tices' decisionmaking process, highlighting Justice Powell's change of mind concerning the form of the Court's judgment. But at least in my view, Schwartz's findings did not justify a book.[4]

## STATE SUPREME COURTS IN STATE AND NATION.

By G. Alan Tarr[1] and Mary Cornelia Aldis Porter.[2] New Haven, Conn.: Yale University Press. 1988. Pp. 288. $28.50

*Michael C. Tolley*[3]

Before the so-called "new judicial federalism," state supreme courts and state constitutional law were largely ignored in the study of public law and the judicial process. However, as more and more lawyers discover that conservative federal judges are unsympathetic to federal constitutional claims, and come to rely increasingly on state constitutional provisions in cases before state courts,[4] the study of state appellate courts takes on new importance. Thanks to several innovative works, scholarship about state supreme courts and state constitutional law has begun to respond to this demand.

*State Supreme Courts in State and Nation* is the second work on state supreme courts by the same authors.[5] Porter and Tarr rightly assume that there is no one type of state supreme court. "Because there is no typical state supreme court, there can be no typical role for a state supreme court in either the state or national arenas." What are the roles of state supreme courts? How are the roles of these institutions affected by legal and extra-legal factors? With these questions as their guide, the authors set out to identify the causes and consequences of the similarities and differences in state appellate courts.

One of the book's central themes is that the diversity among state supreme courts is due to both national and intrastate factors. To pinpoint these factors, the authors focus on three supreme courts (Alabama, Ohio, and New Jersey) chosen simply because

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4. I find it difficult to understand why Schwartz did not simply include *Bakke* among the several cases that he addresses in his other—and considerably more interesting—recent book, THE UNPUBLISHED OPINIONS OF THE BURGER COURT.

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2. Professor Emerita of Political Science, Barat College.

3. Assistant Professor, Dept. of Political Science, Northeastern University.

4. *See generally* Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985). *Cf.* THE BURGER COURT (V. Blasi ed. 1983).

5. STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Porter and Tarr eds. 1982).

each has had an intermediate appeals court since 1945 and "display[s] political, legal, cultural, and demographic diversity."[6] My only objection to the authors' decision to focus on these three states is that they insisted upon excluding states which did not have intermediate appeals courts before 1945, a criterion which excluded more than half the states.[7]

The authors obviously tried to model their work on V.O. Key's 1949 classic, *Southern Politics in State and Nation*. The temptation to replicate Key's research method is understandable given the success of his "comparative case study" approach. It would be unfair to judge Porter and Tarr by the exceptionally high standard set by Key; not suprisingly, their book lacks the breadth and depth of Key's work. Although Key examined eleven states and Porter and Tarr only three, both works show originality in the interpretation of intrastate factors and display the same reluctance to draw broad conclusions.

In the preface, Porter and Tarr outline their three objectives:

> (1) [T]o adopt [Key's] model to a comparative analysis of state supreme courts and of their roles in the lives of the American states,
>
> (2) [T]o identify the range of variation in state supreme court activity and begin to explore the causes and consequences of that variety, and
>
> (3) [T]o explore those factors that have precipitated changes in the roles played by particular courts as well as those broader factors producing change on all courts.

The close fit between approach and subject matter gives the work a methodological coherence which distinguishes this study from single case studies,[8] judicial impact studies,[9] and systems analysis.[10] In the authors' words,

> [t]he comparative case study approach we employ represents a fundamental departure in the analysis of state supreme courts. To place our case studies in perspective, however, it is necessary to begin with an overview of state supreme courts' relationships with federal courts (vertical judicial federalism), with their sister courts in other states (horizontal judicial federalism), and with other governmental

6. *Id.* at 63-4. The following studies assured Porter and Tarr that the three state supreme courts they chose exhibited enough diversity to make comparative analysis meaningful: Kagan, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978); Kagan, *The Business of State Supreme Courts*, 30 STAN. L. REV. 125 (1977); and D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (1966).

7. As late as 1975, only twenty-three states had intermediate courts of appeals.

8. *E.g.*, T. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS (1975); C. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT (1988).

9. *E.g.*, G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977); Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC. REV. 109 (1973); Vines, *Southern State Supreme Courts and Race Relations*, 18 WESTERN POLIT. Q. 5 (1965).

10. *E.g.*, H. GLICK & K. VINES, STATE COURT SYSTEMS (1973).

institutions within the state. For each set of relationships, we look first to the legal factors structuring them, then to the extralegal factors influencing them, and finally—where appropriate—to significant developments in substantive law.

Chapter I, "Judicial Federalism and State Supreme Courts," is an excellent survey of the literature on state courts. Bringing together the works of other researchers, Porter and Tarr summarize the findings of the leading studies. The problem with these earlier studies, the authors argue, is that they emphasized either state court relations with (1) federal courts, (2) other state courts, or (3) other institutions of state government. Porter and Tarr, in contrast, view all three together. It is this broader context which enables the authors to "analyze the patterns of uniformity and variation, continuity and change."

In Chapter II, "State Supreme Courts and Governance," Porter and Tarr present an overview of the "intrastate legal context" which includes the work of state supreme courts, the substance of state law, and the effect of interstate factors such as the national civil rights and judicial reform movements. "[T]o understand how state supreme courts participate in governance, one must look at them as institutions of state government, interacting with and both influencing and being influenced by other political actors in the state." This is, in essence, the old "systems analysis" framework,[11] but with a novel twist. By extending the boundaries of the system to include the interaction of state supreme courts with federal and sister state courts, Porter and Tarr show how both intra and interstate factors influence the "institutional identity" of state supreme courts.

Chapter III, "Alabama: The Court That Came in From the Cold," is the first of three case studies included in this work. In this chapter, Porter and Tarr sketch the history of the state judiciary and describe the court's relationship with the federal courts and other branches of state government. The court's role evolved:

> Where the old court performed a legitimating, supportive, even sycophantic function vis-a-vis the other branches of government and the dominant political, social, and economic forces within the state, the new court is far more independent, far more willing to take initiatives, far more mindful and respectful of the federal judiciary, more interested in utilizing precedent from other states, and certainly more sympathetic to civil liberties claims.

This approach is repeated in Chapter IV, "Ohio: Partisan Justice" and in Chapter V, "New Jersey: The Legacy of Reform."

11. *Cf.* D. EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS (1965); S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (3rd ed. 1985); W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

In the concluding chapter, "State Supreme Courts in Perspective," Porter and Tarr summarize the results of their case studies. Perhaps their most substantial finding is that state supreme courts develop distinctive "institutional identities" in response to specific legal and political developments within their states:

> Our account of the political and legal development of the Alabama, Ohio, and New Jersey supreme courts documents the distinctiveness of each court and the persistence of certain intracourt continuities over time. Each court has developed its own understanding of its responsibilities—its particular jurisprudential orientation and attitude toward legal change, its relationship to other political and legal institutions, and its pattern of intracourt interaction. These continuities permit one to refer to, for example, the Ohio court's tradition of partisanship and the New Jersey court's continuing commitment to reformist activism. This orientation toward judicial responsibilities and toward the court's function, which is internalized by the members of a court and reflected in their actions, we refer to as the court's institutional identity.

In each of the case studies a conspicuous shortcoming is the authors' reliance upon data from earlier studies. For example, in describing the backgrounds and experiences of state supreme court justices, Porter and Tarr rely on the work of Glick and Vines which is now fifteen years old. The only time the authors rely upon data from their own investigations is in calculating dissent rates on the Alabama high court. The neglect of current caseload data and statistical studies of judicial decision making on the high courts of Alabama, Ohio, and New Jersey is unfortunate, for the results surely would have helped us to appraise the "uniformity and diversity" hypothesis.

Porter and Tarr also fail to discuss substantive developments in a number of important areas of state law. State appellate courts perform two quite different functions: the "private function" which ensures that justice is done to litigants in each individual case and the "public function" which is the development of state law. As the appellate court structure matures with the creation of an intermediate court of appeals and a supreme court with an all certiorari docket, the need to exercise the "private," or error correction, function decreases and the time and energy that a state supreme court can devote to its "public function" increases. Unfortunately, the comparative case study approach is not very helpful in uncovering the principles guiding and controlling the development of state law. By not reaching these issues of state constitutionalism, the authors diminish the importance of the "public function" and unconsciously perpetuate the myth that state supreme courts are incapable of developing a principled state constitutional jurisprudence.

Despite these flaws, *State Supreme Courts in State and Nation*

successfully combines the richness of individual case studies with the need to generalize from broad comparisons. In demonstrating the potential of the comparative case study approach, the authors challenge future researchers to discover the peculiar "institutional identities" of state supreme courts across the nation.

## SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION. By Robert L. Cord.[1] Baker Book House. 1988. Originally published: Lambeth Press, 1982. Pp. 302. $19.95.

## CHRISTIANITY AND THE STATE. By Rousas John Rushdoony. Ross House Books. 1986. Pp. 192.

*Steven D. Smith*[2]

If book reviews carried subtitles, this one could be called "The Mechanic and the Manichee." Those terms suggest the character, and the shortcomings, of Professor Robert Cord's and Dr. Rousas Rushdoony's respective efforts to examine the issues of religious freedom from a historical perspective. Each book has its merits. Professor Cord pulls together a mass of (sometimes) helpful historical data to deflate some mischievous historical myths. Dr. Rushdoony offers unorthodox (and therefore potentially valuable) insights and perspectives. The critical comments that follow should not be understood as disparaging these achievements. For different reasons, however, neither book establishes a genuine conversation with the past. Hence, neither book finds a historical antidote for the current doctrinal and theoretical malaise.

### I

A book may be unpersuasive without being unimportant. And in fact, Cord's is an important book that imparts an important truth. The book is important because it has become a cornerstone of sorts for the "nonpreferentialist" school of establishment clause jurisprudence—a school that claims among its adherents the current Chief Justice.[3] The important truth that emerges from Cord's

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2. Associate Professor of Law, University of Colorado.
3. The Rehnquist dissent in Wallace v. Jaffree, 472 U.S. 38, 106 (1985), adopts Cord's position that the establishment clause was intended to prevent establishment of a national church but was *not* intended to prevent public aid to religion so long as such aid is nonprefer-