
COURTS AS CHANGE AGENTS:
DO WE WANT MORE—OR LESS?

LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS. By Emily Zackin. Princeton, N.J.: Princeton University Press. 2013. Pp. ix, 234. \$29.95.

*Reviewed by Jeffrey S. Sutton**

In claiming that Americans are looking for rights in all the wrong places, Professor Emily Zackin targets two flawed mindsets: (1) that the exclusive source of new individual rights is the federal Constitution, as opposed to the state constitutions; and (2) that constitutional rights in general are exclusively negative, just libertarian prohibitions on governmental action, not affirmative calls for the government to act.

The first point returns to a once dominant, then forgotten, now reemerging, insight — that constitutional rights do not originate solely in the U.S. Constitution or come only from decisions of the U.S. Supreme Court. There are fifty-one constitutions and fifty-one high courts, and all of them protect a wide variety of individual rights. The second point, the central thesis of Zackin's book and the useful insight offered in it, acknowledges that the American constitutional law tradition focuses on *negative* protections — structural and individual-rights limitations on government — but claims that this perspective does not describe that tradition in full. To get the full picture, she urges, one must account for a strain of *positive* constitutional rights dating from the nineteenth century and found in most state constitutions, rights that operate by compelling governments to act, not by prohibiting them from acting. To support the point, Zackin offers three examples of positive-rights traditions in the states' constitutions: the right to a free and adequate public education, the rights to safe working conditions and fair pay, and the right to a clean environment. The book purports to tell what is, not what should be. But some will take Zackin's description to suggest, if not to call for, a norm-changing view: that the American constitutional tradition ought to account for such positive rights and appreciate the possibility of more.

This last possibility prompts two competing reactions. The first calls to mind an incident from my youth. When I was about ten, it rained day after day for a week or so. After the rain had saturated the

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ground, the water began to make its way into our basement through two cracks in the wall. Before long, the basement floor was wet and covered with water. My brothers and I started a brigade, filling buckets of water in the basement and dumping them outside. Frustrated by our lack of progress in stemming the rising tide (and oblivious to the possibility that the water dumped outside would soon migrate inside), we grew weary. I suggested that this project might be a lot easier if we knew the full scope of the task ahead. So I took a hammer and a chisel and widened the cracks in the wall, replacing the dripping water with a torrent. Now, I thought, we could relax, wait until the water had stopped coming in, then complete the task of bailing out the basement after we knew exactly what we had to deal with. The water did not stop — at least not until it was about three feet deep, apparently at an equilibrium point between the water inside and outside the house.

That was my first encounter with the principle that more is not always better — that you cannot flood your way out of a deluge. Where some see saturation when it comes to judicially enforceable constitutional rights in America circa 2014, others see room for more. Count me as a skeptic when it comes to the idea that this day and age suffers from a shortage of constitutional rights.

But I have another reaction. Is it possible that the judicialization of so many American policies through the U.S. Supreme Court started in part because the state courts and the state legislatures failed to perform their independent roles in respecting and enforcing individual rights? Is it possible that a revival of state constitutionalism, even one with positive rights, would simultaneously return us to something approximating the original design and ease the pressure on the U.S. Supreme Court to be a vanguard rights innovator in modern America?

So which is it? Does state constitutionalism usefully offer a new source for more constitutional rights, including rights that impose affirmative, not just prohibitive, duties on government? Or does this cure embrace the disease and spread its symptoms? For reasons small and large, I favor a return to a world in which the state courts and state legislatures are on the front lines when it comes to rights innovation, making me open to Zackin's thesis and, yes, vulnerable to the charge that a temporary flood cannot bail us out of a deluge.

I. AMERICA'S CHANGE AGENTS

Zackin's book got me to thinking. Who are the leading change agents in American society? Who *should* be the leading change agents in American society? The states or the federal government? The legislatures or the courts?

Whichever way one leans in answering these questions, one cannot deny that the balance of change-agent power has evolved. No one

disputes that the role of the federal government in facilitating change has grown over the last seventy-five years. And no one disputes that the role of the U.S. Supreme Court in facilitating change has likewise grown — so much so that it is fair to ask whether *the* leading change agent in American society in some years has been the Supreme Court. This evolution poses risks for the Supreme Court, American self-government, and the creation of sound policy, raising concerns about whether the current approach is optimal and whether the current trajectory is sustainable. Zackin's push for a greater appreciation of the positive-rights tradition in state constitutions offers a new reason for thinking of state courts and legislatures as potent forces for change. Before addressing her thoughts on that score, let me take a brief historical excursion into the roles of the national and state governments, and the legislatures and the courts, as change agents.

The study of the separation of powers is the study of the rules for creating and impeding change, the study of who, not what — of who makes the game-changing decisions in society, not what those decisions happen to be. The charters of American government divide power on a horizontal axis (among the legislative, executive, and judicial branches) and on a vertical axis (between the national government and the states). In allocating power, America's fifty-one constitutions thus purport to lay out who can do what and who can block whom, all of course on behalf of the indisputable principal in American government: the people.

As written, the U.S. Constitution was *not* designed to facilitate change. To the extent the Framers thought there would be a change agent at the national level, they thought it would be Congress. Yet they gave the legislature only a modest policymaking portfolio, a series of enumerated powers over eminently national issues. What little they gave with one hand they nearly took away with the other. They divided powers in a range of ways to slow, if not halt, policy initiatives: a two-headed legislature with two opportunities, not one, to block legislation; a President with veto power over Congress; and a life-tenured Court with nullification power over both of them. As Commander in Chief, the President had a pulpit from which to argue in favor of change, but few nonmilitary powers to make it happen and fewer still to go it alone. The Court did not even have a pulpit (or for that matter its own building until 1935¹) and was bequeathed the modest role of blocking (not facilitating) change through enforcement of the written structural limits on power and of the individual rights guarantees included in the original Constitution and the Bill of Rights. The point

¹ See *The Court Building*, SUP. CT. U.S., <http://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Feb. 2, 2014), archived at <http://perma.cc/EG3P-TSWB>.

of this design was not to spark change but to impede it, or at most to allow it to evolve slowly. Proud of their work, the Framers made it nearly impossible to alter, even when alterations in society occurred. A three-quarters-of-the-states threshold for amending the Constitution is a recipe for entrenchment, not up-to-date adaptation.

As written, the state constitutions were change incubators. State legislatures possessed not jealously ceded powers but all lawmaking power within their territories as inherited from the British Crown at the time of the Revolution. Yes, governors and state courts could block change, just as Presidents and federal courts could block change at the national level through comparable separation-of-power limitations. That was not surprising, as the Framers modeled nearly every feature of the federal charter after the state charters. But largely homogeneous cultures created by the smaller territories of the states and the shared circumstances of the birth of each state created populations (and governors and courts) congenial to similar worldviews and thus in the main to similar views about policy.² Unlike the largely rigid federal Constitution, moreover, the state constitutions were not fixed. State constitutions were readily amenable to adaptation and change, as most of them could be amended through popular majoritarian votes and all of them could be amended more easily than the federal charter.

Over the last three-quarters of a century, two developments altered the comparative advantages of the national and state governments when it comes to taking the lead on change. Both involved the U.S. Supreme Court. The first occurred in the 1930s and 1940s when the Court removed many, if not most, limits on congressional power,³ allowing Congress to regulate virtually all policymaking spheres — economic, social, criminal. The New Deal decisions made the national legislature a formidable force for change, one with a nearly horizonless portfolio.

The second development occurred from the 1950s through the early 1970s when the Court incorporated (most of) the Bill of Rights through the Fourteenth Amendment and made these rights applicable to the states, expanding the meaning of most of the guarantees in the process.

² See GORDON S. WOOD, *THE IDEA OF AMERICA* 237 (2011) (noting that the framing of the U.S. Constitution in 1787 went against the prevailing wisdom at the time — credited, for the most part, to Montesquieu — “that republics were supposed to be small in size and homogeneous in character,” a description that might have fit the individual states but that certainly did not fit the nation as a whole); see also CHARLES STEWART GOODWIN, *A RESURRECTION OF THE REPUBLICAN IDEAL* 36 (1995) (“[Montesquieu’s] idea was that small units constituted the optimally governable state . . . His contention was that with smallness came a greater homogeneity of interests and of demography, the best environment for self-government.”).

³ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (declaring the National Labor Relations Act constitutional and greatly enlarging congressional power under the Commerce Clause).

This stage differed from the New Deal era when the Court removed limits on congressional power, and it differed from the earlier post-*Lochner* era when the Court lowered the barriers to change imposed by the freedom of contract and other constitutional guarantees. The Warren Court instead transformed the Court from a by-then-diminished change opponent to a powerful change proponent. Instead of using its power to say what the law is to impede new policies, the Court used that power in several cases to further or create new policies. In some instances, the Court originated these policies itself. *Miranda v. Arizona*,⁴ *Goldberg v. Kelly*,⁵ and *Reynolds v. Sims*⁶ all come to mind. In other instances, it rode a rising, sometimes cresting, wave of policy innovation, expediting change already in the works and already spreading to one degree or another in the states. Think of *Loving v. Virginia*,⁷ *Mapp v. Ohio*,⁸ *Gideon v. Wainwright*,⁹ *Griswold v. Connecticut*,¹⁰ and *Eisenstadt v. Baird*.¹¹ And in still other instances, it resolved a debate among the states at a time when it was not clear how or when the states would resolve the controversy. Think *Roe v. Wade*.¹²

If power is a zero-sum game, one set of agents of the people (the states) lost from the 1930s through the early 1970s and another set of agents of the people (the federal government) won. The power to regulate commerce broadly is the power to preempt state laws broadly, giving force to most state lawmaking initiatives only at the indulgence of Congress. And the Court's broad interpretations of the Fourteenth Amendment and other federal rights guarantees meant that state legislative, executive, and judicial authority would have force only as long

⁴ 384 U.S. 436 (1966) (requiring law enforcement officials conducting custodial interrogations to advise suspects of their rights to remain silent and to obtain an attorney).

⁵ 397 U.S. 254 (1970) (holding that the Due Process Clause requires a full evidentiary hearing before the government may deprive recipients of their welfare benefits).

⁶ 377 U.S. 533 (1964) (holding that state legislative districts must be apportioned equally through a "one person, one vote" requirement, *id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)) (internal quotation mark omitted)).

⁷ 388 U.S. 1 (1967) (holding that Virginia's race-based marriage law violated the Fourteenth Amendment).

⁸ 367 U.S. 643 (1961) (extending the exclusionary rule for evidence obtained in violation of the Fourth Amendment to the states).

⁹ 372 U.S. 335 (1963) (requiring state courts to provide counsel to indigent criminal defendants).

¹⁰ 381 U.S. 479 (1965) (invalidating under the Due Process Clause of the Fourteenth Amendment a state law that criminalized the use of contraceptives).

¹¹ 405 U.S. 438 (1972) (invalidating under the Equal Protection Clause a state law that prohibited the distribution of contraceptives to unmarried people).

¹² 410 U.S. 113 (1973) (establishing a constitutional right to obtain an abortion); *see also* Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) ("*Roe*, on the other hand, halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.").

as the Court declined to exercise its considerable judicial review powers over state authority. As a matter of policy, much of this may have been for the good and indeed the states in the Jim Crow era may have brought this diminishment of authority upon themselves. Who knows? It is never easy to weigh the seen benefits and weaknesses of constitutionalizing an issue against the unseen narrative of what might have been. Be that as it may, constitutional structure concerns who, not what, and the question is who should be the leading change agents going forward.

Since the death of the Federalist and the Anti-Federalist parties, it is the rare national political party that has taken a consistent stand on the roles of Congress and the Supreme Court as change agents. Most interest groups are the same. They care first and foremost about what the decision is, not who is making it — and seem to care about who is making the decision only to the extent that it could extend the reach of a preferred policy. Most interest groups (and most Americans) are plenty happy to see Congress nationalize an issue in their favor or, still better, to see the national Court sideline a policy opponent through a constitutional ruling. The constant for political parties, interest groups, and most Americans is opportunism, pursuing a near-term interest in a favored policy at the distant expense of empowering national legislative and judicial decisionmakers to make still more policy decisions.

Putting Congress to the side for the moment, what does this mean for the U.S. Supreme Court? When the Court is transformed from a modest change opponent into a powerful change agent, two things will inevitably happen: people will care deeply about who is on the Court, and people will increasingly respond to the Court in the same way they respond to the elected branches — by criticizing, even demonizing, the Court when five Justices do not do their bidding. The confirmation process — picking Justices to cast votes on rights and structure debates known and unknown for the next twenty-five years or so — is not well equipped to handle the first development, and the Court as an institution is not well equipped to respond to the second.

Any potential easing of pressure on the Court to continue in its course-setting role is not evident from recent Terms. In some cases, often structural disputes, the Court is the arbiter of change, asked to decide whether to allow new federal or state laws to take effect. In other cases, often individual-rights disputes, the Court is the proponent of change, asked to decide whether the Constitution bars — or requires changing — federal or state laws on major issues of the day. A lot of people care a lot about the policies underlying these cases. The fervency of those policy preferences tends to obscure who oversees or prompts the change: federal or state courts, federal or state legislatures, or some combination.

Many cases from recent years were easy from the perspective of original meaning. What made them difficult was the evolution in meaning via court interpretations of the constitutional provisions. The more courts do, the more it becomes plausible for the courts to do more. The remarkable thing about these landmark cases is that, when measured by precedent, virtually all of the opinions, the dissents and concurrences included, come within the range of reason. Some decisions come out one way, some the other way, making June the cruelest month for some, the happiest month for others.

No less a scholar than Professor Gordon Wood calls the “emergence of the independent judiciary . . . a remarkable story, one of the great political and cultural transformations in American history, . . . accompanied by one of the great propaganda efforts in our history.”¹³ “Convincing people,” he adds, “that judges appointed for life were an integral and independent part of America’s democratic governments — equal in status and authority to the popularly elected executives and legislatures — was an extraordinary accomplishment and one to which many contributed in the decades following the Revolution.”¹⁴ Something so ingrained — Wood traces the roots to the “end of the eighteenth and beginning of the nineteenth centuries”¹⁵ — is not likely to change soon.

One way of measuring the continued growth in federal judicial resolution of issues of public import is the frequency with which *The New York Times* and *The Wall Street Journal* editorialize about U.S. Supreme Court cases. Even when I consider only editorials after the New Deal and the Warren Court, after the initial transformation in the Court’s role, the number of editorials in these papers devoted to Court cases — how they should be decided beforehand, whether they were decided correctly afterward — has grown since the late 1970s. The first three samples (the years 1978, 1982, and 1984) saw a total of eighteen, seventeen, and nineteen editorials from the two papers about the Supreme Court’s docket. Of the editorials in these years, just one, five, and zero of them concerned pending — not yet decided — cases before the Court. By contrast, the last three samples (the years 2006, 2010, and 2012) saw a total of thirty-eight, thirty-eight, and forty-six case-related editorials, and the two papers devoted far more of them (eighteen, eight, and thirteen) to undecided cases.¹⁶ The trajectory, I suspect, runs largely in one direction from the Founding to the present.

¹³ Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION* 49, 53 (Amy Gutmann ed., 1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The sample included all editorials authored by the editorial boards of *The New York Times* and *The Wall Street Journal* in 1978, 1982, 1984, 1986, 1990, 1992, 1994, 1998, 2000, 2002, 2006,

This upward trend of public interest in, and public commentary about, Supreme Court cases is reflected in appellate practice, where the number of friend-of-the-court briefs filed at the Court has grown as well. Between 1946 and 1955, amici filed one or more briefs in 23% of argued Supreme Court cases.¹⁷ By the last decade of the twentieth century (1986–1995), that percentage had increased to 85%.¹⁸ Recent data shows more of the same: 95% of the Court's 2011–2012 caseload involved at least one amicus brief at the merits stage, prompting one pair of Court watchers to call that Term the “year of the amicus.”¹⁹ There may be many explanations for the Court's expanding circle of “friends,” but Justice Scalia for one suggests it stems from modern interest group politics.²⁰ Filing an amicus brief with the Court is another way of lobbying for one policy outcome or another. Or, as one scholar writes: “The modern process of amicus curiae participation is a form of political symbolism reflecting the Court's irreconcilable role in American democracy as a quasi-representative policy making institution.”²¹

A common explanation for the Court's expansion of Congress's authority during the New Deal and for the Court's subsequent creation of new individual rights is that the barriers posed by the amendment process made the conventional way of changing the Constitution unrealistic.²² From the vantage point of today, that view may present a false dichotomy. Why assume that the only way to change norms is to

2010, and 2012. Only editorials published roughly contemporaneously to a Supreme Court merits decision, oral argument, or certiorari decision made the cut, while editorials that discussed trends in the Court, confirmation hearings, and other general, non-case specific issues did not. The relevant pieces showed a marked increase in the number of editorials that commented on recent or upcoming Supreme Court decisions.

¹⁷ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 753 & fig.2 (2000).

¹⁸ *Id.*

¹⁹ Anthony J. Franze & R. Reeves Anderson, *Reliance on Amicus Briefs in the Past Term*, NAT'L L.J., Sept. 24, 2012, at 18 (internal quotation marks omitted).

²⁰ See *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting) (implying that organizations filing amicus briefs in the case were “self-interested,” *id.* at 36, and suggesting that the lopsided number of respondent-side briefs may have influenced the Court's decisionmaking).

²¹ Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 189–90 (2009).

²² If it is fair to imagine what the Framers would have done with a modern problem — say the Depression or Jim Crow — is it not fair also to take this line of thinking to another likely conclusion? Given the Framers' demonstrated distrust of power, and proclivity for limiting it, is it not likely that, if the Framers had realized the power federal judges would accrue over time, they would have imposed some limits on judicial review? It seems inconsistent to imagine new powers without contemplating the limits that would have accompanied those powers. Perhaps a supermajority requirement at the Court for invalidating state or federal laws? A lowered requirement for amending the U.S. Constitution to overrule a U.S. Supreme Court decision? A time limit on judicial service? An age limit on judicial service? Or even an insistence on a more professionally diverse court, including nonlawyers and sitting politicians?

change the meaning of the national Constitution through Supreme Court decisions? State court decisions and state-level constitutional amendments offer another way to provoke change — to less effect, sure, but also with less risk. So too with state legislation. Whatever the prospects for change through state constitutions, state courts, and state legislatures may have been in the 1950s and 1960s, it is hard to understand why these institutions remain inappropriate vehicles for change in the twenty-first century — and why they should not be the lead change agents going forward.

In most areas of the law, we develop new ideas from the ground up. Tort, property, and contract law, for example, all tend to see innovation in the first instance at the state level, usually through common law court decisions, sometimes through legislation. Over time, winning insights emerge. A New York Court of Appeals opinion might be accepted by other courts, or two or three leading schools of thought might arise. After that give and take, a restatement might be written or a uniform code might emerge, simultaneously allowing for a national position on some issues and continued local innovation on others. Congress or the Court eventually might nationalize a single position or allow the innovation to continue.

Yet when we consider constitutional law, why are the tables so often turned? Instead of patiently allowing state courts to construe the same phrases — the federal Framers modeled *all* of the federal liberty guarantees after the original state charters — and instead of allowing winning and losing schools of thought to emerge over time, we tend to have a top-down model of judicial interpretation. The Court announces the decision early on, allowing the states later to grant more rights (never, practically speaking, fewer rights). When Justice Brandeis launched the “laboratory” metaphor for policy innovation,²³ he signaled an interest in hearing how the states in the first instance would respond to new challenges. A single laboratory of experimentation for fifty-one jurisdictions and 330 million people poses serious risks. A bottom-up approach to developing constitutional doctrine instead allows the Court to learn from the states — useful to pragmatic Justices interested in how ideas work on the ground, useful to originalist Justices interested in what words first found in state constitutions mean. It allows each side to a debate time to make its case. It decreases the number of losers in winner-take-all debates at the Court. And above all, it allows the Court in some instances to wait for and nationalize a dominant majority position, and in other instances to treat occasionally indeterminate language in the way it should be

²³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

treated, as allowing for fifty-one imperfect decisions rather than just one imperfect decision.

II. POSITIVE RIGHTS IN THE AMERICAN CONSTITUTIONAL TRADITION

All of this helps to explain why I welcome Zackin's new book and why it warms my heart to see a promising young political scientist devoting scholarship to our oft-neglected state constitutions. If our law schools will not teach state constitutional law (just twenty to thirty schools out of roughly two hundred offer the course in a given year)²⁴ and if most of our state courts will not insist that state constitutional law be covered in their own bar exams (just a quarter or so of the states place the topic on their exams),²⁵ it may fall to political science professors to spread the message. That may be just as well. A preoccupation with the federal Constitution at the expense of state constitutions has become an American norm, and American citizens, not just lawyers and judges, must come to see their state constitutions as independent and independently useful charters of government and sources of rights.

A. *In Defense of Detail in the State Constitutions*

Zackin starts where many advocates of state constitutionalism have failed — by trying to justify the tedious detail and prolixity of most state constitutions, which are rarely confined to the basics of government and are so cluttered with provisions as to look like the Napoleonic Code, if not “yard sales, filled with items that never should have been included in the first place.”²⁶ In many cases, the drafters seem overwhelmed by demand, locating foundational policies in dependent clauses of this or that provision. Here's how Ohio says that voters retain the power to amend the state constitution by popular initiative:

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives *but the people* reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.²⁷

So much for the theory that lawmakers do not hide elephants in mouseholes.²⁸

²⁴ See Jeffrey S. Sutton, Brennan Lecture — Speech, *Why Teach — And Why Study — State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166 (2009).

²⁵ See *id.* at 167–68.

²⁶ Jeffrey S. Sutton, *What Does — And Does Not — Ail State Constitutional Law*, in JUDGES ON JUDGING 332, 334 (David M. O'Brien ed., 4th ed. 2013).

²⁷ OHIO CONST. art. II, § 1 (emphasis added).

²⁸ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 469 (2001).

The ease with which most state constitutions may be amended makes them ready vehicles for change, but change too often in areas customarily associated with statutory law rather than with charters of government. If the people of a state constitutionalize everything, the risk goes, they will constitutionalize nothing and cheapen the charter in the process.²⁹

Bravo to Zackin for tackling the issue and for making headway in justifying the sprawling particulars of so many of the state charters. As she acknowledges, the state constitutions have been accused of being “idiosyncratic,” of reflecting “politics as usual” instead of “visionary planning,” of focusing on the “mundane” and “trivial,” and of “hobbling” the very governments they create by mandating detailed policies that limit the discretion state legislatures need to operate effectively (p. 19).³⁰ Zackin illustrates the criticisms with an eyebrow-lifting provision in the New York Constitution devoted to “ski trails” (p. 28). It says that “not more than twenty-five miles of ski trails thirty to two hundred feet wide” may be constructed in certain portions of New York, mainly the Adirondacks.³¹ That is not the kind of thing one sees in the Bill of Rights. And it is not the kind of thing Chief Justice Marshall had in mind when he described the point of a constitution: “[O]nly its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”³² Instead of a great outline, the ski-trails provision shows restraint only in declining to spell out the number of beginner and black-diamond trails on each slope. “What can one say about the character of a people who enshrine these types of provisions in their constitutions . . . [?] Can one say of New Yorkers . . . that they are a people who cherish their liberty to ski” (p. 18)?³³

Zackin has set a trap, and the just-quoted critic of ski-loving New Yorkers is not the first to be ensnared by it.³⁴ As it happens, the people added the ski-trails amendment to create an exception to their constitution’s “Forever Wild” provision, a guarantee with no analogue in the federal Constitution, yet one that, in declaring that certain portions of the state’s forests be “forever kept as wild forest lands,”³⁵ surely belongs in a constitution or any other document for the ages. Given the

²⁹ See Sutton, *supra* note 26, at 334.

³⁰ See also pp. 22–25, 27–28, 33.

³¹ N.Y. CONST. art. XIV, § 1.

³² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

³³ The author quotes James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819 (1992) (second alteration in original) (internal quotation marks omitted).

³⁴ See, e.g., Note, *California’s Constitutional Amendomania*, 1 STAN. L. REV. 279, 280 (1949).

³⁵ N.Y. CONST. art. XIV, § 1.

existence of the “Forever Wild” guarantee, nothing short of a constitutional amendment would have allowed for any commercial development, however minor, of this portion of the New York wilderness. Instead of an artifact of craven or idiosyncratic politics, the ski-trails provision and its “Forever Wild” predecessor represent the epitome of constitutional principle. As is their right, New Yorkers opted to mean business when it comes to environmental conservation in the Empire State (pp. 31–32).

This defense of the ski-trails provision, and of other prosaic state constitutional provisions by implication, offers a useful lesson. The New York guarantee may not be the only seemingly out-of-place state provision that sits atop a wise justification. And the absence of analogous provisions or even style in the federal charter should not relegate them to disrespect or ridicule. Many Americans, I suspect, wish that their state constitutions or the U.S. Constitution contained a “Forever Wild” guarantee.

Maybe, indeed, the time has come for state constitutionalists to stop retreating when it comes to the particulars of many state constitutions. Detail is not always a curse. The federal charter has its share. The Twelfth Amendment details how to count presidential and vice-presidential ballots to determine how presidencies begin.³⁶ And the Twenty-Fifth Amendment offers even more details to determine how presidencies end.³⁷ Who knew that Congress sometimes gets a forty-eight-hour window to assemble to decide whether the President “is unable to discharge the powers and duties of his office”?³⁸

Detail also can be another word for distrust — distrust of the legislature, distrust of the executive, and distrust above all of the courts to honor the point of an amendment. Vague language permits runaway interpretations; precision does not.

If President Jefferson thought constitutional conventions should be held every twenty years to avoid dead-hand control,³⁹ does that not

³⁶ U.S. CONST. amend. XII.

³⁷ *Id.* amend. XXV.

³⁸ *Id.* § 4.

³⁹ In a letter to Samuel Kercheval, dated July 12, 1816, Thomas Jefferson wrote:

Let us provide in our Constitution for its revision at stated periods. What these periods should be, nature herself indicates. By the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years. At the end of that period then, a new majority is come into place, or, in other words, a new generation. Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; . . . and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution.

suggest that states may and should make frequent amendments in the process, running the risk of blurring the line between what belongs in a constitution and what belongs in a statute, but all the while ensuring the document's enduring relevance? The elegant language of the U.S. Constitution, it must be remembered, is deceiving when viewed alone. Only with the supplement to it in hand, found in the *U.S. Reports*, may the document be understood in full. Had the document been formally amended to account for all of the details supplied by the U.S. Supreme Court, it might well be the longest constitution in the country, making the state charters look sparingly dignified by comparison. In the end, state constitutions are eminently changeable documents, and it makes sense that changes to them frequently would occur through amendments rather than through judicial interpretation. When compared to the near immutability of the federal document, that feature may be as much of a virtue as a curse.

B. Positive Rights and America's State Constitutions

Having shown that state constitutions, short or long, should be taken seriously, Zackin moves on to the central ambitions of her book — to “reject the standard account of American constitutional exceptionalism, which holds that Americans’ extreme suspicion of government power is evidenced by the exclusively negative character of the U.S. Constitution” and to show that “positive rights lie well within, rather than outside, the American constitutional tradition” (p. 212). This thesis requires some groundwork.

How first of all to define “rights”? Any “basis for a justified demand,” she answers (p. 37).⁴⁰ That is a big tent. It includes, in descending order of specificity and amenability to judicial enforcement, (1) provisions mandating a maximum eight-hour workday (pp. 127–28),⁴¹ (2) provisions mandating a free system of public schools (pp. 70–

RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW* 893 (2010) (omission in original) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816)) (internal quotation marks omitted).

⁴⁰ The author quotes HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 14 (1980) (internal quotation mark omitted).

⁴¹ See, e.g., COLO. CONST. art. V, § 25a (“The general assembly shall provide by law . . . for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours . . . for persons employed in underground mines or other underground workings, blast furnaces, [or] smelters . . .”).

71),⁴² and (3) provisions encouraging policies congenial to a sustainable environment (pp. 150–51).⁴³

As the examples illustrate, Zackin defines rights broadly, covering everything from readily enforceable guarantees to aspirational language that operates less like a right and more like a spur. Even where the text alone does not establish a right, she adds, the language still may confer a right discernible by examining the “social context [of the provision] or the actors whose subsequent interpretations and agendas have endowed [the provision] with political meaning” (p. 39) — political meaning that advocates may use to demand governmental action (pp. 171, 173). What part of a constitution under this definition, one might fairly ask, does not create a right? Yet Zackin is a political scientist, not a lawyer, and even “aspirational rights” (p. 58), no matter how wrapped in contradiction, may prod and shape political debates, even if they are more likely to have success in legislative hearings than in judicial ones.

The second piece of groundwork concerns the distinction between “negative” and “positive” rights. The dominant narrative among constitutional law scholars, Zackin submits, is that Americans’ distrust of government led them to adopt negative constitutional rights premised on keeping government out of our lives rather than pulling it in (pp. 39–40). Congress thus may not make laws infringing the free exercise of religion or the freedom of speech,⁴⁴ the people are protected against unreasonable searches and seizures,⁴⁵ and the government cannot take a citizen’s life, liberty, or property without due process of law.⁴⁶ Each right says what government *may not* do, not what government *must* do on behalf of its citizens (pp. 40–41). In contrast to negative constitutional rights, positive rights mandate governmental intervention and provide affirmative protections for the citizenry against problems posed by poverty, unregulated industry, pollution, and the like — some attributable to the actions of private individuals and companies, some attributable to governmental neglect, some attributable to both (pp. 40–42, 44–45).

This is a generalization, yet a generalization with a point. The federal Constitution after all contains positive rights even under Zackin’s definition, including rights that regulate private conduct. Take the

⁴² See, e.g., N.D. CONST. art. VIII, § 2 (“The legislative assembly shall provide for a uniform system of free public schools throughout the state . . .”).

⁴³ See, e.g., VA. CONST. art. XI, § 1 (“[I]t shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”).

⁴⁴ U.S. CONST. amend. I.

⁴⁵ *Id.* amend. IV.

⁴⁶ *Id.* amend. V.

Thirteenth Amendment, which eliminated slavery and involuntary servitude.⁴⁷ Or take the Sixth Amendment, which compels the appointment of defense counsel in all criminal prosecutions.⁴⁸ And what of Article III? Does it not compel the federal government to create “one supreme Court”⁴⁹ (and perhaps even lower federal courts if Justice Story is to be believed⁵⁰)? Or Article II? It requires the President to “take Care that the Laws be faithfully executed.”⁵¹ Or Article IV? It requires the national government to guarantee the states “a Republican Form of Government.”⁵² Nonetheless, her premise by and large remains correct. In conventional terms, most federal constitutional rights have a negative cast, prohibiting governmental action, as opposed to compelling it.

Not so the states. While the U.S. Constitution focuses on negative rights, Zackin explains, the state constitutions do both, offering many negative protections (the source code of the federal guarantees) and many positive ones as well. That was not true at the start, I would add. The original eighteenth-century state constitutions contained as few positive guarantees as the federal charter. The idea of imposing duties on the government through constitutions arose mainly from the mid-nineteenth century on (pp. 71, 111), a development in constitution-making not apt to spread to the federal model given the difficulty of altering it.

To support her thesis, Zackin devotes one chapter each to the free-public-school, wage-and-hour, and environmental-protection provisions found in many state constitutions. These provisions not only require the government to act — by providing free public schools or by passing laws setting the ceiling on workers’ hours or the floor on workers’ wages — but also protect a state citizen from forces outside of government (pp. 40–42) (for example, the “threats posed [to children] by their parents’ poverty” (p. 72)). Many of the provisions have been with us for some time. According to Zackin, the common-school provisions appeared in state constitutions as early as 1816 (though in the main they were added in the middle of the nineteenth century (p. 71)), while the labor provisions made their way into state constitutions as early as 1864 (p. 111). Relying on this data, Zackin argues, contrary to the prevailing scholarship, that positive rights are as much a part of the American constitutional fabric as are their better-known negative cousins (p. 47).

⁴⁷ *Id.* amend. XIII.

⁴⁸ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁹ U.S. CONST. art. III, § 1.

⁵⁰ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328–31 (1816).

⁵¹ U.S. CONST. art. 2, § 3.

⁵² *Id.* art. IV, § 4.

As a descriptive matter, Zackin is on to something. State constitutions often include mandates that can be usefully characterized as positive rights, while the U.S. Constitution contains few such rights. Yet it does not follow, it bears stressing, that this tradition suggests a greater role for positive rights in construing the federal charter.⁵³ Our federalist system makes it understandable that innovative states with readily amendable constitutions would impose such duties on themselves, yet that does not mean that the federal Constitution would impose similar duties on the federal government or that the states in ratifying the federal charter in 1789 would have allowed the new national government to impose affirmative obligations *on them*. The temperature of the times ran the other way. The Tenth Amendment “reserved to the States . . . or to the people” “[t]he powers not delegated to the United States by the Constitution,”⁵⁴ and the Ninth Amendment said that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵⁵ It thus should surprise no one that, even if the original pre-1789 state constitutions and the 1789 federal Constitution contained few positive rights, the states would use these reserved powers to add positive rights to their constitutions, that new (post-1789) states would include positive rights in their constitutions, or that positive rights would be included in the constitutions of the states readmitted to the Union after the Civil War.

C. State Constitutions as Vehicles of Change

Beyond describing these examples of a positive-rights tradition in America’s state constitutions, Zackin offers an insight about these and

⁵³ Zackin does not argue to the contrary, though her emphasis on the synergies between the state and federal constitutions suggests indirectly that this is a state tradition that the federal courts might wish to consider borrowing. Zackin argues:

Rather than considering the state and federal constitutional traditions in isolation from one another, or describing American constitutional development as a steady triumph of the federal Constitution over state practices, it may be more fruitful to explore the many, mutually influential connections between constitutional development at the state and federal levels. (p. 209)

She also observes: “By including state constitutions in our analysis, we become aware of multiple (much older) battles over the meaning of due process rights and the scope of constitutional police powers in the states” (p. 211). Moreover, “[i]deas about who we are shape who we can become. . . . By the same token, a richer understanding [of the American constitutional tradition] can liberate us from the cramped and deficient assumptions [about positive rights] that still dominate discussions of American constitutionalism, creating new possibilities for both scholarship and politics” (p. 213). She notes that environmental activists “located environmental rights in the Ninth Amendment of the U.S. Constitution” (p. 174), and that they sought change in state constitutions to “make it even easier for judges to support their agenda . . . about the existence of constitutional environmental rights” (p. 175).

⁵⁴ U.S. CONST. amend. X.

⁵⁵ *Id.* amend. IX.

other constitutional guarantees. The conventional account says that dominant majorities craft rights to entrench their positions — to leverage a present advantage into a future preservation of their position — by creating two layers of protection: placement of the policies in the constitution and reliance on the courts to enforce them (pp. 14, 49). That narrative, she claims, tells just half of the story. At the state level, many proponents of constitutional rights intended not to entrench the status quo but to change it (p. 56). Zackin writes that the common-school movement of the mid-nineteenth century grew frustrated by state legislatures unwilling to impose taxes to fund free public schools. To cure the funding problem, the movement's followers chose to "take the matter out of the hands of the legislature" (p. 88),⁵⁶ lobbying for and securing constitutional amendments that either mandated school-specific taxes or required minimum state appropriations for the support of public schools (pp. 84–90). It was not the status quo ante but change post that the movement embraced, and the creation of positive rights in the form of mandatory taxing and spending provisions was the route the reformers took.

The states' public school constitutional provisions support Zackin's thesis in many ways, and it may be useful to clarify how and to what extent. The first ambition of these provisions was to clarify that the creation of a system of free public schools was a governmental power. Until the common-school movement, that authority was not clear (pp. 68–74).⁵⁷ The second goal, according to Zackin, was to take the language of these positive rights (for example, the state's creation of a "thorough and efficient" system of free public schools⁵⁸) and to give them a judicially enforceable minimum. It is not clear, as an original matter, whether these provisions were meant to go beyond grants of power to a judicially enforceable minimum level of funding.⁵⁹ The

⁵⁶ Internal quotation marks have been omitted.

⁵⁷ Zackin observes: "At the beginning of the nineteenth century, the entire concept of statewide and state-sponsored education was highly controversial. Simply bringing public school systems into existence was an enormous political challenge" (p. 68).

⁵⁸ *E.g.*, N.J. CONST. art. VIII, § 4, cl. 1 ("The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."); *see also* KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

⁵⁹ *Compare* *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (concluding that the legislature had "enormous discretion" under the Florida Constitution to provide for the "adequate and uniform system of free public schools"), *with* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215–16 (Ky. 1989) (declaring the state's system of school financing unconstitutional, because it did not meet the "adequate" and "efficient" mandates in the Kentucky Constitution, *id.* at 216). *See also* pp. 71–72 ("[A]doption of a common school provision in a state's constitution is not typically a good indication that the state actually created a public school system at the same time it ratified the provision" (p. 71).); Mike Curtin, *Is State Constitu-*

unsuccessful defenders of the constitutionality of these public school funding systems (full disclosure, I was one of them⁶⁰) might argue that it was judicial innovation, not constitutional innovation, that took this last step.

Either way, the story by which roughly two-thirds of the states' provisions became judicially enforceable — and required legislatures to increase significantly their funding of the public schools and the equality of that funding among school districts — is a remarkable one. It starts with a California Supreme Court decision in 1971 (*Serrano v. Priest*⁶¹) recognizing such a right under the state *and* federal constitutions. It leads to a U.S. Supreme Court decision in 1973 (*San Antonio Independent School District v. Rodriguez*⁶²) disclaiming federal constitutional authority to correct funding disparities within the states or to require minimum levels of funding. And it leads over the next four decades to extensive state court (and state legislative) innovation in public school funding. Even after the federal high court permitted continuity, most of the state courts (and legislatures) demanded change. The breadth of change prompted by the loss in *Rodriguez* makes it fair to ask whether the federal court claimants won by losing, won more in remedial funding and systemic changes to the public school systems than they could have won had the Supreme Court created a positive right to increased public school funding in the first instance.⁶³

How could that be? In settings like school funding, the complexity of defining the right and the remedy, whether judicially or legislatively, favors innovation in discrete local jurisdictions, not large multistate jurisdictions. Consider the comparative challenges of defining such a right for one school system or fifty, developing a remedy for one school

tion Key to Education Tax?, COLUMBUS DISPATCH, Jan. 8, 1989, at 4D (discussing whether the “thorough and efficient” education clause in Ohio’s constitution requires a specific level of funding); Michael Curtin, *Original Intent: Ohio’s School-Funding Debate Spans 146 Years*, COLUMBUS DISPATCH, Mar. 9, 1997, at 3B (discussing history of Ohio’s “thorough and efficient system of common schools” constitutional mandate); Mike Curtin, *Technology May Provide Equity in Education*, COLUMBUS DISPATCH, Jan. 6, 1994, at 6C (noting debate over educational equality under the Ohio Constitution).

⁶⁰ See *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

⁶¹ 487 P.2d 1241 (Cal. 1971).

⁶² 411 U.S. 1 (1973).

⁶³ Jeffrey S. Sutton, Essay, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1978–85 (2008); see also HOLLAND ET AL., *supra* note 39, at 569; Jamison E. Colburn, *Rethinking Constitutionalism*, 28 RUTGERS L.J. 873, 898 (1997) (book review) (explaining the “Federalism discount” principle, *id.* (internal quotation marks omitted), which suggests that the Supreme Court becomes wary of announcing expansive, nationwide rules due to the multitude of local considerations implicated by such rules).

system or fifty, and (inevitably) adjusting both over time for one school system or fifty. As Justice Powell pointed out in *Rodriguez*, the development of a school system demands “specialized knowledge and experience”;⁶⁴ the “complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them’”;⁶⁵ and the Supreme Court as a result needs to be careful before imposing “inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions” to these difficult policy problems.⁶⁶ Had the Court undertaken to announce a national right and remedy in *Rodriguez*, the scope of its jurisdiction and the magnitude of the policy task at hand would have run the double-edged risk of crowding out local innovation *and* understating and underenforcing the new right and remedy.

The school-funding story, as Zackin shows, is indeed a successful positive-rights story from the perspective of the claimants who filed these cases. Yet it is one that shows a fork in the road, not parallel lines, between the federal and state experiences — one that confirms that the states can be meaningful change agents, sometimes indeed the superior change agents, in society.

That of course is not the narrative of *Brown v. Board of Education*,⁶⁷ another public education case of some note. There, the states’ recalcitrance (and some federal recalcitrance⁶⁸) prompted federal court intervention. Just as we cannot forget the *Brown* experience in thinking about the comparative roles of the state and federal courts (and legislatures) in protecting individual rights, neither should we lose sight of the *Rodriguez* experience.

One other bubble should be burst. By focusing on education, labor, and environmental rights, Zackin might leave readers with the impression that state constitutionalism, whether of a positive or a negative sort, favors only a small cross-section of rights. Not true. The state courts have vigorously protected all manner of rights along the American political spectrum, both liberal and conservative: school funding⁶⁹

⁶⁴ *Rodriguez*, 411 U.S. at 42.

⁶⁵ *Id.* (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972)).

⁶⁶ *Id.* at 43.

⁶⁷ 347 U.S. 483 (1954).

⁶⁸ Remember that *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown*, arose from the segregated, and federally controlled, District of Columbia school district.

⁶⁹ See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (holding, in contrast to *Rodriguez* that the state’s school financing system violated the Texas Constitution).

and property rights;⁷⁰ establishment⁷¹ and free exercise rights;⁷² obscenity⁷³ and commercial speech;⁷⁴ criminal procedure⁷⁵ and contract rights;⁷⁶ the right to privacy⁷⁷ and the right to bear arms.⁷⁸ And this list does not include other areas where states have embraced rights that defy simple categorization on the political spectrum. To name just a few, consider that states have found — within their own constitutions — robust protection of political speech even in certain private places,⁷⁹ a “reporter’s privilege” against compelled disclosure of news sources,⁸⁰ broad procedural and substantive due process protections,⁸¹

⁷⁰ See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (holding, in contrast to *Kelo v. City of New London*, 545 U.S. 469 (2005), that an economic benefit alone does not satisfy the Ohio Constitution’s public use requirement with respect to the exercise of eminent domain).

⁷¹ See, e.g., *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949) (holding, in contrast to *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), that state-funded bus transportation for parochial school students violated the Washington Constitution).

⁷² See, e.g., *Huffman v. State*, 204 P.3d 339, 344 (Alaska 2009) (holding, in contrast to *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), that under the Alaska Constitution strict scrutiny applies to generally applicable laws that disproportionately impact faith-based practices).

⁷³ See, e.g., *State v. Henry*, 732 P.2d 9 (Or. 1987) (holding, in contrast to *Miller v. California*, 413 U.S. 15 (1973), that obscenity is protected speech under the Oregon Constitution).

⁷⁴ See, e.g., *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720 (Cal. 2000) (holding, in contrast to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), that a marketing order requiring growers to finance generic advertising violated the California Constitution).

⁷⁵ See, e.g., *State v. Marsala*, 579 A.2d 58 (Conn. 1990) (holding, in contrast to *United States v. Leon*, 468 U.S. 897 (1984), that the Connecticut Constitution does not recognize a good-faith exception to the exclusionary rule).

⁷⁶ See, e.g., *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444 (Alaska 2009) (holding, in contrast to *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983), that the retroactive application of a statutory exemption to overtime laws that impaired private contracts violated the Alaska Constitution).

⁷⁷ See, e.g., *Valley Hosp. Ass’n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (holding, in contrast to *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), that Alaska’s express right to privacy is more protective of abortion rights than is the federal Constitution).

⁷⁸ See, e.g., *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding, in contrast to *District of Columbia v. Heller*, 554 U.S. 570 (2008), that a law prohibiting felons from possessing firearms violated the North Carolina Constitution); see also *Sutton*, *supra* note 26, at 340 (noting that thirty-nine state courts found an individual right to keep arms prior to *Heller*); Eugene Volokh, Reference Material, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192, 205–07 (2006).

⁷⁹ See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979) (holding, in contrast to *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), that political petitioners collecting signatures in a shopping mall were entitled to free speech protection under the California Constitution).

⁸⁰ See, e.g., *O’Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (N.Y. 1988) (holding, in contrast to *Branzburg v. Hayes*, 408 U.S. 665 (1972), that the New York Constitution protects from compelled disclosure some nonconfidential information produced in the course of news-gathering activities).

⁸¹ See, e.g., *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996) (holding, in contrast to *Herrera v. Collins*, 506 U.S. 390 (1993), that certain claims of innocence based on newly discovered evidence implicate substantive due process under the Illinois Constitution); *State v. Veale*, 972 A.2d 1009, 1014 (N.H. 2009) (holding, in contrast to *Paul v. Davis*, 424 U.S. 693 (1976), that “reputational stigma can, by itself, constitute a deprivation of liberty deserving due process” under the New Hampshire Constitution).

a right to confrontation in criminal trials despite concerns about child victims,⁸² a right to counsel that extends to all charged misdemeanors,⁸³ a right to twelve-member juries in civil trials,⁸⁴ and protection against large punitive damages awards in tort law.⁸⁵

Moving from education to labor rights, Zackin demonstrates that state constitutional amendments sometimes sought to *remove* the courts from the process. Labor organizers responded to adverse state court decisions, which struck down protective legislation as contrary to a state's constitution, by advocating for constitutional amendments either to make it clear that the legislature had such authority or to place the guarantee in the constitution itself. These amendments not only overturned hostile state court decisions but also insulated future legislation from similar attacks (pp. 123–25, 129–33). In 1897, the New York legislature, at the forefront of the Progressive movement, enacted an eight-hour workday law, only to see it declared unconstitutional by the state courts (p. 125). In response, labor organizers successfully convinced the legislature to add an eight-hour workday amendment to the state constitution in 1905. The state legislature reenacted the eight-hour law in 1906, and the state's highest court upheld the new law against a constitutional challenge in 1908 (p. 126). “[T]he eight-hour constitutional amendment,” Zackin writes, “shifted the ultimate authority to establish (or decline to establish) the eight-hour day from the state courts to the state legislature” (p. 126). Yet again we have a course-setting, positive-rights story, but one with a twist: the end-line goal was to keep the courts out of the process and the legislature in charge of it.

What of the environmental protection movement in the states? Here too we have an effort to place an affirmative duty on government, and here too we have a variation on a theme:

[T]he virtue of the constitutional right to environmental protection was that it would no longer allow government to passively acquiesce in the destruction of the natural environment. Instead, it would force government

⁸² See, e.g., *Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991) (holding, in contrast to *Maryland v. Craig*, 497 U.S. 836 (1990), that testimony of an alleged child victim over closed-circuit television violates the Pennsylvania Constitution).

⁸³ See, e.g., *Brunson v. State*, 394 N.E.2d 229 (Ind. Ct. App. 1979) (holding, in contrast to *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Indiana Constitution requires the state to provide counsel to all indigent defendants charged with a criminal misdemeanor).

⁸⁴ See, e.g., *Blum v. Merrell Dow Pharm., Inc.*, 626 A.2d 537 (Pa. 1993) (holding, in contrast to *Williams v. Florida*, 399 U.S. 78 (1970), that denial of a twelve-person jury violates the Pennsylvania Constitution's guarantee of a trial by jury).

⁸⁵ See, e.g., *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827, 831 (Ga. 1988) (holding, in contrast to *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), that punitive damages in civil cases may be “excessive fines” that violate the Georgia Constitution).

into the role of trustee, a role that would require the state actively to protect and preserve the environment . . . (p. 166)

Unlike its education and workers' rights forebears, Zackin reveals, this modern reform movement wielded state constitutional law not as a shield — limiting legislative discretion or keeping the courts out of the mix — but as a litigation-enabling and legislation-spurring sword (pp. 173–84). The leaders pursued environmental constitutional provisions “primarily because they could serve as the basis for litigation” (p. 173) by creating both individual standing to challenge state laws in state courts (pp. 177, 180–81) and new enforcement standards themselves (pp. 181–84).

The court-based effort largely failed at the state level (pp. 190–91). One reason was the hard-to-pin-down language of many of the provisions. In Illinois “[e]ach person has the right to a healthful environment,”⁸⁶ and in Virginia “it shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”⁸⁷ How does even the most motivated court enforce a “right to a healthful environment”? Another reason may have been the reality that this is an area of policy in which many topics contain state-level externalities that doom local enforcement. How does rural State A use its state law to reduce air pollution within its borders caused by industries in State B? Similar problems with the itinerant costs of local activities often doom state regulation of some water pollution problems.

But the constitutional provisions were not for naught. They allowed environmentalists to use the mantle of the state constitutions and the aspirational commitments in them to shape policy debates in the state legislatures, where these debates may belong and where the record of environmental legislation ever since suggests they have had effect (pp. 190–96). A delegate to the Montana Constitutional Convention put it this way in describing the purpose of the constitution’s environmental-rights provision⁸⁸: “What we did is mandate the legisla-

⁸⁶ ILL. CONST. art. XI, § 2; *see also id.* (“Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”).

⁸⁷ VA. CONST. art. XI, § 1.

⁸⁸ MONT. CONST. art. IX, § 1 (“(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”).

ture to take immediate, forceful action. What they did isn't enough. We want more" (p. 167).⁸⁹

"We want more" is not a bad way to capture this rights debate and not a bad way to illustrate how an interest group can use even a hortatory constitutional provision to influence the resolution of zero-sum disputes that arise when interest groups square off against one another. It also demonstrates both a benefit and a weakness of entrusting change-compelling positive rights to the state courts. In telling the government to do more, positive rights cost money. A school-funding claimant seeks more state public money to supplement local revenue and to smooth out property-wealth disparities at the local level. Workers' rights advocates seek more public funds when they urge the government to increase wages on public works projects. And in the face of the Fifth Amendment, even the most forward-looking state constitutional environmental guarantee cannot convert private lands into public trusts without paying for them. The benefit of all these guarantees, from the perspective of their proponents, is that they give advocates a constitutional basis for going to the legislature and the courts to ask for more when they want more. As I can attest from my experience defending Ohio's public school funding system, that kind of litigation — even the threat of that kind of litigation — can make a dollars-and-cents difference in legislative funding. On the other hand, the weakness of these guarantees is that no constitutional right can pursue its ends at all costs. Courts are institutionally ill-equipped to do either of the two things ultimately needed to increase the funding for a policy, even a constitutionally protected policy: impose a tax increase themselves or order a reprioritization of a fixed budget. That leaves courts in the position of at best playing cat and mouse with the legislature over new funding priorities, not acting as reliable change agents when it comes to costly positive rights.

III. CHANGE AGENTS IN A CHANGING WORLD

Which takes me back to where I started: Who should arbitrate these disputes? Who should decide who gets more, who less? Who should be the leading change agents in America? As an original matter, the eighteenth-century constitutions put the states first and the federal government a distant second. And within each constitution, the legislatures (the first of the three branches to be described in most constitutions⁹⁰) were the key agents of change, with the executive

⁸⁹ Internal quotation marks have been omitted.

⁹⁰ *But see, e.g.,* COLO. CONST. art. IV (Executive Department); *id.* art. V (Legislative Department).

branches the key implementers of change (and frequent advocates for more change⁹¹) and the courts the mere enforcers of these bargains.

Notwithstanding all that has happened in the last seventy-five years, increased appreciation of that model may deserve renewed consideration today. Should not the key change agents in American society be those for which change is easiest, least consequential, and most easily corrected? That describes the states — smaller jurisdictions with less unwieldy legislatures, more easily amended state constitutions, and more easily changed state courts. Within the states, one would think that the state legislatures, the state courts, and the state constitutions, in that order, would be the easiest to the most difficult to alter, making state legislatures the most nimble when it comes to facilitating change. The federal government would seem to be the least equipped and the most risky change agent — as it has a larger legislature with an unrepresentative Senate and a nearly unchangeable Constitution interpreted by a difficult-to-change Supreme Court. Let the reader judge what we have today and whether it makes the most sense. At a minimum, a case can be made that a powerful change agent in modern America — in some years the most powerful change agent in the country — has become the U.S. Supreme Court. From the perspective not of this or that Court decision, but of institutional strengths and weaknesses (and of preserving the Court as an institution that will be there when we need it), is the current system the one we want?

Either way, when the Supreme Court contemplates nationalizing an issue in the future, it might do well to consider what the states have said about it. Start with an originalist's perspective. Every clause of the federal Bill of Rights has antecedents in state constitutions. So the states' interpretations of their own charters necessarily provide useful evidence of the original meaning of the parallel federal guarantees.⁹² What the states think may be even more relevant to a nonoriginalist. If a doctrine does not bear the validation of the People of 1789, then its legitimacy hangs on whether it bears the validation of the People of today. No jurisprudence should be "entirely inward looking."⁹³ Borrowing a dog-eared page from Justice Jackson,⁹⁴ a living constitution-

⁹¹ Cf. U.S. CONST. art. II, § 3 (empowering the President to recommend new measures to Congress).

⁹² See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 584–86 (2008) (looking to interpretations of state constitutions to determine the meaning of the Second Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in part) (looking to parallel state enactments to help define the First Amendment).

⁹³ See *Miller v. Alabama*, 132 S. Ct. 2455, 2490 (2012) (Alito, J., dissenting).

⁹⁴ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (suggesting a tripartite scheme for delineating the scope of presidential authority based on the degree of congressional authorization).

alist might do well to distinguish three settings when the Court evaluates a constitutional right on a national scale: requests to bring outlier states into line with a national consensus,⁹⁵ requests to settle an issue with which the states are still grappling,⁹⁶ and requests to overturn the states' uniform and settled practice.⁹⁷

One of the catalysts for making the Supreme Court such a critical proponent of change is our "obsess[ion]," in Professor Sandy Levinson's words, with the idea that rights must be countermajoritarian to count.⁹⁸ There is ample room, it seems to me, for constitutional *and* statutory rights. Statutory guarantees may be the proletariat of rights, but they often are the superior of the two. One can indeed make the case that the table was set for the most significant countermajoritarian ruling in American history — *Brown v. Board of Education* — by state constitutional and statutory rights. When *Brown* began by saying that "education is perhaps the most important function of state and local governments,"⁹⁹ the Court could not rely on federal law in saying so. It relied on a premise created by state constitutional and legislative change, not federal change.

Brown raises a related question. Should rights advocates invariably prefer constitutional protections to statutory ones? Would not most people prefer to live in a country in which a majority of citizens look after and respect the rights of minority groups through majoritarian legislation rather than through a majority of nine Justices? The Civil Rights Act of 1964¹⁰⁰ and *Brown* both offered critical protections, but a compelling case can be made that the Act is the more instrumental of the two when it comes to creating a culture in which respect

⁹⁵ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding Connecticut's contraception law to violate a right to privacy "created by several fundamental constitutional guarantees"). Judge Richard Posner has suggested that the Court may have acted in *Griswold* in part because "the Connecticut law was fatally out of step with the national consensus." Cass R. Sunstein, *The Supreme Court, 2007 Term — Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 261 (2008) (citing RICHARD A. POSNER, *SEX AND REASON* 329 (1992)).

⁹⁶ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 652 n.7 (1961) (holding that evidence obtained in violation of the Fourth Amendment may not be used in state-law criminal prosecutions in state courts, even though nearly half the states at the time of the decision did not have any criminal provisions relating directly to unreasonable searches and seizures).

⁹⁷ See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 612–14 (1990) (holding that the Fourteenth Amendment's Due Process Clause does not prevent a state court from exercising personal jurisdiction over a nonresident served while temporarily visiting that state, in line with longstanding and ubiquitous state-law precedent).

⁹⁸ Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 791 (2011) (internal quotation marks omitted) (citing Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002)).

⁹⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁰⁰ 42 U.S.C. §§ 2000a to 2000h-6 (2006 & Supp. V. 2011).

trumps prejudice. All else being equal, the earned success of a victory in the halls of a legislature is more likely to hold and facilitate lasting change than a judicial decision. Perhaps indeed the sequel to Zackin's book should be: "Looking for Rights in All the Wrong Places: How State and Federal *Legislatures* Protect Individual Rights."

But surely some rights guarantees, including positive rights guarantees, belong in our state and federal constitutions. As between the state and federal courts, how can we trust the state courts to make good on these commitments when they are largely filled with elected judges? That is a fair question. Yet keep in mind that, notwithstanding elections for most state court judges and life tenure for all federal judges, there are many areas in which the state courts (and for that matter the state legislatures) have been leaders, not followers, in recognizing countermajoritarian rights.¹⁰¹ Consider religious exemptions from laws of general applicability,¹⁰² gun rights,¹⁰³ exclusion of evidence seized during good-faith searches,¹⁰⁴ prohibition of economic-development takings,¹⁰⁵ appointment of counsel for indigents,¹⁰⁶ abolition of the juvenile death penalty,¹⁰⁷ equalization of school funding,¹⁰⁸ freedom to engage in same-sex sex,¹⁰⁹ and recognition of same-sex marriage.¹¹⁰ You need not agree with every right on this list to see the states' capacity for leadership in developing new liberties.

Nor is it fair to say that the federal system produces better judges than the state systems. It might surprise some to know that, of the ten former U.S. Supreme Court law clerks age fifty and under serving on America's appellate courts, five serve on state supreme courts¹¹¹ and five on the federal bench.¹¹² Time will tell whether this admittedly narrow indicator of quality indicates a trend, but at a minimum it undermines the assumption that judicial elections, retention or otherwise, necessarily drive away good candidates.

¹⁰¹ Sutton, *supra* note 26, at 339–41; *see also* Sutton, *supra* note 63, at 1971–78.

¹⁰² *See* Robert F. Drinan, Essay, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 119 n.143 (1997).

¹⁰³ *See* Sunstein, *supra* note 95, at 262–63.

¹⁰⁴ *See* Leigh A. Morrissey, Special Project, *State Courts Reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917, 917–18 (1994).

¹⁰⁵ *See* Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 763 (2009).

¹⁰⁶ *See* Akhil Reed Amar, Feature, *America's Lived Constitution*, 120 YALE L.J. 1734, 1755 (2011).

¹⁰⁷ *See* *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

¹⁰⁸ *See* Sutton, *supra* note 63, at 1971–72.

¹⁰⁹ *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1249–50 (2010).

¹¹⁰ *See id.*

¹¹¹ They are Justices Eid, Lee, Liu, Nahmias, and Stras.

¹¹² They are Judges Gorsuch, Kavanaugh, Kethledge, Srinivasan, and Watford.

Change comes in many stripes and runs in many directions. One change worth considering is whether the correct balance has been lost when it comes to the leading change agents in society, particularly with regard to the creation and recognition of new rights. Americans by and large may not care about this feature of the separation of powers — about who grants the rights they hold dear, just so long as someone grants them. Yet the flip side of that proposition is that the American people may readily accept different institutions taking the lead in rights innovation going forward. My inclination is that we would do well to have more leadership from the states, more rights recognition from legislatures than from courts, and more rights innovation from state courts than winner-take-all debates at the U.S. Supreme Court. Right or wrong about that assessment, I am hopeful that Zackin's thoughtful and timely book will invigorate the debate, reminding readers along the way of the vibrant role states have played, and should continue to play, in defining new statutory and constitutional rights. Whether "[w]e want more" rights or not, we would be lucky to have more scholarship from Zackin about the states' essential role in the American constitutional law tradition.