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BRENNAN LECTURE

STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS: A REAPPRAISAL

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It is a great honor and privilege to give the twenty-third annual William J. Brennan Lecture on State Courts and Social Justice. I am grateful to the Institute of Judicial Administration at N.Y.U. School of Law for the outstanding contributions it has made to judicial education and to the quality and vitality of state courts.

The inspiration for my lecture is the fortieth anniversary of Justice Brennan's 1977 article in the *Harvard Law Review*, titled *State Constitutions and the Protection of Individual Rights*.¹ As of five years ago, this article ranked ninth among the most cited law review articles of all time, in the same league as Charles Reich's *The New Property*, Chuck Lawrence's seminal article on unconscious racism, and Robert

* Copyright © 2017 by Goodwin Liu, Associate Justice, Supreme Court of California. I thank the Institute of Judicial Administration at N.Y.U. School of Law and Dean Trevor Morrison for inviting me to give this lecture. I am indebted to Neil Sawhney for invaluable research assistance and numerous probing conversations on this topic. I had the honor of delivering this lecture at N.Y.U. on March 23, 2017, and I benefited greatly from discussion afterward with Vicki Been, Jesse Furman, Abbe Gluck, Troy McKenzie, Erin Murphy, and Ricky Revesz, among others. For helpful comments on earlier drafts, I thank Tino Cuéllar, Carol Lee, and Martha Minow. I am also grateful to Jeff Sutton, who got me interested in this topic when he enlisted my participation in a March 2015 symposium on state constitutions at the Moritz College of Law at Ohio State University. Finally, I thank Robert Williams, whose contributions to the study of state constitutional law are immense and whose work has informed my thinking on this subject.

¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Bork's exploration of neutral principles and the First Amendment.² Among the top ten most cited articles, Justice Brennan's is the winner for brevity at a slim sixteen pages, beating out Oliver Wendell Holmes's *The Path of the Law*, at twenty-two pages.³

In his article, Justice Brennan urged state courts to engage in independent interpretation of the individual rights guarantees in state constitutions, especially in areas where the U.S. Supreme Court had, in his view, unduly constricted the scope of analogous rights in the Federal Constitution:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁴

The “legal revolution” of which Justice Brennan spoke consisted of Warren Court decisions giving life to the equal protection and due process clauses of the Fourteenth Amendment, as well as decisions applying various provisions of the Bill of Rights to the states.⁵ These decisions, Justice Brennan observed, “have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law.”⁶ After surveying these developments, Justice Brennan declared—in an echo of Chief Justice Marshall's opinion in *McCulloch v. Maryland*⁷—that “the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America.”⁸

² Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012). Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964), is ranked seventh; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), is ranked eighth; and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), is ranked tenth. Shapiro & Pearse, *supra*, at 1489 tbl.1.

³ Shapiro and Pearse rank Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), third. Shapiro & Pearse, *supra* note 2, at 1489 tbl.1.

⁴ Brennan, *supra* note 1, at 491.

⁵ *See id.* at 491–95.

⁶ *Id.* at 493.

⁷ 17 U.S. 319, 415 (1819) (“This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”).

⁸ Brennan, *supra* note 1, at 495. Justice Brennan went on to say:

A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing

Yet Justice Brennan, writing a few years after President Nixon had appointed four new Justices, noted “a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement” of the Bill of Rights and the Fourteenth Amendment guarantees of due process and equal protection.⁹ At the same time, he observed, state courts applying analogous provisions of their state constitutions “have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”¹⁰

Justice Brennan cited, as one example, a decision of the New Jersey Supreme Court declining to follow a U.S. Supreme Court decision holding that in order to establish that a suspect not in custody has consented to a search, the prosecution need not prove that the suspect knew he had a right to refuse consent.¹¹ While acknowledging that the protection against unreasonable searches and seizures in the New Jersey Constitution is textually identical to the Fourth Amendment, the New Jersey high court observed that “each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution” and went on to hold that “an essential element of [showing voluntary consent] is knowledge of the right to refuse consent.”¹²

Summarizing his thesis, Justice Brennan wrote:

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal

occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

Id. This language is from Justice McKenna’s opinion for the Court in *Weems v. United States*, 217 U.S. 349, 373 (1910). See also *Olmstead v. United States*, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting) (quoting *Weems*, 217 U.S. at 373).

⁹ Brennan, *supra* note 1, at 495.

¹⁰ *Id.* at 500.

¹¹ Brennan, *supra* note 1, at 499, cites *State v. Johnson*, 346 A.2d 66 (N.J. 1975). The *Johnson* court declined to follow *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹² *Johnson*, 346 A.2d at 67–68.

courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.¹³

In addition, Justice Brennan argued, “the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. . . . With federal scrutiny diminished, state courts must respond by increasing their own.”¹⁴

Over the years, Justice Brennan’s article has spawned a substantial literature on judicial federalism.¹⁵ New Jersey Supreme Court Justice Stewart Pollock called Justice Brennan’s article “the Magna Carta of state constitutional law.”¹⁶ And the late Judith Kaye, who served as Chief Judge of the New York Court of Appeals and delivered the first Brennan Lecture at N.Y.U. in 1995, said of Justice Brennan’s article: “I still remember the excitement those stirring words generated. Many of us had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.”¹⁷

¹³ Brennan, *supra* note 1, at 502 (footnote omitted).

¹⁴ *Id.* at 503. Five years later, the *New York Times* reported in a lengthy article that “[t]he nation’s state courts, increasingly frustrated with the restrictive rulings of the United States Supreme Court, are emerging from its shadow and fashioning a distinctive body of civil liberties protections.” David Margolick, *State Judges Are Shaping Law that Goes Beyond Supreme Court*, N.Y. TIMES (May 19, 1982), <http://www.nytimes.com/1982/05/19/us/state-judges-are-shaping-law-that-goes-beyond-supreme-court-courts-trial-last.html?pagewanted=all>.

¹⁵ See, e.g., JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 180–275 (2005); ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 135–232 (2009); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Shirley S. Abrahamson, The Mathew O. Tobriner Memorial Lecture, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991) [hereinafter Abrahamson, *Divided We Stand*]; Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PA. ST. L. REV. 837 (2011); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Jeffrey S. Sutton, Speech, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165 (2009); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005) [hereinafter Williams, *Prospective Lockstepping*]; Joseph R. Grodin, *State Constitutionalism in Practice*, 30 VAL. U. L. REV. 601 (1996) (book review).

¹⁶ Stewart G. Pollock, Address, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

¹⁷ Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995).

But the newfound exuberance for judicial federalism also drew criticism. Although Justice Brennan claimed to be “a devout believer” in “our concept of federalism,”¹⁸ one commentator called Justice Brennan a “false prophet” of federalism whose real objective was to encourage “state court activism” in favor of liberal causes.¹⁹ Other commentators described the resort to state constitutionalism as a strategy for “nose-thumbing at the federal Supreme Court”²⁰ and as “a kind of forum shopping for liberals.”²¹ Professor Paul Bator expressed “misgivings about the extent to which [Justice Brennan] seems to assume that state constitutional law is simply ‘available’ to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory.”²² State constitutionalism, critics argued, boils down to a results-oriented jurisprudence—a tactic for evading federal precedents that state courts don’t like.²³ Perhaps as a result of these criticisms, the “renaissance of state constitutional law” urged by Justice Brennan has been described as “rather modest” in its contributions²⁴ or, more harshly, as a “failed discourse.”²⁵

As to Justice Brennan’s bona fides as a believer in federalism, it is worth noting that before his appointment to the United States Supreme Court, he served five years on the New Jersey Supreme Court and, before that, played a key role in the 1947 drafting and modernization of the New Jersey Constitution, which “came to be

¹⁸ Brennan, *supra* note 1, at 502.

¹⁹ Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434 (1988).

²⁰ H.C. Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982).

²¹ Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996); see Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998) (describing Justice Brennan’s article as “avowedly strategic”).

²² Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981); see Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981) (criticizing state courts’ treatment of state constitutions as “little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions”).

²³ See *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985) (“It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented.”); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

²⁴ Rodriguez, *supra* note 21, at 271.

²⁵ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

viewed nationally as a model state constitution.”²⁶ But however devoted Justice Brennan was to federalism, it is fair to say that what his 1977 article lacked, and what judges and commentators then struggled to articulate, was a theory of interpretation to guide state courts in deciding when they should depart from federal constitutional decisions in construing analogous provisions of state constitutions. The premise of this quandary is that “state constitutional law must go its own way not in order to achieve a particular result, but because it is jurisprudentially an independent body of law.”²⁷ State courts, accepting this premise, began to ask: What is the methodology of this jurisprudence? What are the proper modes of inquiry for interpreting state constitutions? And how is such an interpretation distinguishable from the way federal courts interpret the Federal Constitution? These have been the dominant questions that judges and scholars have addressed in theorizing the legitimacy of state constitutionalism.

What I want to suggest in this lecture is that these questions, while interesting, are not the principal fulcrum on which the legitimacy of state constitutionalism rests. The legitimacy of state constitutionalism does not primarily depend on the development of a distinctive, state-centered jurisprudence. Many of our most important rights and liberties are protected by similar language in the federal and state constitutions. State courts and federal courts, using the same modalities of constitutional argument,²⁸ can and do have principled disagreements on the meaning of those rights and liberties. When state courts depart from federal precedent, it may be because a state’s distinct constitutional text or history points to a different result, and state courts should look first to state-specific sources in deciding an issue of state constitutional law. But when there is no state-specific text or history to guide the analysis, it is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries. This redundancy in interpretive authority—whereby state courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy. The legitimacy of

²⁶ Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 772 (1998). For commentary on Justice Brennan’s views on federalism, compare Maltz, *supra* note 19, with Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENTARY 227 (1990).

²⁷ Gardner, *supra* note 25, at 772–73.

²⁸ See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982).

state constitutionalism mainly turns on a proper understanding of the structure of our federal system, not on questions of interpretive methodology.

I

To bring the problem of legitimacy into focus, it is helpful to observe that the problem does not arise in cases where state constitutional provisions materially differ from analogous federal provisions in their text, purpose, or history. For example, the religion clauses of many state constitutions differ from the Free Exercise and Establishment Clauses of the First Amendment, and state courts have interpreted those state provisions to be more protective of religious liberty or to erect a higher wall of church-state separation than their federal counterparts.²⁹ Many state constitutions also have provisions that mandate government provision of social services, such as education and welfare, and state courts have held that these provisions confer positive rights that the Supreme Court has refused to recognize under the Federal Constitution.³⁰ State courts have also relied on state-specific history, where such history is available and informative, to distinguish the content of a state constitutional guarantee from the content of its federal analog.³¹ In such instances, it is no surprise that state courts interpreting state constitutions may construe individual rights more expansively than federal courts interpreting the Federal Constitution.

²⁹ See Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 366 (2004); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1459–66 (1990); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1950 (2006); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985). The stringent separation between church and state set forth in various state constitutions occasionally bumps up against free exercise claims under the Federal Constitution. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 783 (8th Cir. 2015), *rev'd*, 137 S. Ct. 2012 (2017).

³⁰ See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 36–196 (2013); Lawrence Friedland, *Testing the Limits: Judicial Enforcement of Positive State Constitutional Rights*, 53 DUQ. L. REV. 437 (2015); Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 (2006); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1144–52 (1999).

³¹ See, e.g., *State v. Santiago*, 122 A.3d 1, 24–27 (Conn. 2015) (relying extensively on Connecticut history to hold that the death penalty violates the state constitutional prohibition on cruel and unusual punishments).

But what about cases involving state constitutional provisions that do not meaningfully differ from their federal analogs? Justice Brennan's 1977 article urged state courts not to reflexively follow federal precedent "even where the state and federal constitutions are similarly or identically phrased,"³² and it is mainly here that questions of legitimacy arise. For example, almost all state constitutions have guarantees of due process and protection from unreasonable searches and seizures that parallel the federal constitutional guarantees. How should state courts interpret such provisions?

A number of state courts have set forth criteria or factors to determine when divergence from federal precedent is warranted. For example, the Washington State Supreme Court considers "[t]he following non-exclusive neutral criteria . . . : (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."³³ The Illinois Supreme Court has said it considers whether something in "the language of our constitution, or in the debates and the committee reports of the constitutional convention," justifies a departure from federal precedent.³⁴ The high courts of California, Connecticut, New Jersey, and Pennsylvania, among others, have stated similar criteria.³⁵

The infirmities of the criteria approach have been persuasively elucidated by Professor Williams and others.³⁶ Most significantly, the approach treats federal precedent with a presumption of correctness that has no sound basis in our federal system. Just as the Supreme

³² Brennan, *supra* note 1, at 500.

³³ State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986).

³⁴ People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984).

³⁵ See People v. Teresinski, 640 P.2d 753, 760–61 (Cal. 1982); State v. Geisler, 610 A.2d 1225, 1232–34 (Conn. 1992); State v. Hunt, 450 A.2d 952, 955–57 (N.J. 1982); Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991). The formulation and uneven application of the criteria approach in these states is reviewed in WILLIAMS, *supra* note 15, at 146–62. In California, independent state constitutionalism in the area of criminal procedure has largely been eclipsed by a provision of the state constitution, adopted by the voters in 1982, that generally forbids exclusion of "relevant evidence . . . in any criminal proceeding" on state constitutional grounds that exceed the floor of protection provided by the Federal Constitution. CAL. CONST. art. I, § 28(f)(2); see also FLA. CONST. art. I, § 12 (stating that the right against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court").

³⁶ See WILLIAMS, *supra* note 15, at 169–77; see also State v. Kennedy, 666 P.2d 1316, 1322–23 (Or. 1983) (Linde, J.); Abrahamson, *Divided We Stand*, *supra* note 15, at 731. State high court decisions that *prospectively* bind interpretations of state constitutional provisions to federal interpretations of analogous federal provisions are especially problematic. See Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 707–09 (2011); Williams, *Prospective Lockstepping*, *supra* note 15, at 1520–27.

Court, when interpreting a provision of the Federal Constitution, does not accord a presumption of correctness to any state's interpretation of an analogous state constitutional provision or even to an interpretation adopted by a majority of states, there is no reason why a state court, when interpreting a provision of its state constitution, should accord a presumption of correctness to the Supreme Court's interpretation of an analogous federal constitutional provision. State courts should and often do give respectful consideration to relevant Supreme Court decisions, just as they often give respectful consideration to relevant decisions of sister states. And state courts may often be persuaded that the Supreme Court's approach is correct and worthy of adoption, just as they may often be persuaded by a majority view among state high courts. But the crucial point is that state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*.

In practice, it is common for state courts, in deciding a state constitutional issue involving equal protection, due process, or search and seizure, to center the analysis primarily on federal law. One reason is that judges, like all graduates of our nation's law schools, are primarily trained in federal law and find it familiar.³⁷ Another reason is that federal law in these areas may be abundant and well developed. The instinct of judges, when confronted with an open-textured constitutional provision, is not to innovate but to look for precedent. This makes sense as a matter of resource conservation: There is no need to research every legal question from scratch, and the answers or analyses provided by other courts may be instructive.³⁸ But a state court should not assume as a starting point that federal authority is correct. Nor should a state court follow federal law out of sheer force of habit or as a means of obtaining political cover or shifting responsibility.³⁹ In sum, it is appropriate for a state court to consult federal precedent as part of, but not in lieu of, its own independent analysis of a state constitutional issue.⁴⁰

³⁷ See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 736–37 (2016); Sutton, *supra* note 15, at 166.

³⁸ See Dodson, *supra* note 37, at 730–31.

³⁹ See *id.* at 730, 739–45 (discussing how state courts can bend to federal authority for these reasons).

⁴⁰ See *State v. Tiedemann*, 162 P.3d 1106, 1115 (Utah 2007) (“There is no presumption that federal construction of similar language is correct.”). Such independent analysis is consistent with what the Supreme Court expects of state courts if their constitutional decisions are to be insulated from federal review. See *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (finding no independent and adequate state ground where the state high court cited federal precedent without making clear it was doing so only for the purpose of guidance); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (noting that the Supreme Court will not review a constitutional decision by a state court when it clearly states that the decision is

When a state court undertakes such analysis and concludes that federal precedent is unpersuasive, is it “evasive” or “results-oriented” for the state court to adopt the dissenting view in the federal decision and label it state constitutional law? I think framing the criticism in that way misses the mark. Suppose a state court, interpreting a state constitutional prohibition on unreasonable searches and seizures, declines to follow the Supreme Court’s decision in *United States v. Leon*, which adopted the good-faith exception to the exclusionary rule under the Fourth Amendment.⁴¹ Suppose further that the state court reaches its conclusion by analyzing the same textual, historical, and practical considerations that the Supreme Court analyzed in *Leon*.⁴² I do not think the state court can be said to be any more “results-oriented” than the Justices who dissented in *Leon*. Many constitutional issues are difficult, and judges often have principled disagreements. Any valid charge of being results-oriented must go to the merits of the view adopted by the state court (i.e., the view is poorly reasoned, contrary to authority, or otherwise unpersuasive) and not to the mere fact that the state court departed from federal law. Similarly, there is nothing “evasive” about such departures unless one wrongly assumes that federal precedent is binding on state courts in their interpretations of state constitutional law.

The problem is not that state court decisions departing from federal precedent are unreasoned or results-oriented. It is that the reasons for departing seem illegitimate when they include no state-specific grounds and consist of analysis no different than what a federal court would undertake in addressing the same issue under the Federal Constitution.⁴³ If state courts should not accord a presumption of correctness to federal decisions, if they should instead develop

“based on bona fide separate, adequate, and independent grounds” and that “federal cases are being used only for the purpose of guidance”).

Former Oregon Supreme Court Justice Hans Linde has argued that state courts, to develop a truly independent body of state constitutional jurisprudence, should always examine state constitutional claims before examining federal constitutional claims. See Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135, 146 (1970). But I agree with Professor Williams: “In fact, however, it is not the *sequence* that is the most important methodological issue but rather the focus on truly independent state constitutional interpretation, in whatever sequence it occurs. It is substance, not form, that counts most.” WILLIAMS, *supra* note 15, at 144.

⁴¹ See, e.g., *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *State v. Guzman*, 842 P.2d 660, 661 (Idaho 1992); *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987); *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *State v. Carter*, 370 S.E.2d 553, 554 (N.C. 1988); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991).

⁴² See, e.g., *Marsala*, 579 A.2d at 62–68; *Guzman*, 842 P.2d at 672–77; *Novembrino*, 519 A.2d at 850, 852–57; *Gutierrez*, 863 P.2d at 1067–68; *Carter*, 370 A.2d at 560–62; *Edmunds*, 586 A.2d at 895–98.

⁴³ See Gardner, *supra* note 25, at 793–94, 803–05.

an independent constitutional jurisprudence, then shouldn't the hallmark of that jurisprudence be an elucidation of state-specific considerations that distinguish the meaning of state constitutional provisions from their federal analogs? Or does judicial federalism give litigants two bites at the same constitutional apple?

Let me offer additional examples that pose these questions. In 1988, the Supreme Court in *California v. Greenwood* held that police may search trash left at the curbside of a home without a warrant because "society would not accept as reasonable [the] claim to an expectation of privacy in trash left for collection in an area accessible to the public."⁴⁴ Although many state courts have adopted this rule as a matter of state constitutional law, several have not—and the weight of their analysis has focused on how the Court in *Greenwood* failed to properly understand what individuals and society consider private. The New Hampshire Supreme Court found Justice Brennan's dissent in *Greenwood* more persuasive and concluded that "society is prepared to recognize th[e] expectation [of privacy in one's trash] as reasonable."⁴⁵ The Washington Supreme Court opined that "[w]hile a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion."⁴⁶ The Vermont Supreme Court, describing *Greenwood* as "misguided," held that "unconstrained government inspection of people's trash is not consistent with a free and open society."⁴⁷ Notably, the court said there is no reason that "any state court should refrain from following a different path from that taken by the United States Supreme Court unless the court can rely on unique state sources—historical, legislative or otherwise."⁴⁸ And the New Jersey Supreme Court, finding *Greenwood's* reasoning "dubious" and "disturbing," concluded that *Greenwood* was "flatly and simply wrong as [to] . . . the way people think about garbage."⁴⁹ The court did not rely on state-specific sources, making clear that "there is no 'unique New Jersey state attitude about garbage.'"⁵⁰

⁴⁴ 486 U.S. 35, 40–41 (1988).

⁴⁵ *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003).

⁴⁶ *State v. Boland*, 800 P.2d 1112, 1117 (Wash. 1990).

⁴⁷ *State v. Morris*, 680 A.2d 90, 94, 100 (Vt. 1996).

⁴⁸ *Id.* at 101; *see id.* at 101–02 ("[W]e will consider all types of argument, including historical, textual, doctrinal, prudential, structural, and ethical arguments. . . . Our decision is not result-oriented simply because it reaches a result different from the Supreme Court, any more than it would be result-oriented had we reached the same result as the Supreme Court.").

⁴⁹ *State v. Hempele*, 576 A.2d 793, 805, 814–15 (N.J. 1990).

⁵⁰ *Id.* at 814.

In interpreting due process of law, the Supreme Court has held that an interest derived exclusively from state law may give rise to a constitutional right to procedural due process if state law conditions forfeiture of the interest on the occurrence of specified conditions.⁵¹ But no such right arises if state law specifies that forfeiture of the interest is subject to the unconditional discretion of the official in charge of its administration.⁵² Against this backdrop, the California Supreme Court considered whether the state due process guarantee grants procedural protections to an inmate found unfit for treatment in a drug rehabilitation center and transferred to state prison instead.⁵³ The court declined to follow the Supreme Court's doctrine, noting that it has "been criticized as ultimately leading to circular reasoning that contravenes the clause by leaving the state free to decide whether and to what extent procedures are to be followed in dealings with its citizens without regard to federal standards."⁵⁴ Further, the California court said, the federal approach "fails to give sufficient weight to the important due process value of promoting accuracy and reasonable predictability in governmental decision making when individuals are subject to deprivatory action" and "also undervalues the important due process interest in recognizing the dignity and worth of the individual."⁵⁵ None of this reasoning was state-specific.

A similar story can be told about same-sex marriage. In 2003, the Massachusetts Supreme Judicial Court became the first state high court to hold that same-sex couples had a constitutional right to marry.⁵⁶ At the time, the only federal authority on point was *Baker v. Nelson*, an appeal from a Minnesota Supreme Court ruling against same-sex marriage that the U.S. Supreme Court dismissed "for

⁵¹ See *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that an inmate's loss of "good-time credits" is subject to procedural due process protection); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (same for parole revocation).

⁵² See *Meachum v. Fano*, 427 U.S. 215, 224–25 (1976) (holding that an inmate has no due process liberty interest when he is being transferred from one prison to another if state law does not establish conditions for such transfers or otherwise limit official discretion in making transfer decisions).

⁵³ *People v. Ramirez*, 599 P.2d 622, 625 (Cal. 1979).

⁵⁴ *Id.* at 626 (plurality opinion); see *id.* at 634 (Bird, C.J., concurring in part and dissenting in part).

⁵⁵ *Id.* at 626 (plurality opinion). Another due process-related example is *Doe v. State*, which held that retroactive application of Alaska's sex offender registration statute violated the state ex post facto clause. 189 P.3d 999, 1000 (Alaska 2005). In so holding, the Alaska court declined to follow *Smith v. Doe*, which had upheld the same Alaska statute against a federal ex post facto challenge. 538 U.S. 84, 96 (2003). The Alaska court applied the same analytical framework as the Supreme Court but simply reached a different conclusion. See *Doe v. State*, 189 P.3d at 1007–19.

⁵⁶ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

want of [a] substantial federal question.”⁵⁷ Five years after the Massachusetts case, the California Supreme Court held unconstitutional the state’s laws restricting marriage to opposite-sex couples, broadly ruling that discrimination on the basis of sexual orientation is subject to strict scrutiny under California’s equal protection clause.⁵⁸ Five months after that decision, the Connecticut Supreme Court reached the same conclusion on largely the same analysis.⁵⁹ At the time, the U.S. Supreme Court had not suggested that sexual orientation discrimination warranted any greater scrutiny than rational basis review (with bite).⁶⁰ These state courts did not employ any state-specific reasoning in interpreting their state equal protection guarantees. They simply disagreed with or went beyond federal precedent, employing the same analytical approach but reaching different doctrinal conclusions.

There are many other examples of substantive disagreement between state courts and the Supreme Court, and not all of them are liberal in their results. In the wake of the Supreme Court’s decision in *Kelo v. New London*,⁶¹ some state high courts have read their state constitutions to confer greater protection for property rights against eminent domain. The Ohio Supreme Court expressly sided with the dissenters in *Kelo*, concluding that *Kelo* had construed the concept of “public use” too expansively.⁶² The Supreme Court of South Dakota similarly disagreed with *Kelo*’s public benefit rationale and construed “public use” to mean “use by the public.”⁶³ These courts pointed to no meaningful textual differences between the state and federal takings clauses, and “did not rely on variations in local conditions or other factors peculiar to their states as justifications for rejecting [*Kelo*’s] approach.”⁶⁴ Instead, they decided the issue on “general rather than state-specific principles.”⁶⁵

In addition, state high courts have interpreted due process, equal protection, or similar guarantees in state constitutions to strike down economic regulation “even when explicitly acknowledging that the

⁵⁷ 409 U.S. 810 (1972), *dismissing appeal from* 191 N.W.2d 185 (Minn. 1971).

⁵⁸ *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008).

⁵⁹ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 425–73, 481 (Conn. 2008).

⁶⁰ *See Romer v. Evans*, 517 U.S. 620, 631–35 (1996); *see also Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O’Connor, J., concurring). The Supreme Court’s approach has not changed since then. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

⁶¹ 545 U.S. 469 (2005) (holding that a city’s condemnation of private property for the purpose of private development as part of a community economic development plan qualifies as a taking for “public use” under the Fifth Amendment).

⁶² *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136–42 (Ohio 2006).

⁶³ *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006).

⁶⁴ Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 9 (2011).

⁶⁵ *Id.*

U.S. Supreme Court has interpreted the equivalent language in the U.S. Constitution to not extend such protection of economic liberties.”⁶⁶ For example, the Colorado Supreme Court invalidated the Colorado Filled Milk Act under the state due process clause in the face of contrary U.S. Supreme Court precedent upholding similar legislation under the federal due process clause.⁶⁷ State high courts have invalidated Sunday closing laws despite Supreme Court precedent upholding them,⁶⁸ and state courts have gone further than federal courts in applying due process and equal protection guarantees to invalidate occupational licensing or permitting schemes.⁶⁹ In 2004, the Iowa Supreme Court invalidated a slot machine taxation scheme on state equal protection grounds after the U.S. Supreme Court had upheld the same scheme against a federal equal protection challenge one year earlier.⁷⁰ The Iowa court employed no state-specific reasoning; it applied the same rational basis review that the U.S. Supreme Court applies to economic legislation but reached a different outcome.⁷¹

II

The discomfort with these decisions may be traced to our conventional understanding of a constitution as an authoritative expression

⁶⁶ Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 461 (2005); *see id.* app. at 513–39 (comprehensively cataloguing these state court decisions).

⁶⁷ *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940 (Colo. 1971); *see id.* at 945 (“What is permissible under the Federal Constitution in matters of State economic regulation is not necessarily permissible under State law. The Constitution of a State may guard more jealously against the exercise of the State’s police power.”) (quoting *Coffee-Rich, Inc. v. Comm’r of Pub. Health*, 204 N.E.2d 281, 286 (Mass. 1965)).

⁶⁸ *Compare McGowan v. Maryland*, 366 U.S. 420 (1961) (rejecting equal protection, vagueness, and Establishment Clause challenges to Maryland’s Sunday closing laws), *with Fair Cadillac-Oldsmobile Isuzu P’ship v. Bailey*, 640 A.2d 101, 107–08 (Conn. 1994), *Rogers v. State*, 199 A.2d 895, 897 (Del. 1964), *and Spartan’s Indus., Inc. v. Oklahoma City*, 498 P.2d 399, 402 (Okla. 1972).

⁶⁹ *Compare City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a law preferencing certain pushcart vendors over others), *and Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (finding a rational basis for a law disfavoring opticians in relation to ophthalmologists, optometrists, and sellers of ready-to-wear eyeglasses), *with Church v. State*, 646 N.E.2d 572, 582 (Ill. 1995) (striking down a law granting monopolistic rights to regulated entities), *and Nixon v. Commonwealth*, 839 A.2d 277, 290 (Pa. 2003) (striking down a law disqualifying certain persons with criminal records from working in facilities serving older adults on the ground that it infringed on the right to pursue an occupation). For additional examples of state constitutional decisions invalidating occupational licensing schemes, *see Sanders, supra* note 66, at 484 n.153.

⁷⁰ *Compare Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9–16 (Iowa 2004), *with Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 106–10 (2003).

⁷¹ *Fitzgerald*, 675 N.W.2d at 6–9.

of a sovereign people's fundamental values. One answer to the counter-majoritarian difficulty in judicial review is that judges, when interpreting a constitution, do not act in the mode of "Hercules"⁷² overriding the democratic choices of the people. Instead, constitutional interpretation involves vindication of core principles that reflect a permanent consensus of the people over the transient policy preferences of ever-shifting majorities. This understanding, as applied to the Federal Constitution, is premised on "the coherent identity of the American people as an enduring entity with shared values."⁷³

The applicability of this understanding to state constitutions is less straightforward. Of course it is true that each state's constitution is, as a formal and historical matter, the enactment of the people of each state. But, as the previous examples suggest, many provisions of state constitutions do not lend themselves to state-specific understandings. Just as there is no unique New Jersey attitude about reasonable expectations of privacy in garbage, there is no California concept of equal protection that is distinct from the analogous concept in the Federal Constitution.⁷⁴ The state courts and the Supreme Court are not interpreting *different concepts* of equal protection or unreasonable searches and seizures; they are offering different interpretations of the *same concept*—and the common "object of that interpretation [is] American constitutionalism."⁷⁵

For several reasons, it should not be surprising that state courts often interpret state constitutional provisions without relying on state-specific sources. As an initial matter, the development of state constitutions since the Founding Era has often reflected an amalgam of influences rather than legal traditions or values specific to each state.⁷⁶ Drafters of state constitutions have made regular recourse to other

⁷² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) (imagining a model judge as "a lawyer of superhuman skill, learning, patience and acumen").

⁷³ Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 417 (1998).

⁷⁴ Indeed, California's equal protection clause was adopted by the electorate in 1974 with the explicit purpose of "put[ting] into the [California] Constitution some rights which now exist in the federal Constitution." A. Alan Post, *Proposition 7: Declaration of Rights, Analysis by Legislative Analyst*, in CALIFORNIA VOTERS PAMPHLET, GENERAL ELECTION, NOVEMBER 5, 1974, at 26 (1974); see CAL. CONST. art. I, § 7.

⁷⁵ Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1166 (1993); see *id.* at 1168 ("The state constitutionalism I envision is a process of giving voice to the state court's understanding of the values and principles of the national community.").

⁷⁶ See generally DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 125–255 (2d ed. 1998); G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729.

states' constitutions and to the Federal Constitution;⁷⁷ in turn, the Framers of the Federal Constitution borrowed heavily from state constitutional text and experience.⁷⁸ Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition. This is what we would expect, since state constitutions “structure a measure of self-rule within a system of shared rule.”⁷⁹

With regard to individual rights guarantees in state constitutions, state courts do not inherit a tradition of elaborating such rights by reference to state-specific sources. During the Founding Era and throughout the nineteenth century, the Federal Bill of Rights was understood to apply only to the federal government, not to the states.⁸⁰ Before the gradual process of selective incorporation, and well before the Warren Court began to vigorously enforce constitutional rights against the states, the protection of basic liberties was left to state courts interpreting state law. This historical role of state courts should not be exaggerated in terms of its scope or accomplishments.⁸¹ But it is notable that state constitutional decisions from this era often

⁷⁷ See Jon Lauck, “*The Organic Law of a Great Commonwealth*”: *The Framing of the South Dakota Constitution*, 53 S.D. L. REV. 203, 219–20 (2008) (describing the influence of the Framers and the American democratic heritage on the delegates to the Dakotan constitutional conventions); Thomas B. Miller, *The New Federalism in West Virginia*, 90 W. VA. L. REV. 51, 53–54 (1987); Tarr, *supra* note 76, at 729–35; Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995) (reviewing DAVID A. JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890* (1992)).

⁷⁸ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 28–30, 32–33, 65 (1998); Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251 (1992).

⁷⁹ WILLIAMS, *supra* note 15, at 17.

⁸⁰ See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 331 (2011) (“[D]espite the addition of the federal Bill of Rights, state constitutions remained the primary guarantors of individual rights throughout most of American history.”).

⁸¹ See generally TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991). Cf. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1101 (1997) (“Although evidence is fragmentary, historical studies of the business of state supreme courts reveal that these courts were not heavily involved in protecting civil liberties during the first era. During the antebellum period, constitutional litigation in general was relatively rare in state supreme courts.”); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1203–05 (1985) (describing the minor role of state courts interpreting state constitutions in eliminating slavery and segregation); Peter P. Miller, Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 323 (1968) (observing that state courts, though “in a position to make substantial contributions to the development of standards for the preservation of freedom of expression” by interpreting relevant state constitutional provisions, largely “fail[ed] to avail themselves of this opportunity”).

employed concepts of natural law, common-law developments, and other modes of reasoning that transcended state-specific texts or understandings.⁸²

For example, the Tennessee Supreme Court in 1831 declared the principle of non-retroactivity of state laws impairing vested rights on the basis of “eternal principles of justice which no government has a right to disregard.”⁸³ The Connecticut Supreme Court early on recognized a criminal defendant’s right against double jeopardy and right to counsel as a matter of custom or common law.⁸⁴ The Arkansas Supreme Court in 1853, while noting that the state constitution “contains no provisions that private property shall not be taken for public use, without just compensation,” nonetheless enforced the principle “as a law of natural justice.”⁸⁵ The Supreme Court of Georgia in 1847 similarly described the takings principle as “a great common law principle, founded in natural justice, especially applicable to all republican governments.”⁸⁶ And some state courts during this era enforced equality guarantees by invoking natural law principles instead of relying on equality provisions in their state constitutions.⁸⁷

Massachusetts Chief Justice Lemuel Shaw described this perspective of “constitutional universalism”⁸⁸ when he wrote in 1857:

In considering constitutional provisions, especially those embraced in the [Massachusetts] Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of

⁸² See James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 122–28 (1998); J. Morgan Kousser, *Before Plessy, Before Brown: The Development of the Law of Racial Integration in Louisiana and Kansas*, in TOWARD A USABLE PAST, *supra* note 81, at 213, 214; Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, in TOWARD A USABLE PAST, *supra* note 81, at 189, 189–95; Suzanna Sherry, *The Early Virginia Tradition of Extratextual Interpretation*, in TOWARD A USABLE PAST, *supra* note 81, at 157, 157–58.

⁸³ *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 603 (1831); *see also* *Town of Goshen v. Town of Stonington*, 4 Conn. 209, 221 (1822) (deriving the same holding from “the fundamental principles of the social compact”).

⁸⁴ See Peters, *supra* note 82, at 191 (citing authorities).

⁸⁵ *Ex parte Martin*, 13 Ark. 198, 206 (1853).

⁸⁶ *Young v. McKenzie*, 3 Ga. 31, 44 (1847); *see also* *People v. Morris*, 13 Wend. 325, 328 (N.Y. 1835) (describing takings principle as a “universal and fundamental proposition”); James W. Ely Jr., *‘The Sacredness of Private Property’: State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY 620, 634–36 (2015) (collecting examples showing that “[i]n the early decades of the nineteenth century several state courts invoked unwritten fundamental principles to mandate the payment of compensation when private property was taken for public use even if the state constitution was silent on the point”).

⁸⁷ See Williams, *supra* note 81, at 1200–02 (discussing *Holden v. James*, 11 Mass. (10 Tyng) 396, 405 (1814), *Durkee v. City of Janesville*, 28 Wis. 464, 467 (1871), and *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 230, 239 (1829)).

⁸⁸ Gardner, *supra* note 82.

rights, we are rather to regard them as the annunciation of great and fundamental principles, . . . than as precise and positive directions and rules of action Many of them are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislators and judges, without any express declaration, that some of the framers of state constitutions, and even the convention which formed the Constitution of the United States, did not originally prefix a declaration of rights.⁸⁹

The first treatise on state constitutional law, published in 1868 by Michigan Supreme Court Justice Thomas Cooley,⁹⁰ “treated its subject not in the positivist sense of a body of particular commands issued by the sovereign people of particular states, but in the universalist sense of an undifferentiated body of general principles existing independent of any particular constitution and available to courts construing individual constitutions whenever useful” in individual cases.⁹¹

Although primary responsibility for individual rights protection fell to state courts before the advent of incorporation, it is fair to say that the natural law decisions discussed above did not amount in scope or depth to what we would today regard as a developed jurisprudence of individual rights. Professor Akhil Amar’s insightful history of the Bill of Rights demonstrates that our conventional understanding of constitutional rights as protections for individuals and minorities from oppressive majorities has its main origins not in the Founding Era but in the aftermath of the Civil War and ratification of the Fourteenth Amendment.⁹² The central preoccupations of the Founding Era in the drafting of the federal and various state constitutions concerned the structure of government, and

[a] close look at the Bill [of Rights] reveals structural ideas tightly interconnected with language of rights; states’ rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.⁹³

⁸⁹ *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 340 (1857).

⁹⁰ THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (4th ed. 1878).

⁹¹ Gardner, *supra* note 82, at 126–27; see Kahn, *supra* note 75, at 1163 (“Just as his contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court’s interpretive effort.”).

⁹² AMAR, *supra* note 78.

⁹³ *Id.* at xii; see WILLIAMS, *supra* note 15, at 41 (“The central controversies over the first state constitutions had little to do with rights. The focus was on how the new state

Only after the adoption of the Fourteenth Amendment, with its express language prohibiting states from abridging the privileges or immunities of citizens, did the provisions of the Bill of Rights gradually become “less majoritarian and populist, and more libertarian,” through a process of judicial and popular refinement.⁹⁴

The role of courts in enforcing individual rights, as we understand it today, evolved gradually throughout the twentieth century. In many instances, the meaning of those rights has taken shape not through abstract theorizing or invocation of natural law, but through adjudication of specific controversies situated within a national historical context. Freedom of expression, for example, derives concrete meaning from cases that arose during wartime⁹⁵ and during the Civil Rights Movement.⁹⁶ The contours of economic liberty have been shaped by debates over the growing reach of government in regulating our economy.⁹⁷ The meaning of equality in our constitutional tradition is inextricably linked to our nation’s repudiation of slavery and Jim Crow, and our ongoing efforts to combat their vestiges.⁹⁸ And the

governments would be structured and which groups in society would have the dominant policy-making role under the new governments.”); Robert C. Palmer, *Liberties as Constitutional Provisions: 1776–1791*, in *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 64–68 (William E. Nelson & Robert C. Palmer eds., 1987) (explaining that the rights specified in Pennsylvania’s 1776 constitution were intended primarily to reinforce republican majoritarianism, not to protect individual liberty against majority oppression).

⁹⁴ AMAR, *supra* note 78, at xiv.

⁹⁵ See, e.g., *Tinker v. Des Moines*, 393 U.S. 503, 514 (1969) (holding that school officials may not censor students’ symbolic speech, i.e., wearing black armbands to protest the Vietnam War); *Yates v. United States*, 354 U.S. 298, 312–27 (1957) (holding that First Amendment protects speech advocating forcible overthrow of the government as an abstract idea); *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that First Amendment protects children in public schools from being compelled to salute the flag and recite the Pledge of Allegiance); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (invalidating 1919 state statute banning public display of red flags).

⁹⁶ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that news publications cannot be sued for libel or defamation of public figures unless plaintiff shows false reporting was motivated by actual malice, thereby allowing news media wider latitude in reporting on the Civil Rights Movement); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (invalidating state statute requiring nonprofit corporations to disclose membership lists).

⁹⁷ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486, 491 (1955) (upholding state law barring opticians but allowing sellers of ready-to-wear eyeglasses to fit lenses); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (upholding against substantive due process challenge a federal law prohibiting shipment of filled milk in interstate commerce); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating state law establishing maximum work hours for bakery employees); *supra* notes 66–71 and accompanying text.

⁹⁸ See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986) (prohibiting racial discrimination in peremptory strikes); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (invalidating de jure segregation of public schools); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding racial covenants on real estate unconstitutional).

emergence of judicial solicitude for the rights of criminal defendants “can be understood only in the context of the struggle for civil rights.”⁹⁹ Formative controversies such as these comprise a national narrative and crystallize doctrinal concepts that we recognize as integral to our individual rights tradition.

Against the backdrop of selective incorporation and the emergence of an individual rights jurisprudence in federal constitutional law, state courts evolved a similar jurisprudence under parallel provisions of state constitutions. With respect to many individual rights guarantees, there are no comparably formative state-specific histories to anchor the development of a state-specific jurisprudence. It is not surprising that state courts, lacking “a shared social epic” as momentous as the Civil War, foreign wars, or the Civil Rights Movement to inform the interpretation of many basic liberties, often “have embraced the larger American narrative and polity and appropriated them for the use of the state in state constitutional adjudication.”¹⁰⁰

This embrace, moreover, is consistent with the transformation of citizenship codified in the Fourteenth Amendment, the first sentence of which says: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”¹⁰¹ In addition to overruling *Dred Scott*¹⁰² and securing the citizenship of black Americans, this sentence makes clear that national citizenship, whether by birth-right or naturalization, is the primary political identity of the American people and that state citizenship is secondary and derivative—a function of where a citizen of the United States chooses to reside. “[T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence”¹⁰³ and, together with the Privileges or Immunities Clause, ensures that “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.”¹⁰⁴ Setting aside whether states have authority

⁹⁹ A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

¹⁰⁰ Gardner, *supra* note 82, at 129.

¹⁰¹ U.S. CONST. amend. XIV, § 1.

¹⁰² *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁰³ *Saenz v. Roe*, 526 U.S. 489, 506 (1999).

¹⁰⁴ *Id.* at 503 (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872)); see U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

over the immigration of foreign nationals,¹⁰⁵ it is clear that states lack an essential attribute of sovereignty with respect to *U.S.* nationals: They have no authority to control their borders or restrict state citizenship apart from adopting reasonable requirements for becoming a bona fide state resident.¹⁰⁶ The reasonableness of such requirements is a matter of federal constitutional law, and such requirements cannot have a purpose of deterring in-migration by citizens of other states.¹⁰⁷ Our citizens thus “have two political capacities, one state and one federal,”¹⁰⁸ and these two capacities are not vestments we can only wear one at a time. Under the Citizenship Clause, one cannot be a citizen of a state without *also* being a citizen of the United States.

The primacy of national citizenship and derivative nature of state citizenship are today reflected in sociological facts that indicate the porousness of state boundaries. These facts include the ease and extent of mobility of people between states, the national and global integration of the economy, the nationalization of consumer culture (think Amazon and Walmart), and the concentration of mass media and its propagation to every corner of the country through the Internet.¹⁰⁹ The expansion of the federal government and the rise of national political parties and powerful national lobbies have also exerted a homogenizing influence on our political and cultural identity.¹¹⁰ Although geography can demarcate culturally distinct subnational communities, the ones that most readily come to mind—for example, urban versus rural residents—do not neatly track state

¹⁰⁵ See *Arizona v. United States*, 567 U.S. 387, 417–21 (2012) (Scalia, J., dissenting) (arguing that states had sovereign authority to control their borders, including the power to regulate immigration, during the Founding Era).

¹⁰⁶ The Court elaborated in *Saenz* as follows:

The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.

Saenz, 526 U.S. at 503–04 (quoting *The Slaughter-House Cases*, 83 U.S. at 112–13 (Bradley, J., dissenting)); see *Sosna v. Iowa*, 419 U.S. 393, 405–10 (1975); *Vlandis v. Kline*, 412 U.S. 441, 452 & n.9 (1973).

¹⁰⁷ See *Saenz*, 526 U.S. at 499, 506; *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

¹⁰⁸ *Saenz*, 526 U.S. at 504 & n.17 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

¹⁰⁹ See GARDNER, *supra* note 15, at 69–72.

¹¹⁰ Cf. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that the rise of political parties created “a politics that preserved the states’ voice in national councils by linking the political fortunes of state and federal officials”).

lines.¹¹¹ As a matter of constitutional design and contemporary reality,

[t]he members of a state polity are part of the national polity; the institutions of state government they create exist not only to satisfy their own desires concerning the character and content of political life within the state, but also to satisfy the wishes of the national polity of which they are members concerning the character and content of political life throughout the nation.¹¹²

It is thus no accident that state constitutionalism in many areas has not rested on the distinctiveness of a state's history, values, or character—what Professor James Gardner has called “Romantic sub-nationalism.”¹¹³ This is not to say that there is no such thing as state identity or that states cannot be “meaningful political subcommunities of internal integrity and cohesiveness.”¹¹⁴ Where state constitutional provisions have state-specific meanings based on distinctive text or history, courts must give effect to those meanings. But it is to say that many fundamental principles, consistent with their origins and evolution in state constitutions, are today properly and actually understood as transcendent American principles, and state courts have not hesitated to treat them as such.

III

The legitimacy of state constitutionalism must therefore rest on a justification for redundancy between state and federal courts in interpreting unitary constitutional principles. And here is where many

¹¹¹ See GARDNER, *supra* note 15, at 68 (“[E]very American state contains within its borders a considerable diversity of physical and demographic attributes. The real question posed by federalism, then, is not whether geographic boundaries are capable of marking off meaningfully distinct communities—clearly they have that capacity—but whether the boundaries of the American states actually do so.”); Schapiro, *supra* note 73, at 393–94 (urging proponents of state constitutionalism to abandon the premise that states are sites of communal identity or comprise communities of value).

¹¹² GARDNER, *supra* note 15, at 231–32.

¹¹³ *Id.* at 53–79. Professor Gardner illustrates the perils of state-centric essentialism with a discussion of *Ravin v. State*, 537 P.2d 474 (Alaska 1975), which applied the state constitution's protection of privacy to invalidate a state law criminalizing personal use of marijuana in the home. The court explained that its holding

is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

Id. at 503–04. Yet Alaska voters subsequently recriminalized all possession of less than eight ounces of marijuana. See Alaska 1990 Initiative Proposal No. 2, §§ 1–2 (codified at ALASKA STAT. 11.71.060(a)(1)); *cf.* *Noy v. State*, 83 P.3d 538 (Alaska 2003) (invalidating the initiative under the state constitution).

¹¹⁴ GARDNER, *supra* note 15, at 78.

state judges feel a certain anxiety. If we accept that federal courts and state courts are often interpreting a common object, and if that object is national in character, then why shouldn't the interpretations of the U.S. Supreme Court be controlling? Of course they are not controlling in the purely formal sense that the Supreme Court does not control state court interpretation of state constitutional law. But if a state court and the Supreme Court are deciding the same *substantive* issue, does a state court's departure from federal authority rest on a "bona fide" independent and adequate state ground¹¹⁵ simply by virtue of labeling the decision "state constitutional law"?

The problem, to be clear, is not that state courts lack competence to declare rights held in common by our nation's people. Although the existence and powers of state courts are derived from state constitutions, the Supremacy Clause makes clear that "the Judges in every State shall be bound" by federal law, including the Federal Constitution,¹¹⁶ and state judges accordingly take an oath to support and defend not only their respective state constitutions but also the Federal Constitution. State courts are thus obligated and entrusted to interpret constitutional principles whose reach extends beyond state borders.

But when state courts interpret the Federal Constitution, they are acting as "an instrumentality of federal authority" that is unquestionably subordinate to the Supreme Court.¹¹⁷ Why do state courts have independent authority to speak on matters of U.S. constitutional law outside the chain of federal judicial command? This question goes to the heart of the rationale for judicial federalism.

One kind of answer to why our system allows two bites at the same apple is that state courts and federal courts are differently situated when it comes to interpreting constitutional rights. Professor Burt Neuborne famously argued that state courts are less favorable

¹¹⁵ *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

¹¹⁶ U.S. CONST. art. VI, cl. 2.

¹¹⁷ Kahn, *supra* note 75, at 1165; see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327–52 (1816). Some Justices have argued, however, that the Supreme Court should not review state high court decisions that interpret the Federal Constitution in a manner that "overprotects" individual rights. See *Kansas v. Carr*, 136 S. Ct. 633, 646 (2016) (Sotomayor, J., dissenting); *Florida v. Powell*, 559 U.S. 50, 64–71 (2010) (Stevens, J., dissenting). In Justice Sotomayor's view, Supreme Court intervention in such cases "prevent[s] States from serving as necessary laboratories for experimenting with how best to guarantee defendants a fair trial." *Carr*, 136 S. Ct. at 646. In addition, the Court in such cases "risk[s] issuing opinions that, while not strictly advisory, may have little effect if a lower court is able to reinstate its holding as a matter of state law" and "intervene[s] in an intrastate dispute between the State's executive and its judiciary rather than entrusting the State's structure of government to sort it out." *Id.* at 647.

forums than federal courts for litigants seeking enforcement of constitutional rights.¹¹⁸ But there are considerations that cut the other way.

First, federal courts may underenforce constitutional norms because of “institutional” rather than “analytical” concerns, and one of those institutional concerns is federalism.¹¹⁹ The Supreme Court may decline to enforce a constitutional right “to its full conceptual boundaries”¹²⁰ because of a concern that its interpretation would not only bind the federal government but also impose uniformity on the states.¹²¹ This concern has no applicability to state courts; they need not worry that their constitutional rulings will constrain the prerogatives of other jurisdictions. The value of judicial federalism may be partly understood as a function of this institutional difference.

Second, most state judges face electoral accountability in contrast to the life tenure enjoyed by federal judges.¹²² Although majoritarian pressures are thought to make state courts less responsive than federal courts to individual rights claims, the evidence is mixed. Some studies have found that state appellate courts fare no worse and, in some areas, fare better than federal courts in enforcing individual rights.¹²³

¹¹⁸ Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977). Professor Neuborne focused mainly on comparing state trial courts with federal district courts. *Id.* at 1119. He acknowledged that the question of parity between federal district courts and state appellate courts is “much closer.” *Id.* at 1118 & n.51. Still, he concluded that “to a somewhat lesser degree, federal districts courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims” in part because “most state appellate courts are exposed to majoritarian pressures to nearly the same extent as are state trial courts.” *Id.* at 1116 & n.45. Professor Neuborne’s article was published just three months after Justice Brennan’s 1977 article in the same volume of the *Harvard Law Review*, making for an interesting juxtaposition of perspectives on state courts.

¹¹⁹ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978).

¹²⁰ *Id.* at 1213.

¹²¹ See *Arizona v. Evans*, 514 U.S. 1, 30–31 (1995) (Ginsburg, J., dissenting). As Professor Williams notes, this is among the reasons why state courts should not accord a presumption of correctness to federal constitutional decisions. See WILLIAMS, *supra* note 15, at 173.

¹²² See Sutton, *supra* note 36, at 700–02 (cataloguing state judicial selection practices).

¹²³ A number of studies have examined whether state courts (trial or appellate) are better or worse than federal courts at protecting constitutional rights. See, e.g., Sara C. Benesh & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795 (2009); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005). There is evidence suggesting that political accountability induces judicial reluctance to vindicate individual rights claims of criminal defendants. See Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 942, 945 (2016) (examining 3100 criminal appeals decided by state high courts in thirty-two states between 2008 and 2013, and finding significant relationship between electoral attack advertising and judicial hostility to appeals by criminal defendants). Nevertheless, those wary of the effects of electoral accountability on judges “must account for state court decisions over the last several decades, in which elected

And despite Alexander Hamilton's claim that insulating federal courts from political control would make them an "excellent barrier to the encroachments and oppressions of the representative body,"¹²⁴ the modern Supreme Court has not strayed far from public opinion on a variety of issues.¹²⁵

Moreover, virtually all state constitutions are easier to amend than the Federal Constitution; unlike a federal constitutional decision, a state constitutional ruling can be undone by popular initiative in eighteen states, including California.¹²⁶ To be sure, political accountability and the possibility of electoral backlash can induce judicial restraint. But such accountability also lessens the countermajoritarian difficulty and, perhaps counterintuitively, may aid rather than diminish the legitimacy of countermajoritarian decisionmaking by state courts. This, too, is an institutional difference that helps to explain the value of judicial federalism.

State courts may diverge from federal authority because of these institutional differences or because of sheer disagreement on the substantive meaning of a constitutional right. Either way, judicial federalism serves important purposes. Most directly, a state court can provide protection for basic liberties that would otherwise go unprotected for the people of that state. Our federal system, as Justice Brennan said, "provides a double source of protection for the rights of

judges granted individual-rights protections that life-tenured federal justices would not. A narrative assuming that only politically insulated judges will protect politically disfavored rights must account for a range of contrary state court decisions." Sutton, *supra* note 36, at 703.

¹²⁴ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹²⁵ See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14–15 (2009) ("On issue after contentious issue . . . the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll. . . . [O]ver time, . . . the Court and the public will come into basic alliance with each other."); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008) (containing fourteen separate papers documenting how public opinion has tracked with the Supreme Court's decisions in various constitutional contexts); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285, 293–94 (1957) (noting that the Court's policy views tend to conform with those of the "lawmaking majorities" and on contentious issues, the Court can succeed in establishing policy "only if its action conforms to and reinforces a widespread set of explicit or implicit norms"); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 277, 280 (2010) (finding a statistically significant correlation between public mood and the Court's decisions).

¹²⁶ See Sutton, *supra* note 36, at 695 & n.67; *cf. id.* at 693–99 (showing that state constitutions are not monolithic and vary considerably in how easy they are to amend).

our citizens,” and when federal remedies are foreclosed, state courts can “step into the breach.”¹²⁷

But the impact of state constitutional rulings can be more far-reaching. An accumulation of state decisions that depart from a federal precedent may induce the U.S. Supreme Court to reconsider the issue. In *Mapp v. Ohio*, for example, the Court abandoned its earlier refusal to apply the exclusionary rule to the states, noting that more than half the states had adopted the rule by legislative or judicial decision, and emphasizing in particular the California Supreme Court’s decision in *People v. Cahan*.¹²⁸ In *Batson v. Kentucky*, the Court overruled its decision in *Swain v. Alabama* barring a criminal defendant from proving racial discrimination in jury selection solely on the basis of the prosecutor’s conduct in his case, noting that five state courts had departed from *Swain* in interpreting their state constitutions.¹²⁹ And in *Lawrence v. Texas*, the Court explained that “criticism of *Bowers* has been substantial and continuing” and observed that “[t]he courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.”¹³⁰

State constitutional decisions can also shape the development of federal constitutional law when the Supreme Court confronts an issue for the first time. In *New York Times Co. v. Sullivan*, the Court observed that the “actual malice” requirement for proving defamation of a public official or political candidate had been adopted by ten state courts.¹³¹ And the Court has looked to state practice, including state constitutional law, to determine what qualifies as a fundamental lib-

¹²⁷ Brennan, *supra* note 1, at 503.

¹²⁸ *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961) (citing *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955) while overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

¹²⁹ *Batson v. Kentucky*, 476 U.S. 79, 93–96 (1986) (overruling *Swain v. Alabama*, 380 U.S. 202, 221–22 (1965)); *see id.* at 82–83, 82 n.1 (citing state constitutional decisions from California, Delaware, Florida, Massachusetts, and New Mexico). The California decision cited in *Batson* interpreted the state jury trial guarantee in light of the “American tradition” and “American system” of trial by an impartial jury, and observed that “California, of course, is an integral part of that system and tradition.” *People v. Wheeler*, 583 P.2d 748, 758 (Cal. 1978).

¹³⁰ *Lawrence v. Texas*, 539 U.S. 558, 576 (2003); *see id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

¹³¹ 376 U.S. 254, 280 & n.20 (1964) (citing decisions from Arizona, California, Iowa, Kansas, Michigan, Minnesota, New Hampshire, North Carolina, South Dakota, and West Virginia). The citation to state decisions was no accident; the author of the opinion was Justice Brennan.

erty interest protected by the Fourteenth Amendment doctrine of substantive due process.¹³²

Although “federal courts have never used . . . state constitutional doctrine to nearly the same degree as state courts have used federal doctrine,”¹³³ these examples confirm that state courts and federal courts are engaged in a common dialogue when it comes to interpreting various rights secured by both the federal and state constitutions. Describing this phenomenon, Joseph Blocher has written that “[t]he structure of American federalism . . . need not be one that simply divides and separates judicial power. It can instead be one in which various interpretive bodies, both state and federal, are engaged in a shared enterprise of articulating constitutional values.”¹³⁴ In sum, “state courts need not be independent laboratories. They can be part of the same general research institution as the Supreme Court.”¹³⁵

Against these considerations, it is said that state courts should “proceed cautiously” because of “the general advisability in a federal system of uniform interpretation of identical constitutional provisions.”¹³⁶ Vertical uniformity has been a particular concern in the area of criminal procedure, where courts have expressed concern about the costs and inefficiencies that disuniformity could impose on federal and state law enforcement officers.¹³⁷ As one state high court justice put it:

Diverging from settled federal precedent results in two sets of rules and confusion among the bench and bar and law enforcement over which rules to follow. It also leads to inconsistent results, whereby

¹³² See *Cruzan v. Dir.*, Mo. Dep’t of Health, 497 U.S. 261, 271–77 (1990) (discussing various state court decisions addressing the right to refuse medical treatment under state law).

¹³³ Blocher, *supra* note 80, at 370–71.

¹³⁴ *Id.* at 370.

¹³⁵ *Id.* at 343.

¹³⁶ *Right to Choose v. Byrne*, 450 A.2d 925, 932 (N.J. 1982); see *Dodson*, *supra* note 37, at 732–36 (discussing why courts consider vertical uniformity a jurisprudential virtue).

¹³⁷ See, e.g., *McCrary v. State*, 342 So. 2d 897, 900 (Miss. 1977) (arguing that “the imposition of two different standards [for self-incrimination] would introduce unnecessary confusion among lawyers, judges, and law enforcement officers throughout the state”); *State v. Hunt*, 450 A.2d 952, 955 (N.J. 1982) (stating that the “enforcement of criminal laws in federal and state courts, sometimes involving the identical episodes, encourages application of uniform rules governing search and seizure”); *State v. Florance*, 527 P.2d 1202, 1209 (Or. 1974) (“Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances two different rules would cause confusion.”); *State v. Poole*, 871 P.2d 531, 536 (Utah 1994) (Stewart, A.C.J., concurring) (“One untoward consequence of such an approach is to impose two different and possibly conflicting constitutional standards on law enforcement officers with the unintended effect of diminishing, not increasing, protection for rights of privacy.”).

evidence from the same arrest or crime could be admissible in federal court, but not state court.¹³⁸

As a practical matter, it is questionable how significant this concern is in light of the already substantial vertical disuniformity in the criminal law context. Law enforcement officers must constantly navigate conflicting federal and state statutory criminal procedure, evidentiary rules, and substantive criminal law. It is not readily apparent why differences in state and federal constitutional criminal procedure would pose any greater challenge than those that officers already face.¹³⁹ Further, where federal officers are especially concerned about admissibility of evidence or unsure about the forum in which a prosecution will take place, they can always conform their conduct to the more protective state standard.¹⁴⁰ Of course, simplicity and predictability are important virtues, but as the New York Court of Appeals has observed, “[t]he interest of Federal-State uniformity . . . is simply one consideration to be balanced against other considerations that may argue for a different State rule. When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor.”¹⁴¹

Apart from its practical import, the allure of uniformity may lie in a more expressive dimension. Vertical uniformity has been considered a jurisprudential virtue because it inhibits forum-shopping and confers “the appearance of neutrality.”¹⁴² More pointedly, some state judges have worried that giving different meanings to identical textual provisions may seem illogical or manipulative and may breed public distrust of the legal system.¹⁴³ Others have warned that independent state constitutionalism may diminish the moral authority of the

¹³⁸ *State v. Short*, 851 N.W.2d 474, 516 (Iowa 2014) (Waterman, J., dissenting). This concern also appears in commentary. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 103 (2000); Arthur Leavens, *State Constitutionalism: State-Court Deference or Dissonance?*, 33 W. NEW ENG. L. REV. 81, 117 (2011) (“[T]wo layers of overlapping rules cannot but create confusion, particularly in instances in which state and federal officers operate with one another, each subject to different rules.”); Matthew M. Weissman, *People v. Torres and the Limits of State Constitutionalism: Has the Court of Appeals Forgotten the Cop?*, 24 COLUM. J.L. & SOC. PROBS. 299, 316 (1991) (“[T]he existence of different rules of criminal procedure under federal and state law—and different rules from state to state—greatly complicates the task of law enforcement agents, who must often cooperate in investigations across federal/state and state/state boundaries.”).

¹³⁹ See Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 383–90 (2007).

¹⁴⁰ See *id.* at 389; Leavens, *supra* note 138, at 117.

¹⁴¹ *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 561 (N.Y. 1986).

¹⁴² Dodson, *supra* note 37, at 733–34.

¹⁴³ See, e.g., *State v. Hempele*, 576 A.2d 793, 817 (N.J. 1990) (Garibaldi, J., dissenting).

U.S. Supreme Court.¹⁴⁴ As former Wisconsin Chief Justice Shirley Abrahamson has observed, some state judges “regard the state constitutional law movement as threatening the vision of one nation under law.”¹⁴⁵

But the American vision of one nation under law has always been complex, requiring an account of not only what various constitutional provisions mean, but also who gets to decide. It is no accident that the Framers focused their efforts on crafting an intricate and durable structure of government, only later adopting (as amendments to the main document) a Bill of Rights stated in general terms that require future elaboration. James Madison explained:

In the compound republic of America the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.¹⁴⁶

The Framers understood that a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy. The redundancies built into our structure of government largely serve to channel and manage conflict rather than to facilitate permanent resolution.¹⁴⁷

In his article on state constitutionalism, Professor Kahn draws a useful distinction between interpretation and authority.¹⁴⁸ The meaning and application of constitutional principles are the subject of ongoing interpretive conflict. Courts occasionally resolve such conflict through proper exercise of their delegated authority. But the fact that courts have authority to decide constitutional controversies does not mean courts are oracles of constitutional Truth. As Justice Jackson said:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state

¹⁴⁴ See, e.g., *id.* at 815 (O’Hern, J., concurring in part and dissenting in part).

¹⁴⁵ Abrahamson, *Divided We Stand*, *supra* note 15, at 732.

¹⁴⁶ THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴⁷ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 662–80 (1981) (explaining how jurisdictional redundancy provides a mechanism for coping with ideological impasse and promoting innovation).

¹⁴⁸ See Kahn, *supra* note 75, at 1148.

courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.¹⁴⁹

Constitutional law is contested terrain, and we cannot expect our governmental institutions, including the courts, to resolve very deep and fundamental debates to everyone's satisfaction. In the long run, the legitimacy of American constitutionalism rests not only on the substantive merits of particular decisions, but also on the capacity of our governmental structure to give full expression to the debates themselves. Many of our most cherished constitutional principles are stated in general terms, open to a variety of meanings in application. The unique role of courts is that they frame a mode of contestation whereby each side lays claim to the same legal heritage, the same legal texts, the same historical tradition. It is that mode of contestation, as much as its substantive results, that binds us together as a nation.

State constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy. Far from endangering the legitimacy of constitutional law, interpretive pluralism is a source of its resilience and deep resonance with our diverse citizenry. When a state court departs from Supreme Court precedent to secure greater protection for individual rights under a parallel provision of its state constitution, the state court "registers a forceful and often very public dissent."¹⁵⁰ Whether or not it influences other states or eventually induces the Supreme Court to reconsider its precedent, the state decision carries forward a dialogue over the meaning of our basic liberties. In short, state constitutionalism is one way in which our structure of government provides an outlet for constitutional conflict.¹⁵¹

It is true that state constitutionalism cannot serve this function by authorizing downward departures from the floor of federal constitutional protections established by the Supreme Court. But this fact serves to underscore the delicacy of the Supreme Court's role in adjudicating individual rights claims. On the most hotly debated issues, it is questionable to what extent the Court can successfully "call[] the contending sides of a national controversy to end their national divi-

¹⁴⁹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result); see Kahn, *supra* note 75, at 1164 ("Higher courts have no greater access to truth, only power.").

¹⁵⁰ GARDNER, *supra* note 15, at 100.

¹⁵¹ See Cover, *supra* note 147, at 682 (describing "our federalism" as "a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts"); Kahn, *supra* note 75, at 1166 ("The explanation of American citizenship is too important a task to leave to the federal courts alone.").

sion by accepting a common mandate rooted in the Constitution.”¹⁵² The achievement of broad societal consensus on what the Constitution mandates is rarely if ever the direct byproduct of judicial decisions alone. Even *Brown v. Board of Education*, let us not forget, went largely unenforced for over a decade until Congress and the President stepped in.¹⁵³ The dangers inherent in closing off constitutional debate in one direction should make us wary of closing off debate in the other direction as well.

CONCLUSION

In closing, let me again thank the Institute of Judicial Administration at N.Y.U. for continuing this annual tradition of the Brennan Lecture on state courts. Justice Brennan once wrote:

[T]he composite work of the courts of the fifty states probably has greater significance in measuring how well America attains the ideal of equal justice for all. The state courts of all levels must annually hand down literally millions of decisions which determine vital issues of life, liberty, and property of human beings of this nation. . . . We should remind ourselves that it is these state court decisions which finally determine the overwhelming aggregate of all legal controversies in this nation.¹⁵⁴

State courts matter. State law matters. State constitutional law matters.

The point of my lecture is not that state courts should depart from federal precedent more than they do or that they should do so on particular constitutional issues. State courts should always give

¹⁵² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992); see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007) (“[F]or some constitutional questions, authoritative settlement is neither possible nor desirable.”); see also LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–9 (2001) (rejecting the view that “the role of constitutional law is to settle political disagreement” and advancing a theory of constitutionalism whose goal is to “build a community founded on consent by enticing losers into a continuing conversation”).

¹⁵³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see Goodwin Liu, Brown, Bollinger, and *Beyond*, 47 HOW. L.J. 705, 714–15 (2004).

¹⁵⁴ William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 236 (1966). There are roughly 400,000 new filings each year in federal district court, compared to over 30 million new cases (excluding traffic cases) each year in state court. Compare ADMIN. OFFICE OF U.S. COURTS, UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE (Sept. 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf, with 2015 Overview—Trial Courts Caseloads, NAT’L CTR. FOR ST. COURTS, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro (select “Overview” at the top; then select “Statewide Incoming Caseloads” from the “Select Chart/Table” selection menu).

respectful consideration to federal precedent, and it may often be that federal courts and the Supreme Court in particular, through careful deliberation, have reached holdings or have developed analytical frameworks that are well-reasoned and worthy of emulation. A state court may so conclude in interpreting analogous provisions of its state constitution, but it should do so by applying its own independent judgment, not by applying a presumption of correctness to federal authority.

A state court may recognize individual rights that go unrecognized by the Supreme Court because of textual or historical considerations unique to that state or its constitution. When state-specific sources bear on the constitutional issue, they should be consulted first. But there is nothing illegitimate about a state court rejecting the Supreme Court's interpretation of a parallel constitutional provision on grounds that are not state-specific. Our nation's Framers understood that although a written constitution can and should declare our basic liberties, their precise contours are open to vigorous debate, often with no easy resolution. Our structure of government disperses power in order to channel conflict, thereby minimizing the risk that any single branch of any single level of government will have unchecked authority to impose its version of constitutional truth.

Justice Kennedy famously said that "the genius" of the Framers was that they "split the atom of sovereignty."¹⁵⁵ The path to nationhood that began in Philadelphia would eventually travel through Appomattox and places like Selma and Little Rock and beyond.¹⁵⁶ But the Framers' act of fission bequeathed to us, somewhat paradoxically, a durable structure for fusing a diverse citizenry into one nation. Judicial federalism is part of this structure, and state constitutionalism is part of the conversation that sustains us as one people, "We the People of the United States." If Justice Brennan's 1977 article was an invitation to let that conversation begin in state courts, then I hope you will join me today in saying: Let the conversation continue.

¹⁵⁵ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

¹⁵⁶ *See Shelby County v. Holder*, 133 S. Ct. 2612, 2645 (2013) (Ginsburg, J., dissenting); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).