving non-fundamental rights, where the federal Constitution has been interpreted as affording little or no protection. There are important individual rights claims, such as equality of school financing, medicaid funding for abortions, or claims of constitutional protection for

---

ly Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY L. REV. 177 (1982).

37. In practice, the parties will join claims under the federal Constitution, hoping that the state courts will look on those claims more favorably than the federal courts. Additionally, it appears that in a number of cases in the economic regulation area, the state courts sometimes do not separate the federal and state constitutional claims. To the extent that they do, however, the courts set the case up for possible review by the United States Supreme Court on the federal constitutional claim. *See* Michigan v. Long, 103 S. Ct. 3469 (1983).

38. *See infra* note 83 and accompanying text.

39. For the argument that state constitutional law should not be "reactive" to federal constitutional law, see Collins, *supra* note 3, at 1; Linde, *supra* note 3, at 165.

40. And to some extent, the federal Constitution may be interpreted as extending even more protection in the future.

certain privacy and associational interests, that have been rejected by the United States Supreme Court under the federal Constitution. The gap in protection is still substantial, and state courts have the opportunity to expand considerably the scope of constitutional protection of individual rights in the United States. Because the United States is a federal system, there is a *double source* of constitutional protection. It is the function of the state constitution to supplement the protection of individual rights and to provide *greater* protection for individual rights than is provided by the federal Constitution.

III. The State Constitution in Practice

An exploration of the operation of the state constitution as a supplemental source of protection of individual rights against state governmental action illustrates a number of areas where state constitutions have been interpreted as providing greater protection to individual rights than is provided by the federal Constitution, and identifies the factors that have led to this greater protection. The possibility of distortion resulting from the fact that fifty states are involved must be taken into account. The present article does not attempt to undertake a state-by-state analysis of the scope of protection afforded by the constitutions of all fifty states. Such an analysis would probably reveal that in many states, the state constitution has not been interpreted as providing much or any more protection to individual rights than is provided under the federal Constitution. It is suspected that the potential of the state constitution as a source of constitutional protection of individual rights has not begun to be realized in many states.[41] At the other end of the spectrum, looking to what may be called the major areas of state constitutional litigation, some state courts have been very active in utilizing the state constitution to provide greater protection to individual rights than is provided by the federal Constitution.[42] In any event, the purpose here is not to analyze how protection of individual rights under the state constitutions has fared in each of the fifty states.

Rather the focus is on major areas of state constitutional litigation to demonstrate the *potential* of the state constitution as a supplemental source of constitutional protection. Consideration is

41. Perhaps in part, this is because lawyers have not yet begun to use the state constitution as a claimed source of protection for individual rights against state governmental action.

42. The California Supreme Court has taken the lead in this regard.

limited largely to cases within the last decade. Analysis reveals that in the aggregate there are a large number of state court decisions that have interpreted the state constitution as enlarging on the protection for individual rights provided by the federal Constitution. There are a number of state court decisions that have invalidated state economic and social regulatory laws that almost assuredly would have been sustained by the United States Supreme Court against due process and equal protection attacks under the federal Constitution. There are likewise state court decisions that have extended constitutional protection to privacy and associational interests beyond those recognized by the Supreme Court. Finally, cases where state courts have invalidated systems of public school financing and bans on medicaid funding for abortion under state constitutions are considered. What should be clear from this analysis is that although the function of the state constitution is supplemental to that of the federal Constitution, it is indeed significant.

A. State Economic and Social Regulation

State economic and social regulation furnishes the best opportunity for state courts to provide constitutional protection far beyond that provided by the federal Constitution. The Supreme Court has taken a "hands-off" approach to state economic regulation challenged as violative of due process or equal protection,[43] and has given only minimal scrutiny to legislative regulations and classifications that do not implicate "fundamental rights."[44] Thus, parties wishing to challenge state economic regulation have no choice but to bring their challenges in the state courts under the state constitution. A state constitutional claim also may be more effective in challenging a state regulation or classification that does not implicate "fundamental rights."

The crucial question is whether state courts will interpret the due

43. *See supra* note 18 and accompanying text. *See also* New Orleans v. Dukes, 427 U.S. 297 (1976); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963).

44. *See generally* Schweiker v. Wilson, 450 U.S. 221 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 598 (1978); Kelley v. Johnson, 425 U.S. 238 (1976). It is only where the regulation or classification is found to be "objectively unreasonable" that the Court will invalidate it under the "rational basis" standard of review. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 122 (1982); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). *Cf.* Zobel v. Williams, 457 U.S. 55 (1982).

process and equal protection clauses of the state constitution as authorizing *substantial scrutiny* of state economic and social regulation. The substantial scrutiny that some state courts give to state economic and social regulation is sometimes articulated in terms of a "fair and substantial relationship" standard of review,[45] and sometimes only in terms of a "rational basis" standard of review.[46] Regardless of the standard applied, these courts will carefully scrutinize the ends-means fit and may even consider the availability of "less drastic means" to advance the legislative purpose.[47] Moreover, the state court may go so far as to say that the asserted governmental interest is not of sufficient importance to justify interference with economic freedom.[48]

In other words, some state courts have not followed the United States Supreme Court in taking a "hands-off" approach to state economic regulation challenged as violative of due process and equal protection. Rather, as one commentator has observed: "many [state] courts defer to legislative judgments in terms similar to those used by the United States Supreme Court . . . . A number of state courts, however, prefer a more searching inquiry into the justification for state regulation of economic activity."[49] Occasionally the state court will be quite explicit in its rejection of the Supreme Court's hands-off approach. As the Maryland Court of Appeals has stated: "Therefore, it is readily apparent that whatever may be the current direction taken by the Supreme Court in the area of economic regulation, as distinguished from the protection of fundamental rights, Maryland and Pennsylvania adhere to the more traditional test formulated by the Supreme Court."[50] But more fre-

45. *See* City of Russellville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980); Maryland Bd. of Pharmacy v. Save-a-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973).

46. *See* Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutual Wagering, 397 So. 2d 692 (Fla. 1981); *In re* Ashton Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

47. *See* City of Russellville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980); City and County of Denver v. Nielson, 194 Colo. 407, 572 P.2d 484 (1977).

48. *See In re* Ashton Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973). *See also infra* notes 54–57 and accompanying text.

49. Howard, *supra* note 3, at 882–83.

50. Maryland Bd. of Pharmacy v. Save-a-Lot, Inc., 270 Md. 103, 120, 311 A.2d 242, 251 (1973). Here, the Maryland Court of Appeals invalidated on substantive due process grounds a state law prohibiting drug price advertising. *Accord* Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971). The United States Supreme Court, in contrast, has held that price advertising comes within the protec-

quently, state courts do not expressly indicate that they are applying a standard of review different from that employed by the United States Supreme Court.[51] However, it is clear that these courts are giving substantial scrutiny to the challenged economic regulation, and that this has resulted in the invalidation of state regulatory laws that almost assuredly would have been sustained by the United States Supreme Court against due process and equal protection challenges under the federal Constitution.[52]

Typical of such a situation is the decision of the North Carolina Supreme Court in *In re Ashton Park Hospital*,[53] where the court invalidated, under the state constitution, a law requiring state approval for the construction of a private hospital. The purpose of the law was to ensure that the development of health and medical care facilities in the state would be "accomplished in a manner which [was] orderly, timely, economical, and without unnecessary duplication of these facilities."[54] The court held that the asserted governmental interest in preventing duplication of health care facilities was insufficient to justify the interference with property interests that were protected by the "law of the land" clause of the state constitution.[55] It stated as follows:

---

tion of the first amendment as a form of "commercial speech." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

51. Sometimes the state courts rely on the due process and equal protection clauses of the federal and state constitutions indiscriminately. This phenomenon appears in a number of the cases. Ordinarily there will not be any indication whether the state court relied on both the due process and equal protection clauses of the federal and state constitutions or only on the state constitutional provision. When the state courts rely on the federal and state constitutional provisions indiscriminately and invalidate the challenged action, they usually are reaching a different result than would have been reached had the challenge been asserted before the federal courts. Thus, any reliance on the federal Constitution turns out to be unimportant. In practice, the invalidation of the challenged state governmental action results from the fact that the challenge was brought in the state court rather than in the federal court.

52. See the discussion of the "techniques" employed by the state courts in these cases in Howard, *supra* note 3, at 886–91.

53. 282 N.C. 542, 193 S.E.2d 729 (1973).

54. *Id.* at 544, 193 S.E.2d at 731.

55. The "law of the land" provision of the state constitution reads as follows: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. The "law of the land" language traces back to the Magna Charta, while the "due process" language traces back to the Statute of 28 Edward III (1355). *See* E. Corwin, *supra* note 7, at 90–91.

> Compulsory curtailment of facilities for the care of the sick is not a reasonable choice of a remedy for a shortage of trained hospital personnel, nurses, and doctors. In any event, we hold that Article I, § 19 of the Constitution of this State does not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people, who desire the service, merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied.[56]

The court also gave a reading to the "law of the land" clause reminiscent of the United States Supreme Court's reading of the due process clause in the *Lochner* era:

> Any exercise by the State of its police power is, of course, a deprivation of liberty. Whether it is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon Article I, § 19 of the Constitution of North Carolina.[57]

The court then concluded that there was no "reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of the public health."[58] For good measure, the court also found the law violative of the "anti-monopoly" and "exclusive privileges" provisions of the state constitution.[59] The following year the same court invalidated the state fair trade law as a delegation of

---

56. 282 N.C. at 549, 193 S.E.2d at 734.

57. *Id.* at 550, 193 S.E.2d at 735.

58. *Id.* at 551, 193 S.E.2d at 735.

59. *Id.* These state-specific provisions read as follows: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. CONST. art. I, § 32. "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. CONST. art. I, § 34.

legislative power to a private corporation and as a deprivation of the liberty of non-signers under the "law of the land clause."[60]

The same "judicial activism" with respect to state economic regulation is found in a number of other state court decisions. The Florida Supreme Court invalidated a state law requiring the payment of a portion of horseracing purses to a horsemen's association on the ground that the law did not bear a reasonable relationship to the stated purpose of encouraging the continuous stabling of thoroughbred horses in Florida. This was because the law contained no provision as to how the funds paid to the horsemen's association would be spent in furtherance of that objective.[61] The Alabama Supreme Court invalidated a municipal law regulating the detonation of explosives, which had the effect of prohibiting the operation of a stone quarry in the city, on the ground that "less restrictive standards would produce the same degree of safety without having the effect of prohibiting the operation of the quarry."[62] The Kentucky Supreme Court invalidated a municipal ordinance prohibiting coal tipples on the same ground.[63] Additionally, the Nebraska Supreme Court invalidated a milk price-fixing scheme as violative of the due process clause of the state constitution on the ground that it discriminated against efficient producers in favor of inefficient producers and would tend to foster anti-competitive practices in the industry, contrary to the law's stated purposes.[64] Other state economic regula-

60. Bulova Watch Co. v. Brand Distributors, 285 N.C. 467, 206 S.E.2d 141 (1974). For a discussion of other state court decisions invalidating fair trade laws, see Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 252–53 (1981).

61. Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutual Wagering, 397 So. 2d 692 (Fla. 1981). The court stated that the law was an unlawful exercise of the police power, because there was not a reasonable relationship between the objective of the law and the means utilized to achieve the objective. It did not cite the applicable constitutional provision, but presumably was relying on the due process clause.

62. City of Russellville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980). Again, the court did not cite the applicable constitutional provision, but presumably was relying on the due process clause. In Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973), the same court invalidated a law prohibiting the "scalping" of football tickets.

63. U.S. Mining & Exploration Natural Resources Co. v. City of Beattyville, 548 S.W.2d 833 (Ky. 1977). Here too the court did not cite the applicable constitutional provision, but again presumably was relying on the due process clause.

64. Gillette Dairy, Inc. v. Nebraska Dairy Products Bd., 192 Neb. 89, 219 N.W.2d 214 (1974). The court concluded: "[w]e find the minimum basic costs provisions of the

tions that have been invalidated under the due process clauses of state constitutions in fairly recent years include: a Nevada law prohibiting the delivery of gasoline from trucks having capacity in excess of 2,000 gallons;[65] an Alabama law requiring employers to pay the salaries up to twenty-one days for employees on temporary active duty with the National Guard of a reserve unit;[66] a city ordinance in Louisiana that prohibited "froggigging" on a particular lake for most of the year.[67] Massage regulation laws, such as those prohibiting the administration of a massage to members of the opposite sex, have also been held by some courts to be violative of the state constitution's due process clause.[68]

A number of state courts have also invalidated particular state economic regulations on equal protection grounds. Here again, there has been substantial scrutiny of the reasonableness of the classification, in a manner decidedly different from the way that the United States Supreme Court scrutinizes classifications under the rational basis standard of review. Sunday closing laws were invalidated in Alabama insofar as they exempted food stores with

---

questioned act to be arbitrary, discriminatory, and demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Id.* at 102, 219 N.W.2d at 222. See also the discussion in Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 786, 104 N.W.2d 227, 233 (1960), where the court emphasized the importance of property rights under the Nebraska Constitution, and noted that: "[t]he court has also consistently held that the regulation of legitimate business may not be so unreasonable as to result in the confiscation of property and the rights incidental to its ownership." In *Finigan*, the court invalidated a regulation prohibiting the sale of milk that did not meet "Grade A" requirements. *See also* United States Brewers Ass'n v. State, 192 Neb. 328, 220 N.W.2d 544 (1974) (invalidating a law giving the state liquor commission wide discretion in regulating the allocation of beer and liquor distributorships); Skag-Way Dept. Stores v. City of Omaha, 179 Neb. 707, 140 N.W.2d 28 (1966) (invalidating a municipal Sunday closing ordinance).

65. *In re* Martin, 88 Nev. 666, 504 P.2d 14 (1972).

66. White Associated Indus. of Alabama, 373 So. 2d 616 (Ala. 1979). *Cf.* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952) (no violation of fourteenth amendment's due process clause by state law requiring employer to give employees four hours off with pay in order to vote).

67. City of Shreveport v. Curry, 357 So. 2d 1078 (La. 1978).

68. City & County of Denver v. Nielson, 194 Colo. 407, 572 P.2d 484 (1977); Myrick v. Board of Pierce County Comm'rs, 101 Wash. 2d 140, 677 P.2d 140 (1984). Most state courts, however, have upheld such massage regulation laws. *See, e.g.*, City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (1978); Massage Parlors, Inc. v. Mayor of Baltimore, 284 Md. 490, 398 A.2d 52 (1979).

four or less employees,[69] and in Pennsylvania insofar as they exempted family-run grocery stores.[70] Exceptions also rendered Sunday closing laws unconstitutional in Colorado[71] and Nebraska.[72] Hair-cutting regulations discriminating between barbers and cosmetologists have been invalidated in Minnesota,[73] Michigan,[74] and Maryland.[75] The Michigan Supreme Court invalidated, on equal protection grounds, a refuse collection ordinance that distinguished between apartment buildings with four or less units and other apartment buildings with respect to charges for refuse collection.[76] The Maine Supreme Court took similar action with respect to a law that exacted higher license fees for junkyards within 100 feet of highways.[77]

The equal protection clause of the state constitution has also been relied on to invalidate state licensing laws. The California Supreme Court invalidated on equal protection grounds a state law that prohibited the licensing of graduates of out-of-state colleges of osteopathy.[78] The Alaska Supreme Court used the equal protection clause of the state constitution to invalidate a legislative attempt to limit the number of commercial fishers in its waters. Under the law, permits were required for commercial fishing after January 1, 1974,

69. Piggly-Wiggly of Jacksonville, Inc. v. City of Jacksonville, 336 So. 2d 1078 (Ala. 1976).

70. Goodman v. Kennedy, 459 Pa. 313, 329 A.2d 224 (1974). The court upheld the law's provisions exempting stores with less than 10 employees.

71. Dunbar v. Hoffman, 171 Colo. 481, 468 P.2d 742 (1970).

72. Skag-Way Dept. Stores v. City of Omaha, 179 Neb. 707, 140 N.W.2d 28 (1966).

73. Grassman v. Minnesota Bd. of Barber Examiners, 304 N.W.2d 909 (Minn. 1981). The Minnesota regulations applied to barbers, but not to cosmetologists.

74. People v. McDonald, 67 Mich. App. 64, 240 N.W.2d 268 (1976). The Michigan regulations prohibited cosmetologists from cutting men's hair, but permitted barbers to cut both men's and women's hair.

75. Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973). The Maryland regulations likewise prohibited cosmetologists from cutting men's hair.

76. Alexander v. City of Detroit, 392 Mich. 30, 219 N.W.2d 41 (1974).

77. Ace Tire Co. v. Municipal Officers, 302 A.2d 90 (Me. 1973).

78. D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). The court based its decisions on both the federal and state equal protection clauses. The discrimination on the basis of whether the college of osteopathy was in-state or out-state might be so "objectively unreasonable" that the United States Supreme Court would find it to be violative of the federal equal protection clause. *See supra* note 44 and accompanying text.

and no permits were to be issued to those fishers who did not hold a "gear license" issued prior to January 1, 1973. The classification on the basis of the date of receiving "gear licenses" was found to bear "no fair and substantial relationship" to the purpose of the law.[79]

Finally, some state courts have given greater scrutiny to classifications contained in social welfare legislation than the United States Supreme Court has been willing to give to such classifications challenged as violative of the fourteenth amendment's equal protection clause. For example, the Michigan Supreme Court has held that a provision of the state worker's compensation law which subtracted weekly worker's compensation benefits from unemployment compensation benefits denied equal protection.[80] And both the Michigan Supreme Court[81] and the North Dakota Supreme Court,[82] have held that the exclusion of agricultural workers from worker's compensation coverage denied equal protection.

Apart from general economic and social regulation, state courts have been very active in recent years dealing with challenges under the state constitution to laws regulating the rights of parties in civil litigation. In this situation, the capacity of the state constitution to serve as the source of constitutional protection of individual rights is enhanced by the fact that these questions will arise in the state courts in the first instance. They will be asserted in the context of civil litigation between private persons in the state courts, when one party seeks to avoid an unfavorable state law by challenging its constitutionality.[83] While the challenge may be asserted under both the federal and state constitutions, the state court is likely to pass on the state constitutional question first. In any event, the federal

79. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

80. Fox v. Employment Sec. Comm'n, 379 Mich. 579, 153 N.W.2d 644 (1967).

81. Gallegos v. Glaser Crandall Co., 388 Mich. 654, 202 N.W.2d 786 (1972).

82. Benson v. North Dakota Workmen's Compensation Bureau, 283 N.W.2d 96 (N.D. 1979).

83. In rare cases, the challenge may be asserted in the federal courts, such as where federal jurisdiction is based on diversity of citizenship. Thus in Moran v. Beyer, 734 F.2d 1245 (7th Cir. 1984), the Seventh Circuit, applying the rational relationship test, invalidated the Illinois spousal immunity rule as applied to bar an action for an intentional tort committed by a spouse during the marriage. At the time of the suit, the couple were divorced and living in different states. Thus, the suit could be brought in the federal court on the basis of diversity of citizenship, but as the court noted, "[m]ost cases of this sort would, of course, be resolved in state court." 734 F.2d at 1245 n.2.

constitutional challenge may sometimes be foreclosed by prior United States Supreme Court decisions.

Guest statutes also may serve as the focal point of analysis. While the United States Supreme Court has summarily upheld the constitutionality of state guest statutes against equal protection challenges,[84] a number of state courts, applying substantial scrutiny, have found that the required showing of a higher standard of care in suits by guest passengers does not bear a "fair and substantial relation" to the asserted justifications of encouraging hospitality and preventing collusive suits against insurers. In some cases, the courts have expressly invoked the "fair and substantial relation" test,[85] but in all of the cases where the laws have been invalidated, the courts have found the asserted justifications wanting. Again, the result depends on whether the courts are willing to interpret the equal protection clause of the state constitution as requiring a higher degree of justification for the discriminatory treatment of guest passengers than is required under the equal protection clause of the federal Constitution.[86] Using the same approach, the Minnesota Supreme Court held that a provision of the survival statute providing that intentional torts do not survive the death of the tortfeasor was violative of the equal protection clause of the state constitution.[87]

---

84. *See* White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975), *appeal dismissed for want of substantial federal question*, 423 U.S. 805 (1975); Cannon v. Oviatt, 520 P.2d 883 (Utah 1974); *appeal dismissed for want of substantial federal question*, 419 U.S. 810 (1974).

85. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), and Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975).

86. In addition to California and Michigan, guest statutes have been invalidated by state courts in the following states: Idaho, Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Iowa, Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980); Kansas, Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Nevada, Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975); New Mexico, McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); North Dakota, Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Ohio, Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); South Carolina, Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979); Utah, Malan v. Lewis, P.2d (No. 17606, Utah 1984); Wyoming, Nehring v. Russell, 582 P.2d 67 (Wyo. 1978). Guest statutes have been upheld by state courts against constitutional challenges in the following states: Arkansas, White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975); Colorado, Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Delaware, Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Indiana, Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976); Oregon, Duerst v. Limbocker, 269 Ore. 252, 525 P.2d 99 (1974).

87. Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982).

In recent years, a number of states have enacted legislation designed to limit liability for medical malpractice, and some of these efforts have been held to run afoul of the state constitution. In *Carson v. Maurer*,[88] the New Hampshire Supreme Court, expressly invoking the "fair and substantial relationship" standard of review,[89] invalidated on state equal protection grounds the following provisions: (1) a requirement that an expert witness be an expert in the field at the time the defendant rendered the allegedly negligent care; (2) a two-year limitation period except for those whose actions were based upon the discovery of a foreign object in the injured person's body; (3) a ban on minors bringing a malpractice action within two years from the time the disability is removed, which tolling period was available to other minor plaintiffs; (4) a requirement of prior notice to the defendant in a medical malpractice action as a condition for bringing suit; (5) the abolition of the collateral source rule in medical malpractice actions; and (6) a provision for periodic payments in malpractice actions.[90] Limitations on the amount recoverable in malpractice actions have also been held to violate the North Dakota equal protection clause.[91] Particular provisions singling out malpractice actions for differential treatment have also been invalidated in other states.[92]

---

88. 120 N.H. 925, 424 A.2d 825 (1980).

89. *Id.* at 931–32, 424 A.2d at 830. "We now conclude that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test." *Id.*

90. The court also concluded that the invalid provisions of the law were not severable from the valid provisions and held the law to be invalid in its entirety. *Id.* at 945–46, 424 A.2d at 839. *But see* Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984); American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 816 (1984); Sibley v. Board of Supervisors of Louisiana State University, No. 84–C–0571, slip op. (La. Jan. 14, 1985).

91. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

92. *See* Kenyon v. Hammer, ___ Ariz. ___, 688 P.2d 961 (1984) (statute of limitations bar computed from time of injury rather than time of discovery); Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983) (shorter statute of limitations in wrongful death actions based on malpractice); Schwan v. Riverside Methodist Hosp., 6 Ohio St. 2d 300, 452 N.E.2d 1337 (1983) (limitations period in malpractice actions not tolled during minority); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (trial of certain issues by the judge rather than the jury); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (limitations period as applied to minors). However, in Nelson v. Krusen, 52 U.S.L.W. 2325 (Tex. Oct. 16, 1983) the Texas Supreme Court upheld the statute of limitations bar computed from the time of injury rather than from the time of discovery.

In a similar vein a requirement of notice to the governmental defendant in a tort action was held by the Michigan Supreme Court to intrude upon the state equal protection clause,[93] and the Montana Supreme Court held that a limitation on damages recoverable against the governmental defendant in a tort action denied equal protection to the plaintiff therein.[94] In recent years, some state courts have invalidated particular statutes of limitations provisions under the equal protection, due process, or "open courts" clauses of the state constitution.[95]

A final example of invalidation under a state constitution of a law governing the rights of parties in private litigation is the decision of the California Supreme Court in *Hale v. Morgan*.[96] There a state law imposed a civil penalty of $100 per day against a landlord who willfully deprived the tenant of utility services for the purpose of evicting him. In the case at bar, the literal application of the law would have required payment of $17,300 by an individual landlord to a tenant. The court held that insofar as the law required a mandatory, cumulative penalty, without regard to particular circumstances or the landlord's degree of fault, it was violative of due process.[97]

As stated at the outset of this discussion, the area of state economic and social regulation furnishes the best opportunity for state courts to provide constitutional protection far beyond that provided by the federal Constitution. Numerous cases have been reviewed in which state courts have given substantial scrutiny to particular economic and social regulations and have invalidated them, usually

93. Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972).

94. White v. State, 661 P.2d 1272 (Mont. 1983).

95. *See* Lankford v. Sullivan, 416 So. 2d 996 (Ala. 1982) (products liability statute of limitations violates due process); State Farm Fire & Casualty Co. v. All Electric, Inc., ____ Nev. ____, 660 P.2d 995 (1983) (different statute of limitations for suits against building contractors violates equal protection); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983) (different statute of limitations in product liability actions violates equal protection); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (special limitation period in actions against architect, engineer or contractor to recover damages for deficiency in design violates equal protection); Daugaard v. Baltic Cooperative Building Supply Association, 349 N.W.2d 419 (S.D. 1984) (statute of limitations bar in construction actions computed from the time of completion and in products liability actions computed from the time of delivery violates "open courts" provision).

96. 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978).

97. *Id.* at 405, 584 P.2d at 523, 149 Cal. Rptr. at 386.

under the due process and equal protection clauses of the state constitution. It should not be forgotten, however, that a number of other state courts continue to follow the very deferential approach to economic and social regulation favored by the United States Supreme Court. The point to be emphasized is that the capacity of the state constitution to serve as a source of supplemental protection of individual rights in this area is considerable. And, as illustrated by the many recent cases invalidating state laws regulating the rights of parties in civil litigation, the state courts may now be more disposed to utilize the state constitution to close the gap in protection left by the Supreme Court's highly deferential approach to the constitutionality of state economic and social regulation.

B. Privacy, Associational and Expression Interests

The capacity of the state constitution to serve as a source of constitutional protection of privacy and associational interests is precisely defined because the gap in protection left by the United States Supreme Court's decisions is clear. The Supreme Court has extended substantial protection to certain kinds of privacy and associational interests under the due process and equal protection clauses, but has made it clear that other of these rights will receive little or no protection under the federal Constitution. The Court has held that reproductive freedom, and marriage and family interests involve "fundamental rights," and thus, has generally invalidated state laws or governmental action interfering with these interests.[98] But the "right of privacy" has not been extended beyond those interests. The Supreme Court has summarily held that the federal Constitution does not protect either sexual freedom on the part of unmarried persons[99] or the use of drugs.[100] It has held that the

98. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (involving both reproductive freedom and marital privacy). Although the court in *Griswold* treated the "right of privacy" as an independent constitutional right, the Court in Roe v. Wade, 410 U.S. 113, 153 (1973), said that the "right of privacy" was a part of the "liberty" protected by substantive due process. Marriage and family interests were explicitly recognized as involving "fundamental rights" in Zablocki v. Redhail, 434 U.S. 374 (1978), and Moore v. East Cleveland, 431 U.S. 494 (1977).

99. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *sum. aff'g.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court).

100. Strictly speaking, the Court has refused to grant review in any of the cases where the state appellate court or the federal court of appeals has held that the federal Constitution does not protect the use of drugs. *See, e.g.*, State v. Smith, 93 Wash. 2d 329, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980).

states are not constitutionally required to facilitate the exercise of reproductive freedom, such as by providing medicaid funding for abortion.[101] It has protected the right of family members to live together in the same household[102] but has upheld the power of the states to limit the ability of unrelated persons to live together[103] in the same household. Thus, the critical question is whether state constitutions will be interpreted as providing protection for particular privacy and associational interests that the United States Supreme Court has held to be unprotected under the federal Constitution.

The pattern that emerges is that some state courts have decided to provide such additional protection, while others have not. New Jersey[104] and New York[105] have invalidated, on due process grounds, laws prohibiting sexual relationships between unmarried consenting adults, and Pennsylvania has done the same on equal protection grounds.[106] Other states, in contrast, have upheld such laws.[107] Challenges to prohibitions on drug use under the state constitution generally have been unavailing.[108] The only exception is Alaska which has held that the "right to privacy" clause of the state constitution precludes the state from sanctioning an individual's use of marijuana in the home.[109]

Some states have held that the state constitution protects the right of unrelated individuals to live together in the same household, contrary to the United States Supreme Court's holding in *Belle Terre*. Zoning laws requiring single-family occupancy and defining

101. Williams v. Zbaraz, 448 U.S. 358 (1980); Maher v. Roe, 432 U.S. 464 (1977).

102. Moore v. East Cleveland, 431 U.S. 494 (1977).

103. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

104. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977).

105. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980) (decided on federal constitutional grounds), *cert. denied*, 451 U.S. 987 (1981).

106. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980). The court used an equal protection analysis, focusing on the fact that the law prohibited consensual oral or anal sex by unmarried persons, while permitting the same by married persons.

107. *See, e.g.*, Kelly v. State, 45 Md. App. 212, 412 A.2d 1274 (1980), *aff'd. sub nom.* Neville v. State, 290 Md. 364, 430 A.2d 570 (1981); State v. Santos, 413 A.2d 58 (R.I. 1980).

108. See the cases cited in *Developments, supra* note 32, at 1431 n.8.

109. Ravin v. State, 537 P.2d 494 (Alaska 1975). The Alaska Supreme Court, however, has upheld all other restrictions on drug use. *See generally Developments, supra* note 107, at 1441.

single-family in terms of relationship by blood or marriage have been invalidated under the due process clauses of the state constitution in Michigan[110] and New Jersey,[111] and under the "right to privacy" clause of the California Constitution.[112] Michigan has also held that a zoning regulation that excluded all mobile homes from residential zones not designated as mobile home parks infringed on the due process clause of the state constitution.[113]

Other forms of privacy and associational interests have also been protected by state courts. The Supreme Court of California, relying on the "right to privacy" clause of the state constitution,[114] has held that the police could not obtain a depositor's bank records or credit charge records without a warrant.[115] The New York Court of Appeals has held that the due process clause of the New York Constitution requires that pretrial detainees in county jails be given contact visits of reasonable duration.[116] The New Jersey Supreme Court found a right under its constitution for a comatose person to be taken off an artificial life-support system.[117] Finally, some state courts have found that parents subject to termination of parental rights proceedings have greater guarantees under the state constitution, such as the right to counsel, than are afforded under the federal Constitution.[118]

---

110. Charter Township of Delta v. Dinolfo, 419 Mich. 253, 351 N.W.2d 831 (1984).

111. State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

112. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

113. Robinson Township v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981).

114. On the "right to privacy" clause of the California Constitution, see generally Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1982).

115. People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

116. Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188 (1979).

117. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). *Cf.* People v. Privitera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (California Supreme Court held that the "right of privacy" did not include the right of a terminally ill cancer patient to be treated with laetrile), *cert. denied*, 444 U.S. 949 (1979).

118. In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the United States Supreme Court held that due process did not require the appointment of counsel in all termination of parental rights cases involving indigent parents, and left the appointment of counsel in such cases to be determined by the courts on a case-by-case basis. Some state courts have held that counsel must be appointed in all cases involving termination of parental rights. *See* V.F. v. State, 666 P.2d 42 (Alaska

In the area of expression interests, there is really very little opportunity for the state constitution to serve as a source of additional protection because so much protection is already provided under the federal Constitution. Most of the cases asserting free expression claims under the state constitution involve access to privately-owned shopping centers or other facilities, which is not protected under the first amendment because of the "state action" requirement.[119] A right of access to privately-owned shopping centers under the free expression clause of the state constitution has been recognized in California,[120] Washington,[121] and Massachusetts.[122] A right to equal access to the facilities of a private university has been recognized in New Jersey[123] and Pennsylvania.[124] The state constitution also could be interpreted as providing additional protection with respect to particular forms of expression that the Supreme Court has held are not protected by the first amendment, such as obscenity,[125] or nude dancing in liquor establishments.[126] While no state court has yet held that obscenity is protected by the free expression clause of the state constitution,

---

1983); Reist v. Bay Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (1976) (plurality opinion). See also *In re* C.G., 637 P.2d 66 (Okla. 1981), where the Oklahoma Supreme Court held that the Oklahoma Constitution required the use of the "clear and convincing" standard of proof in termination of parental rights proceedings prior to the time that the United States Supreme Court held that this standard was required by the due process clause of the fourteenth amendment in Santosky v. Kramer, 455 U.S. 745 (1982).

119. Hudgens v. NLRB, 424 U.S. 507 (1976).

120. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the United States Supreme Court held that recognition of a right of access to privately-owned shopping centers under the state constitution did not violate the first amendment or due process rights of the shopping center.

121. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

122. Batchelder v. Allied Stores International, 388 Mass. 83, 445 N.E.2d 590 (1983).

123. State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982).

124. Commonwealth v. Tate, 495 Pa. 158, 431 A.2d 1382 (1981).

125. Miller v. California, 413 U.S. 15 (1973).

126. California v. LaRue, 409 U.S. 109 (1972) (twenty-first amendment qualifies the first amendment with respect to state regulation of liquor establishments).

the New York Court of Appeals and the Massachusetts Supreme Court have held that a ban on topless dancing in liquor establishments is violative of the free expression clauses of the state constitution.[127] Finally, particular questions of protection of expression could be resolved differently under the state constitution than they have been resolved by the United States Supreme Court under the first amendment.[128]

The most striking feature that emerges from analysis of state court decisions extending greater protection to privacy, associational and expression interests under the state constitution is that these cases are concentrated in relatively few states, California and New Jersey being the most prominent. This suggests that the major factor influencing the results in these cases has been the willingness of the particular state court to make value judgments about the relative importance of the conflicting individual and governmental interests contrary to the value judgments made by the United States Supreme Court. The results reached by the United States Supreme Court can only be explained in terms of that Court's value judgments as to the relative importance of the conflicting interests.[129] The same explanation is submitted for the results reached by state courts under the state constitution. The existence of a specific constitutional guarantee protecting privacy does not appear to be significant. California has a "right of privacy" provision, but New Jersey does not, and no cases invalidating state laws interfering with these interests have been decided in the number of other states that do have "right of privacy" provisions.[130] Unlike economic regulation cases, these cases do not lend themselves to explanation in terms of the degree of scrutiny that the court gives to the relationship between the law's provisions and the accomplishment of the law's asserted purpose. Rather, the courts have stressed the importance of the individual interest involved, and have found that the

127. Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 429 N.E.2d 765 (1981); Commonwealth v. Sees, 374 Mass. 532, 373 N.E.2d 1151 (1978).

128. In other words, the state courts could strike the constitutional balance in favor of expression in circumstances where the United States Supreme Court has struck the constitutional balance in favor of the asserted governmental interest. *See, e.g.*, Colten v. Kentucky, 407 U.S. 104 (1972).

129. *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) *with* Moore v. East Cleveland, 431 U.S. 494 (1977).

130. Eleven states have "right of privacy" provisions in their state constitutions. *See* Linde, *supra* note 3, at 182 n.41.

asserted governmental interests were not of sufficient importance to justify interference with the individual interest.[131]

The submission, then, is that some state courts have interpreted the state constitution as affording greater protection to privacy and associational interests[132] than is afforded by the federal Constitution because they have made a different value judgment about the relative importance of the conflicting individual and governmental interests. In this sense, these courts are more "activist" than the United States Supreme Court has been, and are more willing to uphold claims of individual autonomy. As a result, in some states, the state constitution has been interpreted as providing protection for *particular* privacy and associational interests that the United States Supreme Court has held to be unprotected under the federal Constitution.[133]

C. Equality of School Financing and Medicaid Funding For Abortions: A Study in Reactive State Constitutional Interpretation

As discussed earlier, state constitutional law in practice is reactive to federal constitutional law. In most cases involving constitutional challenges under the state constitution, the real issue is whether the state court will reach a different result under the state constitution than the United States Supreme Court has reached under the federal Constitution. The responsiveness of state constitutional interpretation appears most clearly in the areas of equality of school financing and medicaid funding for abortion. Here, the challenges under the state constitutions have been brought in the wake of Supreme Court decisions squarely rejecting such challenges under the federal Constitution. This reactive nature is demonstrated most cogently in these two areas because the same kind of

131. Where the United States Supreme Court has reached a contrary result, it has been because it struck the balance in favor of the asserted governmental interest over the individual interest. *See supra* note 129 and accompanying text.

132. There has been relatively little additional protection to expression interests under the state constitutions because of the extensive amount of protection to expression interests that already is afforded under the federal Constitution. *See supra* notes 119–28 and accompanying text.

133. Particular individual interests are sometimes protected by specific provisions of the state constitution. Justice Linde notes, for example, that Georgia and Oregon have specific provisions commanding humane treatment of persons arrested or in prison. Linde, *supra* note 3, at 182.

value determinations that provided the foundation for the United States Supreme Court decisions were also the basis for the state court decisions. To put it another way, there was nothing distinctive about the *process* by which the United States Supreme Court, on the one hand, and the state courts, on the other hand, decided whether equality of school financing and medicaid funding for abortions were required by the respective federal and state constitutions. With regard to equality of school financing, the United States Supreme Court made the value judgment that the federal Constitution should not be used to require the states to restructure their systems of school financing, despite the inequities that property-based school financing systems produce for students attending school in property-poor districts. The state courts had to make the same kind of value judgment as to restructuring when the challenge was brought under the state constitution. The results in state court cases, which saw some state courts upholding and others rejecting such challenges, can only be explained in terms of differing value judgments as to the propriety of using the state constitution to require restructuring of the system of school financing. In the matter of medicaid funding for abortion, the United States Supreme Court decided that the state, when acting as dispenser of benefits, could advance the interest in protecting potential human life by refusing to provide medicaid funding for abortion. The state courts that have invalidated such restrictions under the state constitution simply made the opposite decision.

Constitutional challenges to systems of school financing involve what may be called restructuring litigation. Here, a holding of unconstitutionality does not operate negatively so as to prevent the state from interfering with individual rights.[134] It goes beyond a mere prohibition against certain conduct in that it requires the state to extend certain benefits to an excluded group[135] and, more importantly, necessitates a fundamental change in the method by which the state allocates its resources. There will be a con-

134. For example, the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), prohibited state restrictions on a woman's ability to obtain an abortion. The effect of the holding was to prohibit the states from enforcing anti-abortion laws, but the decision did not require the states to do anything affirmatively.

135. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (state may not deny welfare benefits to resident aliens); Shapiro v. Thompson, 394 U.S. 618 (1969) (state may not impose durational residency requirement as a condition for eligibility for welfare benefits).

stitutionally required reallocation of state resources, and possibly a significant alteration of state taxation and fiscal policy. Thus, the value choice is very clear. There is no doubt that systems of school financing based on school district wealth work to the disadvantage of students living in property-poor districts by providing these students with less in the way of tangible educational benefits[136] than is provided to students living in property-rich districts. But if such systems of school financing are declared to be unconstitutional, there will have to be a judicially-ordered restructuring of school financing, with far-reaching resource allocation and fiscal consequence.[137]

In *San Antonio Independent School District v. Rodriguez*,[138] the United States Supreme Court determined that the fourteenth amendment's equal protection clause would not be used to require a restructuring of state systems of school financing. Justice Powell, writing for the Court, was very explicit in regard to this value judgment:

> [T]his case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause. . . .[139]

Justice Powell also emphasized the complexity of the problems of school financing, noting that: "[I]n such a complex arena in which

136. Tangible educational benefits refer to the quantifiable inputs of education, such as course offerings and teachers' salaries. While states defending property-based systems of school financing argue that it is impossible to quantify "equality of educational opportunity," it cannot be denied, as one court has emphasized, that there is a direct relationship between per pupil expenditures and the breadth and quality of educational programs. Horton v. Meskill, 172 Conn. 615, 634–35, 376 A.2d 359, 368 (1977). For further discussion of the argument that "money doesn't matter," see Washakie County School District No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

137. There also must be ongoing judicial supervision of equalizing efforts.

138. 411 U.S. 1 (1973).

139. *Id.* at 40 (footnote omitted).

no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."[140] Finally, Justice Powell saw federalism considerations as militating against "constitutionalizing" the matter of school financing under the federal Constitution:

> [I]t 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 . . . it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[141]

In order to implement this value judgment and uphold the challenged system of school financing, it was necessary for the Court to remove the case from a "strict scrutiny" standard of review. The lower court had invoked "strict scrutiny" and had invalidated the Texas system of school financing on the ground that it did not advance "compelling governmental interests" by the "least drastic means."[142] The Supreme Court noted: "Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative classifications that interfere with fundamental constitutional rights or that involve suspect classifications."[143] The Court avoided application of the "strict scrutiny" standard of review by holding that classifications on the basis of school district wealth were not "suspect,"[144] and that education did not involve a "fundamental right" for purposes of the two-tier standard of equal protection review.[145] On the latter point, the Court held that what constituted a "fundamental right" for equal protection purposes did not depend on the relative importance of the right in relation to other rights, but on whether the right was "explicitly or implicitly guaranteed by the Constitution,"[146] which the

140. *Id.* at 41 (footnote omitted).

141. *Id.* at 44.

142. *Id.* at 16–17.

143. *Id.* at 16 (footnotes omitted).

144. *Id.* at 18–28.

145. *Id.* at 29–37.

146. *Id.* at 33–34.

right to education was not.[147] Thus, the challenged system of school financing was subject to review under the more deferential "rational basis" standard, and was found to be "rationally related" to the state's interest in maintaining local control over school financing.[148]

The Supreme Court's decision in *Rodriguez* set the stage for challenges to systems of school financing under the state constitution. At the time of *Rodriguez*, the California Supreme Court, in *Serrano v. Priest (Serrano I)*,[149] had held the California system of school financing was violative of equal protection. That court's analysis was based entirely on the federal Constitution, but in a footnote the court also noted that the same result would prevail under the state constitution.[150] After subsequent legislative modifications in the system of school financing took place, the California Supreme Court held that these modifications did not cure the inequality found to exist in *Serrano I*.[151] It then rejected the Supreme Court's analysis in *Rodriguez*,[152] applied strict scrutiny, and invalidated the system of school financing under the equal protection clause of the California Constitution.[153]

A number of other state courts have invalidated systems of school financing under a state constitution in the wake of *Rodriguez*, but even more state courts have upheld the financing system. In addition to California, property-based systems of school financing have been invalidated in New Jersey,[154] Connecticut,[155] Washington,[156] Arkansas,[157] Wyoming,[158] and West Virginia.[159] Constitutional

147. *Id.* at 35–39.

148. *Id.* at 44–45.

149. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

150. *Id.* at 596 n.11, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

151. Serrano v. Priest (*Serrano* II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

152. The California Supreme Court found *Rodriguez* to have been based on "federalism constraints." *Id.* at 766–67, 557 P.2d at 952, 135 Cal. Rtpr. at 367–68.

153. *Id.* at 776–77, 557 P.2d at 958, 135 Cal. Rptr. at 374.

154. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *supplemented*, 63 N.J. 196, 306 A.2d 65 (1973), *cert. denied*, 423 U.S. 913 (1975). For further proceedings see Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976); Karcher v. Byrne, 79 N.J. 358, 399 A.2d 644 (1979).

155. Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

156. Seattle School Dist. No. One v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc).

157. Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983).

challenges to such systems of school financing have been squarely rejected in New York,[160] Ohio,[161] Arizona,[162] Colorado,[163] Georgia,[164] Idaho,[165] Oregon,[166] Maryland,[167] and Michigan.[168] It is difficult to explain the differing results in these cases other than in terms of differing value judgments as to the propriety of using the state constitution to require a restructuring of the school financing system.

Every state constitution has an "education clause," and virtually all of these clauses impose an affirmative duty on the legislature to establish and maintain public schools.[169] Typically, these clauses refer to the duty of the legislature to "establish a thorough and efficient system of free public schools,"[170] or to "maintain and establish a public school system,"[171] or to make "ample provision for the education of all children."[172] All of these provisions were promulgated at some time in the past or trace back to predecessor provisions in earlier constitutions.

The existence of these provisions could influence constitutional challenges to systems of school financing under the state constitution in two ways. First, they could provide an independent ground of challenge, apart from equal protection. It could be contended that

158. Washakie County School Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

159. Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979).

160. Bd. of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1138–39 (1983).

161. Bd. Educ. of Cincinnati v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980).

162. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973) (en banc).

163. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

164. McDaniel v. Thomas, 248 Ga. 6342, 285 S.E.2d 156 (1981).

165. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

166. Olsen v. State *ex rel* Johnson, 276 Or. 9, 554 P.2d 139 (1976).

167. Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983).

168. East Jackson Public Schools v. State, 133 Mich. App. 132, 348 N.W.2d 303 (1984). The author was counsel for the unsuccessful plaintiffs in this case.

169. See the discussion and review of state constitutional provisions in *Developments, supra* note 31, at 1446–47.

170. *See* N.J. & W. VA. CONSTS.

171. *See* ARIZ., MICH. & N.Y. CONSTS.

172. *See* WASH. CONST.

these provisions impose on the state the obligation to provide *equality* of educational support, so that a system of school financing that results in disparities in the amount of public funds available for the education of different children, depending on the property wealth of the district in which those children reside, violates the education clause of the state constitution.[173] Second, the existence of the education clause means that the right to an education is specifically guaranteed by the state constitution. Therefore, if a state court follows the *Rodriguez* text of "explicitly" or "implicitly guaranteed by the constitution," education would be a "fundamental right" for equal protection purposes, and the constitutionality of the school financing system would be tested under the "strict scrutiny" standard of review.

What has happened in practice is that state courts have simply disagreed on the impact of the education clause on the state's obligation to provide equality of school financing and on whether education is a "fundamental right" for purposes of equal protection analysis. Those state courts that have invalidated property-based systems of school financing have emphasized the state's obligation to support public education, and have found that the existence of substantial inequalities in the amount of public funds available for the education of children living in different school districts was inconsistent with the nature of that obligation. Some of these courts based their decisions primarily on the education clause,[174] while others related the state's obligation under the education clause to the denial of equal protection resulting from the disparities in funds available for the education of children residing in different school districts.[175] On the other hand, the state courts that have upheld the

173. This is a distillation of the argument that the author presented in the Michigan litigation. *See supra* note 168.

174. *See* Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) (*see also supra* note 154); Seattle School Dist. No. One v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978). In Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979), the court found that as a result of inequities in school financing, school children in a number of districts were not receiving a "thorough and efficient education." *Id.* at 878. The court held that the education clause required that the legislature quantify standards for a "thorough and efficient education," and that the quality of education provided by the different school districts be tested against those standards. *Id.*

175. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977); Washakie County School Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

constitutionality of property-based systems of school financing have interpreted the education clause as merely requiring the state to provide a "minimally adequate education" for all children and not as imposing any obligation of equality in funding.[176] Since all states have an education clause in the state constitution, and since these clauses generally have similar terminology and historical origin, there is no objective way to explain the differing interpretations of the education clause in the context of equality of school financing.

Similarly, the state courts that have invalidated the challenged system of school financing have found education to be a "fundamental right" and thus have invoked the "strict scrutiny" standard of review.[177] Those courts that have upheld the challenged system, in contrast, have invoked the "rational basis" standard of review, and like the United States Supreme Court in *Rodriguez*, have found the system to be rationally related to promoting local control over school financing. Some courts have simply cited *Rodriguez* for the proposition that education does not involve a "fundamental right."[178] Other courts, recognizing the doctrinal bind that would result if they followed the *Rodriguez* test, have concluded that the test is not appropriate to determine "fundamental rights" for purposes of the state constitution's equal protection clause.[179] Either way, the rational basis standard of review has been applied, and the challenged system of school financing has been upheld. Again, there is no objective way in which to explain the differing conclusions of the state courts as to whether education is a "fundamental right" for purposes of the equal protection clause of the state constitution.

The only plausible explanation for the different results in challenges to property-based systems of school financing under the state

176. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); East Jackson Public Schools v. State, 133 Mich. App. 132, 348 N.W.2d 303 (1984); Bd. of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1138 (1983); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

177. In Dupree v. Alma School Dist. No. 30, 379 Ark. 340, 651 S.W.2d 90 (1983), however, the court invalidated the system of school financing under the purportedly less restrictive "rational basis" standard of review.

178. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

179. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983).

constitution is that the different state courts have made different value judgments as to the propriety of using the state constitution to require a restructuring of the system of school financing. These state court evaluations are no different than the value judgments made by the United States Supreme Court with respect to the fourteenth amendment's equal protection clause in *Rodriguez*. Thus, state constitutional law in this area is clearly reactive to federal constitutional law. Some state courts have followed the lead of the United States Supreme Court in *Rodriguez* as to the "restructuring" value judgment, while others have not.

The same reactive nature of state constitutional interpretation appears in state court decisions dealing with challenges under the state constitution to prohibitions on medicaid funding for abortion. In *Maher v. Roe*,[180] *Harris v. McRae*,[181] and *Williams v. Zbaraz*,[182] the United States Supreme Court held that bans on medicaid funding for abortions were not contrary to the due process or equal protection clauses of the federal Constitution.[183] Although abortion had been held to be a "fundamental right,"[184] the Court held in these cases that the state is not required to "subsidize" the exercise of this "fundamental right" by providing medicaid funding for abortions, notwithstanding the fact that it provided medicaid funding for other medical procedures. The state could constitutionally provide medicaid funding for pregnancy, but not for abortion, because the states may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[185] In effect, the Court held that while the state, when acting as regulator, could not advance the interest in protecting potential life until the stage of viability had been reached,[186] it could, when acting as dispenser of benefits, advance that interest from the moment of conception by denying medicaid funding for abortion.[187]

180. 432 U.S. 464 (1977).

181. 448 U.S. 297 (1980).

182. 448 U.S. 358 (1980).

183. *Maher*, 432 U.S. at 470; *Harris*, 448 U.S. at 317–18; *Zbaraz*, 448 U.S. at 369.

184. Roe v. Wade, 410 U.S. 113 (1973).

185. 432 U.S. at 474.

186. *Roe v. Wade*, 410 U.S. at 113.

187. As Justice White stated, concurring in *Harris v. McRae*:

Maher held that the government need not fund elective abortions because withholding funds rationally furthered the State's legitimate interest in normal

Following these cases, the denial of medicaid funding for abortion has been challenged as an intrusion on the state constitution in a few states. The challenge has been sustained, as applied to all abortions in California[188] and Massachusetts,[189] and as applied to therapeutic abortions in New Jersey.[190] The Massachusetts and New Jersey decisions clearly follow the United States Supreme Court decisions in *Maher* and *Harris*, but strike the constitutional balance differently. The Massachusetts Supreme Court based its decision on the due process clause of the state constitution, and concluded that the ban on medicaid funding for abortions "impermissibly burdens a right protected by our constitutional guarantee of due process."[191] It focused on the discrimination effected by the denial of medicaid funding for abortions, and said that in the allocation of governmental benefits, the state, "may not use criteria which discriminatorily burden the exercise of a fundamental right."[192] The court also expressly engaged in "interest balancing." It balanced the state's interest in the protection of potential human life against the pregnant woman's interest in having an abortion, and took the position that, "we think the balance in this case to be decisively in favor of the individual right involved."[193] In other words, contrary to the value judgment made by the United States Supreme Court in *Maher* and *Harris*, the Massachusetts Supreme Court made the

---

childbirth. We sustained this policy even though under *Roe v. Wade*, the government's interest in fetal life is an inadequate justification for coercive interference with the pregnant woman's right to choose an abortion, whether or not such a procedure is medically indicated. We have already held, therefore, that the interest balancing involved in *Roe v. Wade* is not controlling in resolving the present constitutional issue.

448 U.S. at 329 (White, J., concurring).

188. Comm. to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

189. Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981).

190. Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982). In Planned Parenthood Ass'n v. Dep't of Human Resources, ____Or.____, 687 P.2d 785 (1984), the Oregon Supreme Court invalidated a departmental regulation restricting medicaid funding for abortion on the ground that the regulation was not authorized by statute. The court of appeals had invalidated the rule under the equal protection clause of the state constitution.

191. 382 Mass. at 646, 417 N.E.2d at 397.

192. *Id.* at 652, 417 N.E.2d at 401.

193. *Id.* at 659, 417 N.E.2d at 404 (footnote omitted).

value judgment that even when the state was acting as dispenser of benefits, it could not advance the interest in protecting potential life over the woman's interest in exercising her right to obtain an abortion.

The New Jersey Supreme Court based its decision on the equal protection clause of the state constitution and focused on the discrimination with respect to *health*. It stated: "Given the high priority accorded in this State to the rights of privacy and health, it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions."[194] The court then expressly engaged in "interest balancing," but, given its focus on health, it struck the balance in favor of the individual interest as to therapeutic abortions, but in favor of the asserted governmental interest as to non-therapeutic abortions. Thus, as a matter of equal protection under the state constitution, the state was required to fund therapeutic abortions, but was not required to fund non-therapeutic abortions.[195]

The California Supreme Court's decision that the state was required under the state constitution to provide medicaid funding for all abortions at first glance appears less responsive to United States Supreme Court decisions. The California Supreme Court has been more of an "activist" than any other state court in relying on the state constitution to provide constitutional protection for individual rights beyond that which the Supreme Court has found to inhere in the federal Constitution.[196] In this case, California drew on its prior

194. *Byrne*, 91 N.J. at 307, 450 A.2d at 935.

195. The court stated as follows:

> This balancing test is particularly appropriate when, as here, the statutory classification indirectly infringes on a fundamental right. In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable. Elective, non-therapeutic abortions, however, do not involve the life or health of the mother, and the State may pursue its interest in potential life by excluding those abortions from the Medicaid program.

Id. at 310, 450 A.2d at 936–37 (citations and footnote omitted).

196. It may be noted in this regard that in 1972, the California Constitution was amended to provide expressly that, "the rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CALIF. CONST. art. I, § 24. However, the California Supreme Court has emphasized that this provision was a "mere affirmance of existing law." People v. Brisendine, 13 Cal. 3d 528, 551, 531 P.2d 1099, 1114, 119 Cal. Rptr. 315, 330 (1975).

decisions involving discrimination in the allocation of governmental benefits. Those decisions, said the court, had established a three-part standard "for judicial analysis of restrictions, like those here at issue, which exclude from governmental benefit programs potential recipients solely on the basis of their exercise of constitutional rights."[197] Under this standard, the state had the burden of establishing that: (1) the condition relates to the purpose of the legislation which confers the benefit, (2) the utility of imposing the condition must manifestly outweigh any resulting impairment of constitutional rights, and (3) there were no less drastic means by which the purpose could be advanced.[198] In applying this standard, the court put "particular emphasis upon the second prong of the test in which it must weigh the utility of the funding restrictions against the resulting impairment to the woman's right of procreative choice."[199] In this regard, the court noted that the right to privacy was specifically guaranteed by the California Constitution, and that the denial of medicaid funding would have the practical effect of impairing the woman's exercise of her right to have an abortion. It then balanced the woman's right to reproductive freedom against the state's interest in protecting potential human life, and "conclude[d] that the alleged 'benefits' which flow from [the ban on medicaid funding for abortion] in no sense 'manifestly outweigh' the resulting impairment of constitutional rights."[200] While the California Supreme Court followed an analysis that was derived from its prior decisions interpreting the state constitution, it too ended up by balancing, within the framework of that analysis, the pregnant woman's interest in exercising her right to obtain an abortion against the state's interest in protecting potential human life.

In essence, these state courts have made a different value judgment than the United States Supreme Court has made in regard to the constitutional permissibility of the denial of medicaid funding for abortion. The Supreme Court has made the value judgment that, as far as the federal Constitution is concerned, the state, when acting as dispenser of benefits, can advance the interest in protecting potential human life over the woman's interest in exercising her

197. Comm. to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 265, 625 P.2d 779, 786, 172 Cal. Rptr. 866, 873 (1981).

198. *Id.* at 265–66, 625 P.2d at 786, 172 Cal. Rptr. at 873.

199. *Id.* at 270, 625 P.2d at 789, 172 Cal. Rptr. at 876.

200. *Id.* at 282, 625 P.2d at 797, 172 Cal. Rptr. at 884.

right to obtain an abortion.[201] Massachusetts[202] and California[203] have made the opposite value judgment under the state constitution, and New Jersey[204] has taken a middle ground, holding that the state may refuse to fund non-therapeutic abortions, but constitutionally is required to fund therapeutic ones. Again, as in the matter of equality of school financing, some state courts have made value judgments that have differed from that made by the United States Supreme Court. As a result, in these states, the ban on medicaid funding for abortions is violative of the state constitution, and the state constitution has been construed to provide greater protection for the exercise of the right to obtain an abortion than is provided by the federal Constitution.

IV. Conclusion

It has been the thesis of this article that the function of the state constitution is to supplement the protection to individual rights afforded by the federal Constitution and to provide additional protection against state governmental action beyond that which the United States Supreme Court has found to inhere in the federal Constitution. It is further contended that this function is very significant in the United States today. While there is a finite quantum of constitutional protection that may be afforded to individual rights, and while the federal Constitution has already been interpreted as extending a substantial amount of protection to individual rights, there is still a *gap in protection* that the state constitutions may fill. This gap is substantial, and state courts have the opportunity to expand considerably the scope of constitutional protection to individual rights.

This article also explored the operation in practice of the state constitution as a supplemental source of constitutional protection of individual rights in some of the major areas of constitutional litigation. This analysis has revealed that state constitutional law is reactive to federal constitutional law in the sense that in most cases involving constitutional challenges under the state constitution, the real issue is whether the state court will reach a different result

201. *See supra* notes 180–87 and accompanying text.

202. *See supra* notes 181–93 and accompanying text.

203. *See supra* notes 196–200 and accompanying text.

204. *See supra* notes 194–95 and accompanying text.

under the state constitution than the United States Supreme Court has reached under the federal Constitution. With respect to the constitutional protection of individual rights, the process of constitutional interpretation by the state courts is the same as the process of constitutional interpretation by the United States Supreme Court. The result in the state courts, as in the Supreme Court, frequently depends on a value judgment concerning the relative importance of conflicting individual and governmental interests, or as to whether a particular kind of governmental action, such as economic and social regulation, will be subject to substantial judicial scrutiny.

Finally, this analysis has revealed a "mixed picture" among the state courts. In a number of states, it would not appear that the state constitution has been interpreted as providing much or any more protection to individual rights than is provided under the federal Constitution. However, some state courts have been very active in utilizing the state constitution to provide greater protection to individual rights, and some state courts have done so in some areas, although not in others. In the aggregate, there are a large number of state court decisions that have interpreted the state constitution as providing greater protection for individual rights than is provided by the federal Constitution.

The state constitution thus has great *potential* as a supplemental source of constitutional protection of individual rights. It remains to be seen whether that potential will be realized.