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STATE COURTS AS SOURCES OF CONSTITUTIONAL LAW: HOW TO BECOME INDEPENDENTLY WEALTHY

Jennifer Friesen*

I. INTRODUCTION

My topic today is the future direction of each state's constitutional law of individual rights, law over which state supreme court judges alone possess final interpretive power, though their power is often left unused.1 Any regular reader of opinions of the high courts of the fifty states and Puerto Rico can confirm that these courts do interpret or apply state bills of rights provisions, hundreds of times in

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1 On the meaning of state constitutional rights, the United States Supreme Court must yield to state courts. See 28 U.S.C. § 1257 (1996) (limiting review of state court judgments by writ of certiorari to cases with a federal question); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). Federal trial courts that have supplemental jurisdiction under 28 U.S.C. § 1367(a) (1996) to hear state constitutional law questions are bound by the decisions of the highest court of the state in which they sit; see, e.g., Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991) (applying California provisions on separation of church and state); Carerras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) (applying California free expression provision). If the district court has serious doubts how the state supreme court would decide a particular issue, it should decline to exercise its supplemental jurisdiction over the state claim, see 28 U.S.C. § 1367(c) (1996), or, if available, use the state's certification statute to seek clarification from the state's high court. See JENNIFER FRIESSEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 31-34 & n.128 (2d ed. 1996) [hereinafter STATE CONSTITUTIONAL LAW].

Members of the state legislative or executive branches are duty bound to comply with the state constitution, and therefore need to interpret open questions from time to time, but the state's judicial branch alone possesses the final authoritative voice. Only subsequent amendments to the state constitution can change, add to, or subtract from, a constitutional right that the court has defined.

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each calendar year. In many cases they decide the state question along with a parallel federal rights claim. Sometimes the litigant

2 This is not to say the state law question receives a thorough treatment—often it appears as an “also ran,” summarily decided in the course of a discussion dominated by federal law precedents. This practice can unnecessarily open up the court’s judgment to Supreme Court review and reversal. See Michigan v. Long, 463 U.S. 1032 (1983) (requiring a “plain statement” by the state court that it rested its judgment for the rights claimant on state grounds, independent of any federal law discussion, to defeat Supreme Court jurisdiction); State v. Robinette, 653 N.E.2d 695 (Ohio 1995) (holding search after traffic stop violated both Ohio Constitution and Fourth Amendment), rev’d sub nom., Ohio v. Robinette, 117 S. Ct. 417 (1996); State Constitutional Law, supra note 1, at 50–56.

About a quarter of the states have held instead that they will not address any federal constitutional claims raised unless all properly raised state law questions have first been decided adversely to the claimant. When the state law proves adequate to dispose of the controversy, reaching any federal claims also briefed is unnecessary. See, e.g., Large v. Superior Ct., 714 P.2d 399, 405 (Ariz. 1986) (“Because petitioner did not articulate whether he was proceeding under the federal or state due process clause, and because the provisions of our state constitution settle the matter, we address only the state constitutional issue.”); Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992) (“Consistent with federalist principles set forth below, we examine the [defendant’s] confessions initially under our state Constitution; only if they pass muster here need we re-examine them under federal law.”); State v. Perry, 610 So. 2d 746, 751 (La. 1992) (“[W]e set to one side, without deciding, the federal constitutional issues and proceed to resolve this case on state constitutional grounds.”); see also State Constitutional Law, supra note 1, at 27 n.108 (citing and quoting cases from other states).

In civil cases, federal courts adopt the same hierarchy of claims as a form of judicial restraint, to avoid unnecessary resolution of federal constitutional questions. See City of Mesquite v. Aladdin’s Castle, 455 U.S. 283, 293–95 (1982) (noting federal court of appeals should apply state constitution first in order to avoid a federal issue); Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909) (federal policy to prefer resolution on state law grounds); Ellis v. City of La Mesa, 990 F.2d 1518, 1523 (9th Cir. 1993) (“[A]lthough the plaintiffs’ suits allege both federal and state constitutional violations, we turn first to the California Constitution.”); Hewitt, 940 F.2d 1561; Carreras, 768 F.2d 1039.

Besides avoiding unnecessary federal constitutional issues, resting decisions exclusively on state law whenever possible saves parties and courts extra costs that could be imposed by inviting Supreme Court review of a federal holding. See, e.g., Immuno A.G. v. Moor-Jankowski, 549 N.E.2d 129 (N.Y. 1989) (holding for libel defendant on First Amendment grounds), vacated and remanded, 497 U.S. 1021 (1990), enforced, 567 N.E.2d 1270 (N.Y.) (reinstating original judgment on both federal and state constitutional grounds and commenting on needless expense and delay caused by Supreme Court review), cert. denied, 500 U.S. 954 (1991).

3 State courts are most often called upon to apply federal constitutional rights imposed on the states by the Fourteenth Amendment. A future majority of the United States Supreme Court could conceivably reduce this contributive role by deciding to “de-incorporate” the First, Fourth, Fifth, Sixth, and Eighth amendments, leaving states bound only by the Privileges and Immunities, Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other federal provisions that ap-
claiming the protection of the state constitution wins; more often he or she loses. This is in no way meant to suggest that state constitutional law is too conservative; most assertions of constitutional rights, state or federal, are unsuccessful. My concern is not especially with outcomes, but with how state court judicial methodology and craft is often influenced by federal methodology whenever the court is presented with parallel state and federal claims. Specifically, I want to question the uncritical adoption, when giving meaning to state constitutional rights, of verbal formulas that the United States Supreme Court uses to measure federal constitutional rights or powers. Some of this dogma should be laid to rest even by the Supreme Court, as federal law scholars agree; it certainly does not deserve a second life, released to stalk the pages of the state reports, where, vampire-like, it sucks the life out of fresh constitutional analysis.

4 It is true that much of the law review and press commentary on the rights secured by state constitutions has been merely to urge state judges to “expand” state bills of rights, or to applaud them for doing so, especially when state law might dictate a result different from an unwelcome federal precedent. That so much of the commentary might be called result-driven is not surprising: much legal commentary, including that on federal constitutional law, argues for one outcome or another without challenging the court’s underlying methodology. And it is results that catch headlines and fire advocates, not necessarily soundly crafted opinions. In any event, it is clearly past time for commentators, as well as judges and attorneys, to devote more energy to methodology, and not to use state bills of rights as federal “look-a-likes” that can be made to pop out a more pleasing result by applying a different balance.

5 Supreme Court boilerplate that is the least deserving, yet the most likely, to be so favorably received includes the “reasonable expectation of privacy” in search and seizure cases, see infra notes 63–71 and accompanying text; for equality and speech provisions, the “suspect” classes and “fundamental” rights that merit protection if “strict scrutiny” does not uncover a “compelling state interest;” see infra notes 72-85 and accompanying text, and the aging three-part inquiry of Lemon v. Kurtzman, 403 U.S. 602 (1971), for deciding questions of religious establishment, despite detailed and multiple religion clauses that, in most states, clearly dictate a stricter separation of church and state than does the text of the Federal First Amendment.

6 See, e.g., Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. Rev. 2417 (1996) (arguing that a federal rule that a “compelling state interest” justifies content-based restrictions on free speech is wrong both descriptively and normatively, and distracts us from formulating a better, categorical approach).
But—as judges, attorneys and students alike point out—there is a lot of federal mimicry of this kind out there, in both state constitutional precedents and appellate briefs, where it grows like kudzu vines. My remarks thus unavoidably raise the question whether there is any value in creating an independent body of state constitutional doctrine, when a state court can achieve its desired result in particular cases without it.\(^7\) Without independent rules, a state court has the option of routinely following, for state constitutional purposes, whatever the Supreme Court has done; in doubtful cases it can make an educated guess about what the Supreme Court would do.\(^8\) If a

\(^7\) For example, the members of the Supreme Court of California have sometimes placed little value in this endeavor, as illustrated by recent caselaw. In \textit{Smith v. Fair Employment \\& Hous. Comm'n}, 913 P.2d 909 (Cal. 1996), the court decided as a matter of \textit{federal law} that the owner of an apartment building could not, on the grounds that it offended her religious scruples, lawfully refuse to rent to an unmarried couple, and sustained sanctions against her for statute-based housing discrimination. Since the rights claimant had lost under the Federal Religious Freedoms Restoration Act (RFRA), 42 U.S.C. \S 2000bb-1 (1996), and the First Amendment, she had a right to a reasoned decision whether application of the state statute to her business nevertheless violated the California Declaration of Rights. To this argument, the court plurality responded somewhat evasively:

That the state Constitution’s free exercise clause is more protective of religious exercise than the federal Constitution’s free exercise clause has also been suggested. No court, however, has articulated a test more protective than the test . . . now codified in RFRA. Because Smith’s claim fails even under that test, . . . we need not address the scope and proper interpretation of California Constitution article I, section 4. These important questions should await a case in which their resolution affects the outcome. \textit{Smith}, 913 P.2d at 931. But of course these “important questions” could have been crucial to this particular outcome, particularly as Justice Mosk, who cast the necessary fourth vote for the plurality disposition, would have held RFRA unconstitutional. See also \textit{Sands v. Morongo Sch. Dist.}, 809 P.2d 809 (1991) (invalidating practice of allowing religious invocations at public high school graduations under both the state and the federal constitutions by a plurality, while two concurring justices rested the result on the Federal First Amendment, treating the state constitution as practically immaterial, though First Amendment precedents were not clear on the issue). In \textit{Sands}, Justice Mosk pointed out the illogic of deliberately bypassing the state’s organic law in order to open up the decision to federal review:

The Chief Justice virtually begs the Supreme Court to relieve us of our duty under the Constitution of California. Such a supplication is unprecedented. We are not a branch of the federal judiciary; we are a court created by the Constitution of California and we owe our primary obligation to that fundamental document. \textit{Id.} at 835 (Mosk, J., concurring).

\(^8\) The California court happened to guess correctly in \textit{Sands}, 809 P.2d 809, as shown by the later \textit{Lee v. Weisman}, 507 U.S. 577 (1992); but the Ohio court guessed incorrectly in \textit{State v. Robinette}, 655 N.E.2d 695 (Ohio 1995) (holding search after
state supreme court finds unsound, for whatever reason, a Supreme Court ruling in favor of the state regarding, say, a police search, it can retain the federal framework and change the outcome by differently weighing a "governmental interest," as the Supreme Court of Michigan did, or by crediting citizens with a higher "expectation of privacy," as the Supreme Court of Colorado and other state courts have done. If there is no practical value in the enterprise of creating independent doctrine, then it is a waste of time to suggest it.

But I believe there is great value in this enterprise. The call to create a truly independent set of constitutional rules at the state level is one that responds to the demands of craft, logic and pragmatism, and not necessarily to the call of any ideological agenda, whether of the left or the right. Independent methodology may or may not "broaden" a state search and seizure clause beyond the fourth amendment, but broadening rights is not its purpose. The point is that no test for judicial review of constitutional rights, whether of the balancing, multi-factor, or categorical variety, should be embraced without first testing it against criteria of good governance. A conscientious


10 See, e.g., People v. Hillman, 834 P.2d 1271 (Colo. 1992) (holding state constitution protects expectation of privacy in trash left at curb and rejecting California v. Greenwood, 486 U.S. 35 (1988)); see cases cited in STATE CONSTITUTIONAL LAW, supra note 1, at 617 nn.108–12. Of course, state courts do not merely react to what the Supreme Court has already ruled. The Hawai'i Supreme Court, while using federal type tests to implement the state bill of rights, has a history of independent outcomes that are not triggered by the desire to reject a Supreme Court precedent. Thus, in State v. Tanka, 701 P.2d 1274 (Haw. 1985), the court ruled years before Greenwood that people have a reasonable expectation of privacy in their trash bags. See also Bachr v. Lewin, 852 P.2d 44 (Haw. 1993) (using federal model of tiers of scrutiny for types of discrimination, but departing from federal law by declaring gender to be "suspect classification" under the Hawai'i Constitution), on remand sub. nom, Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

11 As Chief Justice Randall Shepard of Indiana has aptly stated, "[T]he continuing strength of this movement does not derive from a desire to continue, at the state level, the agenda of the Warren-Brennan Court. It derives from the aspiration of state court judges to be independent sources of law." Randall T. Shepard, The Maturing Nature of State Constitution Jurisprudence, 30 Val. U. L. Rev. 421, 421 (1996). Chief Justice Shepard's illustrations of good independent constructions of a state constitutional provision include a sampling of pre-1977 decisions, id. at 424–29, and more recent developments of free speech and equality provisions, id. at 444–56.

12 For example, in remarks delivered at a conference on the vogue of federal balancing tests, Professor Kathleen Sullivan's contribution asks whether balancing tests or categorical rules are most likely to enhance rights and concludes that the
state judge wants rules to be coherent, intelligible, workable, and at least somewhat predictable, especially to members of the other two branches of government—not to mention the trial courts—who must conduct themselves according to these rules every day. He or she also wants, if possible, to write opinions that have a reasonable degree of precedential value, not conclusions hung upon formulas of judicial review so ad hoc and elastic that they unnecessarily hamper lawyers' ability to advise their clients what the court means to do with the next case.

Every state public servant, from elected state representatives asked to vote on questionable legislation, to the janitorial supervisor at a rural school district faced with discharging an employee, can expect, at some time, to make a constitutional law decision in the course of his or her official duties. Law enforcement officers are forced to do so under stressful conditions on a near daily basis. It should be assumed that all public servants want to comply with the state constitution (though not necessarily that they have done so). Inadvertent violations of citizens' rights will decrease—surely a goal of good governance—in direct relation to the clarity and workability of the lines judges and other rulemakers devise. When law professors find explaining and applying the Supreme Court's fragmented Fourth Amendment opinions next to impossible, what chance has a responsible police officer in the field to get it right? Some theorists assert that advocates of independent state jurisprudence hold as an ultimate objective "the creation in each state of a jurisprudence that is uniquely

answer depends on who is on the Supreme Court and who is devising the categories or performing the balancing. She closes with the statement: "I do not think the choice between categorization and balancing will ever go away, but I think which you like depends on whose ox is being gored." Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 618 (1992). In other words, a balancing approach is neither liberal nor conservative; categorical rules are neither liberal nor conservative. Any court's choice between modes of reasoning must be made on some basis other than result orientation.

13 There would be less need for case-specific constitutional judgments if police practices were more often regulated by administrative or statutory rules, as is indeed the case with most other government functions, such as the discharge or discipline of public employees and the procedures for exercising eminent domain, to name only two.

14 Perhaps the best inducement for a state's political representatives, police chiefs, bar, and bench to write their own rules of search and seizure is the promise that they may rarely have to read a Fourth Amendment opinion again.
expressive of that state’s own particular constitutional heritage . . . ."\textsuperscript{15}
I do not make that assertion: I say that a state court’s duty is not to make unique constitutional law, but to make good constitutional law.

State appellate opinions can and do dispose of concrete constitutional disputes justly, no matter what test is used. The justness of particular resolutions is not the question, but the structure of the rules. It is a very good question, for example, how a state court ought to proceed when it "agrees with the Supreme Court’s result but rejects ‘balancing,’ more or less ‘fundamental’ rights, ‘degrees of scrutiny,’ or other Supreme Court clichés of the times."\textsuperscript{16} Too often, the litigants will not have briefed the state question in any other terms.\textsuperscript{17} Yet state courts are bound to produce, to the extent possible within institutional constraints, intelligible rules of conduct for future use as well as proper results in the immediate case. I am acquainted with state judges who doubt whether much of the federal constitutional rubric performs this second function well. Improving the coherence and textual fidelity of state constitutional rulings will not be achieved without work, but it is work that offers a chance of the payoff held out by the title of this essay: a wealth of state constitutional law that can free the state judiciary and other state officials from the imposition of national rules that are made and modified beyond their control.\textsuperscript{18}


\textsuperscript{17} Inadequate briefing often forecloses a decision on state grounds, unless the court takes a more active role:

In many states, a deeply embedded tradition sees the court as an umpire judging only the arguments presented by counsel, even when neither side has it right. For an appellate court to introduce a new line of reasoning is thought unfair to the losing party, to the lawyers, and to a lower court that is reversed on grounds never presented to it. On their own, judges can introduce new reasons only carefully and without prejudice to the litigants, most easily when affirming a decision or when its result would be the same under the older views.

Id. at 933–34; see State Constitutional Law, supra note 1, at 58–60 (summarizing rules for preserving and presenting state law claims).

\textsuperscript{18} This statement is a bit hyperbolic, but only a bit. Fourteenth Amendment questions will still need to be addressed by state courts whenever state law falls short of the national minimum requirements, or where no state issue is properly raised, or where the right asserted is one that is unique to the federal constitution or laws. I am assuming what the last two decades of state constitutional opinions suggest: that state guarantees will usually be interpreted to protect the asserted right in a manner
I begin by suggesting six prerequisites to the development of this body of law, and discussing briefly why some of these have seemed problematic to judges, academic critics, and others. As Chief Judge Judith Kaye of New York has said, a serious idea such as the deliberate development of state civil liberties is bound to attract criticism. By this measure, state constitutional law has arrived, having now gathered a respectable number of academic detractors as well as well-intentioned friends offering "constructive criticism." The most skeptical academics are specialists in federal constitutional law. Backing their commentary is a drumbeat of belief that a national constitutionalism, or the opinions of the United States Supreme Court, is the only constitutional rights law worth having or discussing. Some would treat that Supreme Court as the exclusive legitimate arbiter of all American constitutional rights and liberties questions, a role that the Supreme Court's members have repeatedly disclaimed.

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Professor James Gardner's severe and flawed critique of state constitutional decisions, see Gardner, supra note 20, engendered responses ranging from the respectful to the indignant from a variety of judges and constitutional scholars. These responses are collected in Volume 24, Issue 4 of the Rutgers Law Journal, published in the summer of 1993. Indiana chief Justice Shepard's lucid and intelligent commentary on Professors Gardner and Kahn appeared recently as well. See Shepard, supra note 11.

22 While I find a nationalist attitude unsurprising in an academic at a national law school, I don't readily understand the reasons for the same sentiment in the opinions of state supreme court justices. Law students in my State Constitutional Rights Seminar ask me repeatedly why some state justices are loath to decide state constitutional questions independently, or at all, even when the state issues are clearly distinct, and have been raised and briefed for the court. I have no single answer for them. Perhaps the preference for a federal law solution springs from a desire to be a participant, or "player," in a larger enterprise; or from a natural reluctance to divert controversy toward state courts, who are much less well defended from public reaction than the Supreme Court; or from a dislike of innovation; or maybe from a confluence of actual agreement with the prevailing philosophy of the Supreme Court
I conclude by offering as candidates for reconsideration some time-honored but questionable formulas that often appear in the constitutional opinions of state courts. These range from the importation of phrases like "police power" that may incorrectly imply limits on state legislative power not found in the state constitution, to formulas like "reasonable expectation of privacy" that pose as premises for deciding substantive rights. The particular examples chosen do not matter. They are meant to jostle our thinking about constitutional law a little, to re-examine familiar but perhaps unworthy conceptual tools. It is a habit of mind that, if overindulged, may threaten to paralyze us: but if underindulged, risks freezing us in a middling intellectual landscape where the view never changes.

II. Six Postulates of Independent Methodology

I make no claim to originality or completeness in listing the following six postulates, or prerequisites, for reducing dependency on the federal judiciary in interpreting state law. They are but a starting point that I am prepared to defend.23 If they provoke questions, they are probably questions that I ask my students and that an interested judge should not hesitate to pose to counsel, whether advocating or opposing an independent construction of state law.

1. Power. State supreme courts have the power to interpret state law, including constitutional law, in any way they deem sound;24 this power remains exactly the same even if the United States Supreme Court has made a contrary ruling, on the same or similar facts, interpreting an identical or similar federal right.25

2. Permission. The Supreme Court of the United States has neither the power nor the desire to nationalize all American constitu-

with a judicial philosophy that different state texts and history do not play much of a role in constitutional interpretation.

23 Wholesale rejection of federal doctrine is unnecessary and counter-productive; it remains one of many sources from which state courts may draw inspiration when grappling with similar sorts of questions. On reflection, a state court may conclude that it cannot improve on a particular federal rule and decide to adopt it as state law in a particular case. The worst mistake a court can make in such cases, in my judgment, would be to go further and announce that in all future cases, the state provision will be treated identically with the federal. This "lockstep" practice unnecessarily ties the state court's hands and confounds lower courts and counsel when the United States Supreme Court significantly changes its direction in a way that contradicts standing state precedents.

24 See, e.g., Alderman v. United States, 394 U.S. 165, 175 (1969) (observing that federal guarantees of civil rights and liberties may be exceeded by state law).

tional rights to fit one uniform mold; rather, its members, of all ideologi- 
cal bents, have often invited state courts to consider whether state 
law should compel a different analysis or a different outcome.26

3. **Polity.** The fact that individual rights may differ, depending 
only on the happenstance of crossing a state border, is an inevitable 
and natural consequence of a federal system, and is no cause for 
alarm.

4. **Sources.** State declarations of individual rights have histories 
and qualities that differ, to a greater or lesser degree, from each other 
and from the first ten amendments to the Federal Constitution; how-
ever, what really "counts" in state constitutional interpretation is often 
not truly unique to one state. Independent interpretation does not 
require uniqueness; nor are differences in a state's political or cultural 
makeup relevant unless they are differences that demonstrably influ-
cenced the making of constitutional choices in an original or amended 
document.

5. **Semantics.** Fresh constitutional theorizing requires scholars, 
judges, and lawyers to practice, as a discipline, setting aside federal 
jargon, and to question the meaning and the inevitability of catch-
phrases like "fighting words" or "compelling interests" that carry the 
comfort and convenience of long use.

6. **Systematic Implementation.** The full rewards of independence—
among them local control and better guidance to citizens and af-
fected governmental officials—cannot be achieved by ad hoc resort to 
state law, but only over time, by a determined and systematic ap-
proach carried out in cooperation by the bar, the bench, the law 
schools, and constitutional law scholars.

Virtually no one would disagree with the first two entries on this 
list, **Power and Permission.** Power is a legal truism. Permission is not a 
legal prerequisite at all; I list it here only as a reminder that there is 
simply no need to see an independent application of state rights as 
any kind of statement to the Supreme Court, whether of "defiance,"

may surely construe their own constitutions as imposing more stringent constraints on 
police conduct than does the Federal Constitution."); Moran v. Burbine, 475 U.S. 
412, 428 (1986) ("Nothing we say today disables the States from adopting different 
requirements for the conduct of its [sic] employees and officials as a matter of state 
law."); California v. Ramos, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States 
are free to provide greater protections in their criminal justice system [sic] than the 
Federal Constitution requires."); see also William J. Brennan, Jr., *The Bill of Rights and 
the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. 
Rev. 535, 549 (1986) ("[S]tate courts have responded with marvelous enthusiasm to 
many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the 
Supreme Court majority.").
disapproval, or "evasion." Yet their awareness of power and permission caused no little discomfort to state judges in the early years of the state constitutional rediscovery. Even now, state courts who have no doubt of their power to disagree with the Supreme Court often do not wish to use this power after the Supreme Court has already visited the issue, even if it means backsliding from an earlier pronouncement of more protective state law. Others may use their power only with extreme caution, deliberately embracing a policy of deference toward federal interpretation.

27 Examples of post-certiorari conversion are not rare. On religious establishment or preference, see Conrad v. City & County of Denver, 724 P.2d 1309 (Colo. 1986) (backing away from an earlier finding that plaintiffs had established a prima facie case that a nativity scene violated the state constitution, the court approved the display as consistent with the intervening federal decision in Lynch v. Donnelly, 465 U.S. 668 (1984)); and State v. Freedom from Religion Found., 898 P.2d 1013 (Colo. 1995) (holding that display of Ten Commandments in public park near state capitol building did not violate the state constitution's ban on granting "preference" to a religion; Conrad was to be "enlightened" by subsequent Supreme Court First Amendment decisions).

The degree of protection of free speech afforded by the Ohio and Wisconsin constitutions was in some doubt after the Supreme Court, disagreeing with the two state supreme courts, upheld the constitutionality of penalty enhancement for racially motivated assaults. See State v. Wyant, 597 N.E.2d 450 (Ohio 1992) (holding that a law punishing racial bias in the commission of crime violated both federal and state constitutions), vacated and remanded sub nom., Ohio v. Wyant, 508 U.S. 969 (1993), vacated, 624 N.E.2d 722 (Ohio 1994) (holding that the law violated neither constitution); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992) (holding that both First Amendment and Wisconsin rights had been violated), rev'd sub nom., Wisconsin v. Mitchell, 508 U.S. 476 (1993). The Wisconsin Supreme Court did not revive its earlier judgment for defendant on state grounds. State v. Mitchell, 504 N.W.2d 610 (Wis. 1993).

Counter-examples are also evident. They include that of Michigan, holding that a sobriety checkpoint program that had passed muster under the Fourth Amendment nevertheless violated the state's prohibition on unreasonable searches and seizures. See Sitz v. Department of State Police, 506 N.W.2d 209 (Mich. 1993), on remand after Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990). The Supreme Court of Minnesota, ruling after the Supreme Court had issued contrary decrees, declined to conform its free exercise clause to the boundaries of the First Amendment, and struck down a statute imposing a life sentence for first time drug possession as cruel or unusual under the Minnesota Constitution. See State v. Hershberger, 444 N.W.2d 282, (Minn. 1989), vacated and remanded sub nom., Minnesota v. Hershberger, 495 U.S. 901 (1989), on remand sub nom., State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (reinstating judgment for religious freedom claimant on state constitutional grounds); Harmelin v. Michigan, 501 U.S. 957 (1991) (sustaining Minnesota sentencing statute against Eighth Amendment attack); People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (striking down same statute).

28 A strong variety of this judicial policy might mean advising litigants that the state court will not depart from federal precedent unless the claimant gives them a "compelling reason" to do so. A weaker variety instructs litigants that the court will
The third postulate, which I have called Polity—that diversity of individual rights is inevitable in our fifty-plus sovereign territories—is not universally accepted, despite its logic, and despite the drastic and absurd measures that would be needed to prevent such diversity, if indeed it is preventable. For several years, I have been teaching a seminar at Loyola Law School called State Constitutional Rights. The course principally covers individual rights from a comparative and national perspective, and is the first exposure most students have to state constitutions. Every year, a few students are initially distressed at the notion that the exclusionary rule in Idaho might be broader than the one in Iowa; that conducting political activities in private shopping malls might be a constitutional right in Massachusetts or New Jersey and a criminal trespass in North Carolina. When I press them to say why this diversity makes them uncomfortable, they give answers that are either conservatively ideological (for example, "the federal floor creates adequate rights against state government already") or mythical ("constitutional rights are so fundamental that everyone should have

not depart from analogous federal precedent unless some combination of factors is demonstrated. Requiring attorneys to brief the factors the court considers relevant is an excellent practice. It is the notion of giving parallel federal precedent any "presumption" of correctness that should be questioned. The court is free to reach a decision in line with federal precedent without the aid of any such a priori announcement, and, if it prefers a different result, it may feel forced, again unnecessarily, to defend its decision to "depart." Phrasing the presumption in reverse, for example, "We will not follow federal precedent unless you prove to us beyond a doubt that it is an accurate interpretation of this state's constitution," demonstrates the absurdity of a lock-step rule.

It is encouraging to see courts soften earlier statements of this kind that unnecessarily limited their freedom. The Michigan Supreme Court, for example, once stated that the state's prohibition on unreasonable searches and seizures should be given a meaning different from the federal counterpart’s "only when there is a compelling reason to do so." People v. Nash, 341 N.W.2d 439, 446 (Mich. 1983). Ten years later, that court explained that the quoted language from Nash meant only that "claims that art. I, § 11 should be interpreted more expansively than the Fourth Amendment must rest on more than a disagreement with the United States Supreme Court." Sitz v. Department of State Police, 506 N.W.2d 209, 213 (Mich. 1993). The court was correct in directing claimants to furnish the court with a principled argument for an independent interpretation, not just an assertion that the Supreme Court was wrong. On the other hand, the Supreme Court does not make state law, and disagreement with the Supreme Court's understanding of a federal provision can quite legitimately spur a state court to consider the state provision differently.


30 See State v. Felmet, 273 S.E.2d 708 (N.C. 1981); see also Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987) (upholding a tortious trespass for political activity at a mall).
the same ones"). I suspect that members of the latter group are sometimes expressing a vague nostalgia for the Warren Court era, an era that first impressed upon them, through college courses and heroic motion pictures, the majesty of federal courts enforcing ever-expanding constitutional rights on behalf of the underdog. The ideological answer is, at least, one that could ethically be advanced in court on behalf of a government client. The mythical or nostalgic answer could not be squared with ethical obligations, if it blinded a lawyer to a plausible state constitutional argument that supported her client's case but proposed to "exceed" federal precedent.

Of course, other students are believers from the first day of class, and cannot wait to start making new constitutional law. Most of these are motivated by ideology too, a rights-expanding ideology—after all, they are preparing themselves to be advocates, not judges, and students in civil rights classes commonly identify with the perceived underdog. Finally, others—a handful—exhibit a touching hope that in my class they will learn something about constitutional reasoning that does not hide behind the Oz-like curtain of interest balancing and intermediate scrutiny. I hope that I do not fail them. Perhaps law students have always hidden their insecurities behind tough assertions such as "judges do whatever they want and make up the reasons later" (they hold the same high regard for professors' grading habits), but I fear that much federal constitutional rights "discourse" only entrenches their cynicism, and leaves them unpracticed and even resistant to arguments based on text, craft, history, or logic.

When I read academic articles complaining that "state constitutionalism" is producing a diversity of rights that is undesirable and practically un-American, I cannot help but think of my students. Two writers holding this view are Professor James Gardner and Professor James Diehm. Professor Gardner's 1992 broadside at state constitutionalism in the Michigan Law Review dismissed the decisions of state supreme courts as impoverished, unintelligible, and destructive of national unity. Professor Diehm, a law professor and former federal prosecutor, has attacked the modern diversity of constitutional rights on the ground of unfairness. He recalls the trade in illegally seized evidence, a practice known as the Silver Platter, that flourished before

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31 See Gardner, supra note 20, at 824 ("The existence in our system of state constitutions is in tension with the premises of national constitutionalism and may even pose a genuine threat to it.").

32 Gardner, supra note 20 (describing state constitutional law as a "danger" or "threat" to the nation at least sixteen times).

Mapp v. Ohio\textsuperscript{34} standardized the application of the Fourth Amendment exclusionary rule. State courts that now impose higher-than-federal limits on law enforcement practices are, he argues, creating unacceptable inequities among similarly situated defendants, and confounding the state and federal officers who must now operate and cooperate under non-uniform rules.\textsuperscript{35}

Although I find something to agree with in the comments of each of these two commentators, each fundamentally misses the mark. Professor Gardner, for example, besides ignoring the innovative and highly intelligible work of several fine courts, scores points off a strawman. The strawman is a false premise that he says defines state constitutionalism. He writes: "The central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it."\textsuperscript{36} This statement is inspirational, but in the way that political speeches are meant to be. As a statement of theory, or law, or even of a central premise of anything but Gardner's own preferences,\textsuperscript{37} I cannot agree with it. The independence of state constitutional decisions rests, more modestly but no less importantly, on the dispersal of power inherent in a national plan that retains, as to matters not delegated, the sovereignty of each state. State courts that exercise this power, when they interpret and apply the state's own organic law, need neither to apologize to any other court, nor to claim for themselves the rather daunting role of dispensing, along with judicial decisions, the "fundamental values and character" of the state's citizens, the majority of whom are unaware of and little affected by constitutional opinions. But no state court can decline to exercise this power, once presented with a genuine state constitutional claim on which hinges the outcome of a live dispute.\textsuperscript{38}

Separate sovereignties may and often do produce outcomes and approaches diverse from the national answer and from one another. They are also entitled to copy one another, if satisfied of the sound-

\textsuperscript{34} 367 U.S. 643 (1961).
\textsuperscript{35} Diehm, \textit{supra} note 33, at 250–59.
\textsuperscript{36} Gardner, \textit{supra} note 20, at 764.
\textsuperscript{37} "Gardner . . . is a nationalist. He does not want to see an independent state constitutional law because it will interfere with his hierarchical conception of American nationalism." Daniel J. Elazar, \textit{A Response to Professor Gardner's The Failed Discourse of State Constitutionalism}, 24 \textit{RUTGERS L.J.} 975, 982 (1993).
\textsuperscript{38} "[I]nterpretation is more than academic theory, it is a daily practical task. Theory requires more than having an opinion whether state courts should postulate separate state and national values; it must be tested against real questions." Linde, \textit{supra} note 16, at 929.
ness of another court's reasoning. But Gardner and others make the claim that national uniformity is logically, and perhaps even normatively required. Conformity is not the highest value to be achieved in constitutional law, nor is it demanded by the structure of our nation's government. 39

State judges, I believe, would do well to avoid singling out state constitutions as the embodiment of state citizens' "fundamental" values or their unique character. Their charge—difficult enough—is to arrive at a means of sound interpretation and application that is responsible to the document they are examining, however they see that responsibility. Constitutional pronouncements need not, to inspire respect and admiration, be phrased as revelations of universal truth: as Gardner says, this posture places a court in the odd position of inadvertently suggesting that other jurisdictions that get along without the rights just held to be "fundamental" might be a bit antediluvian. 40

Each constitution certainly reflects the high aspirations that its drafters and ratifiers held concerning the proper goals of good gov-

39 Congress must guarantee to each state a republican form of government, U.S. Const. art. IV, § 4, and the Supreme Court must outlaw challenged state rules, including constitutional ones, that fall below national norms, U.S. Const. art. VI. But beyond enforcing these minimum requirements, neither Congress nor the Supreme Court purports to have the power forcibly to standardize state and federal constitutional law. Given the political impossibility of a mass revision of state charters, which Gardner concedes, he and fellow critics of diversity must therefore be urging state courts to abandon their own law wholesale, a choice no state court can logically or ethically make.

40 If one were to accept his inflated definition of constitutionalism, Gardner's objections would carry some weight. For example, he says that differences in rights would then be incoherent and disparaging of the choices of other jurisdictions: [W]hen a state constitution conflicts with the national Constitution, we can only conclude that the people of that state consider certain values fundamental for themselves, but not for the rest of us.

Even on the most basic level, this type of divergence can be unsettling. If a value is good enough to be fundamental to the people of the state, one might say, why isn't it good enough for everybody? There is something vaguely selfish and hostile about the people of a state going off to their own corner and making up rules for their own self-governance that they think superior to the ones the rest of the country has decided to use. And even were this not the case, it is difficult to accept the idea that fundamental values on which all Americans agree can really differ significantly from place to place. . . .

. . . Such an inference embraces another contradiction: how can the same person simultaneously have both types of character? Constitutionalism itself rejects such a possibility—if a constitution reflects the character of a people then it cannot simultaneously reflect the opposite of their character.

Gardner, supra note 20, at 824–25.
ernment, the demands that relinquished power be exercised in a certain way, and the limits on governmental power that they thought wise in order to safeguard their liberty (mostly meaning government non-interference) to realize individual or community values. A constitution certainly expresses deeply held values, but not necessarily the most important values, nor the character, of any group of people living at a particular moment in time within a particular set of boundaries, state or national. If we are sincere about locating the places in our legal system from which our deepest values emerge, I would suggest we are more likely to find them in common law decisions, or in such statutes as those that govern marriage and divorce, who shall pay taxes and how much, and how our schools are run. And outside the law are even deeper and more personal shared values: responsibility, neighborliness, charity, filial respect, and respect for the miracle of nature.

Professor Gardner is not the first to find differences in rights unsettling—as I mentioned earlier, my students also do for the first week or two of the seminar. But Gardner’s anxiety has no cure. The national Constitution is not a document of totalitarianism, either of values, or of character, or of individual rights. And conformity, as he concedes, is not practical. State judges whose own analysis and precedents direct them to apply similar texts in ways modestly different from the way five of nine federal appointees see it—for none of the state variations yet adds up to any radical statement of symbolic secession—are neither amateurs nor heretics. To choose just one example, twenty or so states have by decision or statute declined to adopt the “good faith exception” to the Fourth Amendment exclusionary rule that would admit evidence seized under the authority of an invalid search warrant, so long as the executing officer believed in good faith that the warrant was valid.41 On what conceivable ethical grounds could these courts and legislatures allow their considered judgment to be overridden by an abstract goal of national uniformity—even if they assigned some value to uniformity?

The other critic to condemn diversity, Professor Diehm, inveighs sternly against the fact that state and federal law enforcement cooper-


Traditional courts are probably right to be wary of embracing an exception which, by logical extension, could swallow the entire exclusionary rule except in provable instances of deliberate police misconduct. In fact, the exception is already being expanded. See Arizona v. Evans, 514 U.S. 1 (1995) (admitting evidence of search of car, though warrant to arrest motorist had earlier been quashed but erroneously not removed from police computers).
ation is complicated when constitutional rights differ by state and differ from federal standards.\textsuperscript{42} (Of course, diverse state statutes regulating searches, which he also deplores, are equally complicating.) It is undeniable, as he writes, that disparities in treatment occur as a result. Here is but one illustration. Suppose that both state and federal law enforcement agents are involved in capturing two defendants, Mr. A and Ms. B, who are accused of a crime prosecutable in either state or federal court, at the discretion of the prosecutors. A is tried in state court, where an exclusionary rule stricter than the Fourth Amendment’s excludes the evidence seized by a state agent. The same evidence is then lawfully admitted by a federal court against B, A’s accomplice. As a result, one defendant is acquitted and the other convicted, based solely on the uniform of the searching officer and the court that tries the case. This, Professor Diehm argues, is unfair: he believes two convictions would be more just than one, for he argues against the creation of separate state rights that result in different outcomes. But, once again, this is a normal incident of separate sovereignties, here dramatized by concurrent jurisdiction. And the author’s proposed “solution” is as extreme and misplaced as his alarm. He concludes:

> If the problems created by the disparities in constitutional principles again reach a critical level, even more drastic measures may ensue. The United States Supreme Court could possibly abrogate or modify the “adequate state grounds rule” and hold that federal and state constitutional standards must be the same. It is even possible that Congress could enact federal legislation requiring a unified approach to constitutional criminal procedure.\textsuperscript{43}

Maybe so, but I fear another Revolution would have to precede such a change, one that would severely modify federalism as we know it or do away with the states altogether, except as administrative units for the central authority. That might be the ultimate goal of the cultural and legal nationalists, but it is not the law.

The fourth postulate listed—Sources—deliberately evokes what has been called the “Doctrine of Unique State Sources.” This, too, remains a point of disagreement between courts and critics. Professor Paul Kahn,\textsuperscript{44} calling himself friendly to a vigorous state constitutional-

\textsuperscript{42} Diehm, \textit{supra} note 33.

\textsuperscript{43} Diehm, \textit{supra} note 33, at 262–63 (footnotes omitted). The three omitted notes refer to \textit{Michigan v. Long}, 463 U.S. 1032 (1983), and other commentators who are said to suggest the Supreme Court or Congress could impose uniform national standards governing state and federal police investigations.

\textsuperscript{44} Kahn, \textit{Interpretation, supra} note 21; see also Kahn, \textit{Two Communities, supra} note 21 (responding to Gardner, \textit{supra} note 20).
ism, nevertheless asks state judges to soft-pedal reliance on any state source, including apparently the actual text and drafting history of the document, in favor of more generic reasoning that will qualify them as partners in the national enterprise of what he calls “American Constitutionalism.” This advice, I think, will not be accepted by most state judges, nor should it be. On the other hand, Professor Kahn has a point if, as he says, state judges believe that only the existence of “unique” state texts or histories can justify interpreting constitutional language differently and independently.

The disagreement between courts and critics would vanish if exponents of each end of the spectrum on this issue would accept a common sense middle ground definition of what state sources, whether unique or not, “count” as premises for modern constitutional theories or applications. A legitimate source of state pride can be the political and cultural attributes of the state’s present population or even of its earliest settlers. Unless these attributes can clearly be linked to constitutional choices made by the latest effective drafters, they do not easily furnish plausible sources of contemporary interpretation. State populations change, and change profoundly over time. Immigrants arrive, old ways die out, new priorities arise. People governed by today’s decisions do not bear much necessary relation to those who yielded their sovereign power to a state government originally. States do have and retain genuine cultural differences, despite the tidal wave of conformity imposed on us, mostly by national purveyors of entertainment and consumerism. But I imagine it would be a relatively rare occurrence where soft evidence of this kind would give a judge enough of a handhold to draw an otherwise difficult line between two plausible outcomes. Without question, however, a state’s text, drafting and adoption history, and precedent, whether unique or not, remain relevant. Most challenging is the modern judge’s task of discerning there the larger principles that support modern applica-

45 Kahn states that if he were a state judge he would:
abandon the central premise of most previous works, namely, that the interpretation of a state constitution must rely on unique state sources of law. Those sources include the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community.
Kahn, Interpretation, supra note 21, at 1147.

46 “State constitutional law, it is assumed, can diverge from federal law only if the differences can be traced to one of these sources.” Id.
tions undreamed of by distant writers. But these "hard" sources usually leave a great deal of room to move as well: a variety of choices may be equally in keeping with them. Differences in state constitutional decisions, like differences in common law tort decisions, usually have much more to do, I suspect, with the individual philosophies and experiences of members of the bench and bar, with the vehicles presented to the courts, with the political climate of the state, with degrees of ideological agreement or disagreement with the Supreme Court, and with—for want of a better word—the court's inclination toward leadership or followership.

To illustrate, few states can be said to have a truly "unique" search and seizure clause—after all, the common history of the states, the

47 I know of no metaphor that better captures a judge's need to seek diligently for plausible modern applications while remaining true to historical principles than this one:

Constitutional text is important not for what a court must decide but for what it cannot plausibly decide. . . . A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles, to the applause of theorists who prefer butterflies.


48 Fifth Circuit Court of Appeals Judge James Dennis, then a Justice on the Louisiana Supreme Court, once said, deploring his colleagues' reluctance to stand on their own ground:

In reality, my colleagues have sunk this court to the lowest pitch of abject followership. They no longer believe in our state constitution as an act of fundamental self-government by the people of Louisiana. They no longer perceive this court to be the final arbiter of the meaning of that constitution, bound by the intent of the drafters and ratifiers as reflected by the text, the drafting history, and this court's constitutional precedents. Instead, for them, our state constitution is a blank parchment fit only as a copybook in which to record the lessons on the history of the Common Law that flow from Justice Scalia's pen.

State v. Tucker, 626 So. 2d 707, 719 (La. 1993) (Dennis, J., dissenting), quoted in Lisa D. Munyon, Comment, "It's a Sorry Frog Who Won't Holler in His Own Pond": The Louisiana Supreme Court's Response to the Challenges of New Federalism, 42 Loy. L. Rev. 313, 313 (1996). The author also attributes to a delegate to the 1973 Louisiana Constitutional Convention the following observation, which probably says it all, as far as this Essay is concerned: "I'm against the federal government trying to bring Louisiana kicking and screaming into the 20th century. Why can't we lead the way some time?" *Id.*

49 There are some variants of the familiar formula. Both the Washington and Arizona Constitutions provide: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8; Wash. Const. art. I, § 7. Amendments have also introduced some variety by expressing contemporary concerns. See, e.g., La. Const. art. I, § 5 (adding right against "invasions of pri-
The United States, and England yielded the wording of this common restraint of government. But divergence from another court's prior result requires no separate justification, not even if that prior court is a highly respected national one. The Supreme Court's prior visitation of a Fourth Amendment issue carries no guarantee of infallibility: in constitutional interpretation, first in time is not first in right. As has been said before by abler scholars—the question whether to give “more” or “less” than, or to interpret differently from the Supreme Court detains us far too much. At bottom, it is not the right question. The right question it what the state provision says, what it means, and how it applies to the case at hand.50 We cannot avoid these questions indefinitely.

I find myself most in agreement with the comments of Justice Denise Johnson of the Vermont Supreme Court, who states that a state text or other materials can sometimes guide the answer, but that, at the same time, “we do not need a unique state source to justify our differences with the interpretation of the Federal Constitution. The concept of sovereignty gives state courts the right and the justification to disagree.”51 It is enough to discern and apply the values that document apparently meant to perpetuate. It is not necessary, in order to support pursuit of independent or diverse state doctrines, to assert that every state constitutional decision reflects a unique political climate or set of values.

The fifth and sixth postulates on my short list—Semantics and System—ask for a change of ingrained habits of mind and habits of professionalism, in the interest of creating an intellectual space where participants have the permission and the inducement to engage in freedom of thought. Pretend that there are no federal constitutional opinions.52 Or if that is too much, discard any lingering presumption
of correctness of federal doctrine for all cases, not just for some. Guides to the sort of briefing the court demands are essential; but, sometimes lists of "factors" a court announces simply deform the inquiry: the rights claimant should not be required to use these factors to persuade the court first that the federal standard is wrong, before getting to what the state law means.

There are real obstacles to innovation: the defaults of lawyers, the philosophical disagreements among justices, the costs to clients of devising new theories, the pressure to reduce the backlog, and other institutional pressures. They are not insurmountable, as experience has shown. Practical guides to stimulating a reinvigoration of state constitutional arguments and decisions have been published by two Oregon Justices. See Wallace P. Carson, Jr., "Last Things Last": A Methodological Approach to Legal Arguments in State Courts, 19 Willamette L. Rev. 641 (1983) (suggesting a five point methodology to lawyers preparing to argue constitutional questions in state court); Linde, supra note 16, at 933 (suggesting a twelve step program for the cooperation of judges and attorneys in achieving "an independent jurisprudence freed from generic boilerplate"). To paraphrase the twelve elements briefly, judges can regularly:

1. Decide the issue, if possible, on subconstitutional grounds, such as lack of legal authority or principles of equity.
2. Announce that it will hear, and then decide state constitutional claims before federal constitutional claims in challenges to state or local laws.
3. Ask the parties for additional memoranda when a state issue is raised, but not independently briefed.
4. Note in an opinion the nature of any state constitutional issue not decided.
5. Remind counsel that independent state jurisprudence does not require a state court to disagree about the meaning of parallel state and federal clauses in order to apply a state clause differently from federal decisions.
6. Begin the court's opinion by analyzing the state's law, not with federal doctrines and whether to depart from them.

Lawyers can, without waiting for judges to take these steps:
7. Raise state issues at the first opportunity.
8. Separate state issues from federal issues in all arguments. When a Supreme Court holding will not permit a federal claim, present one based only on the state constitution.
9. Always quote the state constitutional provisions, but unless any distinct wording is known to have been purposeful, stress that identical or different wording is unimportant for independent state interpretation.
10. Begin by briefing state law, not by briefing federal cases and terminology, and arguing simply that the state court should strike a different balance in your favor.

Elazar, supra note 37, at 978-79.

See supra note 3, at 978-79.
ested judges and lawyers. The law schools could do much more to help. Most state justices are able to cultivate professional relationships with constitutional professors from schools in their states. In appropriate cases, these professors might be asked to author amicus curiae briefs addressed to state constitutional questions raised but unanswered by the litigants. Professors should also be willing to aid the state and local bar associations by conducting Continuing Legal Education courses in the substance and methodology of state constitutional law.

III. The Quality Question

If writers have sometimes questioned the quality of analysis in state constitutional opinions, it is not entirely without reason. One generation of renewed activity in interpreting underused language is hardly enough time to achieve uniform excellence in an enterprise this challenging. Successful innovations in basic theory are the most difficult, requiring time, a willing bar, a receptive bench, and the availability of cases that present good vehicles for examining old assumptions. But better analysis does not always require major, or even much, innovation in theory. Constitutional opinions, both federal and state, could benefit from the quiet elimination of pockets of outdated or illogical boilerplate that are often unnecessary to the substance of the opinions. I conclude by suggesting two candidates for elimination, and two for innovation.

A. "Police Power": Is There Such an Animal?

Is it possible, in your state, for the judiciary to invalidate an act of the legislature, on the sole ground that the statute exceeds the legislature’s "police power"? If not, does "police power" nevertheless appear in published opinions as a descriptive term for a power that the legislature possesses? In either case, why? The explanation is important because it concerns the vital question of the scope of legislative power and corresponding scope of judicial review.

According to the most common understanding, a state constitution distributes plenary power to the legislative branch—unlike the

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(11) Rely on the state courts' broader statutory and constitutional sources (common examples are regulation of elections, education, or judicial remedies) rather than all-purpose federal doctrine.

(12) Offer the court ways of discarding an old precedent without overruling it, for example, by checking whether an independent state claim was raised or briefed to the court and whether a better analysis can be made.

Id. at 934–36 (footnotes omitted).
federal Constitution, it does not grant enumerated powers. A challenge to a federal statute as falling beyond the power of Congress to enact it requires analysis of the enumerated power that purportedly supports the legislation. The typical state charter, which appears to vest the full legislative power in the legislative branch, eliminates the need, in challenges to state statutes, to examine and interpret a grant of a particular power. Clearly, then, we cannot talk about a state's "police power" in the same way that we refer to Congress' power over, say, interstate commerce. Limits on plenary state legislative power are expressed elsewhere in the constitution (for example, in the Declaration of Rights or other prohibitions on government) or are structural (that is, limits necessarily implied in order to maintain separation of powers). Therefore, unless the state constitution uses the term police power to describe legislative power or some fraction of it, the practically ubiquitous presence of this concept in state opinions needs explanation.54

A "police regulation" is commonly described as one that affects public safety, welfare, health or morals, or the like.55 Sometimes it is added that the law must be "rational," in the sense of being reasonably effective in achieving these goals.56 The implication is that when a

54 The definition and precise scope of "police power" has never been clear. Most of the time, the term does not appear in the constitution, but is descended from generations of judicial opinions. Sometimes the state constitution refers explicitly to the "police power" as including some, usually specialized, aspect of legislative power. New Jersey furnishes one example in a 1928 constitutional amendment declaring that a legislative delegation to local governments of authority to adopt land use regulations "shall be deemed to be within the police power of the state." N.J. Const. art. IV, § 6, ¶ 2. I address my questions here to uses of the "police power" concept without a textual basis for it.

55 Examples could be drawn from almost any state, in almost any year. See, e.g., State v. Ballance, 51 S.E.2d 731, 734 (N.C. 1949) ("legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society"); Mattei v. Hecke, 279 P. 470, 471 (Cal. Ct. App. 1929) ("[T]he due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation." (quoting Ex parte Dickey, 77 P. 924, 925 (1904))) (striking down statute requiring vendor to label non-standard fruit containers as "irregular container"); Ex parte Hayden, 82 P. 315 (Cal. 1905) ("Legislature, under the guise of police regulation, cannot enact laws which do not pertain to [public welfare, health or morals] and which impose onerous and unnecessary burdens upon business and property.") (striking down law requiring county of origin to be stamped on packages of fruit for sale, as invalid invasion of personal liberty).

56 Ballance, 51 S.E.2d at 735.

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health,
statute exceed the imits of "police power," it is unconstitutional and may be invalidated, even if the law transgresses no other limit on what the legislature is allowed to do.\textsuperscript{57} The result appears to be an extraordinary extension of power to the judiciary. Even if in a particular state the concept has no "bite," but simply appears routinely in the court's opinions as a synonym for plenary legislative power, it is not harmless. In both cases, "police power" implies something that is not self-evident. A state legislature ordinarily can enact any law not forbidden by state or federal constitutional provisions—presumably its members do so precisely because a majority believes the law will enhance the welfare, safety, or health of their constituents. Legislators routinely explain their actions to the press and the voters in such terms. However, the majority can misjudge in which direction public welfare lies, and still produce a law that is constitutional, however unwise and unpopular. The executive branch may have a veto power over such a law; voters retain the ultimate veto power, whether via the initiative process or by electing smarter representatives. But from where would the judicial branch receive the power to strike down such a law?

A little historic detective work easily uncovers how "police power" may have entered state court decisions, where it came to mean a sub-

morals, orders, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm.


\textit{[T]he legislative power . . . . is subject to the general limitation thereof that the interference with individual liberty, or with the right of an owner of property to use it as he sees fit, must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree, in comparison with the probable public benefit.}

\textit{Id.}; \textit{cf.} People \textit{ex rel.} Duryea v. Wilber, 90 N.E. 1140, 1143 (N.Y. Ct. App. 1910) (striking down law making it an offense to operate a public dancing academy without proper license as a "discrimination" without a substantial factual basis, and therefore exceeding police power).

\textsuperscript{57} In contract, some states do tie the police power limit directly to the constitution, creating a different vision of the proper scope of legislative power than the "usual understanding." In \textit{Ballance}, the North Carolina Supreme Court voided a statute making it an offense to practice photography without a license, as exceeding the police power of the legislature and \textit{therefore} intruding upon the liberty that, according to N.C. CONST. art. I, § 17, may not be infringed but by "the law of the land." \textit{Ballance}, 51 S.E.2d at 784. The court has linked its decision to the constitutional text, with the scope of "police power" serving as a way to define what is and what is not a bona fide "law of the land." The result is a sort of "substantive due process" review of economic and social legislation of the type formerly practiced by the United States Supreme Court, before its abandonment in the 1930s.
stantive limit on plenary legislative power. It originated, however, in a different context, for a different purpose. In the early part of the 19th century, it was an open question how much a state could regulate activities that could otherwise be characterized as “interstate commerce” and therefore perhaps subject to the exclusive authority of Congress. The earliest Supreme Court decisions to address this issue needed to remove state imposed obstacles to trade across state lines, but did not wish to deny states all ability to regulate the effects of these commercial activities on their citizens. A line was needed to demarcate state legislative power at the edge of the Commerce Clause. The line was drawn, by Justice Marshall and his successors, according to the apparent purpose of the challenged state law. If its purpose was to safeguard citizens’ health, safety, and welfare, and the like, it was not a forbidden “regulation of commerce” but rather a proper exercise of the state’s “police power” to protect its inhabitants from harm.58

In this context, the term was a useful shorthand for indicating the boundaries on state plenary power imposed by the Commerce Clause. Years later, the concept assumed a similar function in Supreme Court opinions like *Lochner v. New York*,59 in which the issue was now whether a state law had intruded into a zone of liberty implicitly protected by the Federal Fourteenth Amendment. But however distorted, “police power” was still used to demarcate a line between state legislative power and the prohibitions of the Federal Constitution. It was not meant to announce an implied, all-purpose limit on state legislative power—and of course the Supreme Court would have had no power to impose such a limit, were a supreme federal law not concerned.

Meanwhile, “police power” began, like a non-native species, to creep into state court decisions, where it was used to challenge unwelcome laws in cases where no potential clash with superior federal law was involved, on the ground that they did not in fact promote the health or welfare of the populace.60 In this usage, it simply en-

59 198 U.S. 45 (1905) (finding that state law limiting working hours for bakers involved neither the safety, the morals, nor the welfare of the public and was not necessary or appropriate as a health law; holding that law was an invalid exercise of the state’s police power, and violated the baker’s Fourteenth Amendment guarantee of individual liberty to contract for his labor on other terms).
60 In the mid-eighteenth century Justice Lemuel Shaw of Massachusetts was likely the first American state judge to speak of legislative “police power,” spelling out the “ends” test only intimated by Justice Marshall’s early decisions. See Norris v. Boston, 45 Mass. (4 Met.) 282, 292–93 (1842) (in distinguishing whether a state has the com-
couraged the courts to second guess the wisdom or utility of duly passed statutes, though no written constitutional constraint required the legislature to be either wise or utilitarian. Protecting public health, welfare, and safety may be a good narrative description of the goals of lawmakers, but a poor test for the legality of their acts.

In sum, the question for courts that use the "police power" formula is whether it serves any valid purpose. If a state legislature possesses true plenary power, not power to make law in limited subject areas the phrase is misleading. It is superfluous if used only to refer to plenary legislative power. In any use, it cannot help but suggest to potential litigants that there are subject areas in which the legislature may not legislate—areas outside the "police power"—although the boundary of this forbidden terrain is not usually drawn from any text or articulated theory of government. This suggestion leads inevitably to litigation asking courts to strike down unpopular legislation as exceeding the police power, thus proposing a dubious and undemocratic premise for judicial review and rejection of laws. In short, unless its use is further explained, this is a concept that deserves an immediate interment in state legislative power cases. Without specific rejection by a state court it will continue to pepper appellate briefs and student exams whenever an advocate is seeking a way around the law.

B. The Presumption of Constitutionality

The oft-quoted presumption that statutes and ordinances are constitutional is a misnomer that is unnecessary to the court's purpose. It can be omitted from constitutional opinions without effect on appropriate burdens of persuasion or results.

petence to pass any state law, "we look rather to the ends to be attained, than to the particular enactments by which they are to be reached"); see also Bruce Kempkes, The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight, 42 Drake L. Rev. 593, 598 n.19 (1993).

61 See, e.g., Brandmiller v. Arreola, 544 N.W.2d 894, 897 (Wis. 1996) ("We start with the presumption that the ordinances are constitutional and that, in order to prevail, [plaintiff] must demonstrate otherwise beyond a reasonable doubt."); California Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978) ("strong" presumption supports legislative acts). Courts sometimes modify or reject the presumption when it appears that the law invades civil liberties. See Baehr v. Lewin, 852 P.2d 44, 64 n.28 (Haw. 1993) ("The presumption of statutory constitutionality... does not apply to laws, which, on their face, classify on the basis of suspect categories."). On remand sub. nom, Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when
A presumption, in precise and ordinary usage, is a legislative or court made rule, or statute, that is concerned with matters of evidence—matters of fact, not of law. Presumptions are meant to solve problems of missing evidence, such as the presumption of death after a seven year absence; to shift the burden to the party most likely to be in possession of relevant evidence (such as the presumption contained in the doctrine of res ipsa loquitur); or to effect substantive policy by favoring one outcome despite available evidence (for example, a conclusive presumption that a husband is the father of any child conceived during the marriage). Other, looser uses of presumptions serve policy ends by encouraging conditions necessary for an impartial decision—for example, the presumption of innocence accorded to the criminally accused. All these examples address matters capable of proof or disproof, by evidence.

In strict usage, then, one cannot presume that a law is constitutional. Presumptions cannot decide matters of law, and whether a given law is in within the state’s power to make is a question of law, though often decided by judges in connection with a factual record of its passage or its operation. Thus, a true presumption of constitutionality is logically impossible in most contexts in which it appears.

Functionally, the maxim is probably not meant literally, but figuratively. It is a serious way of signifying to litigants something like the following: “The court will not take a constitutional challenge lightly. Those who make such claims bear the burden of persuading us by adequate legal research and argument that lawmakers (who should be assumed to desire to be law-abiding) have transgressed the limits of their authority.” Rephrasing to eliminate the word presumption would not lessen a challenger’s burden nor change any outcome. It would, however constitute a small but welcome advance in the straightforward quality of a court’s reasoning.

legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . .”)

62 Thus, as the presumption is explained by the California Supreme Court, it is actually an expression of deference to an expert legislative judgment:

[When the Legislature has enacted a statute with the relevant constitutional prescriptions in mind . . . [T]he statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary, a focused legislative judgment on the question enjoys significant weight and deference by the courts.

C. The Reasonable Expectation of Privacy in Search and Seizure Cases

The "reasonable expectation of privacy"\(^{63}\) has been justly criticized as an unduly vague standard, one that lends itself to the judicial creation of myriad fact-specific exceptions in order to avoid excluding valuable evidence of guilt from a criminal prosecution.\(^{64}\) The ultimate product of thirty years of this case-by-case rulemaking is an illogical and unwieldy body of Fourth Amendment doctrine. I am troubled by this formulation as constitutional law, less for its use of the word "reasonable," with the looseness this and similar classes of words permit,\(^{65}\) than for its upside-down focus on the expectations of the citizen, rather than on the conduct of the government agent (or searcher). Unlike most other rights guarantees, the text of the typical provision on search and seizure, by prohibiting "unreasonable" actions (setting aside for the moment the proper scope of the warrant clause) invites flexibility in application over changing factual patterns and over time. But the prohibition, like most others, is nevertheless directed specifically to government agents: it is improper searches that are forbidden, not foolish expectations. Reorienting the test would not by itself answer the question whether a particular type, or instance, of government scrutiny was excessive, or required a prior warrant, but it would at least place the focus where it belongs.\(^{66}\)

By contrast, making the starting point of analysis the privacy the citizen expected, or should have expected, leads to outcomes that challenge common sense. Logically, our expectations of receiving

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\(^{63}\) Justice Harlan introduced the "reasonable expectation of privacy" as a reason to invalidate a search under the Fourth Amendment in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967). It later became the majority standard.


\(^{65}\) The process that is "due" when the government takes life, liberty, or property falls into a similar class of terms lacking readily objective standards, as do bans on "unnecessary" rigor in the treatment of prisoners, for example, *Ind. Const.* art. I, § 15, and requirements that "all penalties shall be proportioned to the nature of the offense," for example, *Ind. Const.* art. I, § 16. Still, to make them workable on other than an ad hoc basis, courts are meant to confine these sorts of terms by more definite principles.

\(^{66}\) Some courts have expressed doubts, or simply rejected the test. See, e.g., *State v. Wallace*, 910 P.2d 695 (Haw. 1996) (holding that a search occurs when there is an exploration for an item or when that item is hidden); Moran v. State, 644 N.E.2d 536, 540 (Ind. 1994) ("[w]e are not persuaded that [the expectation of privacy test] should be used when applying the state reasonableness standard under Article I, § 11"); State v. Campbell, 759 P.2d 1040, 1048 (Or. 1988) (finding that a search is any activity which, "if engaged in wholly at the discretion of the government, will significantly impair [citizens'] freedom from scrutiny").
anything diminish to the degree that we have given it up, or have been regularly deprived of it. No American court would approve of the pervasive government surveillance imagined by George Orwell in his novel *1984*, though his characters clearly, and very reasonably, expected no privacy at all. Is our reaction that "they had a right to more than they expected?" If so, then the definition of a search should be reformulated to protect not the privacy one expects—but the privacy to which one has a right. In Supreme Court opinions, a recurring justification for holding that police information gathering is not a "search" is that the citizen had already exposed the matter to a private third party—for example, a bank, a telephone company, a garbage collector, or a commercial pilot flying over a residential backyard. The Supreme Court reasons in such cases that the citizen cannot then reasonably expect the same information to remain private from police officers, even if they have no reason for suspicion—an illogical conclusion, but one that is made to seem plausible by the emphasis on the citizen's conduct and expectations, rather than on the government's conduct.

D. The Compelling State Interest Defense

The strict scrutiny formula has come under increasing scrutiny itself by federal law scholars representing a spectrum of political ideologies. A common and convincing criticism of the strict scrutiny framework is that it disparages constitutional rights by its very form: it postulates that the government may discriminate against a "suspect

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67 George Orwell, 1984 (1949). He wrote:

There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to.

Id. at 4.


72 See, e.g., Volokh, supra note 6. See generally Public Values in Constitutional Law (Stephen E. Gottlieb ed., 1993) (A collection of essays based on remarks delivered at Albany Law School's Conference on Compelling Government Interests: The Mystery of Constitutional Analysis. The conference papers are published at 55 Alb. L. Rev. 585–761 (1992). Contributing authors debated the place and the propriety of a judicial philosophy that calculates the importance of government "interests" asserted to "trump" claims of individual rights, such as rights to equal protection or freedom of speech.).
class" or even override "fundamental rights" if the public (or govern-
ment?) need to do so is important enough to satisfy the court.\textsuperscript{73} Moreover, the word "compelling" is a misnomer: few laws are really passed under "compulsion."\textsuperscript{74} It is a question of words—of semantics—but semantics are important in law. Is it sensible to call a state's asserted policy "compelling" if that state and others can freely reject that policy and choose the opposite one? For example, the United States Supreme Court has held that the state's "compelling interest" in protecting its child abuse information prevents full disclosure to the defense of the confidential records of a complaining witness.\textsuperscript{75} But the Massachusetts high court, for one, did not feel compelled to withhold such records, holding rather that disclosure was the state's constitutional obligation.\textsuperscript{76}

Remarkably unpopular among the states is the Supreme Court's assertion of what constituted a compelling interest in Moran v. Burbine.\textsuperscript{77} In that case, police officers had refused to inform a suspect in custody that an attorney, retained by his sister to represent him, was trying to reach him; defendant then waived his rights and confessed. The Supreme Court found no violation of the Fifth or Sixth Amendments, reasoning that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."\textsuperscript{78} But the importance of obtaining convictions did not compel California, Connecticut, Delaware, Florida, Illinois, Michigan, Oklahoma, and Oregon to allow conduct that their state constitution forbids.\textsuperscript{79} And what are we to think when, after the Supreme Court rules that a particular


\textsuperscript{74} Linde, supra note 16, at 951.


\textsuperscript{76} Commonwealth v. Stockhamer, 570 N.E.2d 992 (Mass. 1991) (holding that the criminal defendant was entitled under Massachusetts Declaration of Rights to review complainant's psychiatric treatment records).

\textsuperscript{77} 475 U.S. 412, 426 (1986).

\textsuperscript{78} Id. at 426 (citation omitted).

\textsuperscript{79} See, e.g., People v. McCauley, 645 N.E.2d 923, 930 (Ill. 1994) (holding that police efforts to prevent retained counsel from contacting his client, who had waived his rights and was being interviewed by the police, required suppression of defendant's statements); State v. Haynes, 602 P.2d 272, 277 (Or. 1979) ("[A]ny statement or the fruits of any statement obtained after the police themselves know of the attorney's efforts to reach the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel."); \textsc{State Constitutional Law, supra} note 1, at 695–97 & nn.49–54 (citing cases).
state "interest" overrides a competing constitutional right, the very state affected disagrees? The Supreme Court agreed with the Michigan Attorney General that detecting and punishing drunk drivers through a sobriety roadblock program outweighed motorists' constitutional privacy rights, but on remand, the Supreme Court of Michigan did not find the state's interest so weighty. It invalidated the program as a violation of the state search and seizure clause.

Another difficulty with the compelling interest standard is that the Supreme Court does not always make clear whether the asserted serious potential harm to the state is a matter left merely to argument, or whether it must be proven with evidence. The Hawai'i Supreme Court, in a recent application of "strict scrutiny," at least required the state to demonstrate factually how the public would be harmed by enforcing the state constitutional right to be free of discrimination on the basis of sex (a "suspect class" in Hawai'i). This is a better approach than not putting the state to its proof, but is it not fair to ask why a government's asserted need to discriminate should be allowed, potentially, to override individual rights at all?

The constitutional text itself provides plenty of "handholds" for interpretation. The Hawai'i Constitution states: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." This sounds fairly absolute: questions for the court would be whether entering into marriage is a "right," and whether this right was denied on account of the sex of the prospective marriage partner. Further, the Hawai'i Constitution also provides: "No person shall . . . be denied equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." The opportunity to enter into a legal marriage is either a civil right, or it is not; the plaintiffs who wished to marry were either discriminated against in the exercise of this civil right on account of sex, or they were not. Adding a government "defense of necessity" to sex discrimination is pragmatically appealing, because it may serve to flush out unforeseen adverse consequences of a proposed ruling, allowing the

83 Haw. Const. art. I, § 3.
court to rule with more confidence about its ultimate effect. However, neither the form nor the substance of this defense is found in the constitutional text, which, moreover, supplies two standards that are stricter and more specific than a broad promise of “equal protection.” The point is not whether the court was right to find that denying same sex couples the right to marry might be unconstitutional sex discrimination—that may or may not be the case in other states. The point is whether use of federal strict scrutiny methodology was the best, or most logical, way to analyze the problem. The text suggests, rather, that one’s rights, absolute or qualified, be defined “up front.” If there are defenses to state-sponsored sex discrimination, they should be plausibly linked to the constitutional language, or the demonstrated intent behind it.  

IV. Conclusion  

Indiana Chief Justice Randall Shepard recently wrote that “state judges [aspire] to be independent sources of law.” There is much evidence, both in the published opinions, and in judges’ published articles, that he is correct. This aspiration became the basis for my remarks at the Chief Justices’ meeting; it is still the reason that I devote most of my professional writing to the topic of state constitutional rights. This can be a lonely job: many, if not most professors of law, worked as clerks for federal judges, and view state constitutional law as distinctly minor league. Law schools with hopes for national prestige also tend to neglect the state judiciary, unfairly, and unwisely. Most of them do not “aspire” to be a source of help to judges and scholars working in state constitutional law. I am sure I speak for my colleagues on the state constitutional law panel, Professor Williams and Professor Tarr, when I say we welcome the suggestions and the questions and—most of all—the published opinions—of judges laboring in the field, often without adequate help from the bar. Very little about a justice’s professional life is easy, this subject included; but then very few subjects offer the same opportunities for unfettered, creative judgment as this one.

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85 I don’t mean to single out the Hawai‘i court for criticism: it is a skilled and responsible court, whose work I admire. Moreover, I do not know whether the court received any independent briefing on the state provisions that proposed a test other than strict scrutiny. No matter what the state’s text says, federal methodology is nearly universal in state equality decisions.

86 Shepard, supra note 11, at 432.

87 A bibliography of articles by state supreme court judges writing on the topic of state constitutional law lists over 70 such articles and it is not complete. See State Constitutional Law, supra note 1, at 831.