

### *Symposium on The New Judicial Federalism: A New Generation*

## The Maturing Nature of State Constitution Jurisprudence

Randall T. Shepard

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Shepard: The Maturing Nature of State Constitution Jurisprudence

# THE MATURING NATURE OF STATE CONSTITUTION JURISPRUDENCE

RANDALL T. SHEPARD\*

The renaissance in state constitution jurisprudence has extended for nearly a generation. This movement has produced hundreds of appellate opinions, scores of journal articles, and dozens of books. These provide a substantial basis for assessing the viability of the movement and its impact on modern American law.

The celebration of this renaissance is widespread, especially among state court judges and attorneys who practice civil liberties and civil rights law. There is, however, a modest countercurrent of criticism by some who express disappointment about the results of the litigation and others who question the intellectual caliber of the enterprise.

To some extent, I think the disappointment about outcomes flows from a disagreement over the purpose of the movement and who launched it. Those who think of the movement as the product of Justice William Brennan's call for state courts to rediscover their own constitutions are necessarily disappointed whenever they read an opinion reaching a result different from the one Justice Brennan probably would have reached. I think it is apparent, however, that the continuing strength of this movement does not derive from a desire to continue, at the state level, the agenda of the Warren-Brennan Court. It derives from the aspiration of state court judges to be independent sources of law.

That aspiration also generates case law and other evidence rebutting the recent criticism about the development of state constitutional jurisprudence. In light of this, I will outline here the nature of those criticisms and my own best answers to them.

## I. WHOSE MOVEMENT IS THIS, ANYWAY?

One need not search very far to find that scholarly literature regularly credits Justice Brennan with launching the renewal of state constitutional law. Brennan's 1977 article in the *Harvard Law Review*<sup>1</sup> has been called "the

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\* Chief Justice of The Indiana Supreme Court. A.B., Princeton University, 1969; J.D., Yale Law School, 1972; LL.M., University of Virginia, 1995.

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

starting point of the modern re-emphasis on state constitutions.<sup>2</sup> Another scholar called Brennan's piece "a clarion call to state judges to wield their own bills of rights."<sup>3</sup> Yet another said that Brennan "is primarily responsible for this revamping of federalism."<sup>4</sup> Occasionally, scholars with a better sense of the history of the matter credit Brennan and Oregon's Justice Hans Linde.<sup>5</sup>

Justice Brennan's own renewed interest in state constitutions actually predates his 1977 article, and the genesis of it is easy to identify. Beginning with the arrival of Justice Goldberg, Brennan and Chief Justice Warren marched to victory for nearly a decade. Long-standing federal constitutional precedents were cut down like wheat, and state constitutions and lesser rules of law were rendered nearly irrelevant by a galloping federalization of a wide variety of matters. By the mid-1970s, however, Justice Brennan began to find himself on the losing end of cases. He concluded that the revolution was over as far as the Supreme Court was concerned and quite candidly announced that the war should be waged on another front. The announcement came in the case of *Michigan v. Mosley*.<sup>6</sup> Dissenting in a search and seizure case was a relatively novel experience for Brennan, and he called for state judges "to impose higher standards governing police practices under state law than is required by the Federal Constitution."<sup>7</sup> The timing of this plea was hardly a coincidence.<sup>8</sup>

2. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992) (noting that at least one influential commentator laid the groundwork almost a decade earlier) (citing Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970)).

3. Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1492 (1990).

4. John D. Boutwell, *The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina*, 70 N.C. L. REV. 1899, 1910 n.70 (1992).

5. Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 647 (1994) ("[T]wo important articles started the trend: one by Justice Hans Linde, of the Oregon Supreme Court, and one by Justice William J. Brennan, Jr., of the United States Supreme Court.") (footnotes omitted) (citing Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) and William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

6. 423 U.S. 96 (1975).

7. *Id.* at 120.

8. During the 1975 Term, Justice Brennan wrote 26 dissenting opinions, his second-highest number for that decade. In cases disposed of during that Term by written opinion, he also cast 56 dissenting votes, which tied his record for that decade. (This discussion relies on statistics reported each fall in the *Harvard Law Review*.) During the 1970s (1970 through 1979 Terms), Brennan wrote 198 dissenting opinions (an average of 19.8 per term) and cast 452 dissenting votes (45.2 per term) in cases disposed of by written opinion.

In contrast, during the 1960s (1960 through 1969 Terms), Brennan wrote just 33 dissenting opinions (3.3 per term) and cast only 67 dissenting votes (6.7 per term) in cases disposed of with written opinions. Moreover, during the five-year period from the 1963 Term to the 1968 Term, Brennan wrote only eight dissents (averaging just 1.3 per term) and cast only 25 dissenting votes (4.2 per term) in cases disposed of with written opinions.

Justice Brennan's 1975 conversion ultimately became the stuff of folklore because of his own considerable standing and because he identified a method by which certain litigants and litigation organizations might achieve their ends notwithstanding their increasing inability to succeed through the vehicle of the Supreme Court. He is undoubtedly an important part of the new state constitutionalism story. On the other hand, there were both scholars and judges working this idea long before Justice Brennan. Many of them were attracted to state constitutional law on grounds possessing higher moral authority than Brennan's outcome-based motivation. New legal scholarship on state

It is also revealing to view the data at "natural" breaks coinciding with changes in the Court's membership. As noted above, from the 1963 to 1968 Terms, Brennan cast 25 dissenting votes (4.2 per term) in cases disposed of with written opinions. This was only 2.6% of those cases. Chief Justice Burger replaced Chief Justice Warren for the 1969 Term. During that Term, Brennan cast 13 dissenting votes in full-opinion cases, which represented 10.4% of those cases. This was four times the percentage of full-opinion cases in which Brennan had dissented during the prior five-year period. In 1970, Justice Blackmun joined the Court, replacing Justice Fortas, who had resigned in 1969. During the 1970 and 1971 Terms, Brennan cast 72 dissenting votes (36 per term). This number represented 23.3% of the cases disposed of with full opinions—twice the percentage during the 1970 Term and eight times the percentage during the 1963 to 1968 Terms.

In 1972, Justices Powell and Rehnquist replaced Justices Black and Harlan. Justice Brennan's dissent rate rose again slightly. During the 1972 to 1974 Terms, he cast dissenting votes in 140 full-opinion cases (46.6 per term). This figure amounted to 16.9% of those dispositions. Finally, Justice Douglas retired shortly after the start of the 1975 Term and was replaced by Justice Stevens. During that Term, Brennan cast 56 dissenting votes in full-opinion cases, representing 30.9% of those dispositions. This was a higher percentage than in any single term throughout the 1960s and 1970s (except for 1979's 31.0%). From the 1975 to 1980 Terms, Brennan cast 282 dissenting votes (47 per term), a number that represented 28.6% of those dispositions. The following chart summarizes some of these statistics and suggests why Brennan began calling for greater use of state constitutions in 1975:

Average Number of  
Dissenting Votes

<i>Terms</i>	<i>Per Term</i>	<i>Percentage</i>	<i>New Justices</i>
1963-68	4.2 (N= 25)	2.6	
1969	13.0 (N= 13)	10.4	Burger
1970-71	36.0 (N= 72)	23.3	Blackmun
1972-74	46.6 (N= 140)	26.5	Powell, Rehnquist
1975-80	47.0 (N=282)	28.6	Stevens
1975	56.0 (N= 56)	30.9	

The raw numbers present a fairly accurate picture. However, greater precision would require standardization of the numbers from term to term. In the 1960s, for example, the Court disposed of cases with written opinions in an average of 148.9 cases per term, but during the 1970s the number rose to an average of 166.4 cases per term, an 11.7% increase. This accounted for some of the increase in the number of Brennan's dissenting votes and opinions.

Brennan's dissent percentage dropped during the 1977 Term (23.9%), probably because he suffered a mild stroke during this period and did not participate in a number of cases. The dissent percentage returned to its previous level during the 1978 and 1979 Terms (29.2%, 31.0%), but then diminished somewhat in the 1980 and 1981 Terms (26.4%, 22.7%).

constitutions began to appear as early as the 1960s, including one article in this law review.<sup>9</sup>

More important to the world of day-by-day litigation, state courts exercised their constitutional authority in a variety of settings well before Justice Brennan's exhortation. Where no parallel federal provision existed, for example, the state constitution regularly provided the sole basis for a constitutional challenge.<sup>10</sup> The state constitution was also pertinent where a parallel federal provision had not been incorporated into the meaning of the Fourteenth Amendment,<sup>11</sup> or where a parallel federal provision had been construed in such a way that it clearly did not apply to the facts of the instant case.<sup>12</sup> In still other instances, state supreme courts heard cases involving claims under parallel federal and state constitutional provisions and gave the state constitutional claim independent consideration.<sup>13</sup> Not surprisingly, some of these decisions presented laudable attempts at independent construction of state constitutions, while others were woefully inadequate. A sampling of pre-1977 state constitutional decisions reveals some decisions in which state supreme courts made good attempts at providing an independent, state-specific construction of their own constitutions.

In the 1962 case of *K. Gordon Murray Productions, Inc. v. Floyd*,<sup>14</sup> the Georgia Supreme Court invalidated a provision of Atlanta's municipal code that required exhibitors of motion pictures to obtain for each film they showed the prior approval of a Board of Motion Pictures Censors.<sup>15</sup> Designed to prevent exhibition of obscene films, the ordinance nevertheless subjected all films to the screening process.<sup>16</sup> The court engaged in a fairly lengthy analysis under the

9. Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969). See also Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

10. See, e.g., *Landes v. Town of N. Hempstead*, 231 N.E.2d 120 (N.Y. 1967) (protection against disenfranchisement).

11. See, e.g., *Simonson v. Cahn*, 261 N.E.2d 246 (N.Y. 1970) (right to grand jury); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976) (right to keep and bear arms). The Supreme Judicial Court noted tersely with a string cite that the Second Amendment was not relevant to the case, even if it should be incorporated into the Fourteenth Amendment at some future time. *Id.* at 850-51.

12. See, e.g., *State v. Moore*, 483 P.2d 630 (Wash. 1971) (protection against self-incrimination).

13. See, e.g., *State v. Burkhart*, 541 S.W.2d 365 (Tenn. 1976) (right to counsel).

14. 125 S.E.2d 207 (Ga. 1962).

15. *Id.* at 212-14.

16. *Id.* at 210-11.

First Amendment and concluded that, in light of *Times Film Corp. v. Chicago*,<sup>17</sup> the ordinance did not violate the federal Constitution.<sup>18</sup>

The Georgia court then proceeded to a detailed consideration of the state free expression provision, which contained quite different language:

No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty. Protection to person and property is the paramount duty of government, and shall be impartial and complete.<sup>19</sup>

After analyzing the text of this provision, the court held that "it is absolute as to what it protects, but it does not protect an 'abuse of that liberty.' Any invasion of the constitutional rights of others or the government would be an 'abuse of that liberty,' and is not constitutionally protected."<sup>20</sup> The court cited numerous prior cases in support of this proposition. If expression is protected under the provision, it said, "no interference, no matter for how short a time nor the smallness of degree, can be tolerated."<sup>21</sup> Although government could punish unprotected speech if it found a way to do so without disturbing protected speech, "[t]his does not mean that the house may be burned in order to get the rats out of it."<sup>22</sup> The court invalidated the ordinance because it subjected *all* motion pictures to prior approval, not just obscene ones.<sup>23</sup>

In the 1971 case of *State v. Moore*,<sup>24</sup> both the majority and dissenters on the Washington Supreme Court labored at construing the self-incrimination provision of their state constitution.<sup>25</sup> The case involved a challenge to an implied consent law that required persons suspected of driving while intoxicated to submit to a breathalyzer examination or face revocation of their licenses.<sup>26</sup> All members of the court agreed that the law was not invalid under the federal Constitution according to *Schmerber v. California*,<sup>27</sup> which held that the self-incrimination clause applied only to testimonial, not physical, evidence.<sup>28</sup> The

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17. 365 U.S. 43 (1961).

18. *K. Gordon Murrey Prod., Inc. v. Floyd*, 125 S.E.2d 207, 211-12 (Ga. 1962).

19. *Id.* at 212 (quoting GA. CONST. art. 1, § 1, ¶ 15 (1945)).

20. *Id.* at 212.

21. *Id.* at 213.

22. *K. Gordon Murrey Prod., Inc. v. Floyd*, 125 S.E.2d 207, 213 (Ga. 1962).

23. *Id.* at 213-14.

24. 483 P.2d 630, 631 (Wash. 1971).

25. *Id.* at 634, 636.

26. *Id.* at 631-32.

27. 384 U.S. 757 (1966).

28. *Id.* at 760-65.

plaintiff in *Moore* argued that the Washington provision was broader, for it used the phrase "give evidence against" instead of "be a witness against."<sup>29</sup>

The majority rejected this contention. Assessing the historical evil against which the right was directed, they concluded that testimonial self-incrimination was the primary concern.<sup>30</sup> They also said that "[w]here language of our state constitution is similar to that of the federal constitution, . . . the language of the state constitutional provision should receive the same definition and interpretation as that which has been given to the federal provision by the United States Supreme Court."<sup>31</sup>

The dissenters challenged the majority on two grounds. First, in a lengthy analysis of *Schmerber*, they quoted generously from Justice Black's dissent and concluded that "the better view is expressed by the dissent in *Schmerber*."<sup>32</sup> This suggested that even where the language of the two constitutions was similar, a state court should independently evaluate the meaning of a provision in order to choose the better rule, not to merely follow a majority of the U.S. Supreme Court. Secondly, and even more to their credit, the dissenters provided a brief, but more probing investigation of the history of the Washington provisions, particularly focusing on the constitutional convention.<sup>33</sup> The framers of the state constitution had specifically rejected an attempt to use the word "testify" instead of the phrase "give evidence" in the self-incrimination clause.<sup>34</sup> The dissent criticized the majority for papering over this difference in calling the provisions "similar."<sup>35</sup>

In the 1976 case of *State v. Burkhart*,<sup>36</sup> the Tennessee Supreme Court considered whether a criminal defendant had a right to participate personally in his own defense and to be simultaneously represented by participating counsel.<sup>37</sup> In a lengthy opinion, the court concluded that a defendant did not have such a right under either the state or federal constitution.<sup>38</sup> The court described the emergence of the right to counsel, the right to testify on one's own behalf, and the right of self-representation.<sup>39</sup> It then analyzed the federal claim, concluding that a defendant did not have the kind of simultaneous right

29. *State v. Moore*, 483 P.2d 630, 632-33 (Wash. 1971).

30. *Id.* at 633-34.

31. *Id.* at 634.

32. *Id.* at 638 (Rosellini, J., dissenting).

33. *State v. Moore*, 483 P.2d 630, 638-39 (Rosellini, J., dissenting).

34. *Id.* at 638.

35. *Id.* at 639.

36. 541 S.W.2d 365 (Tenn. 1976).

37. *Id.* at 366.

38. *Id.* at 367-72.

39. *Id.* at 366-67.

at issue in the case.<sup>40</sup>

Next, the court considered the claim under the state constitution. The text of the relevant provision differed from its federal counterpart: “[T]he accused hath the right to be heard by himself *and* his counsel . . . .”<sup>41</sup> That provision had been a part of the state’s fundamental law since the 1796 constitution.<sup>42</sup> The court construed the provision in light of the historical context in which it was originally adopted—a period when defendants could not testify, even on their own behalf, and were generally allowed only to make unsworn statements at trial.<sup>43</sup> It was this narrow right that the constitution was intended to protect. The court reasoned that the use of the term “and” in the provision meant only that “[i]t was the purpose and intent of the framers of our Constitution to recognize and protect these two basic rights, but not to establish their simultaneous enjoyment in a single criminal trial.”<sup>44</sup> This construction was supported by Tennessee case law as well as decisions from other states.<sup>45</sup>

Finally, the court noted that in 1887 the state had declared criminal defendants competent as witnesses.<sup>46</sup> This legislative change substituted sworn for unsworn testimony as the mode of fulfilling the constitutional obligation that defendants “be heard” by themselves at their trials.<sup>47</sup> Interestingly, the court then concluded that in light of that change, a defendant did not have the right to make an unsworn statement, even though such a statement was seemingly the mode that the framers had in mind.<sup>48</sup> In fact, the court went so far as to say: “Paraphrased, the constitutional proviso might now read: ‘In all criminal prosecutions the accused has the right to testify as a witness in his own behalf and to be represented by counsel.’”<sup>49</sup> Surely, this represented the work of a supreme court comfortable with aggressive interpretation of its own constitution.

While opinions of this caliber reflect able and thoughtful state constitutional work, even those opinions resting on thinner analytical grounds demonstrate the breadth of state constitutional activity in the years before the Brennan call. In the 1970 case of *Simonson v. Cahn*,<sup>50</sup> for example, the New York Court of Appeals held that the requirement of indictment by grand jury, secured by the

40. *State v. Burkhart*, 541 S.W.2d 365, 367-68 (Tenn. 1976).

41. *Id.* at 639 (quoting TENN. CONST. art. 1, § 9).

42. *Id.*

43. *Id.*

44. *State v. Burkhart*, 541 S.W.2d 365, 369 (Tenn. 1976).

45. *Id.* at 369-71.

46. *Id.* at 371.

47. *Id.*

48. *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976).

49. *Id.*

50. 261 N.E.2d 246 (N.Y. 1970).



New York Constitution, could not be waived by a defendant.<sup>51</sup> In reaching that conclusion, the court relied largely on the text of the provision: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . ." <sup>52</sup> The court read the provision as establishing not so much an individual right as a community right. In light of that conclusion, the court observed that a waiver would allow the very thing the provision prohibited.<sup>53</sup>

In the 1972 case of *In re McCloud*,<sup>54</sup> the Rhode Island Supreme Court considered whether a juvenile charged with delinquency had a constitutional right to a jury trial.<sup>55</sup> U.S. Supreme Court precedent clearly held that the federal Constitution did not provide such a right.<sup>56</sup> The Rhode Island court considered the issue under two provisions of the state constitution before ultimately reaching the same conclusion. It noted that the state due process clause, which prohibited deprivations of life, liberty, or property "unless by the judgment of [one's] peers, or the law of the land"<sup>57</sup> was "significantly different" from the federal provision.<sup>58</sup> Nevertheless, the court adhered to a one hundred-year line of cases holding that the peer-judgment language did not apply outside of criminal prosecutions.<sup>59</sup> To be sure, these examples of useful state constitutional work existed alongside relatively unsuccessful ventures in the decades before Justice Brennan's call.<sup>60</sup>

51. *Id.* at 247-49.

52. *Id.* at 247 (quoting N.Y. CONST. art. I, § 6).

53. *Id.* The court did note that the provision had its origin in a 1683 Charter of Liberties and Privileges, but said little else about its history. *Id.* at 248. In the end, the court refused to overrule a prior decision establishing the principle of non-waivability. See *People ex rel. Battista v. Christian*, 164 N.E.2d 111 (N.Y. 1928).

54. 293 A.2d 512 (R.I. 1972).

55. *Id.* at 513-14.

56. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

57. *McCloud*, 293 A.2d at 515 (quoting R.I. CONST. art. I, § 10).

58. *In re McCloud*, 293 A.2d 512, 514 (R.I. 1972).

59. *Id.* at 515 n.4. The court's disposition of Rhode Island's "inviolable" right to a jury trial, R.I. CONST. art. I, § 15, was less than fulsome. The court noted that it had long believed jury trials were only available for causes triable by jury at the time the 1842 Constitution was adopted and said: "No more need be said to make the point that such proceedings were not of the class for which adjudication by a jury was secured by the adoption of article I, section 15 of our constitution in 1842." *Id.* at 516.

60. *State v. Fowler*, 83 A.2d 67 (R.I. 1951), is such a venture. The City of Pawtucket adopted an ordinance transparently aimed at penalizing peaceful assemblies held in its city park by minister William Fowler of the Jehovah's Witnesses. *Id.* Sitting in the shadow of Roger Williams, the court spent great energy holding that the ordinance did not violate the First Amendment and then disposed of three state constitutional provisions in a single paragraph. *Id.* at 72 (certified question). The court took the same position on the direct appeal, *State v. Fowler*, 91 A.2d 27 (R.I. 1952), and got reversed by the U.S. Supreme Court in an opinion that took up about three pages in the U.S. Reports. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

In *People v. Fries*,<sup>61</sup> for example, the Illinois Supreme Court invalidated a state law requiring all motorcycle riders to wear protective headgear.<sup>62</sup> The court lumped together analyses drawn from both federal substantive due process and a provision of the Illinois constitution that the court construed as limiting the state's police power.<sup>63</sup> The court did not even describe the provision in question, much less provide any independent state constitutional analysis.<sup>64</sup>

In short, there were some impressive attempts at independent state constitutional interpretation before Justice Brennan's 1975 dissent and his 1977 article. There were also relatively average or even mediocre attempts before the article, just as there have been since. A few of these attempts will be examined.

## II. THE COUNTERCURRENT OF CRITIQUE

Any political or legal movement of consequence eventually attracts critics. Yale Professor Paul W. Kahn has provided a powerful critique of recent state constitutionalism in none other than the *Harvard Law Review*.<sup>65</sup> Kahn places "front row center" what he calls "the real problem," namely, "that the vision of [the] law's possibilities has become too homogeneous."<sup>66</sup> Close scrutiny of his criticism suggests that, despite disclaimers to the contrary, "homogeneous" for Kahn is code for "conservative." Indeed, the impetus for Kahn's article appears to be concern about the efficacy--but not the wisdom--of Justice Brennan's strategy of enlisting the states in an effort to defend liberal jurisprudential gains by removing them from the reach of Reagan-Bush appointees to the federal bench.

Kahn does outline a second problem: a claimed bankruptcy in the doctrine of unique state sources and the corresponding unworkability of state constitutionalism as currently conceived. This same "problem" was described in James Gardner's article entitled *Failed Discourse of State Constitutionalism*

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61. 250 N.E.2d 149 (Ill. 1969).

62. *Id.* at 151.

63. *Id.* at 150-51.

64. *Id.* Of similar rank was *Bush v. Reid*, 516 P.2d 1215 (Alaska 1969). The court held that a law declaring parolees civilly dead violated both state and federal due process and equal protection. *Id.* at 1219-20. Most of the opinion focused on U.S. Supreme Court rulings. *Id.* at 1217-19. The state due process analysis consisted of one paragraph endorsing the reasoning of *Boddie v. Connecticut*, 401 U.S. 371 (1971). The court proclaimed that "we would reach an identical result in interpreting the due process provisions of the Alaska Constitution alone," and "we would not be impeded in our constitutional progress by a narrower holding of the United States Supreme Court." *Bush*, 516 P.2d at 1219-20.

65. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

66. *Id.* at 1154.

which recently appeared in the *Michigan Law Review*.<sup>67</sup>

Kahn and Gardner agree that the foundation of the current state constitutionalism movement is a specific vision of state sovereignty. As Gardner puts it:

State constitutionalism . . . holds that a state constitution is the creation of the sovereign people of the state and reflects the fundamental values, and indirectly the character, of that people. An important corollary of this proposition is that the fundamental values and character of the people of the various states actually differ, both from state to state and as between the state and national polities.<sup>68</sup>

Similarly, Kahn writes that the “central premise” of state constitutionalism “rests on an idea of state sovereignty”<sup>69</sup> that views the “state as an already-defined historical community, with a text that can be interpreted to reflect the unique political identity of members of that community.”<sup>70</sup>

Neither Kahn nor Gardner accept the legitimacy of this premise. Kahn describes it as “[nothing] more than an anachronism or romantic myth”<sup>71</sup> that “at best is a romantic longing for vibrant local communities and at worst misunderstands modern American constitutionalism.”<sup>72</sup> Gardner goes further, describing attempts to attribute differences among the various state and federal constitutions to variations in the character of the relevant polities as “contradictory, counterfactual, and potentially dangerous.”<sup>73</sup> Given this, neither critic thinks state constitutionalism has much positive potential. Kahn writes that, at least as currently constructed, state constitutionalism “promises to remain a marginal factor in American public life.”<sup>74</sup> Gardner, having done some empirical research on this point, asserts that his studies demonstrate that state constitutionalism is, and will remain, “impoverished” and “pedestrian” despite the scholarly attention lavished upon it.<sup>75</sup>

Symptomatic of the obsolescence of state constitutions, Gardner says, is the fact that they are unnecessarily long, frequently amended, and replete with

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

68. *Id.* at 816.

69. Kahn, *supra* note 65, at 1147.

70. *Id.* at 1160.

71. *Id.*

72. *Id.* at 1147.

73. Gardner, *supra* note 67, at 830.

74. Kahn, *supra* note 65, at 1150.

75. Gardner, *supra* note 67, at 770, 822.

“frivolous” and “unreflective” provisions.<sup>76</sup> A constitution, he argues, is not supposed to be the product of pluralistic political bargaining regarding matters of everyday concern, but, rather, the outcome of a deliberative process meant to identify matters of fundamental importance. He opines that the stories of state constitutions are often not those of principle and integrity, but stories of expediency and compromise at best, foolishness and inconsistency at worst.

For Gardner, this observation raises an interesting question. How is it that “We The People” have produced “extraordinarily rich” and “epic” federal constitutionalism and generated “impoverished” and “pedestrian” state constitutionalism at the same time? Gardner has several answers, the first of which parallels Kahn’s explanation for the moribund quality of state constitutionalism. Both agree that the root cause of the failure of the fundamental differences or sovereignty model of state constitutionalism is that modern Americans do not think of themselves as citizens of a state, nor do they have strong attachments to their state. Commerce, information, ideas, art, and literature are not constrained within geographic boundaries. A national culture and a national media support a national political life. Local communities are wholly open to new people and new ideas, Kahn argues, and thus cannot easily defend a historical public identity against cultural, social and political homogenization. Gardner sounds a similar note, arguing the following:

[W]e all watch the same national news and the same prime-time television shows; we listen to the same music on the radio; we shop in malls with the same stores; we eat at the same chain restaurants. It is difficult to see how any truly fundamental character differences would stand up against such a cultural assault.<sup>77</sup>

From this, both Gardner and Kahn conclude that even if regional differences once existed, Americans are now a people who are so alike from state to state and whose identity is so focused on national institutions that the notion of significant local variations in identity is too implausible to take

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76. *Id.* at 820.

77. *Id.* at 828. See also Terrance Sandalow, *Constitutionalism Interpretation*, 79 MICH. L. REV. 1033, 1042 (1981). Sandalow states:

Both the reality of American government and the way it is perceived have changed . . . . Increased mobility and the growth of mass communication have more and more led us to see ourselves as one nation and, together with a rising egalitarianism, have led to a reduced willingness to treat each state as a separate political community. . . . Although perhaps not inevitable, it is at least not surprising that in these circumstances constitutional law should come to reflect the idea that in their relations with government, at any level, all Americans, wherever located, are entitled to those protections that we as a people hold to be fundamental.

*Id.*

seriously as the basis for a distinct constitutional discourse. Moreover, both would agree that “[t]he tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level.”<sup>78</sup> Additionally, Kahn observes that this consensus has been reinforced by the federal courts which have long been instruments of national political authority.<sup>79</sup>

Are Kahn and Gardner correct that the foundation of state constitutionalism is the notion that the fundamental values of the citizens of the various states differ? If not, then what is the foundation of state constitutionalism? The issue is put into broader context by Peter Teachout, who recently wrote:

Underlying the literature of the state constitutional law movement . . . is a fundamental tension between two different views of what the movement itself is all about. One view, which I shall call the “expansionist” view, sees the primary goal of the movement as that of expanding fundamental rights and liberties. Those who subscribe to this view essentially see the state constitutional law movement as a vehicle for keeping alive and advancing the activist tradition of constitutional jurisprudence . . . .

The other view, which I shall call the “independent state jurisprudence” view, reflects a very different understanding of the state constitutional law movement. Under this second view, the ultimate objective is the creation in each state of a jurisprudence that is uniquely expressive of that state’s own particular constitutional heritage . . . . The keystone is the development in each state of a jurisprudence that is faithful to that state’s particular constitutional

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78. Gardner, *supra* note 67, at 828.

79. Gardner actually goes much further than Kahn, arguing that robust state constitutionalism presents theoretical inconsistencies as well as dangers, and that these *rightly* retard its development. First, he says, constitutionalism reflects the character of our people; our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community to which we all belong. Thus, when state constitutions hold views different from the national one, an “unintelligible inconsistency” is present, for how can the same people (e.g. Hoosiers/Americans) hold conflicting views. Also, he opines, “there is something vaguely selfish and hostile about the people of a state going off to their own corner and making up rules for their own self-governance that they think superior to the ones the rest of the country has decided to use.” *Id.* at 825. Second, and Gardner says “most significantly,” state constitutionalism is incompatible with national constitutionalism; indeed the type of robust state constitutionalism advocated by “New Federalist” threatens the nationwide stability and sense of community that national constitutionalism provides. *Id.* at 825-26.

traditions.<sup>80</sup>

This breakdown into two theories of state constitutionalism provides a helpful way to analyze the Kahn-Gardner critique. Even if Kahn and Gardner were correct that the endpoint of constitutional orthodoxies prevailing among the states is uniformity, their criticism would be of no moment if independent state constitutionalism rests on a different theory. Second, even though Kahn and Gardner might be right that character differences between states provide the imperative for state constitutionalism, they may be wrong that no meaningful differences exist between states.

### III. CAN THE INDEPENDENT MODEL BE JUSTIFIED WITHOUT STATE DIFFERENCES?

If one accepts Kahn's presupposition that states must differ about the core meaning of the rule of law before their differences will support independent state constitutionalism, but concludes that states do not differ in meaningful ways, then the independent model certainly becomes difficult to defend. To succeed in such a defense, one would need to develop a theory which does nothing less than explain why it is important that states develop different bodies of constitutional law based on their own climates and precepts even when those climates are not meaningfully different, either from each other or from that which prevails nationally. The difficulty becomes even more apparent when one seeks to enlist some time-honored justifications of state constitutionalism in defense of the independent model.

For instance, it is often said that vigorous state constitutionalism is imperative because it perpetuates the scheme of dispersal of powers envisioned by the framers. Thus, some have argued that states need to exercise their constitutional prerogatives because the very fact that they can do so gives life to legitimate power existing distinct from that exercised by the federal government.<sup>81</sup> I made this argument eight years ago when I wrote:

Our constitution's founders believed that the rights of Americans could only be secured by creating a federal system full of checks and

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80. Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 1, 34-35 (1988).

81. See *Duncan v. Louisiana*, 391 U.S. 145, 173 (1968) (Harlan, J., dissenting) (arguing that federalism protects "the security of liberty in America . . . [through] the dispersion of governmental power across a federal system"); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 950, 959 (1983) (recognizing "the need to divide and disperse power in order to protect liberty," even when the cost is to "impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . .").

balances. They borrowed this idea from the French philosopher Montesquieu, who proposed that governmental authority be dispersed among competing institutions in order that no part of the government could achieve so much power as to have the capacity for tyranny. The federal system created in 1787 supposes two kinds of dispersion of power. One is vertical, that we call separation of powers: legislative, judicial, and executive. The other is horizontal, between state governments and the national government.<sup>82</sup>

Similarly, Chief Justice Stanley Feldman of the Arizona Supreme Court has written that the "double security" of our individual rights afforded by the existence of two sovereigns is "the true value of federalism."<sup>83</sup> He goes on to say that "we should never allow federal guarantees to supplant the provisions of our state constitution. If we choose to follow federal precedent to bolster nationwide conformity, we destroy the "double security" designed to protect our citizens."<sup>84</sup>

To be sure, this double protection concept no longer functions in the manner originally envisioned. In *Federalist No. 51*, Alexander Hamilton said "a double security arises to the rights of the people" by virtue of the fact that "the different governments will control each other."<sup>85</sup> At least since the 1865 demise of interposition, it is no longer clear how the states have it in their power to control the federal government.<sup>86</sup> Professor Akhil Reed Amar has explored the nature of this problem. Calling *Federalist No. 51* a "riddle," he asks "what . . . structural features vindicating constitutional rights animate federalism?"<sup>87</sup> The key to unlocking this riddle, he says, lies in a seldom-quoted passage of *Federalist No. 28*:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by

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82. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 586 (1988).

83. Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 117 (1988).

84. *Id.* See also Justice Yvonne Kauger, *Reflections of Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1 ("This double tier of protections, provided by the people's surrender of power to two distinct governments, is the true hallmark of federalism.")

85. *The Federalist No. 51*, at 288 (Alexander Hamilton) (E.H. Scott ed., 1894).

86. *But see* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

87. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1494 (1987).

throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*<sup>88</sup>

In view of *Federalist No. 28*, Amar concludes that the foundation of constitutional federalism is that states provide a “double security” of the People’s rights. Double security is achieved by states stepping into the breach to protect citizens from violations of constitutional rights done by the federal government and by the federal government providing a forum for vindication of individual rights against state usurpation. As such, a fundamental function states perform is a check on the exercise of sovereign-like federal power. Amar goes on to argue that states were designed to “check and balance” the federal government on at least three levels: military, political, and legal.<sup>89</sup>

To the extent that state constitutionalism still provides double security (as when state courts control state actors), it is legitimate to ask why the double lock is best created by state constitutional law developed on the independent model. One line of support for this approach is based on originalism. Chief Justice Feldman, for instance, argues that the canons of originalism themselves provide the rationale for non-expansionist state constitutionalism:

But even where the federal guarantees incorporated through the fourteenth amendment cover the field, there are reasons to turn to the state constitution. First, those who proclaim their adherence to a strict “jurisprudence of neutral principles” would demand that we follow the text and intent of the framers of our constitution . . . . Because the federal Bill of Rights did not then apply to the states, the Arizona framers clearly intended that the state constitutional guarantees would be the solitary, fundamental rules shielding our people from government power. When they approved the Arizona Constitution in 1911, the citizens of the state must have intended that the state constitution would basically limit government action and intrusion into the lives of the people. If a jurisprudence of neutral principles is truly governed by text and original intent, then its adherents can hardly ignore either the unique text of the Arizona Constitution or the intent of those who drafted the document.<sup>90</sup>

Ironically, Justice Feldman’s approach buttresses Kahn’s criticism, for Kahn asserts that “originalism is only a particularly narrow version of the doctrine of

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88. *Id.* (emphasis added).

89. Amar, *supra* note 87, at 1494.

90. Feldman & Abney, *supra* note 83, at 116-17.



unique state sources.”<sup>91</sup> On the other hand, Kahn’s critique relies on several dubious assertions about originalism in state constitutionalism (for example, “the very identity of the state framers is often unknown, and even less is known of their beliefs”<sup>92</sup>). These assertions lead him to conclude that “to advocate an originalist approach to state constitutional law is to present state judges with a nearly impossible task of questionable legitimacy.”<sup>93</sup>

All in all, this debate seems to lead back toward testing the legitimacy of unique state sources. It also points up the difficulties attendant to any effort to articulate a defense of the independent model of state constitutionalism which concedes the nonexistence of unique state constitutional climates.

#### IV. THE EXISTENCE OF STATE DIFFERENCES

I now turn to the second possible response to Kahn and Gardner, namely that they are right that state differences provide an imperative for state constitutionalism but wrong that meaningful differences do not exist. One might well commence by asking what constitutes a “*meaningful* difference” in state views. As I noted above, Kahn characterizes American constitutionalism as a continuing debate over the meaning of the rule of law in a majoritarian political system. It is not enough for him that states take different positions in this debate; instead, apparently a state’s constitutional climate is meaningfully different only if it rejects the notion that this is the fundamental debate. Just as differences in personal experience lead to different moral insights, Kahn warns that “[d]ifferent state understandings of constitutional norms should similarly be seen as different insights into a common object of interpretation.”<sup>94</sup>

Gardner makes a similar point. He argues that “attempting to salvage the principle character as an explanation for constitutional differences tends to reduce the concept of character to triviality.”<sup>95</sup> He gives as an example the debate which has occurred in many states about whether to retain, as a matter of state constitutional law, the *Aguilar-Spinelli*<sup>96</sup> test or to adopt the new rationale of the *Illinois v. Gates*<sup>97</sup> holding as the standard governing the legitimacy of warrants issued on the basis of tips from informants. He contends:

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91. Kahn, *supra* note 65, at 1162.

92. *Id.*

93. *Id.*

94. *Id.* at 1161-62.

95. Gardner, *supra* note 67, at 825.

96. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

97. 462 U.S. 213 (1983).

[I]t is simply implausible that these different constitutional doctrines can be attributed to differences in the fundamental character and values of the people of the states. What possible trait of *character* could cause someone to prefer a “totality of the circumstances” test for issuing a search warrant to a two-pronged informant reliability test?<sup>98</sup>

Instead, he says, “differences among state constitutions and between the federal and state constitutions . . . reflect the varied outcomes of constitutional bargaining among essentially similar [national] subgroups distributed in slightly different proportions within each state.”<sup>99</sup>

In sum, Kahn’s strategy is to ratchet up the level of abstraction at which American constitutionalism is defined to a level which virtually assures similitude. Gardner’s approach is to insist that legitimate constitutionalism be “epic” or “near-mythical” and then to dismiss all that state constitutional text without federal analog as the product of a “political deal among interest groups” about which one cannot “plausibly claim a meaning rooted in political theory, or justice, or the framers’ deliberations on fundamental principles.”<sup>100</sup> Each approach allows its author to dismiss the many differences which exist between the constitutions of states and between them and the federal constitution.

There are other ways of looking at this subject. Professor Lawrence Sager has advanced a “strategic” rationale for state constitutionalism.<sup>101</sup> His notion of “strategic space” is that constitutional rules bear a pragmatic, strategic relationship to the norms of political morality which comprise their targets. Thus, Sager says:

The idea that constitutional judges throughout the United States are engaged in a common enterprise, are colleagues in the effort to shape and explicate a common tradition of political morality, is an attractive one . . . . Some state judges may be prepared to accept fully the goal of a common political morality and to see in the Supreme Court a source of leadership in defining that common tradition. But even for such judges there remain compelling reasons for reserving the prerogative of independent judgment on the substantial matters of strategy that inform the translation of constitutionalized norms of political morality into rules of constitutional law.

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98. Gardner, *supra* note 67, at 826 (emphasis added).

99. *Id.* at 832.

100. *Id.* at 821.

101. Lawrence Gene Sager, *Foreward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

Questions of abstract morality are by nature general and enduring. In contrast, questions of instrumental strategy are sensitive to elements in their target environment, and hence highly variable. In the move from Supreme Court decisions about the content of constitutional rules to state court decisions about comparable matters, strategic disparities will often arise and trigger divergent state outcomes. Prominent among the sources of such strategic disparity are differences in regulatory scope, the states themselves, and judicial experience.<sup>102</sup>

Sager's approach is significant for at least one reason: it distinguishes a large category of distinctive state features as strategic innovations, not fundamental values. This redefinition in turn allows one to focus the inquiry on the existence of fundamental differences.

It is most common to find state differences articulated in historical terms. For instance, David Schuman writes:

The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a large sphere of rights, a larger arena of activity into which the government could not intrude, at least with respect to such matters as bearing arms and avoiding scrutiny, than a more communitarian, homogeneous state like Massachusetts or one with sectarian roots like Maryland. Those latter states, on the other hand, might be assumed to have cared more deeply about matters of religion.<sup>103</sup>

A tougher rebuttal to Professor Kahn is made by former Texas Supreme Court Justice Lloyd Dogget:

"I live in a state where emblazoned on T-shirts, on bumper stickers, on billboards all over the state is the slogan 'Don't Mess with Texas.' . . . I think there are some unique aspects not just of my state, but of many of your states, and there is some identity within states."<sup>104</sup>

Justice Denise Johnson of the Vermont Supreme Court also penned a response to Kahn. After observing that "there will be occasions, despite our core values, when a unique state source, whether text or other materials, really provides the answer," she concludes that "the most important lesson we can

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102. *Id.* at 973-74.

103. David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 285 (1989).

104. PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM, REPORT OF THE 1992 FORUM OF STATE JUDGES 53 (Barbara Wolfson ed., 1993).

draw from Professor Kahn, however, is that we do not need a unique state source to justify our differences with the interpretation of the federal Constitution. The concept of sovereignty gives state courts the right and the justification to disagree."<sup>105</sup>

Professor David Schuman, in a rebuttal to Gardner, writes that the:

"collapse of meaningful state identity" is as much a *result* of the hegemony of national constitutionalism as its cause. The relationship between identity and constitution is reciprocal and complex: identity creates constitution, and constitution creates identity. The Warren Court is at least partly responsible for shaping a generation of lawyers, scholars, politicians, and ordinary citizens who believe that *the constitution* means *the U.S. Constitution* and have therefore lost the habit of regarding a state as a political body that can have its own constitutional identity. As the Oregon example demonstrates, that habit of mind can be recaptured. For those of us who believe that the nation is too large a polity ever to achieve meaningful community, the recent weakening of distinctive state identities argues for a vital state constitutionalism as a restorative tonic.<sup>106</sup>

Professor John Kincaid offers this perspective:

State constitution making also allows citizens to institutionalize conceptions of justice and quality of life, especially when constitutional amendments can be initiated by voters . . . . The constitutional structuring of budgetary priorities, levels of taxation, tax and expenditure limits, local revenue discretion, and the degree of progressiveness or repressiveness in the state revenue system both reflect and shape justice and the quality of life. State declarations of rights and other provisions for rights are especially indicative of the different conceptions of justice and quality of life that exist among Americans on such matters as capital punishment, victims' rights, privacy, gender discrimination, alcoholic beverage control, environmental protection, property, and individual dignity.<sup>107</sup>

Focusing on the "quality of life" dimension, involving such matters as environment and schools, is an excellent defense of the distinctiveness of state

105: *Id.* at 40, 43.

106. David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 280 (1992) (emphasis added).

107. John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17 (1988).

polities. Kahn writes that:

[i]n this essay, I am concerned only with those aspects of a state constitutional text that are 'of constitutional dimension.' Generally, this means the constitutional protections of liberty, equality, and due process . . . . The state constitutional text may contain a great deal that does not rise to this level. Such items may be unique to each state and need not be considered part of the general enterprise of American constitutionalism.<sup>108</sup>

The constitutions of the American states, however, are full of provisions concerning such matters as environmental protection, sound education, and safe schools. How can these be brushed off as "not of constitutional dimension?"

These issues lie at the frontier of "American Constitutionalism." States and state constitutions are uniquely positioned to contribute to the development of law in these areas because the questions are particularly sensitive to local variations, such that meaningful differences do exist among the states on many of them.

#### V. UNIQUE STATE SOURCES IN THE MODERN ERA

The center of American constitutionalism is not, as Kahn argues, striving to adjust an eighteenth century text to speak to twenty-first century problems. It is, instead, the states' diverse experiments in formulating innovative constitutional principles—through both amendment and interpretation—to address next-generation fundamental values involving such matters as the environment, education, and dignity issues. The cutting edge is not agonizing over how to wedge unimagined subjects into the federal Constitution's old liberal-legal rights regime. It is the act of creating new regimes for new issues. How, for example, may one begin the task of fundamentally transforming society into an environmentally sustainable organization by focusing on individual rights and state-action requirements?

Distinctions that may exist among states over more established matters of due process and equal protection, which Kahn calls matters of "constitutional dimension," seem simply to reflect historical contingencies. However, narrowing of the theoretical debate on these questions within the courts is in large part a function of decades of debate and consensus building within state courts, much of which predates adoption of the federal Constitution. Much of the national or federal consensus on the broad outlines of various fundamental

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108. Kahn, *supra* note 65, at 1159 n.52.

rights is the product of cross-breeding between state and federal constitutional discourse.<sup>109</sup> It is hardly surprising then, after decades (in some cases centuries) of borrowing and cross-breeding between and among state and federal courts, that a national synthesis has emerged about the central features of certain core values.

Moreover, when novel issues do arise in some of these areas, such as the legal response to homosexuality, state constitutions are usually at the forefront. Thus, while several states have constitutional provisions that might be construed to prohibit discrimination against gays and lesbians,<sup>110</sup> others have moved in quite the opposite direction.<sup>111</sup> Developments such as these expose the limits of consensus onto the structure of traditional rights as well as the divergent moral climates which prevail among the states.<sup>112</sup>

Of course, the opportunities and constraints raised by state constitutionalism are different than those raised by federal constitutionalism. There are fundamental differences, not necessarily between constitutional cultures, but between the nature of the state and federal constitutions and/or state and federal judiciaries. Justice Robert Utter, for instance, has identified several "crucial differences"<sup>113</sup> between the state and federal constitutions which "compel state courts to interpret state constitutional provisions independently."<sup>114</sup> The United States Constitution is structured as a grant of limited and enumerated powers, while state constitutions serve as limitations on the otherwise plenary

109. See, e.g., Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED* (Bill F. Chamberlin & Charlene J. Brown eds., 1982); Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 *ANNALS AM. ACAD. POL. & SOC. SCI.* 43 (1988); Robert F. Williams, "Experience Must Be Our Only Guide:" *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 *HASTINGS CONST. L.Q.* 403 (1988).

110. See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); Joan Biskupic, *Hawaii's Supreme Court Opens the Way to Gay Marriages*, *WASH. POST*, May 7, 1993, § 1, at A10.

111. See *COLO. CONST. art. II, § 30b*; H.B. 864, Ky. Leg., Reg. Sess. (1996) (proposing constitutional amendment to overturn *Wasson*); Donna O'Neal, *Law Would Amend The State Constitution to Prohibit Laws Protecting Gays and Lesbians From Discrimination*, *ORLANDO SENTINEL*, Aug. 28, 1993, at B1. But see *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), cert. denied, 114 S. Ct. 419 (1993), appeal after remand, 882 P.2d 1335 (Colo. 1994), cert. granted, 115 S. Ct. 1092 (1995).

112. See generally David E. Anderson, *Voters Have Choices on the Moral Issues*, *CHI. TRIB.*, Oct. 30, 1992, § 2, at 7 (describing constitutional referenda in several states addressing issues such as term limitations, right-to-die, gender discrimination, gay rights, capital punishment, abortion, and gambling).

113. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 239, 241 (Bradley D. McGraw ed., 1985).

114. *Id.*

power of state governments. "Consequently," Utter says, "state constitutions are typically much longer and more detailed than the federal Constitution, and contain much more specific provisions for the regulation of state governmental conduct."<sup>115</sup> Moreover, he notes, "state constitutions are much more 'political' documents than their federal counterpart."<sup>116</sup> The fact that they are often both comparatively easy to amend and more recently written or rewritten makes them "much more reflective of current local values than the federal charter and much more responsive to changes in those values."<sup>117</sup>

In addition, Justice Utter writes, "there are also significant differences between the federal and most state judiciaries . . . [which] suggest that state judges have more freedom than federal judges to interpret their constitutions."<sup>118</sup> Life-tenured federal judges may have more freedom to interpret in a countermajoritarian manner with less fear of adverse personal consequences if their decisions do not conform to the public will. On the other hand, while an activist role may be personally riskier to an elected state judge, it may also be considered more democratically legitimate. Similarly, the relative ease of amending state constitutions reduces the risk of erroneous or politically unacceptable constitutional interpretation by state judges.

The states have certainly responded to the changing society by amending their constitutions far more regularly than the federal government. As Judge Vito J. Titone has pointed out: "at the state level constitutional revisions are continually under consideration, and amendments are frequently found on the ballot at election time. Moreover, it is the function of elected state representatives to monitor whether the existing constitution accurately reflects contemporary values."<sup>119</sup> Thus, state constitutions often reflect contemporary notions of the amenities that modern civilized life should include, well beyond the basic freedoms guaranteed by the federal Constitution. Accordingly, they, "unlike the federal Constitution, may be said . . . to be true reflections of current social mores and values."<sup>120</sup>

Judge Titone's approach is noteworthy for at least two reasons. First, it rebuts the assertion that state constitutions are delegitimized by their length and often-amended nature, at least when compared to the more "fundamental" and

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115. *Id.* at 242.

116. *Id.*

117. *Id.*

118. *Id.* at 242-43.

119. Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 462-63 (1987).

120. *Id.* at 462.

“enduring” federal charter.<sup>121</sup> Second, it exposes a distinction between state and federal constitutionalism which strikes at the heart of the supposed community of interest between the two that is central to Professor Kahn’s thesis. Kahn asserts that the fundamental problem of “*American constitutionalism*”—by which he means our broad constitutional tradition—is to find a discourse that adequately reconciles the paradigm shifts that have characterized its history.<sup>122</sup>

The ossification of the federal constitutional text has led to expansive interpretation or synthesis as a method of responding to social developments, a process which has generated many of the issues which Kahn calls central to American (which is read as *federal*) constitutionalism. On the other hand, to quote Judge Titone, “frequently amended state constitutional provisions cannot fairly be dismissed as the outmoded pronouncements of a by-gone generation of aristocrats”<sup>123</sup> but are “in many instances . . . true reflections of current social mores and values.”<sup>124</sup>

Accordingly, even if it is true—as Kahn argues—that “[n]o state’s experiences are so different as to reject the norms of equality, liberty, and due process as the ideals of the constitutional order,”<sup>125</sup> it is not true that “[d]ifferent state understandings of constitutional norms should similarly be seen as different insights into a *common object of interpretation*,” as he also argues.<sup>126</sup> “Unlike the U.S. Constitution, which relies upon indirect popular consent and complex majoritarianism, state constitutions are instruments of majoritarian democracy.”<sup>127</sup> Accordingly, whether the values are similar or not, the nature and quality of the mechanisms by which they are given voice does differ.

This fact has additional relevance when coupled with the cluster of issues which I have described as constituting the emerging frontier of American constitutionalism. The convergence of the two has positioned state constitutions as the vehicle by which citizens have and will constitutionalize many of the quality of life values which are at the heart of twenty-first century consciousness.<sup>128</sup> Kincaid correctly forecasts that:

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121. See also Kincaid, *supra* note 107, at 19 (“Some critics argue that frequent and detailed change trivializes state constitutions. Such change, however, can also be regarded as a measure of the importance that the citizens attribute to state constitutions.”).

122. Kahn, *supra* note 65, at 1156 (emphasis added).

123. Titone, *supra* note 119, at 463.

124. *Id.* at 462.

125. Kahn, *supra* note 65, at 1162.

126. *Id.* (emphasis added).

127. Kincaid, *supra* note 107, at 19-20.

128. See generally STEPHEN SCHECHTER & DANIEL ELAZAR, *THE ROLE OF THE STATES AS POLITICS IN THE AMERICAN FEDERAL SYSTEM* (1982).



the modernization of state governments, the diversification of most state economies, the increased sophistication of state electorates, the presence of a more tolerant pluralism within most states, the increased diffusion of ideas among the states themselves, and the emergence of new problems and issues that require state action all point to the possibility of a new vitality and sophistication for state constitutionalism.<sup>129</sup>

An expanded notion of “constitutional dimension” which includes these new problems (many of which, like education, have long been part of state—but not federal—constitutionalism) will expose the tremendous diversity which does exist among the various state polities. This point, in turn, establishes the relevancy of the doctrine of unique state sources, while a number of other arguments—including the importance of local self-government, separation of powers, and others—establish its theoretical justification.

#### VI. THE HARD WORK OF FREE EXPRESSION

Beyond their other criticisms, Kahn and Gardner claim there is a paucity of careful and developed jurisprudence produced by the state constitutional law movement. As I indicated above, there were both good and bad pieces of work generated by state courts in the years before Brennan. The same has been true during the last generation of renaissance.<sup>130</sup> As is true on the wide variety of subjects about which state courts write in their tens of thousands of opinions each year, some of the courts demonstrate hard work and good thinking, while others do not. In this section and the next, I describe some very hard and good thinking on two of the most difficult topics in constitutional law, what the *federales* would call “free speech” and “equal protection.”

In *Price v. State*,<sup>131</sup> the Indiana Supreme Court provided an independent construction of the free expression provision of the Indiana Bill of Rights.<sup>132</sup> Its language, with a “freedom-and-responsibility standard,”<sup>133</sup> is quite different from that of the First Amendment: “No law shall be passed, restraining the free

129. Kincaid, *supra* note 107, at 22.

130. The worst opinion I have read recently was Justice Larsen’s in *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6 (Pa. 1991), stitching together language from dissenting U.S. opinions about the federal Takings Clause and from a lower Pennsylvania court to define the Pennsylvania Takings Clause. *Id.* at 10-14. Fortunately, this opinion was set aside on rehearing and replaced with quite a respectable piece of work by Chief Justice Nix. *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993).

131. 622 N.E.2d 954 (Ind. 1993). Our court is still considering a petition for a rehearing in this case.

132. IND. CONST. art. 1, § 9.

133. *Price*, 622 N.E.2d at 958.

interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."<sup>134</sup> Our court held that section nine of the Indiana Bill of Rights prohibits the legislature from imposing "material burdens" on speech that serves a political function or imposing irrational burdens on speech that does not.<sup>135</sup>

Colleen Price appealed her conviction for disorderly conduct.<sup>136</sup> She had protested the behavior of Indianapolis police officers, who had just arrested another person. After several verbal exchanges, one of the officers threatened to arrest her for disorderly conduct, which he promptly did when she responded: "F--- you. I haven't done anything."<sup>137</sup> She was subsequently convicted of disorderly conduct and public intoxication but was acquitted of interference with a law enforcement officer.<sup>138</sup>

In reversing Price's conviction for disorderly conduct, the court first held that Price's remarks were within the scope of section nine by literally construing the phrase speaking, writing, or printing "on any subject whatever."<sup>139</sup> Next, the court rejected overbreadth analysis under section nine on several grounds: (a) the freedom of speech was no more preferred within the Indiana Bill of Rights than other freedoms and (b) as a prudential matter, courts should not speculate on hypothetical applications.<sup>140</sup>

The court then construed the abuse qualification of section nine to refer to speech that frustrates the state's use of its police powers to enhance the liberty of its citizens.<sup>141</sup> While exercises of the police power are typically analyzed under a rational basis standard, the court concluded that the Bill of Rights barred the legislature from "impos[ing] a material burden upon a core constitutional value."<sup>142</sup>

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134. *Id.* at 957.

135. *Price v. State*, 622 N.E.2d 954, 961 (Ind. 1993).

136. *Id.* at 957.

137. *Id.*

138. *Id.*

139. *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993).

140. *Id.* at 958.

141. The court construed the term "abuse" in light of law dictionaries published contemporaneously with the ratification of section nine to mean: "Abuse is the use of a thing in a manner injurious to the order or arrangement from which it derives its function." *Id.* at 958. Section nine "derives its function from a constitutional arrangement calculated to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the former." *Id.* at 959. "State powers were . . . intended to perform an ameliorative function and were considered liberty enhancing when exercised by a properly structured republican government." *Id.*

142. *Id.* at 960.

Reviewing the historical dispute between Indiana's "territorial leadership comprised of southern planters" and "comparatively poor" frontierfolk that preceded the 1816 constitutional convention,<sup>143</sup> the court concluded that section nine "enshrines pure political speech as a core value."<sup>144</sup> Section nine represented a populist victory of the frontier democrats over the aristocratic planter class, the latter of which sought to suppress political activism among the frontierfolk. Ultimately, the court concluded that political speech "could hardly be called an abuse which impairs the sovereign."<sup>145</sup>

The parties conceded and the court concluded that Price's remarks constituted political speech.<sup>146</sup> Thus, the question became whether the disorderly conduct statute had materially burdened her political speech. In construing "material burden," the court reasoned that interfering with speech that simply constitutes a public nuisance was not such a burden, but that "[w]hen the expressions of one person cause harm to another in a way consistent with common law tort, an abuse under § 9 has occurred."<sup>147</sup> The court then construed the disorderly conduct statute's reference to "unreasonably noisy" to apply only to speech that "inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker."<sup>148</sup> Because Price's conduct was not sufficiently harmful to sustain tort liability against her by her neighbors, her conviction for disorderly conduct was reversed.<sup>149</sup> Early scholarly commentary on the hard work this framework represented was quite favorable.<sup>150</sup>

Indiana's work in this vineyard hardly stands alone. I describe here the work I think is the best.<sup>151</sup>

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143. Price v. State, 622 N.E.2d 954, 957 (Ind. 1993).

144. *Id.* at 963 (footnote omitted).

145. *Id.* at 962.

146. *Id.* at 961.

147. Price v. State, 622 N.E.2d 954, 964 (Ind. 1993).

148. *Id.* at 963.

149. *Id.* at 964.

150. See Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994); Daniel O. Conkle, *The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857 (1994).

151. There are sure to be less successful ventures, like *State v. Linares*, 655 A.2d 737 (Conn. 1995), in which the Connecticut Supreme Court reviewed the history of its 1816 free expression clause as a prelude to declaring that it had the same meaning adopted in a 1972 First Amendment case, *Grayned v. Rockford*, 408 U.S. 104 (1972).

It should also be noted that good work sometimes occurs in dissent. See, e.g., *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 63-64 n.2 (Ohio 1994) (Wright, J., dissenting) (analyzing the history and interpretation of Ohio's free expression clause). In another unusual venture, the Minnesota Supreme Court recently split its right of speech and abuse clauses, declaring that the speech right had a state meaning but that the abuse clause incorporated the obscenity standards of

In *State v. Robertson*,<sup>152</sup> Justice Linde, writing for a unanimous court, formulated a specific interpretation of Oregon's free expression provision. In that case, a defendant challenged his indictment for "coercion."<sup>153</sup> Although Oregon's free expression provision is virtually identical to Indiana's, Linde took a very different course than our court did in *Price*. He concluded that the provision:

forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 [when the Oregon Constitution was adopted] demonstrably were not intended to reach.<sup>154</sup>

Linde did not cite any source for this theory, although he did try to state it in such a way as to incorporate some words from the constitutional provision.

Linde denied that the rule limited the legislature to regulations in force under territorial law in 1859,<sup>155</sup> but the result has been to lock the legislature into the 1859 territorial code. For instance, in *State v. Stoneman*,<sup>156</sup> the court invalidated a state law prohibiting the commercial purchase or viewing of visual child pornography, including films and magazines.<sup>157</sup> The court did not dispute the state's argument that such child pornography simply did not exist in 1859. Nevertheless, it relied on several Oregon precedents to invalidate the law because no parallel provision had existed in the territorial code.<sup>158</sup>

While Linde's approach denies the Oregon provision much contemporary responsiveness, it succeeds in giving the provision a meaning that derives from the unique history of Oregon law.

The Tennessee Supreme Court recently engaged in a fairly detailed historical analysis to construe the meaning of its free expression provision. In *State v. Marshall*,<sup>159</sup> a case with many similarities to *Price*, the court

the First Amendment. *State v. Davidson*, 481 N.W.2d 51 (Minn. 1992).

152. 649 P.2d 569 (Or. 1982).

153. *Id.* at 571.

154. *Id.* at 576.

155. *Id.* at 588-89.

156. 888 P.2d 39 (Or. App. 1994) (en banc).

157. *Id.* at 44-46.

158. *Id.* at 44-45 (citing *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993); *State v. Henry*, 732 P.2d 9 (Or. 1987)).

159. 859 S.W.2d 289 (Tenn. 1993).

considered the appeal of individuals convicted for possessing obscene materials with intent to distribute.<sup>160</sup> The court affirmed, but Justice Drowota and a majority determined that either obscenity was exceptional or that a rational basis test applied to all speech.<sup>161</sup> The two dissenters, led by Chief Justice Reid, would have applied a form of strict scrutiny to all speech.<sup>162</sup>

The constitutional provision, also very similar to Indiana's, reads: "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."<sup>163</sup> The majority first traced the origin of the provision. It had appeared in state constitutions unchanged since the constitution of 1796.<sup>164</sup> The court then concluded that, though convention records revealed little about the clause, it was clear that it had been borrowed from the Pennsylvania constitution of 1790.<sup>165</sup>

The majority looked to opinions of Pennsylvania courts interpreting the meaning of the provision in light of its historical development. Following *Long v. 130 Market Street Gift & Novelty of Johnstown*,<sup>166</sup> the Tennessee court construed the right and responsibility phrases separately.<sup>167</sup> It held that the right phrase granted an arguably absolute right to speak without prior restraint.<sup>168</sup> On the other hand, the responsibility phrase allowed subsequent prosecution for abuses of the right.<sup>169</sup> The court adopted the view of the Pennsylvania court that:

it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government would afford protection and immunity.<sup>170</sup>

The majority also followed Pennsylvania's holding that there was no authority to protect obscenity (accepting the definition from First Amendment

160. *Id.* at 289-90.

161. *Id.* at 294-95.

162. *Id.* at 304-08.

163. TENN. CONST. art. I, § 19.

164. *State v. Marshall*, 859 S.W.2d 289, 291 (Tenn. 1993).

165. *Id.* at 292.

166. 440 A.2d 517 (Pa. Super. Ct. 1982).

167. *Marshall*, 859 S.W.2d at 293-94.

168. *State v. Marshall*, 859 S.W.2d 289, 293 (Tenn. 1993).

169. *Id.*

170. *Id.* (quoting *Respublica v. Oswald*, 1 U.S. (1 Dallas) 319 (1788)).

case law) from prosecution under the abuse caveat.<sup>171</sup> But the holding appears to be broader. The majority concluded that “no protection from prosecution is guaranteed for publication of material that is ‘destructive of the ends of society.’ . . . It was *reasonable* for the General Assembly to conclude that such material is ‘destructive of the ends of society.’”<sup>172</sup> This statement at least sounds like rational basis review.

Chief Justice Reid, in dissent, accused the majority of handing over freedom of expression “into the willing grasp of the censor” while “[s]mall effort is made to conceal the judicial abdication.”<sup>173</sup> He relied on nineteenth-century state supreme court decisions, which the state had touted as evidence of past criminalization, to conclude that obscenity was not prohibited at common law.<sup>174</sup> He also argued that the Tennessee framers had rejected both the First Amendment’s wording as well as that of mother-state North Carolina in order to adopt Pennsylvania’s language, which was the language “most expansive of all models.”<sup>175</sup> He interpreted the text to declare three principles:

liberty of expression is an invaluable right; liberty of expression extends to any subject; and violation of other recognized rights is the abuse which imposes responsibility and, to that extent, limits the freedom of expression. In summary, the history and language . . . compel the interpretation that affords the greatest protection of expression consistent with the protection of competing constitutional rights.<sup>176</sup>

Based on the “any subject” language, he rejected a categorical approach to free speech, but later moved away from the competing rights idea to advocate the application of strict scrutiny in a confusing final section of the opinion.<sup>177</sup>

In 1992, the Texas Supreme Court announced a general policy favoring development of an independent body of state constitutional law in *Davenport v. Garcia*.<sup>178</sup> At issue was a trial court’s gag order which prohibited public discussion in a suit involving toxic chemical exposure at a dump site.<sup>179</sup> The

171. *Id.* at 293-94.

172. *State v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993) (citations omitted) (emphasis added).

173. *Id.* at 295 (Reid, C.J., dissenting).

174. *Id.* at 300 (“Speech and publications that are not public and are not directed at children, bear no resemblance to the notorious *acts* punished at common law.”).

175. *Id.* at 303.

176. *State v. Marshall*, 859 S.W.2d 289, 303-04 (Tenn. 1993).

177. *Id.* at 307-08.

178. 834 S.W.2d 4 (Tex. 1992).

179. *Id.* at 5-6.

high court threw out the order.

In doing so, it provided a narration of the rich historical development of the state free expression clause.<sup>180</sup> The court related the story of Texas' struggles, first for separate Mexican statehood and later for independence.<sup>181</sup> The court explained the great emphasis placed on free speech in a proposed Mexican state constitution and in subsequent national and state Texas constitutions.<sup>182</sup> Texas patriot Stephen F. Austin was jailed for outspokenness and for carrying the proposed Mexican constitution to Mexico City.<sup>183</sup> Lorenzo de Zavala drafted significant portions of the Texas national constitution while in hiding from a wide-scale manhunt ordered by Santa Ana because of de Zavala's criticisms of the Mexican government.<sup>184</sup> The court asserted that denials of free expression were "a contributing factor to Texas' revolution and independence."<sup>185</sup> The original language of the provision remained in subsequent constitutions, the court noted, even during difficult Civil War and reconstruction eras.<sup>186</sup> Defenders of free expression beat back an attempt to water down the provision in the 1876 Constitution and even managed to extend its reference to "persons" rather than "citizens."<sup>187</sup>

The court also explored its prior rulings invalidating speech restrictions under the Texas provision. Drawing on the absolute right or qualified responsibility language that other courts have construed, the Texas court held that the provision was broader than the First Amendment and imposed a very high standard for a judge seeking to impose a gag order.<sup>188</sup>

In a general discussion about relying on the state constitution before addressing federal constitutional questions, the court stressed Texas' distinctive history and culture:

"[T]he powers restricted and the individual rights guaranteed in the present constitution reflect Texas' values, customs, and traditions." The diverse drafters of our Constitution represented a "heterogenous miscellany of opinions." The experiences and philosophies of this group were far different than those who sat in a Philadelphia meeting hall a century earlier. As expressed by one commentator, "[o]ur

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180. *Id.* at 6-10.

181. *Id.* at 7-8.

182. *Davenport v. Garcia*, 834 S.W.2d 4, 7-8 (Tex. 1992).

183. *Id.* at 7.

184. *Id.* at n.5.

185. *Id.* at 7.

186. *Davenport v. Garcia*, 834 S.W.2d 4, 8 (Tex. 1992).

187. *Id.* at 8.

188. *Id.* at 9-10.

Texas Forbears surely never contemplated that the fundamental state charter, crafted after years of rugged experience on the frontier and molded after reflection on the constitutions of other states, would itself veer in meaning each time the United States Supreme Court issued a new decision.<sup>189</sup>

One noteworthy observation that emerges from this exploration is that against all the disparate interpretations of free expression provisions in these states and despite some firm declarations of state uniqueness, the texts of the respective free expression provisions are remarkably similar. They contain differences limited largely to preambles, conjunctions, and punctuation. All the borrowing that obviously occurred with expression provisions suggests a need to trace the language to its origin and study variations in an attempt to discern their relevance and intended meaning. The review also suggests that the variations in jurisprudence owe something to demographics, social and legal culture, and the influence of individuals—both in the last century and during the recent renaissance.

#### V. EQUAL PRIVILEGES AND IMMUNITIES

Another recent experience of the Indiana Supreme Court involved Indiana's Equal Privileges and Immunities Clause<sup>190</sup> which was, for over a century, a perfect example of constitutional drift. We tried to find a new course in *Collins v. Day*.<sup>191</sup> Section twenty-three was drafted in the spirit of Jacksonian populism and against the backdrop of Indiana's bankruptcy at the end of the 1840s. It was conceived for the purpose of preventing the General Assembly from specially granting an exclusive privilege to an individual, or class of individuals, who could bilk the State's treasury and remain immune from obligations incurred.<sup>192</sup> Early cases specifically reveal that this section was most concerned with matters economic rather than those of liberty, speech, political association, or other core constitutional values.<sup>193</sup> For many years after the ratification of the Fourteenth Amendment to the U.S. Constitution, the Indiana Supreme Court continued to give section twenty-three its own unique identity, either by deciding cases without reference to that amendment or by

189. *Id.* at 16 (citations omitted).

190. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. 1, § 23.

191. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

192. *Id.* at 76-77.

193. *Id.*



clearly distinguishing each provision when explicating its grounds for decision.<sup>194</sup>

The latter part of the nineteenth century witnessed the advent of Indiana's constitutional drift with respect to the clause. Perhaps reflecting the substantive due process "revolution" taking place in federal law, the Indiana Supreme Court began to interpret section twenty-three expansively, giving effect to its words by applying them to resolve disputes affecting political rights<sup>195</sup> and to invalidate burdens on economic "rights."<sup>196</sup> The Court also began to decide cases by concurrently relying on both section twenty-three and the Fourteenth Amendment without distinction.<sup>197</sup> This process appears to have lasted until the time of the First World War.

The Indiana Supreme Court never returned to the purely commercial interpretation of section twenty-three that predated the 1890s, but it eventually drifted back to the practice of giving an independent character to the clause's application in a variety of cases. Thus, a meaningful body of law began to reemerge with respect to the way Indiana courts would resolve disputes over the distribution of privileges and immunities. The most significant cases of this period involved the striking of regulations restricting the commercial activity of varying classes of persons.<sup>198</sup> The fact that these cases involved commercial regulations rather than commercial ventures was a departure from the original concern of the framers as to the state's bankruptcy. More importantly, however, it reestablished the framers' intent regarding the prevention of monopolies and illicit partnerships between the state and private parties. It also

194. *Id.* at 95 (citing *Cory v. Carter*, 48 Ind. 327 (1874)); *Warren v. Sohn*, 13 N.E. 863 (Ind. 1887); *Pennsylvania Co. v. State*, 41 N.E. 937 (Ind. 1895); *Street v. Varney Elec. Supply Co.*, 66 N.E. 895 (Ind. 1902); *Levy v. State*, 68 N.E. 172 (Ind. 1903); *Inland Steel Co. v. Yedinak*, 87 N.E. 229 (Ind. 1909).

195. *Collins v. Day*, 644 N.E.2d 72, 78 (Ind. 1994) (citing *Graffy v. City of Rushville*, 8 N.E. 609 (Ind. 1886) (invalidating fee for sale of goods not manufactured or grown in local county)); *State ex rel. Holt v. Denny*, 21 N.E. 274 (Ind. 1888) (precluding residency and political limitations for fire and police commissioners); *City of Evansville v. State*, 21 N.E. 267 (Ind. 1888) (overturning political and local residency requirements for certain city employees); *In re Leach*, 34 N.E. 641 (Ind. 1893) (preventing the exclusion of women from admission to law practice).

196. *See, e.g.*, *Graffy v. City of Rushville*, 8 N.E. 609 (Ind. 1886).

197. *State v. Hogleiver*, 53 N.E. 921 (Ind. 1899); *Indianapolis Union Ry. Co. v. Houlihan*, 60 N.E. 943 (Ind. 1901); *Vandalia R.R. v. Stillwell*, 104 N.E. 289 (Ind. 1914), *aff'd*, 239 U.S. 637 (1916).

198. *See, e.g.*, *Sperry & Hutchinson Co. v. State*, 122 N.E. 584 (Ind. 1919) (invalidating prohibitory license fee for distribution and redemption of trading stamps); *Martin v. Loula*, 194 N.E. 178 (Ind. 1935) (finding in violation a law permitting wage garnishment notwithstanding statutory exemptions); *State Bd. of Barber Examiners v. Cloud*, 44 N.E.2d 972 (Ind. 1942) (finding a regulation of barbershop hours to be a violation); *Needham v. Proffitt*, 41 N.E.2d 606 (Ind. 1942) (invalidating prohibition of newspaper advertisement of funeral prices).

reflected the changed economic circumstances of the twentieth century.

During the Warren Court era, development of state constitutional law came to a virtual standstill. Unfortunately, this experience included Indiana's Equal Privileges and Immunities Clause. The expansion of individual rights under federal law led to wholesale importation of Fourteenth Amendment equal protection jurisprudence into section twenty-three.<sup>199</sup> This occurred despite the fact that there is no equal protection language in the Indiana Constitution.

In the late 1970s and 1980s, the Indiana Supreme Court again gave independent interpretation to the Equal Privileges and Immunities Clause.<sup>200</sup> *Collins v. Day* firmly moored section twenty-three to its source, the Indiana Constitution. Justice Dickson showed that from the beginning, cases decided under section twenty-three have utilized a two-step analysis for determining whether a governmental act violated the constitution by conferring a special, unequal privilege or immunity on a particular person or class of persons.<sup>201</sup> The first step is a determination of the classification of persons upon which the government is according disparate treatment and then, as a further inquiry, whether the classification inheres in the subject matter.<sup>202</sup> The second phase in the analysis asks whether the classification encompasses all persons similarly situated, with the difference between those persons included in and excluded from the class being a characteristic both substantial and related to the government's purpose in acting.<sup>203</sup> It is a rule firmly grounded in Indiana's Constitution, independent of any other source or analytical prop.

The first step in Indiana's two-part analysis begins with the same question as federal equal protection doctrine: what is the claimant's classification *vis a vis* the challenged governmental act? The similarity does not run deep, however, because we do not strain to pigeonhole the claimant into a suspect or semi-suspect class. Instead, by utilizing just one test under the Equal Privileges and Immunities Clause, and thus a single standard of review, we intend merely to determine whether or not there is disparate treatment under the governmental

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199. *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994); *W.A. Barber Grocery Co. v. Fleming*, 96 N.E.2d 108 (Ind. 1951); *State v. Hi-Jinks, Inc.*, 181 N.E.2d 526 (Ind. 1962); *Dortch v. Lugar*, 266 N.E.2d 25, 39 (Ind. 1971) (Section 23 and the Fourteenth Amendment "protect substantially identical rights"); *State ex rel. Miller v. McDonald*, 297 N.E.2d 826, 829 (Ind. 1973), *cert. denied*, 414 U.S. 1158 (1974); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495, 501 (Ind. 1972); *Sidle v. Majors*, 341 N.E.2d 763, 767 (Ind. 1976); *Murphy v. Schilling*, 389 N.E.2d 314 (Ind. 1979) (two simultaneous provisions without any explicit statement as to equivalence or separateness); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 600 (Ind. 1980).

200. *Reilly v. Robertson*, 360 N.E.2d 171 (Ind.), *cert. denied*, 434 U.S. 825 (1977).

201. *Collins*, 644 N.E.2d at 78.

202. *Id.*

203. *Collins v. Day*, 644 N.E.2d 72, 79 (1994).

act.<sup>204</sup> If there is not, then the claimant cannot prevail and one need not continue the analysis.

The significance of this direct inquiry into classification is that all claimants must satisfy the same standard of review—and thus are treated fairly. This is not to say that some people or groups have not suffered a history of invidious discrimination as a result of classifications based on immutable characteristics. The question of suspicion regarding classification more appropriately is one of the legitimacy of governmental purpose in the enactment of the challenged state action. Thus, Indiana's classification analysis looks not to *who* claims disparate treatment, but first to *what* disparate treatment is claimed. Where disparate treatment is found, an inquiry into the reasonableness of the classification to the legislative purpose will be undertaken before moving to the second part of the test.<sup>205</sup> Additionally, significant to this discussion, this analytical process has its source within our distinctive constitutional jurisprudence.

The second stage of analysis under Indiana's test directs our inquiry to whether the "privileged" classification is "open to any and all persons" who are similarly situated.<sup>206</sup> If there is a classification dividing the claimant from those similarly situated, then the challenge to the disputed governmental action succeeds because it indeed confers a special privilege or immunity in violation of the constitution.

The streamlined approach under Indiana's Constitution yields many benefits. First, disputes challenging the equality of legislative action will not turn on the pre-trial battle over what standard to employ, nor over the weight of the showing and who must carry the burden of proof. This eliminates the problem that the three-tiered balancing test yields, which is that it ultimately leads not to consistent resolution of sensitive claims but to arbitrary policy determinations based only on preliminary evidence. This may actually encourage litigation. Second, as a corollary, our inquiry indulges no presumptions for either party to overcome other than the presumption of constitutionality. Thus, the outcome of a constitutional controversy will depend on the evidence taken at trial, not on the amorphous weight accorded to varying presumptions by the trial court. Third, notions of group rights play little role.<sup>207</sup> Consequently, all claims under Indiana's Constitution are equal before

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204. *Id.*

205. *Id.*

206. *Id.* The federal inquiry would ask about the nature of the right being burdened.

207. This is not to say that the memory of invidious discrimination against members of various ethnic or religious groups in American or Indian history is erased. Rather, the fact that such discrimination has occurred provides evidence that would surely impact the reasonableness of the unequal treatment. We simply will not assume that the unequal treatment of a member of an

the law.

Indiana's effort in this field of law does not stand alone. Oregon, whose Equal Privileges and Immunities Clause is identical to Indiana's, has long maintained an individual approach to these claims, regularly addressing them under the state constitution before looking to federal jurisprudence for guidance.<sup>208</sup> This approach makes much sense, for the governmental acts in issue are those of the state or its political subdivisions.<sup>209</sup>

The Oregon approach to equal privileges and immunities claims is dressed with the ordinary presumptions of legislative compliance with the constitution and involves four parts. First, a court examines whether there is state action that confers either a privilege or immunity.<sup>210</sup> If so, the court then inspects whether the privilege or immunity is distributed "upon the same terms equally."<sup>211</sup> If it is not distributed equally, then the court tests whether the reason for unequal distribution is based on unreasonable or improper grounds.<sup>212</sup>

If the unequal distribution is supported by a "governmental policy choice," then the court conducts the third analytical step, examining whether the classification between the claimant and the class to whom the privilege or immunity belongs is identifiable.<sup>213</sup> When the classification is based on a "personal characteristic, identifi[able to] each and every one,"<sup>214</sup> the unequal distribution of the benefit is not constitutional. When the classification derives from the legislation itself, thereby creating a "pseudo-class,"<sup>215</sup> the unequal

historically discriminated against group is irrational, unreasonable, or without a legitimate governmental purpose. As a consequence, special legislation aimed at ameliorating historically unequal conditions existing in society may very well survive a constitutional challenge to its legitimacy.

208. *Zockert v. Fanning*, 800 P.2d 773, 777 (Or. 1990).

209. *Id.* (right to counsel in proceeding to terminate parental rights claimed to be privilege created by statute). See also *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (exclusion of agricultural workers from coverage under worker's compensation statute claimed denial of equal privilege).

210. *Zockert*, 800 P.2d at 777.

211. *Id.*

212. *Zockert v. Fanning*, 800 P.2d 773, 777 (Or. 1990). See also JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* ¶ 3.01, at 3-10 (1994) ("[I]ndividuals may object to the state's distribution of privileges and immunities if the criteria for granting or withholding them are ad hoc, haphazard, or based on other impermissible or unauthorized criteria.").

213. *Zockert*, 800 P.2d at 778.

214. *Id.*

215. FRIESEN, *supra* note 212, ¶ 3.01, at 3-10 to -11. Friesen compares this analysis to the suspect class analysis of the federal equal protection doctrine. Thus, a member of a "pseudo-class" would be entitled only to the minimum scrutiny of the rational basis test.

distribution is constitutional so long as class entry is open to all citizens equally.<sup>216</sup> Finally, when an Oregon court determines that the Equal Privileges and Immunities Clause has been violated, it may fashion a remedy either by striking the governmental act or by extending the privilege or immunity.<sup>217</sup>

Even state courts where equal privileges or equal rights clauses are applied under analytical frameworks similar to the federal model have, in recent years, issued decisions rather different from those reached under the federal Constitution. The Hawaii Supreme Court, for instance, has declared gender a suspect class.<sup>218</sup> The Minnesota Supreme Court has used disparate impact analysis in its constitutional decisions on equal privileges and protection.<sup>219</sup>

I believe that the foregoing cases demonstrate the maturing nature of state constitution jurisprudence. The movement expands apace from my vantage point. Moreover, state courts that have moved from subjects like the confrontation clause in criminal cases to topics like free expression and equal privileges have plainly decided to wade out into much tougher analytical territory.

## VI. CONCLUSION

To be sure, the product of the recent renaissance is still uneven, just like so much else that is the result of human endeavor. There are fair grounds for criticism, and Kahn and Gardner have contributed usefully to the debate. Still, what respectable alternative is there to independent state constitutional jurisprudence? Is it a nation where civil liberties at all levels of activity depend solely on whether the left, the center, or the right of the U.S. Supreme Court is ascendant at the moment? Is it a country where state courts hearing ninety percent of the litigation resolve the most important cases without regard to their own history or precedent? Surely not.

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216. *Cole v. Department of Revenue*, 655 P.2d 171, 173 (Or. 1982).

217. *Zockert v. Fanning*, 800 P.2d 773, 779 (Or. 1990) (citing *Hale v. Port of Portland*, 783 P.2d 506, 515-16 (Or. 1989)).

218. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *cf.* *Craig v. Boren*, 429 U.S. 190 (1976) (recognizing intermediate scrutiny for sex). *But see* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (pronouncing sex to be a suspect classification); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) (reserving question whether sex is suspect classification); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 n.6 (1994) (same).

219. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991); *cf.* *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding disparate impact based on sex not denial of equal protection); *Washington v. Davis*, 426 U.S. 229 (1976) (same holding with regard to race).

**Instead, we are moving rather surely towards becoming a nation where the most important constitutional issues are joined and resolved in a variety of fora after robust debate and analysis. This should make for a better America.**

