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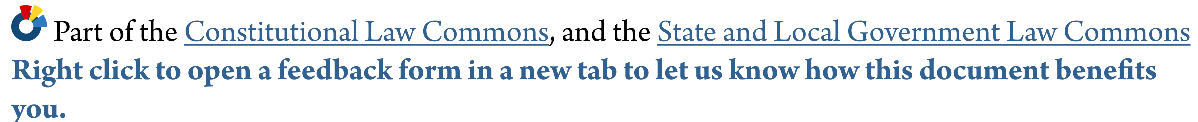

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Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement

BY JENNIFER DIGIOVANNI*

INTRODUCTION

The resurgence of state constitutional law jurisprudence has caused many to positively reevaluate the feasibility of state courts developing an independent body of law based upon their own state constitutions. This Essay will provide an overview of the state constitutional law revival movement by focusing upon the work of one state jurist, the late Kentucky Supreme Court Justice Charles M. Leibson. During his tenure on the court, from 1983 through 1995, Justice Leibson's state constitutional law opinions underwent a transformation that presaged similar developments in the greater movement going on nationwide. In essence, a study of Justice Leibson's work provides a microcosm for viewing the development of the state constitutional law movement as a whole.

The transformation of Justice Leibson's opinions demonstrates that, given time to evolve and grow, state constitutional adjudication can succeed in creating an alternative body of constitutional law that may be more protective of individual rights and more reflective of the beliefs of the people than federal constitutional law More particularly, by tapping into Kentucky's unique culture, traditions, and value system, Justice Leibson's

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state constitutional law opinions grew to represent a fully developed and workable state jurisprudence that was the product of thorough analyses of Kentucky's rich political and social history

Part I of this Essay will briefly review the history of the relations between the United States Supreme Court and the various state supreme courts in the struggle to determine which entity would be primarily responsible for protecting people's rights and liberties. Part II will provide a concise survey of the history of the state constitutional law revival movement and will furnish the reader with both positive and negative critiques from some of the movement's most vocal commentators. Part III will then begin a discussion of Kentucky constitutional law jurisprudence starting with the first phase of Justice Leibson's state constitutional law development, in which independent state constitutional analyses were confined to issues of peculiarly state concern. Part IV of the Essay will focus upon the middle portion of Justice Leibson's state constitutional law career, in which he analyzed issues under the Kentucky Constitution where the United States Supreme Court had not decided a case directly on point. Part V will concentrate on the culmination of Justice Leibson's journey into state constitutional law jurisprudence, during which he analyzed rights issues on the independent basis of the Kentucky Constitution, notwithstanding federal constitutional law precedent to the contrary Finally, the Essay will conclude with a brief summary of the importance of Justice Leibson's contributions to the people of Kentucky, in particular, and to the New Judicial Federalism Movement as a whole.

I. HISTORY OF TENSION BETWEEN THE FEDERAL AND STATE GOVERNMENTS IN THE STRUGGLE TO DETERMINE WHICH POWER WOULD BE PRIMARILY RESPONSIBLE FOR ENSURING AND PROTECTING THE PEOPLE'S CIVIL RIGHTS

This section of the Essay will review the history of the tension between the federal and state governments in their struggle for constitutional supremacy as guardians of civil rights and liberties. It will demonstrate that, although our founding fathers envisioned strong state governments that would protect the rights of their respective citizens, the states abdicated their responsibilities. In the states' wake, the federal government intervened in order to ensure that all persons enjoyed a certain minimum level of protection from encroachment upon their guaranteed rights.

None would doubt that the governmental system established by our founding fathers envisioned a two-tiered system with a strong national government, but it was also anticipated that the individual states would be

the primary guardians of the civil liberties of the people. The states' constitutions, many of which pre-dated the federal Constitution, were the primary, and in many cases, the sole repositories of individual rights.[1]

The intricacies of this system, and the compromises that were integral to its formation, are evident in the debates between the federalists and the antifederalists of the day. In fact, one of James Madison's goals in writing the *Federalist* papers was to alleviate the fears of some factions of the public that the proposed national government would be too strong and would subvert the traditional role of the states. Thus, Madison emphasized that the powers delegated to the national government would be few and that, apart from these carefully delineated provisions, the states would continue to be vital and robust guarantors of the rights of the people:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and infinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and propensities of the people and the internal order, improvement, and propensity of the State.[2]

The independence with which the states were vested is evident in the fact that it was not until 1816, in *Martin v. Hunter's Lessee*,[3] that the United States Supreme Court held that state court constitutional decisions were subject to judicial review. In so holding, the Court affirmed the constitutionality of section 25 of the Judiciary Act of 1789,[4] which had authorized Supreme Court review in such situations.[5]

It may be the opinion of the appellate court of Virginia in that same case, however, that best demonstrates the ferocity with which the individ-

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[1] *See generally* Stanley J. Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

[2] THE FEDERALIST No. 45 (James Madison).

[3] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[4] 1 Stat. 85 (1789).

[5] *See Martin*, 14 U.S. (1 Wheat.) at 340-41 (noting that the state courts are bound by the Supremacy Clause when adjudicating federal constitutional matters). Section 25 of the Judiciary Act of 1789 extended the appellate jurisdiction of the Supreme Court to all matters involving federal statutory or common law and treaties ruled upon by the highest court of any state.

ual states attempted to guard and protect their perceived supremacy The judges of the Virginia Court of Appeals boldly asserted that they were not subject to the appellate jurisdiction of the United States Supreme Court and were, therefore, not bound by a previous holding issued by that Court that reversed the Virginia court and directed that judgment be entered in favor of the appellant. At oral argument before the United States Supreme Court, the state's attorney asserted this same position: "This court, undoubtedly, has all the incidental powers necessary to carry into effect the powers expressly given by the constitution. But this cannot extend to the exercise of any power inconsistent with the whole genius, spirit, and tenor of the constitution."[6]

Despite the strong assertion of national power evident in Justice Story's opinion in *Martin v. Hunter's Lessee*, the state courts retained their sovereign position as primary guarantors of the people's civil liberties. After all, the federal Constitution, with its narrowly defined scope, did not address the rights of state citizens, but only federal citizens.[7] So it worked, unquestioned in practice if not in theory, until the Reconstruction Era following the Civil War. This time period, often referred to as the "vast transformation,"[8] saw a tremendous metamorphosis in both the conception and role of the federal Constitution as a vehicle for protecting people from state actions that denied them liberties.[9] Indeed, the effect of the passage of the Civil War amendments was not lost on those in Congress who lobbied for their passage. Cognizant of the sweeping changes in our federal system that the amendments would likely bring about, the drafters and supporters of the amendments forged ahead nonetheless because of the

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[6] *Id.* at 316.

[7] *Cf. e.g.*, Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) (holding that while the federal Constitution did not protect state citizens from local governmental takings of private property, a state constitution could do so by requiring additional "safe-guards to liberty from the apprehended encroachments of their particular governments").

[8] For example, in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), the United States Supreme Court characterized 42 U.S.C. § 1983 and its predecessor, the Civil Rights Act of 1871, as "product[s] of a vast transformation from the concepts of federalism that had prevailed in the late 18th century [Their] purpose was to interpose the federal courts between the States and the people to protect the people from unconstitutional action under color of state law "

[9] *See* Mosk, *supra* note 1, at 1083-84; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV L. REV 489 (1977).

belief that the states had, in many cases, abdicated their responsibilities and duties.[10]

This belief was not without foundation. A historical survey of the states' records of preserving individual liberties shows that any reliance one placed in the states to protect one's civil rights would have been questionable at best, and misplaced at worst.[11] It was this empirical data that led the drive to establish the federal Constitution as the primary font for the protection of individual liberties.

The transition that culminated in the predominance of the federal Constitution over the states' constitutions was not smooth or without casualties. Within five years after the ratification of the Fourteenth Amendment, the members of the United States Supreme Court, now more conservative than their congressional contemporaries, held that the Privileges and Immunities Clause of the Fourteenth Amendment was not intended to make the provisions of the Bill of Rights applicable to the states.[12] This was so in spite of the voluminous history surrounding the passage of the Civil War amendments that clearly and conspicuously detailed the fact that the amendments were intended to bring about a radical shift in the balance of power between the federal and state governments. Stating that "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established,"[13] the Court held in the *Slaughter-House Cases* that the Privileges and Immunities Clause "speaks only of privileges and immunities of the United States, and does not speak of those citizens of the several states."[14]

Notwithstanding the defeat suffered in the *Slaughter-House Cases*, the states were gradually brought within the purview and scope of the federal Constitution by selective incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.[15] It was in this way that the

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[10] *See, e.g.*, Hans A. Linde, *E Pluribus - Constitutional Theory and State Courts*, 18 GA. L. REV 165, 174-76 (1984) [hereinafter Linde, *E Pluribus*]; David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV 274 (1992).

[11] *See* Linde, *E Pluribus*, *supra* note 10, at 174; Schuman, *supra* note 10, at 276 n.17 and accompanying text.

[12] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (distinguishing federal or national citizenship from the privileges and immunities that may accrue to state citizens).

[13] *Id.* at 73.

[14] *Id.* at 74.

[15] *See, e.g.*, Schlib v. Kuebel, 404 U.S. 357 (1971) (incorporating the Eighth Amendment Prohibition on excessive bail); Benton v Maryland, 395 U.S. 784

drafters and supporters of the Fourteenth Amendment saw fruition, albeit tardily, of their idea that the federal Constitution should set the standards for state courts to follow

II. HISTORY OF THE NEW JUDICIAL FEDERALISM MOVEMENT

After the federal government established itself as the primary guarantor of the people's civil liberties by not only passing the Civil War amendments, but also mandating that the states comply with those amendments, the pendulum of the federal bench's jurisprudential outlook began to swing to the right. The New Judicial Federalism movement began to emerge during the Burger and Rehnquist Courts. Throughout the era of the Warren Court, when the United States Supreme Court was more liberal then its state counterparts, the states were constitutionally bound to follow the precedent of the Supreme Court and extend to their citizens the greater rights and liberties that the Supreme Court claimed were contained in the federal Constitution. The mandate of the Supremacy Clause in the federal Constitution served to force the hand of those state courts that were reluctant to recognize or protect individual liberties.[16] In essence, courts were bound to hold that their state constitutions were at the very least coextensive with the federal Constitution. The fact that many state courts were conservative often precluded a finding that a state constitutional provision was more expansive than a similar or identical federal provision.

The ideological shift on the United States Supreme Court brought about by the Burger and Rehnquist Courts marks the time period during which state courts gradually found themselves with a body of state law that potentially granted the people greater rights than did federal law. As review was granted by state supreme courts, the question arose whether they

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(1969) (Fifth Amendment Prohibition on double jeopardy); Washington v Texas, 388 U.S. 14 (1969) (Sixth Amendment right to compulsory process for obtaining witnesses); Duncan v Louisiana, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy and public trial); Pointer v Texas, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation of opposing witnesses); Malloy v Hogan, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); Gideon v Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Robinson v California, 370 U.S. 660 (1962) (Eighth Amendment Prohibition of cruel and unusual punishment); Mapp v Ohio, 367 U.S. 643 (1961) (Fourth Amendment right to be free of unreasonable searches and seizures); Fiske v Kansas, 274 U.S. 380 (1927) (First Amendment rights of freedom of speech, press, and religion).

[16] *See* U.S. CONST. art. VI, cl. 2.

should follow the more recent United States Supreme Court decisions which placed limitations upon so many of the earlier Warren Court holdings, or continue to interpret their state constitutions in step with the earlier holdings. As Supreme Court Justice William J. Brennan, Jr. wrote in 1977:

> I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their own states' bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being [protecting the private rights of individuals] with respect to the application of the federal Bill of Rights and the restraints of the due process and the equal protection clauses of the Fourteenth Amendment.[17]

As with the earlier sweeping changes that culminated in the primacy of the federal Constitution, the shift to independent analysis of, and holdings based upon, state constitutions was marked by a good deal of confusion and debate. As courts began to muddle through early cases grounded in state constitutional law, which were insulated from review by the United States Supreme Court,[18] the propriety of the practice was questioned.[19]

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[17] Brennan, *supra* note 9, at 495. Justice Brennan bemoaned what he perceived to be the weakening of the high Court's application of the "*Boyd* principle" to protect individual rights. *See id.* In *Boyd v. United States*, 116 U.S. 616 (1886), the Court had articulated a content-based privilege against disclosure of personal papers in a criminal trial based upon the premise that private property rights took precedence over government interests in obtaining evidence. *See* Brennan, *supra* note 9, at 634-35. Justice Brennan believed that through the "*Boyd* principle," the Warren Court had strengthened individual rights protections; he decried the high Court's increasing rejection of *Boyd*. *See* Brennan, *supra* note 9, at 634-35.

[18] *See* Murdock v City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) (holding that a state court decision would be upheld even if the federal question was incorrectly decided, so long as there was truly an adequate and independent state ground upon which the decision rested). The high Court revised its holding in *Michigan v. Long*, 463 U.S. 1032 (1983), stating that while state courts should be left "free and unfettered" to interpret state constitutions, *id.* at 1041, the United States Supreme Court always has jurisdiction to determine whether asserted non-federal grounds are "bona fide separate, adequate, and independent [state] grounds," *id.* at 1044.

[19] Michigan v Long, 463 U.S. 1032, 1039 (1983) (noting that even if there is an independent and adequate state ground that precludes Supreme Court review,

One early critic of the practice of insulating a state court decision by basing it upon an "adequate and independent state ground" was Dean Scott Bice.[20] Bice's criticism was directed not at the practice of using a state constitution as an analytical tool to effectuate a decision, but at the resulting inability of the United States Supreme Court to review the decision even when it was apparent that a federal question had been incorrectly decided. In Bice's view, this was an illegitimate practice that took advantage of the limited jurisdictional reach of the federal courts.[21]

Bice believed the solution lay in altering the United States Supreme Court's policy regarding review of state court decisions involving a purported "adequate and independent state ground." He argued that the Supreme Court always should determine whether the federal question had been correctly decided by the state court, regardless of whether there existed an adequate state constitutional basis for the decision. If correctly decided, the state court's judgment would be affirmed. If incorrectly decided, it would be vacated and remanded.[22]

The New Judicial Federalism movement had early proponents as well as critics. One proponent was Hans A. Linde, then a justice on the Oregon Supreme Court. As a jurist, Linde wrote scholarly articles about, and judicial opinions using, the emerging tenets of the state constitutionalism revival movement. In his seminal article on the topic, *Without "Due Process" Unconstitutional Law in Oregon*,[23] Linde strongly advocated that state courts routinely and thoroughly examine their state constitutional provisions before undertaking an analysis under the federal Constitution, if they did so at all.[24]

It was Linde's position that "[t]o begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state."[25] Acknowledging that proper application of this primacy approach

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"[t]his ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved").

[20] *See* Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV 750, 750-51 (1972).

[21] *See id.* at 755-58.

[22] *See id.* at 760-63.

[23] Hans A. Linde, *Without "Due Process" Unconstitutional Law in Oregon*, 49 OR. L. REV 125 (1970) [hereinafter Linde, *Without "Due Process"*].

[24] *See id.* at 133-35.

[25] *Id.* at 182.

to state constitutional adjudication necessitated a greater amount of research and briefing of the issues raised, Linde wrote that both counsel and the court would be required "to give independent professional attention to the text, history, and function of the state constitutional provisions, as is sometimes found in cases from a generation when constitutions like Oregon's were still recent and there were fewer federal premises available to litigants."[26]

The debate over the propriety and success of the New Judicial Federalism movement has not ebbed with time. Instead, a lively and voluminous exchange continues to be part of the growing jurisprudence of state constitutional law Perhaps the most well known recent critic of the movement is Professor James A. Gardner, who concludes, in his article *The Failed Discourse of State Constitutionalism*,[27] that "state constitutional law today is a vast wasteland of confusing, and essentially unintelligible pronouncements."[28] Essentially, Gardner argues that state court decisions that deviate from the holdings of the United States Supreme Court are reactionary and result-oriented instead of being the product of a true and thoughtful jurisprudence that is on the same level as federal jurisprudence.[29]

While not denying that state constitutionalism theoretically could succeed, Gardner claims that both courts and litigants have little interest in creating a coherent and separate body of state constitutional law, with its own legal terms, tests, and rationales.[30] Ultimately, Gardner concludes that state court decisions "show no sign of any discourse of distinctness that would allow participants in the legal system to craft intelligible arguments about the nature of any differences between the state and federal constitutions."[31]

Additionally, Gardner posits that state constitutionalism is fundamentally incompatible with the perception of most Americans that they are national citizens.[32] That is, differences among the states based on their own unique histories and experiences are more perceived than real in this modern age. Gardner goes so far as to speculate that a robust state

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[26] *Id.*

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

[28] *Id.* at 763.

[29] *See id.* at 765.

[30] *See id.* at 781-84.

[31] *Id.* at 804.

[32] *See generally id.* at 822-26.

constitutionalism could have dangerous side effects, resulting in the sort of factionalism that led to the great schism that caused the Civil War.[33] "[O]nly one constitution at a time can ever truly and safely reflect the essential character and fundamental values of a people," he wrote.[34]

Professor Gardner's criticism of state constitutionalism did not go unanswered. One of the many scholars who responded to Gardner's thesis was Professor David Schuman,[35] who argues that "state constitutional law does not have to be infrequent, grudging, obscurely reasoned, unoriginal, or silent with respect to local history and culture."[36] While acknowledging that Professor Gardner was correct in asserting that few state courts have risen to the challenge of crafting a unique state constitutional discourse, Schuman takes issue with Gardner's idea that it would be impracticable and unwise to do so.[37]

Using the state of Oregon as a model, Schuman details how dedication to state constitutionalism can result in "a strikingly independent universe of constitutional references and a constitutional culture completely distinct from the one used by the U.S. Supreme Court."[38] Beyond this, Schuman vigorously defends the belief that such a discourse would, in fact, be positive and would result in havens tailored for those national citizens who live in a "nation of overlapping and layered loyalties encompassing a multitude of communities."[39]

While scholars have been watching, analyzing, and critiquing the New Judicial Federalism movement for the past twenty-five years, there has been a select group of jurists who have provided them with ample fodder. State court justices such as Hans A. Linde of Oregon, Shirley A. Abrahamson of Wisconsin, Stanley Mosk of California, Judith S. Kaye of New York, and the late Charles M. Leibson of Kentucky have demonstrated that, at its best, state constitutional adjudication can provide a rich discourse and an individualized jurisprudence tailored for the citizens of a particular state.[40]

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[33] *See id.* at 826-27

[34] *Id.* at 827-28.

[35] *See* Schuman, *supra* note 10, at 274.

[36] *Id.* at 276.

[37] *See id.* at 276-77

[38] *Id.* at 276.

[39] *Id.* at 278.

[40] *See generally, e.g.*, Shirley A. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV 1141 (1985); Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*,

This evolution has been incremental, as should be expected when a new type of constitutional adjudication is being molded and developed. As Justice Abrahamson noted several years ago, "[t]he state courts are acknowledging the need for a principled theory and approach to state constitutional law."[41] Equally important is the fact that the evolution has been successful when state courts have allowed sufficient time for the changes to come about. These success stories prove that state constitutional law is truly a different type of adjudication, and not a reactionary, false type of adjudication.

III. OVERVIEW OF PHASE I OF JUSTICE LEIBSON'S STATE CONSTITUTIONAL LAW DEVELOPMENT: INDEPENDENT ANALYSIS OF ISSUES UNIQUE TO STATE CONCERN

The metamorphosis that state constitutional adjudication has undergone is best appreciated when viewed on a smaller scale, using one justice's work as a case study. It has often been said that when relying upon state constitutions, the individual state courts are acting as laboratories, experimenting and attempting to create a workable and satisfying body of law for their constituency.[42]

In choosing a laboratory to enter, one cannot err in surveying the work of the late Justice Charles M. Leibson of the Supreme Court of Kentucky, who died of lymphoma in late 1995 at the age of sixty-six. This portion of the Essay will review and critique several state constitutional law opinions decided by Justice Leibson during his early years on the court. As will be demonstrated, Justice Leibson's initial forays into state constitutional jurisprudence were tentative and, at times, terse. Also, the justice's early experiments with interpreting the Kentucky Constitution were confined to those cases in which a federal constitutional issue was not raised. It will become apparent, however, that from these seedling holdings there emerged a greater talent for, and appreciation of, the abilities of the state

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64 TEMPLE L. REV. 1163 (1994); Linda Matarese, *Other Voices: The Role of Justices Durham, Kaye and Abrahamson in Shaping the Methodology of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 239 (1989).

[41] Abrahamson, *supra* note 40, at 1179.

[42] This metaphor was first utilized by Justice Louis Brandeis in his dissent in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Constitution to provide the people of Kentucky with an individually tailored, fruitful, and workable body of jurisprudence.

Justice Leibson served the people of Kentucky on their supreme court from 1983 to 1995. He was widely admired by his colleagues in the legal community as a brilliant jurist and an insightful thinker.[43] Indeed, Justice Leibson's quest for learning was never quenched in the years after his admission to the bar and the beginning of his long and distinguished career. For example, in 1986, Justice Leibson received his LL.M. degree from the University of Virginia.[44] This lifelong affection for knowledge and his clear ability to provide quick and accurate insight into all types of legal matters led to Leibson being hailed as "one of the brightest people ever to serve on the Kentucky Supreme Court, someone who could slice through complex legal arguments as skillfully as a pilot navigates dense skies."[45]

From a state constitutional law standpoint, it is significant that Justice Leibson began his tenure on the Kentucky Supreme Court in 1983, because it was at that point in time that the New Judicial Federalism movement was gaining momentum across a broad range of states. While state constitutional law had long had a core of strong proponents, it was not until the early 1980s that the movement began, incrementally, to catch the attention of a number of state court justices, in addition to those academics and justices who had been debating its utility and propriety for years.[46]

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[43] *See, e.g.*, MARQUIS WHO'S WHO IN AMERICAN LAW 531 (Maureen Sprong ed., 1994). Justice Leibson's accolades included: Kentucky's Outstanding Judge, Kentucky Bar Association (1990); Outstanding State Trial Judge Award, Association of Trial Lawyers of America (1980); Outstanding Service Award, Kentucky Personnel Board (1982); Distinguished Alumni Award, University of Louisville School of Law (1984); Outstanding Legal Scholarship Award, Brandeis Society (1984); Outstanding State Appellate Judge Award, Association of Trial Lawyers of America (1985).

[44] *See id.*

[45] *The New Justice*, THE COURIER-JOURNAL (Louisville, Ky.), Dec. 8, 1995, at 12A, *see also Leibson's Law*, THE COURIER-JOURNAL (Louisville, Ky.), Dec. 13, 1995, at 20A.

[46] An illustration of the tremendous growth in state constitutional adjudication at that time is provided by Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599 (1986):

Additionally, the fact that Justice Leibson served on Kentucky's highest court demonstrates that even small, traditionally conservative states began to get swept up in the state constitutional law resurgence. Proponents like Justice Mosk from California and Justice Kaye from New York may have been regarded as typically radical or liberal in their affection for state constitutional law. Kentucky, however, was not one of those states in which one would expect a "radical" or "liberal" movement to take root.[47]

TABLE 1

Number of Independent State Constitutional Rights Decisions Since 1950

Years	Number	Percent of Total
1950-1959	3	1
1960-1969	7	2
1970-1974	36	12
1975-1979	88	28
1980-1984	125	40
1985-1986	52	17
Total	311	100

Collins et al. note that the 311 decisions analyzed were those from 1950-1985 in which state high courts either announced greater rights protection for individuals under the state's constitution than the federal Constitution, or affirmed individual rights solely on state constitutional grounds. *See id.* at 600 nn.2, 5.

[47] *See id.* at 605. There are noticeable regional differences in the degree to which state constitutional law litigation in individual rights cases has increased since 1980. The data displayed in Table 3 show a U-shape, regional distribution. Respondents from both the Northeast and the West reported greater increases in the number of individual rights cases litigated under their state constitutions since 1980 than did respondents from the Midwest and South.

TABLE 3

Perceptions of State Constitutional Rights Litigation by Region

	Percent of Respondents			
Response	Northeast	Midwest	South	West
Significant increase	73	0	5	24
Moderate increase	20	27	29	29
Slight increase	7	45	24	29
No increase	0	27	43	18
Total number	15	11	21	17
Percent of 311 actual cases decided since 1950	[26]	[7]	[16]	[51]

Before discussing Justice Leibson's opinions, however, it may be helpful to delineate the factors that mark truly independent, well-reasoned state constitutional law analysis. Ideally, such an opinion would contain the following: (1) the text of the state and federal constitutional provisions raised; (2) a plain statement clearly identifying the state constitutional law provision upon which the decision was based; (3) the history of the state constitutional provision; (4) any history or traditions unique to the people of the state with respect to the claim raised; (5) state precedent; and (6) related case law from sister states.[48]

While recognizing that it is the rare opinion that would satisfy all of the above requirements, it seems clear that the more they are met, the greater the chance that the opinion will not only resolve the dispute between the current parties in interest, but will also serve as a guidepost for the future. In other words, an opinion that provides an in-depth analysis of relevant history and state precedent will serve as a building block upon which a state's independent constitutional body of law can grow. Instead of merely providing a cursory disposition of the dispute, the opinion will serve as an important catalyst to state constitutional dialogue. As will be seen, there are opinions that achieve such results. Also, it must be noted that the failure of an opinion to include all the ideal elements does not necessarily relegate that opinion to the annals of legal insignificance.

It was not long after ascending to Kentucky's highest court that Justice Leibson had his first opportunity to resolve a dispute between not only two litigants, but also two Constitutions. Decided in 1983, the same year that Justice Leibson joined the Kentucky Supreme Court, *Fannin v. Williams*[49] was a declaratory judgment action challenging the validity of a statute that provided for distribution of textbooks to non-public schools. The statute was alleged to be unconstitutional under seven separate provisions of the Kentucky Constitution as well as the First and Fourteenth Amendments to the federal Constitution.

While not entirely expressing the Court's opinion in *Michigan v. Long* terms – issuing a "plain statement" that any federal cases considered were

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[48] With the exception of the "plain statement" factor, *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this list is substantially similar to the methodology outlined by the Pennsylvania Supreme Court in *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), wherein the court stated that in order to properly analyze an issue under the state Constitution, it was preferable that the litigants each brief and analyze the factors.

[49] Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

for purposes of guidance only[50] - Justice Leibson nonetheless strongly indicated that the court's decision was based on the Kentucky Constitution and that it would, therefore, be unnecessary to examine the federal Constitution. Specifically, Justice Leibson stated, "Because we have reached the conclusion, albeit reluctantly, that regardless of its salutary purpose the statute violates the Kentucky Constitution, it would extend this opinion unnecessarily to examine all of the complaints against the constitutionality of the statute and the responses thereto."[51]

Justice Leibson went on in *Fannin* to test the constitutionality of the statute against each of the implicated provisions of the Kentucky Constitution. The text of each provision was set out. In some cases, the intent of the drafters of the provision was speculated about, but more often the court emphasized that the clear language of the provision itself led the court to conclude that the legislature's intent was to spend public money for the *public* good only.[52] To buttress this conclusion, there were copious citations to Kentucky precedent that had held various other programs invalid when similarly challenged. There was no reference to persuasive authority from sister states, nor was there any discussion relating to the unique traditions of Kentucky that underlie the state Constitution.[53]

Justice Leibson noted that the United States Supreme Court had held a similar distribution program constitutional under the auspices of a "child benefit" theory in *Board of Education v. Allen*.[54] While pointing out that there were factual differences between the programs, he emphasized that there were legal distinctions that were far more important:

> In *Allen*, the Court decided whether the statute in question violated the seven words in the "establishment of religion" clause in the First Amendment to the United States Constitution. The problem in this case is not whether the challenged statute passes muster under the federal constitution as interpreted by the United States Supreme Court, but whether it satisfies the much more detailed and explicit proscriptions of the Kentucky Constitution. It does not.[55]

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[50] *See Long*, 463 U.S. at 1040-41.

[51] *Fannin*, 655 S.W.2d at 481. Justice Leibson's failure to follow the exact *Michigan v. Long* formula in articulating the court's plain statement should not be criticized since *Fannin* and *Long* were decided the same day.

[52] *See id.* at 483-84.

[53] *See generally id.*

[54] Board of Educ. v. Allen, 392 U.S. 236 (1968).

[55] *Fannin*, 655 S.W.2d at 483.

Justice Leibson's opinion in *Fannin* concluded by repeating that the holding was reached reluctantly. The people of Kentucky wrote the Constitution and retained the ability to amend it. "We cannot sell the people of Kentucky a mule and call it a horse," he wrote, "even if we believe the public needs a mule."[56]

The judgment in *Fannin* was not unanimous. Two justices dissented.[57] While they stated their belief that the challenged statute did not violate either the state or the federal Constitution, they clearly relied upon the United States Supreme Court holding in *Allen* to provide their rationale. In essence, their dissenting opinion contains the type of quintessential "ambiguous state ground" that the United States Supreme Court sought to clarify in *Michigan v. Long* by creating the "plain statement" requirement.[58]

The main thrust of the dissent was that the majority should interpret the Kentucky Constitution in lockstep with the federal Constitution, but it did not offer any explanation as to why this should be so. After making mixed references to both federal and state constitutional provisions and precedent, the dissent concluded by stating, "The majority decision in this case is a giant step backward both in time and the law. It results in arbitrary discrimination against individual children and their parents who choose to select nonpublic schools for educational purposes. The entire question has been answered by the United States Supreme Court in the *Allen* case more than fifteen years ago."[59]

Overall, the majority and dissenting opinions in *Fannin* display a fairly rudimentary state constitutional law analysis, which is typical when compared to state constitutional law opinions from other jurisdictions at the time. For example, Justice Leibson's majority opinion relied heavily upon what he believed was the overwhelming clarity of the textual language itself.[60] The absence of a more detailed discussion regarding the intent of the constitutional provisions at issue and any state traditions or history unique to Kentucky makes *Fannin* an opinion that may be cited in later times for the content of its holding, but not as an instructional or educational state constitutional opinion. One could not, for example, turn to

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[56] *Id.* at 484.

[57] The dissent was written by Justice Donald C. Wintersheimer and joined by Justice J. Calvin Aker. Joining Justice Leibson in the majority opinion were Chief Justice Robert F. Stephens and Justices William M. Gant, James B. Stephenson, and Roy N. Vance. *See id.* at 485.

[58] Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

[59] *Fannin*, 655 S.W.2d at 487 (Wintersheimer, J., dissenting).

[60] *See id.* at 483.

Fannin in an effort to discover the historical underpinnings of the Kentucky constitutional provisions it involved and what importance the court assigned to that history. Also, one could not look to *Fannin* generally in an effort to learn how to draft a state constitutional law opinion or brief.

This is equally true of the dissenting opinion, in that the conclusion that the Kentucky Constitution was not violated was premised completely upon federal precedent. This was so in spite of the fact that the litigants raised a number of state constitutional challenges apart from their federal constitutional challenges. This lack of differentiation makes it difficult to ascertain whether the dissenting justices believed that the state Constitution should be interpreted in step with the federal Constitution at all times or in this particular area of the law only. Indeed, there was no acknowledgment at all that judicial review under the state and federal constitutions might at times result in divergent holdings.

In addition to *Fannin*, Justice Leibson wrote one other opinion in his first year on the Kentucky Supreme Court in which both the state Constitution and the federal Constitution were raised on appeal. The case was *Lexington Herald-Leader Co. v. Meigs*,[61] which followed a determination by the lower courts that the *voir dire* proceedings in a capital murder trial were to be held outside the presence of the press. This decision was made at the request of the accused, who stated that he feared that intense and inaccurate pre-trial reporting would prejudice the potential jury pool, thus denying him a fair trial as guaranteed by both the Kentucky and federal Constitutions.[62] The Lexington Herald-Leader, among other news organizations, appealed the trial court's grant of closed *voir dire* of individual jurors.

Writing for the majority, Justice Leibson first articulated the constitutional provisions at issue and stated that the basic conflict involved "fair trial versus free press."[63] Leibson also indicated that "[t]here is no United States Supreme Court decision nor any Kentucky case, dealing specifically with limited closure during individual *voir dire* of prospective jurors."[64] Thereafter, he surveyed various other courts' resolutions of issues similar to the one at hand. In addition to Kentucky precedent,[65] he cited precedent

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[61] Lexington Herald-Leader Co. v. Meigs, 660 S.W.2d 658 (Ky. 1983).

[62] *See id.* at 658-61.

[63] *Id.* at 662.

[64] *Id.* at 664.

[65] *See* Lexington Herald-Leader Co. v. Tackett, 601 S.W.2d 905 (Ky. 1980) (holding that excluding every member of the press and public from criminal trial violated presumption in favor of public trials contained in section 11 of the

from the United States Supreme Court,[66] the federal courts of appeal,[67] and the Supreme Court of California.[68] Finally, Justice Leibson concluded that "the record does not support the conclusion that [the press's] first amendment right of access was denied in this case in a manner constitutionally impermissible."[69]

Kentucky Constitution); Ashland Publ'g Co. v. Asbury, 612 S.W.2d 749 (Ky. Ct. App. 1980) (holding that the public has no absolute right to attend pre-trial hearings in a criminal case, and that it rests within the discretion of the trial court to make transcripts of the proceedings public thereafter). The holding in *Ashland Publishing* is especially valuable for purposes of this essay, because it compares sections 8 (freedom of the press), 11 (public trials), and 14 (speedy trial) of the Kentucky Constitution with their federal counterparts, found respectively in the First, Sixth, and Fourteenth Amendments.

[66] *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (construing the First and Fourteenth Amendments in concluding that a state may close the courtroom to the public during a rape trial only if closure serves a compelling state interest and is narrowly tailored to that interest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (stating that unless the trial court finds to the contrary, the trial of a criminal case is presumed to be open to the public under the dictates of the First, Sixth, and Fourteenth Amendments); Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (stating that where all parties agreed that suppression hearing should be closed to the press and public, reporter could not assert rights of access under the First Amendment and have trial court's order overturned).

[67] *See* United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) (holding that press may challenge trial court's order closing voir dire and suppression hearing where the court's reasoning for the closure is not sufficiently clear, based on First Amendment freedom of the press and Sixth Amendment right to public trial); United States *ex rel.* Pulitzer Publ'g Co., 635 F.2d 676 (8th Cir. 1980) (stating that in camera voir dire is inappropriate if other methods of examining veniremen will serve goals of preserving defendant's rights and granting access to press required under First Amendment).

[68] *See* Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980) (stating that it is appropriate to conduct that portion of voir dire that deals with death-qualifying jurors in a capital case individually and in sequestration from remainder of the veniremen). The *Hovey* holding considered the rights of the accused under both federal and California constitutional provisions. The relevant federal provisions were the Sixth Amendment rights to public trial and confrontation, while the state constitutional provisions were sections 7 (due process and equal protection), 15 (public trial), and 16 (jury trial).

[69] *Meigs*, 660 S.W.2d at 667 (stating that both section 11 of the Kentucky Constitution, which requires a public trial, and the Sixth Amendment of the federal Constitution, which contains the same requirement, support the conclusion that

Throughout the opinion, there was no independent analysis of the Kentucky Constitution with respect to either the right of the criminally accused to have a fair trial or the right of the press to have access to criminal proceedings. It is unclear from the opinion whether this omission was the result of the parties' failure to fully brief the issues or the court's failure to analyze the issues.

In comparing these two early opinions, *Fannin* and *Meigs*, one might conclude simply that they are examples of the type of haphazard state constitutional law decision-making that Professor Gardner discussed in detailing the "general trends" of state constitutional decisions, which, he says, are infrequent, grudgingly resorted to, and obscure.[70] It is, however, misleading to end the comparison by simply applying these broad, generic labels. A closer examination of the issues involved in the two cases reveals a more specific rationale as to why only the *Fannin* opinion contained an independent analysis of the state Constitution.

One of the most frequent justifications put forth by proponents of state constitutional law is that the states' constitutions are not mirror images of the federal Constitution.[71] Therefore, there are notable textual and interpretative differences. In addition, there are differences of coverage that can play a very important role in determining when a state constitution should be considered apart from the federal Constitution. One such area is education. "[I]n contrast with the Federal Constitution, state constitutions contain numerous policy provisions - for example, guarantees of a 'thorough and efficient education,' requirements of environmental quality, and the like."[72]

Indeed, the dearth of language about education in the federal Constitution was noted by Justice Leibson early on, in the *Fannin* opinion. "The federal constitution is silent on the subject of education, leaving this most important function to the several states."[73] It is, therefore, quite plausible that the distinction in subject matter between *Fannin* and *Meigs*, not an inattentive or inarticulate court, partially explains the disparate analyses.

Also, it is critical to remember that both *Fannin* and *Meigs* were written in 1983, which was not only fairly early in the New Judicial

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conditional closure of voir dire is acceptable in proper circumstances).

[70] *See* Gardner, *supra* note 27, at 780-88.

[71] *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1107 (1997) (citing to various state constitutions); *see also id.* at 1112-17, 1118 n.38.

[72] *Id.*

[73] *See* Fannin v. Williams, 655 S.W.2d 480, 482 (Ky. 1983).

Federalism movement but also was Justice Leibson's first year on the Kentucky Supreme Court. As previously stated, the discourse that is so integral to the success of this movement can only be developed gradually.

At that time, only a few state courts, concentrated in the western and northeastern sections of the country, were beginning to experiment with state constitutional adjudication.[74] Certainly, a small, midwestern, traditionally conservative state like Kentucky would not have been considered to be on the leading edge of what was widely believed to be a liberal movement. Also, while a few law review articles either encouraged or discouraged the further development of the New Judicial Federalism movement,[75] journals and reviews focusing exclusively upon state constitutional law had not yet come into existence. Most of the writings available took the form of debating pros and cons. It was not until later that state constitutional law surveys were published with regularity and journals and columns arose that specifically focused upon the movement. Clearly, the absence of a highly developed and articulate state constitutional law discourse on the Kentucky Supreme Court in 1983 was not unusual at all, but was rather to be expected.

This hypothesis - that Justice Leibson's early state constitutional law opinions would naturally gravitate toward areas of particular state concern - is buttressed by the fact that the next opinion he wrote undertook an independent analysis of the state Constitution in a case where only the state Constitution was at issue. *Howard v. Salyer*,[76] decided in 1985, involved an issue that was peculiar to state constitutional coverage, and therefore an independent analysis was mandated.

Howard involved the constitutionality of a so-called "local option" election pursuant to section 61 of the Kentucky Constitution. Factually, the case centered upon the constitutional propriety of a district election to determine whether or not alcoholic beverages could be sold in the district. The court had to determine whether the Cammack Act of 1906,[77] which favored "dry" voting over "wet" voting, had been reenacted by subsequent legislation after having been repealed in 1948. Justice Stephenson wrote the majority opinion, holding that subsequent legislation had implicitly

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[74] *See supra* note 47 (showing the geographic distribution of state constitutional law opinions).

[75] *See, e.g., supra* notes 17, 20-26 and accompanying text (discussing the characteristics of state constitutional law decisions).

[76] Howard v. Salyer, 695 S.W.2d 420 (Ky. 1985).

[77] 1906 Ky. Acts ch. 21, *codified as amended at* KY. REV. STAT. ANN. [hereinafter K.R.S.] § 242.210 (Michie 1994).

reenacted the Cammack Act and relying on *Board of Trustees v. Scott*,[78] which had held the Act constitutional.[79] The result of this holding was the determination that the district election was improperly called and was, therefore, invalid.[80]

In writing an opinion for the dissent, Justice Leibson first noted that the language of section 61 was clear, neutral, and did not favor either "wet" or "dry" voting. In reaching this conclusion, he considered both the text of the provision and reports of the constitutional debates.[81] In Justice Leibson's view, both the Cammack Act and *Scott* were the product of Prohibition-era thinking and were clearly violative of the spirit and purpose of the Kentucky Constitution because they favored "dry" voting over "wet" voting. "This is a bias that contrasts with the plain meaning of the words of the constitutional provision," he wrote, "and which represents his [referring to Chief Justice O'Rear, who wrote the majority opinion in *Scott*] own viewpoint and, historically, the passion of his time more then the time of the Constitutional Convention of 1890."[82] Because of his belief that the state precedent was flawed because it rested upon faulty reasoning and a result-oriented rationale, Justice Leibson concluded that "[w]e should not perpetuate erroneous supplementation of the constitution in previous judicial decisions."[83] Accordingly, the dissenting justices were of the opinion that the election that would have allowed alcoholic beverages to be sold in the district should have been upheld.

Taken together, *Fannin*, *Meigs*, and *Howard* show that Justice Leibson initially employed the Kentucky Constitution most often when there was no specific federal constitutional analogy. The Kentucky court was not yet at the stage of its state constitutional law development in which it would undertake an independent state constitutional analysis in spite of a federal provision that was similar or identical to the state provision. This hesitancy was not peculiar to the Kentucky court, or to Justice Leibson in particular. Rather, it was common to the early New Judicial Federalism movement itself.[84] Again, the

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[78] Board of Trustees v. Scott, 101 S.W. 944 (Ky. 1907) (holding that a city may choose to be wet even if the surrounding county is dry).

[79] *See id.* at 951.

[80] *See Howard*, 695 S.W.2d at 422-25.

[81] *See id.* at 426 (Leibson, J., dissenting).

[82] *Id.* (Leibson, J., dissenting).

[83] *Id.* at 427 (Leibson, J., dissenting).

[84] *See, e.g.*, Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317 (1986) ("The lion's share of state constitutional law in this area continues to be largely reactive.... Although the state courts may one

growth and application of state constitutional law principles took time to develop.

Importantly, the two opinions that do analyze the Kentucky Constitution, *Fannin* and *Howard*, do so in a thorough manner, considering the legislative history, intent, text, and relevant persuasive and binding precedent. This dedication to careful analysis served not only to better the individual opinions, but also to provide a framework upon which later opinions could build when the court delved deeper into state constitutional jurisprudence.

IV. PHASE II OF JUSTICE LEIBSON'S STATE CONSTITUTIONAL LAW DEVELOPMENT: INDEPENDENT ANALYSIS OF ISSUES COVERED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS WHERE THE UNITED STATES SUPREME COURT HAD NOT DECIDED A CASE SPECIFICALLY ON POINT

This portion of the Essay will explore the second phase of Justice Leibson's state constitutional law development. After spending several years familiarizing himself with state constitutional adjudication, Justice Leibson's work evolved to the point where, for the first time, the court began deciding cases based on the state Constitution although the federal Constitution provided ample guidelines and precedent. In keeping with the incremental approach of both the Kentucky court and the New Judicial Federalism movement as a whole, however, this series of cases was confined to instances in which the federal case law provided a plethora of general guidelines but did not include a holding that would directly control the outcome of the particular issue before the court.

The Kentucky court had the opportunity to delve deeper into state constitutional jurisprudence in *Tabler v. Wallace*,[85] decided in 1986, for which Justice Leibson wrote the majority opinion. The issue in *Tabler* involved the constitutionality of a no-action statute that prohibited lawsuits against those engaged in the design and construction fields of real

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day get around to articulating coherent and more complete bodies of state constitutional law, current jurisprudence in the criminal justice field remains reactive and ad hoc."); Comment, *Private Abridgment of Speech and State Constitutions*, 90 YALE L.J. 165, 188 (1980) ("Cases in which state constitutional guarantees of free speech have been used to redress private abridgment, although few and not always clear, represent an important part of the trend away from exclusive reliance on the federal Constitution to protect civil liberties.").

[85] Tabler v. Wallace, 704 S.W.2d 179 (Ky. 1986).

estate improvement after five years following completion of the real estate project. Because other similarly situated groups in the construction industry, such as product manufacturers and designers, were not brought within the purview of the statute, a challenge was brought alleging equal protection violations under both the state and federal Constitutions.

Unlike the education and local option cases that Justice Leibson had previously analyzed under the Kentucky Constitution, *Tabler* involved an issue to which the United States Supreme Court had dedicated ample time, resulting in a wealth of case law. Therefore, the fact that the Kentucky Constitution was analyzed independently represented a new stage in the development of state constitutional jurisprudence on the Kentucky Supreme Court.

This new willingness to employ the Kentucky Constitution even though the federal Constitution provided a specific counterpart may be traced to several factors. First, as stated earlier, the state constitutional law movement throughout the country had been steadily gaining in prestige and popularity since the early 1980s.[86] In fact, several commentators speculated that Justice Brennan's seminal article in the *Harvard Law Review* - *State Constitutions and the Protection of Individual Rights*[87] - provided a legitimacy to the movement that, in turn, encouraged greater experimentation by state courts.[88] For whatever reason, the number of independent state constitutional law decisions had been steadily increasing, as had the volume of commentary on the topic.

Also, by 1986 Justice Leibson had earned his LL.M. degree from the University of Virginia. This achievement marked the culmination of years

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[86] *See supra* notes 40-41; *see also* Ken Gormley, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689, 734 (1988):

> With gradual precision over the process, state constitutional law is inching away from its initial status as a harsh reaction to Supreme Court decisions which a small group of active "liberals" found to be unpalatable, to a tool available to liberals, conservatives, and moderates alike, who may simply seek to build more workable, sturdy rules of law.

[87] *See* Brennan, *supra* note 9.

[88] *See, e.g.*, Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 49 n.2 (1988) (detailing the proliferation of scholarly works on state constitutional law topics).

of intensive research and writing, which broadened Leibson's intellectual horizons. It is not difficult to conclude that Justice Leibson had a greater familiarity with and closeness to the world of academia and legal theory than many of his judicial counterparts nationally, and that this familiarity was evidenced in his work product of the time.

Early in the *Tabler* opinion, Justice Leibson distinguished between the text and relative specificity of the two Constitutions as they related to equal protection. Justice Leibson concluded that "[s]ections 1,[89] 2[90] and 3[91] of the Kentucky Constitution," taken together, "suffice to embrace the equal protection clause of the Fourteenth Amendment."[92] These provisions required the General Assembly to treat all people equally and not exercise arbitrary power.[93] There was, however, an additional provision of the

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[89] This section provides:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
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> First: The right of enjoying and defending their lives and liberties.
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> Second: The right of worshipping Almighty God according to the dictates of their consciences.
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> Fourth: The right of freely communicating their thoughts and opinions.
>
> Fifth: The right of acquiring and protecting property.
>
> Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purpose, by petition, address or remonstrance.
>
> Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

KY. CONST. § 1.

[90] This section provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." *Id.* § 2.

[91] This section provides:

> All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Id. § 3.

[92] Tabler v. Wallace, 704 S.W.2d 179, 183 (Ky. 1986).

[93] *See* KY. CONST. §§ 1-3.

Kentucky Constitution that controlled the analysis. Section 59 prohibited the General Assembly from passing local or special acts regulating "the limitation of civil or criminal causes."[94] The intent behind section 59 – to limit the arbitrary exercise of legislative power in several very specific instances – was manifested in the debates of the Constitutional Convention of 1890.[95] Indeed, Justice Leibson quoted excerpts from the remarks of four Convention delegates and noted that "limitations of time and space" prohibited more extensive citations.[96]

Because the court found that the state Constitution provided a more detailed proscription of the type of activities that were the subject matter of the case, a federal constitutional analysis was not undertaken. This was conspicuously noted by the Kentucky court in a "plain statement"[97]: "We have decided that KRS 413.135 violates Section 59(5) of the Kentucky Constitution, which is much more detailed and specific than the equal protection clause of the Federal Constitution. We declare the statute unconstitutional on state grounds, and do not reach the federal question."[98]

Before beginning his analysis, Justice Leibson noted that the parties' briefs had cited to cases from thirty-one other jurisdictions that had decided similar or identical issues involving no-action statutes. The citations were included in a footnote,[99] and the modern trend toward holding the statutes unconstitutional under state constitutions was noted in the main text of the opinion.[100] In addition to being an important step in state constitutional adjudication, this was noteworthy because it highlighted the benefits of thorough briefing of state constitutional claims. As suggested by Justice Linde, it was incumbent upon the parties to provide helpful guidance and persuasive authorities to the state court endeavoring to resolve a dispute under the state constitution.[101]

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[94] *Id.* § 59; *see Tabler*, 704 S.W.2d at 183.

[95] *See Tabler*, 704 S.W.2d at 183.

[96] *Id.* at 183-84. One excerpt from Delegate Mackoy stated: "'[N]ow, if there is any one evil more than another which the people of this State have earnestly demanded should be corrected by this Convention, it was that local and special legislation should be uprooted entirely . . . .'" *Id.* at 183 (quoting 3 DEBATES, CONSTITUTIONAL CONVENTION OF 1890, at 4019).

[97] Michigan v. Long, 463 U.S. at 1040-41.

[98] *Tabler*, 704 S.W.2d at 183.

[99] *See id.* at 182 n.4.

[100] *See id.* at 182.

[101] *See* Linde, *Without "Due Process," supra* note 23, at 182.

Additionally, Justice Leibson cited other Kentucky cases in which section 59(5) was used to invalidate local or special legislation and statutes of limitations.[102] Justice Leibson concluded by stating that section 59(5) was "fundamental" to Kentucky law and must be upheld in both "letter and spirit."[103]

The no-action statute in *Tabler* was declared unconstitutional under the Kentucky Constitution because it created, without sufficient justification, the type of arbitrary classification that section 59(5) specifically proscribed.[104] The more interesting aspect of the holding, however, was the methodology or legal test used to arrive at the decision. While not specifically holding that Kentucky equal protection standards differ from federal standards, the language and rationales used compel the conclusion that state equal protection standards did not reflect federal counterparts.

For instance, the Kentucky court stated that "the fundamental question is whether the General Assembly had a reasonable basis for the legislation."[105] This question, under federal jurisprudence, would indicate that the court was employing rational basis review. The state would thereafter be required to show a legitimate government interest that it sought to further or protect.[106] Moreover, this flexible and deferential federal standard would allow the state to provide a plausible, constitutionally sound justification for the challenged legislation even if it was not clear that the justification actually was the impetus for the legislation.[107] In *Tabler*, however, the

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[102] *See Tabler,* 704 S.W.2d at 184 (citing City of Louisville v. Klusmeyer, 324 S.W.2d 831 (Ky. 1959); Commonwealth v. McCoun, 313 S.W.2d 585 (Ky. 1958); City of Louisville v. Louisville Taxicab & Transfer Co., 238 S.W.2d 121 (Ky. 1951); Gorley v. City of Louisville, 47 S.W.2d 263 (Ky. 1898)).

[103] *Id.*

[104] *See id.*

[105] *Id.* at 185.

[106] *See, e.g.,* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979) ("[T]hese assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause."); U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) ("[T]he challenged classification must rationally further some legitimate governmental interest other than those specifically stated in [the Act]."); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) ("[Governments] must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation.").

[107] *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the

Kentucky court rejected the justifications put forth by the proponents of the statute. "A number of different reasons have been suggested by the defendants and those filing amicus curiae briefs on their behalf for creating a separate classification for these groups," wrote Justice Leibson, "[b]ut these are offered only as possible reasons that could have existed, not as reasons that did in fact exist."[108]

Likewise, Justice Leibson did not find a legitimate interest in providing greater protection from legal action to those engaged in the service, as opposed to the supply, end of the construction industry.[109] Indeed, the majority opinion did not even indicate that a legitimate reason would pass constitutional muster. Rather, Justice Leibson wrote that the appellants failed to present a "substantial reason" justifying the classification.[110] In federal parlance, a substantial reason or interest would not indicate rational basis review, but a higher degree of scrutiny.

In retrospect, *Tabler* proved to be a decision that was a turning point in Justice Leibson's state constitutional law growth. Not only was it the first decision that directly involved a federal constitutional provision that had been given copious scrutiny by the United States Supreme Court, but it also was a decision that, in its attention to detail, provided a building block in state constitutional discourse. Each of the six factors[111] previously articulated as being indicative of a healthy growth in state constitutional jurisprudence was included in *Tabler*. Also, it will be shown that the decision was not a one-time anomaly, but a precursor of future opinions.

Gillis v. Yount,[112] decided in 1988, built on *Tabler* in the independent analysis of constitutional issues under the Kentucky Constitution. *Gillis* illustrates well the point that a thorough, well-researched, and well-reasoned opinion like *Tabler* will aid a state tremendously in establishing its own constitutional law framework. While not involving section 59(5)'s

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classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken."); U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."). *But see* Moreno, 413 U.S. at 533-38 (noting that where the initial impetus for legislation was to prevent "hippies" and "hippie communes" from participating in the food stamp program - rather than to prevent fraud as the government later claimed - the statute could not stand).

[108] *Tabler*, 704 S.W.2d at 185.

[109] *See id.*

[110] *See id.* at 186.

[111] *See supra* note 48 and accompanying text.

[112] Gillis v. Yount, 748 S.W.2d 357 (Ky. 1988).

prohibition on special or local legislation, *Gillis* is analogous to *Tabler* because one of the more general equal protection provisions of the state Constitution was at issue. Specifically, section 3,[113] prohibiting the arbitrary exercise of power by the General Assembly, and section 171,[114] requiring that all taxes be uniform, were at issue. These provisions were used to challenge a statute classifying and taxing real property containing unmined coal differently from other real property.[115]

As in *Tabler*, Justice Leibson's opinion in *Gillis* provided a detailed historical account of the 1891 Kentucky Constitutional Convention as it related to the intent of the framers to limit the power of the legislature to impose arbitrary taxes and grant arbitrary exemptions.[116] Also, Justice Leibson's opinion explored the effect of a 1915 amendment to section 171 and concluded that the amendment "did not generate from a perceived need to favor certain classes of property in the process of taxation."[117]

Thereafter, the majority opinion took issue with the contention of the movants that the historical data was irrelevant to the issue because the Constitution was "outmoded."[118] As quoted by the court, a portion of the movant's brief stated that "'[t]he politics and issues of Kentucky in 1890 are as foreign to this generation as the intrigues of ancient Rome.'"[119] In response, Justice Leibson posited that this contention was false and that the same worries about special interest groups and unscrupulous legislators that abounded in 1890 held true, even more so, in the present.[120] Citing *Fannin*

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[113] *See* KY. CONST. § 3.

[114] *See id.* § 171. This section provides, in pertinent part:

> The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

[115] *See Gillis*, 748 S.W.2d at 357-58.

[116] *See id.* at 366-70 (Leibson, J., concurring.)

[117] *See id.* at 361. The 1915 amendment altered the original language of section 171, which provided that state property taxes were to be "uniform upon all classes of property," to "uniform upon all property of the same class."

[118] *Id.* at 359.

[119] *Id.* (quoting Revenue Cabinet's Brief).

[120] *See id.* at 360 ("The record is not convincing that circumstances today are so different that constitutional restrictions on the power of the General Assembly with regard to property taxes are no longer viable.").

v. Williams,[121] Justice Leibson then repeated his admonishment that the constitutional amendment process could not and should not be circumvented through "legislative enactment and judicial acquiescence."[122]

Turning to the actual classification at issue, the court reaffirmed the *Tabler* equal protection test and again refused to accept imaginary and speculative justifications for the classification absent any proof of their actual existence.[123] Stating that the legislature "'may indulge in class legislation if the classification is made to depend upon natural, real or substantial distinctions,'"[124] the court nevertheless invalidated the legislation because it found that the statute at issue created an arbitrary distinction: "There is no difference between unmined coal and other unmined materials for the purpose of taxation . . . ."[125]

Because neither the parties nor the intermediate appellate court raised or analyzed any federal constitutional provisions, such as the Fourteenth Amendment's equal protection guarantees, the Kentucky court did not reach any federal issues and did not have to include a "plain statement" insulating the decision from further appellate review. While not citing to any persuasive authority from sister states, the opinion in *Gillis* still provided a complete state constitutional review that served to add to the complexity, intricacy, and richness of Kentucky state constitutional law.

Although not addressing identical state and federal constitutional provisions, the case of *Diemer v. Commonwealth*,[126] decided in 1990, is of interest because the challenged statute, which the court held unconstitutional under the state Constitution, was clearly not violative of the federal Constitution. In fact, the statute specifically borrowed language from analogous federal legislation.[127] The issue in *Diemer* was whether a provision of the Kentucky Billboard Act granting the Secretary of Transportation broad discretion to define an "urban area" resulted in an "unconstitutional delegation of legislative power to executive authority."[128]

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[121] Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

[122] *Gillis*, 748 S.W.2d at 360.

[123] *See id.* at 362.

[124] *Id.* at 363 (quoting Board of Educ. of Jefferson County v. Board of Educ. of Louisville, 472 S.W.2d 496 (Ky. 1971)).

[125] *Id.*

[126] Diemer v. Commonwealth, 786 S.W.2d 861 (Ky. 1990).

[127] *See id.* at 865.

[128] *Id.* at 863.

Thus, the applicable state constitutional provisions pertaining to separation of powers[129] were in the forefront of the discussion.[130]

Quoting from a 1922 Kentucky case, Justice Leibson noted: "Perhaps no state forming a part of the national government of the United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does ... [the Kentucky] Constitution. . . ."[131] With this historical background in context, Justice Leibson then proceeded to determine whether the discretion granted to the Secretary resulted in legislative authority being vested in the executive. Since the term "urban area" was not defined in the statute, the court concluded that the legislation vested the Secretary with lawmaking power because the vague nature of the statute allowed the Secretary to make policy rather than to simply enforce laws.[132]

This holding was made despite the clear recognition by the court that the statute in question did not violate the federal Constitution. "Our Kentucky regulation has the virtue of not being at variance with federal legislation, but it has little else."[133] The rationale for this result was that the Kentucky Constitution, through the plain wording of its provisions as well as case law interpreting them, exacted a higher standard than the federal Constitution.[134] Justice Leibson wrote:

> The fact that the broad delegation of legislative authority to determine the definition of an "urban area" found in the federal statute is copied in the state statute does not cure its state constitutional law defects. Even if we are to assume that the federal law would escape federal constitutional

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[129] These provisions are sections 27 and 28, which provide as follows:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

KY. CONST. §§ 27, 28.

[130] *See Diemer*, 786 S.W.2d at 864-65.

[131] *Id.*

[132] *See id.* at 865.

[133] *Id.*

[134] *See id.* at 865-66.

scrutiny, our Kentucky Constitution imposes a higher standard in this area.[135]

Thus, gradually the Kentucky Supreme Court began to use its state Constitution as a protector of the rights of the people of Kentucky equal to or greater than the federal Constitution. *Diemer* proved to be another important link in the development of Kentucky's state constitutional law because, like *Fannin v. Williams*[136] seven years before, a Kentucky statute modeled after its federal counterpart was held unconstitutional under the state Constitution. Justice Leibson's state constitutional analysis in *Diemer*, however, went further than that of *Fannin* in that the subject matter at issue in *Diemer* - separation of powers - is at the heart of the federal Constitution. In contrast, the subject matter at issue in *Fannin* - education - is not specifically provided for in the federal Constitution. This incremental progress in Justice Leibson's state constitutional law analysis and development of Kentucky's state constitutional discourse continued in later cases.

V. PHASE III OF JUSTICE LEIBSON'S STATE CONSTITUTIONAL LAW DEVELOPMENT: INDEPENDENT ANALYSIS OF ISSUES COVERED BY BOTH THE KENTUCKY AND FEDERAL CONSTITUTIONS WHERE THE UNITED STATES SUPREME COURT HAD DECIDED A CASE DIRECTLY ON POINT

After spending almost a decade on Kentucky's highest court, during which he familiarized himself with the intricacies and benefits of state constitutional adjudication, Justice Leibson was poised to examine a case in which, despite controlling federal constitutional precedent,[137] the Kentucky Supreme Court would interpret analogous provisions of the Kentucky Constitution independently, and in the end reach a different result.[138] More important, however, was the development of the methodology employed by Justice Leibson: rather than drafting a state constitutional opinion that merely disposed of the case at hand, his work in *Common-*

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[135] *Id.*

[136] Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

[137] *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding there is no fundamental federal constitutional right for homosexuals to engage in sodomy).

[138] *See* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

wealth v. Wasson[139] demonstrated an appreciation for state case law that left a jurisprudential legacy to the people of Kentucky - a framework for later opinions that would buttress Kentucky's rich social and legal traditions. In *Wasson*, one can readily see how the preceding decade of growth led to a decision that can only be described as a pinnacle of state constitutional jurisprudence. The case, decided in 1992, exemplifies the conclusion that state constitutional discourse can, in fact, develop if given time to grow and mature.

The *Wasson* opinion could not have been written a decade earlier when Justice Leibson began his tenure on the Kentucky Supreme Court. At that time, Justice Leibson was too inexperienced with the New Judicial Federalism movement, and too cautious in his application of it, to envision using the Kentucky Constitution to grant greater rights of privacy to Kentucky's homosexual citizens than would be permitted under the federal Constitution. As we have seen, Justice Leibson's early forays into state constitutional law were confined to areas peculiar to state constitutional coverage and concern. Gradually, Justice Leibson's state constitutional focus developed to the point where - as in *Tabler* and *Diemer* - the court analyzed issues that were covered by both the state and federal Constitutions. It was not until *Wasson*, however, that Justice Leibson's sophistication and confidence in state constitutional adjudication developed to the point where the Kentucky Supreme Court held that a specific constitutional law decision - *Bowers v. Hardwick*[140] - decided by the United States Supreme Court did not apply in Kentucky because the federal Constitution, unlike the Kentucky Constitution, did not recognize a broad enough spectrum of rights. When viewed as part of a greater continuum, Justice Leibson's opinion in *Wasson* was a culmination of years of incremental progress towards the development of independent state constitutional analysis in Kentucky.

At issue in *Wasson* was a state statute criminalizing "deviant sexual intercourse"[141] with a person of the same sex. The defendant had been arrested and convicted of solicitation to commit the offense after propositioning an undercover police officer during a sting operation. Because the United States Supreme Court's decision in *Bowers* controlled the resolution of any privacy issues raised under the federal Constitution, the attorneys for the defendant challenged the statute solely on state

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[139] Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

[140] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[141] K.R.S. § 510.100 (Michie 1990) (judicially invalidated as to private acts between consenting adults).

constitutional grounds. Justice Leibson included a plain statement quite early in the opinion to the effect that any discussion of federal precedent, particularly *Bowers*, was relevant only to the state law issue.[142]

Initially, the court addressed whether the statute violated the implicit right to privacy recognized in the Kentucky Constitution, a right not recognized, according to *Bowers*, by the federal Constitution.[143] It was this very issue, but in the federal context, that the United States Supreme Court had decided in *Bowers*.[144] Because *Wasson* ultimately rejected *Bowers*, it was necessary to fully explore the state constitutional question and provide a rationale as to why the court found it necessary to deviate from the *Bowers* holding.

Justice Leibson first noted that there were "both textual and structural differences between the United States Bill of Rights and our own. . . ."[145] The court then emphasized the fact that many state constitutions, including Kentucky's, pre-dated the federal Constitution. State constitutions were the source of the federal Constitution, rather than the reverse.[146] Highlighting the textual differences between the two documents was the fact that, in the federal Constitution, the only reference to individual liberties is included in the Preamble. In contrast, while the Kentucky Constitution has similar language in its Preamble, there are additional, more specific, provisions that are applicable. In particular, Justice Leibson noted that sections 1 and 2 of the state Bill of Rights serve to "amplify" the Preamble.[147] As such, it was only natural to assume that a history unique to Kentucky shaped the state Constitution and should be consulted in its interpretation.

Justice Leibson seized upon this notion and stated that it was particularly significant that Kentucky had been a leader, early on, in protecting individual rights: "Kentucky has a rich and compelling tradition of recognizing and protecting individual rights from state intrusion in cases similar in nature, found in the Debates of the Kentucky Constitutional Convention of 1890 and cases from the same era when that Constitution was adopted."[148] Justice Leibson found this early state case law particularly compelling because the judges of that era wrote their opinions "with a

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[142] *See Wasson*, 842 S.W.2d at 489.

[143] *See id.* at 490.

[144] *See id.*

[145] *Id.* at 492.

[146] *See id.* (noting "State constitutional law documents and the writings on liberty were more the source of federal law than the child of federal law").

[147] *See id.*

[148] *Id.*

direct, firsthand knowledge of the mind set of the constitutional fathers, upholding the right of privacy against the intrusive police power of the state."[149] Leibson then quoted portions of the Proceedings and Debates of the 1890 Convention, from which it was evident that there existed a strong intent to protect the privacy of individuals.[150] For instance, one delegate stated that the exercise of the rights vested in the people should be protected by the Constitution "'provided that he shall in no wise injure his neighbor in so doing.'"[151] With this in mind, Justice Leibson then concluded that, although the right of privacy in the Kentucky Constitution was not stated in precise terminology, it had long been interpreted by the courts as being "inalienable"[152] and "recognized as an integral part of the guarantee of liberty in our 1891 Kentucky Constitution since its inception."[153] In support of this statement, the majority opinion provided numerous citations to state precedent.[154]

The cited cases made it quite clear that the right of privacy in Kentucky protected individuals from state legislation that was designed to regulate morals to the detriment of individual expression.[155] "[L]egislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise," wrote Justice Leibson. "It sacrifices personal liberty, not because the actor's conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior."[156] Because the United States Supreme Court holding in *Bowers* declared that privacy rights under the federal Constitution extend only to those activities that are "deeply rooted in this Nation's history and

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[149] *Id.*

[150] *See id.* at 494.

[151] *Id.* (quoting J. Proctor Knott).

[152] *Id.*

[153] *Id.* at 495.

[154] *See id.* at 494-97.

[155] *See, e.g.*, Lewis v. Commonwealth, 247 S.W. 749 (Ky. 1923) (holding a hotel room does not constitute a public place); Commonwealth v. Smith, 173 S.W. 340 (Ky. 1915) (stating that police power is limited to actions affecting the public); Adams Express Co. v. Commonwealth, 157 S.W. 908 (Ky. 1913) (holding that states may not regulate interstate commerce wholly); Hershberg v. City of Barbourville, 133 S.W. 985 (Ky. 1911) (holding that a statute regulating cigarette smoking in one's home violated the right to privacy); Commonwealth v. Campbell, 117 S.W. 383 (Ky. 1909) (holding that state constitutions cannot prohibit citizens from having liquor for their own use).

[156] *Wasson*, 842 S.W.2d at 498.

tradition," sodomy not being among one of those traditions,[157] the Kentucky court found the Supreme Court's rationale flawed and unpersuasive.[158]

The most significant analytical flaw that Justice Leibson focused upon was what he termed *Bowers*' "misdirected application of the theory of original intent."[159] Specifically, Justice Leibson believed that the narrow framing of the issue in *Bowers* led to a result that was at odds with a contemporary interpretation of liberty interests. To illustrate his point, Justice Leibson noted that the framers of the Fourteenth Amendment almost surely did not intend that interracial marriages be sanctioned. Nevertheless, the amendment was interpreted in an "enlightened" manner by the Supreme Court in *Loving v. Virginia*,[160] which held that state prohibitions of interracial marriages were not constitutionally permissible.[161]

Thereafter, Justice Leibson's opinion cited various state court decisions that had also reached holdings at variance with *Bowers* when interpreting their own constitutions.[162] Particularly persuasive was the decision of the Pennsylvania Supreme Court in *Commonwealth v. Bonadio*,[163] decided in 1980, in which the Pennsylvania Supreme Court held that its state's voluntary deviant sexual intercourse statute violated the equal protection guarantees of both the federal and Pennsylvania Constitutions.[164] The prohibition under the Pennsylvania statute applied to both homosexual and heterosexual conduct.[165] The Kentucky court found the *Bonadio* holding more persuasive than other state authorities because, when adopting its Constitution, the Kentucky delegates copied almost verbatim from the

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[157] *See Bowers*, 478 U.S. at 192.

[158] *See Wasson*, 842 S.W.2d at 497.

[159] *Id.*

[160] Loving v. Virginia, 388 U.S. 1 (1967).

[161] *See Wasson*, 842 S.W.2d at 497.

[162] *See id.* at 498. State supreme court decisions cited are *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (holding sodomy statute invalid when based on police power), and *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (holding that state's voluntary deviant sexual behavior statute was violative of police power and the right to equal protection). Lower state court cases cited include *Texas v. Morales*, 826 S.W.2d 201 (Tex. Crim. App. 1992) (holding that statute prohibiting private sexual relations between same-sex adults was violative of Texas's state constitutional right to privacy).

[163] Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980).

[164] *See Wasson*, 842 S.W.2d at 498.

[165] *See id.*

then-recently enacted Pennsylvania Constitution.[166] This shared heritage made the reasoning behind *Bonadio* uniquely compelling, which, in turn, led to Justice Leibson's conclusion that "our decision, rather then being the leading edge of change, is but a part of the moving stream."[167]

Although the Kentucky Supreme Court thus held that the challenged statute unconstitutionally infringed upon the state constitutional guarantee of privacy, Justice Leibson nevertheless proceeded to reach the second issue presented by the appellants; namely, whether the statute violated the state constitutional guarantees of equal protection. At this point, Justice Leibson embarked on a pure state constitutional analysis, with no need to distinguish his holding from *Bowers*. The statute in *Bowers* did not implicate the Fourteenth Amendment's equal protection provisions because it criminalized both heterosexual and homosexual sodomy, while the Kentucky statute specifically criminalized only homosexual conduct.[168]

With this issue, Justice Leibson once again had the opportunity to reaffirm his earlier decision in *Tabler v. Wallace*[169] and to apply Kentucky's unique *Tabler* equal protection test. First, however, he addressed the threshold question of whether one's sexual preference is a characteristic that is immutable, thus creating a protected class for purposes of scrutiny.[170] Justice Leibson answered this inquiry in the affirmative and stated that he was particularly impressed with the "medical, scientific and social science data provided in the briefs filed herein by Amicus Curiae."[171] (Again, as in *Tabler*, this overt recognition by Justice Leibson of the importance of thorough briefing cannot be de-emphasized.)

But Justice Leibson's majority opinion departed from utilizing federal constitutional categories and standards. For example, Justice Leibson did not state that homosexual people in Kentucky were a suspect class.[172] In federal jurisprudence, this classification would be highly significant and would allow a court to employ a strict scrutiny method of review. In order

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[166] *See id.* ("A comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, demonstrates unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790." Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L.J. 1 (1991-92)).

[167] *Wasson*, 842 S.W.2d at 498.

[168] *See id.*

[169] Tabler v. Wallace, 704 S.W.2d 179 (Ky. 1986).

[170] *See Wasson*, 842 S.W.2d at 500.

[171] *Id.*

[172] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

to find that the challenged law was constitutional, the state would have had to prove that it had a compelling interest and that the statute was narrowly tailored to meet that compelling interest.[173] Rather, the court categorized homosexuals as a protected class and framed the issue as whether the state can prove "a substantial governmental interest, a rational basis, for different treatment."[174] Thereafter, the court used the test developed in *Tabler* to determine the validity of the state's interest. Concluding that the state's proposed justifications for the legislation were either "outrageous" or "arbitrary," the court held that the statute violated sections 2 and 3 of the Kentucky Constitution.[175]

One curious aspect of the equal protection test used in *Wasson*, and borrowed from *Tabler*, was that in *Tabler* there was no protected class involved. This was equally true of the classification that was at issue in *Gillis*. Indeed, one would be hard-pressed to conclude that occupation in a particular field of the construction industry, or owning land containing unmined coal, was an immutable characteristic. Nonetheless, Justice Leibson carefully reviewed whether homosexuals were a protected class before progressing with his analysis.[176] The end result seems to be that the *Tabler* equal protection test applies to all classifications.

While this speculation may be unsatisfying to those who desire the relative clarity that the federal classifications and levels of scrutiny provide, one must remember that the federal case law in this area developed over a number of years and underwent numerous revisions. Also, while the federal standards and classifications seem to be fairly well-established at present, there is no guarantee that they will not undergo still more revision in the future. Constitutional law, both state and federal, is an ever-growing and, therefore, ever-changing body of jurisprudence. This fact springs from the necessity of adapting our jurisprudential models to modern life, and the federal Constitution is no more exempt from these changes in interpretation than state constitutions.

Also, if the speculation that Kentucky's *Tabler* equal protection test applies to all classifications is correct, the people of Kentucky would enjoy

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[173] *See id.* at 8-10. The U.S. Supreme Court noted it did "not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose . . . where the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *Id.* at 6.

[174] *Wasson*, 482 S.W.2d at 500-01.

[175] *Id.*

[176] *See id.* at 499-501.

a test that not only offers a higher degree of protection to claimants across the board than the federal standards, but also would be easier to apply. There would be no need to inquire whether or not a given claimant was a member of a protected or suspect class, because all claimants would be entitled to a review using the equivalent of the most stringent federal tier of review, strict scrutiny. Unfortunately, Justice Leibson's death made the fate of the *Tabler* equal protection test uncertain. It remains to be seen whether the present Kentucky court will apply the *Tabler* test to all classifications.

There were two dissenting opinions in *Wasson*, the first of which was written by Justice Lambert. With respect to the privacy issue, Justice Lambert forcefully voiced his opinion that the Kentucky court should have followed the United States Supreme Court precedent, *Bowers*.[177] After quoting at length from the portion of Chief Justice Burger's majority opinion in *Bowers* that related to the historical societal and penal proscriptions against sodomy, Justice Lambert stated: "The history and traditions of this Commonwealth are fully in accord with the Biblical, historical and common law view. Since at least 1860, sodomy has been a criminal offense in Kentucky and this fact was well known to the delegates of the 1890 Constitutional Convention."[178] This rationale inescapably leads one to conclude that Justice Lambert framed the issue narrowly, just as the *Bowers* majority had done - as whether there existed a constitutional right of privacy to engage in sodomy, rather than whether there existed a constitutional right to be free from governmental regulation and intrusion in planning one's private affairs. By so doing, Justice Lambert proceeded to develop an argument based on the same type of faulty original intent reasoning that Justice Leibson had conspicuously critiqued in his majority opinion.[179] Once the issue was so narrowly framed, it naturally followed that Justice Lambert would conclude that the framers of the Kentucky Constitution did not evidence any intent to protect the right of people to engage in sodomy.

Interestingly, Justice Lambert did include in his opinion a statement of his belief that the Kentucky Supreme Court should not blindly follow the precedent of the United States Supreme Court at every turn. It was Justice Lambert's belief that "on those occasions when state courts depart from that Court's reasoned interpretations, it should be for compelling reasons, usually text or tradition, and only in clearly distinguishable circumstances,

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[177] *See id.* at 504 (Lambert, J., dissenting).
[178] *Id.* at 503-04 (Lambert, J., dissenting).
[179] *See id.* at 497.

none of which are present here."[180] Justice Lambert did not, however, cite any state precedent or describe any hypothetical circumstances that would illustrate when a departure from a United States Supreme Court holding was justified. Also, as Justice Leibson's majority opinion so carefully and fully developed the textual and traditional differences between the state and federal Constitutions, it is difficult to understand why Justice Lambert did not believe that *Wasson* presented a situation in which departure from federal precedent was proper.

With respect to the equal protection claim, Justice Lambert stated that the statute at issue was properly analyzed using traditional rational basis review.[181] After citing a number of landmark United States Supreme Court decisions, Justice Lambert rightly concluded that sexual orientation was not an immutable characteristic triggering heightened scrutiny under the federal Constitution.[182] He did not discuss whether sexual orientation should properly give rise to a protected class or a suspect classification under the Kentucky Constitution. This would have been the better analysis, because at no point in Justice Leibson's majority opinion did he claim that homosexuals were entitled to heightened scrutiny under the federal Constitution. To the contrary, Justice Leibson specifically noted that sexual orientation was not an immutable characteristic for purposes of federal review.[183] Instead, Justice Leibson held that the Kentucky Constitution provided the means for triggering the protected classification.[184]

Justice Wintersheimer wrote the second dissent in *Wasson*. The initial portion of the opinion indicates that the majority opinion was improperly rendered and advisory in nature.[185] This conclusion was reached by noting that Jeffrey Wasson was charged with solicitation to commit sodomy during an undercover police operation, not with commission of the actual offense. Because the solicitation occurred on a public street, Justice Wintersheimer found that there was no reasonable expectation of privacy under the circumstances and that the constitutionality of the statute was not properly before the court.[186] Thereafter, Justice Wintersheimer stated:

> Judicial time is very precious and there is no reason why this Court should be seeking problems to solve which we make on our own initiative.

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[180] *Id.* at 504 (Lambert, J., dissenting).
[181] *See id.* at 507 (Lambert, J., dissenting).
[182] *See id.* at 507-08 (Lambert, J., dissenting).
[183] *See id.* at 499.
[184] *See id.* at 500.
[185] *See id.* at 510 (Wintersheimer, J., dissenting).
[186] *See id.* at 508-09 (Wintersheimer, J., dissenting).

> Apparently the majority opinion could not wait for a proper case but it had to jump into the controversy in order to proclaim its view on the discovery of privacy in Kentucky.[187]

Strangely, following this admonishment, Justice Wintersheimer went on to give his own advisory opinion on whether engaging in homosexual sodomy was a protected privacy right under the Kentucky Constitution. He further discussed whether homosexuals are a protected class for purposes of equal protection analysis.

As to the privacy issue, Justice Wintersheimer's dissenting opinion stated that the majority of the public had the right to legislate against traditionally morally offensive behaviors engaged in by a minority of the public.[188] With this pronouncement, he was in lock-step with the majority in *Bowers*. Unlike Justice Lambert, Justice Wintersheimer did not say whether he believed that a state constitutional opinion holding to the contrary of a United States Supreme Court decision was proper under any circumstances. Thereafter, the portion of the dissent discussing the privacy issue blurred the line between the privacy and the equal protection challenges because it outlined the state's interest in the health and safety of the public at large and concluded that such considerations prevailed "over any equal protection challenge."[189]

Addressing the equal protection issue, Justice Wintersheimer, like Justice Lambert, found that one's sexual orientation is not an immutable characteristic.[190] Thereafter, Justice Wintersheimer rather summarily concluded that it was rational for the legislature to distinguish between

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[187] *Id.* at 510 (Wintersheimer, J., dissenting).

[188] *See id.* at 511-14 (Wintersheimer, J., dissenting).

[189] *Id.* at 511 (Wintersheimer, J., dissenting).

[190] *See id.* at 516 (Wintersheimer, J., dissenting). Justice Wintersheimer stated that the majority failed to correctly analyze the equal protection issue. Thereafter, Justice Wintersheimer concluded that homosexual people do not make up a suspect class because "[s]hared attitudes or preferences of any kind do not establish a recognizable class because they are subject to change." *Id.* (Wintersheimer, J., dissenting). However, it must be noted that Justice Wintersheimer's analysis of the issue, purporting to use the federal classifications, was itself flawed and/or confusing in that both federal rational basis and strict scrutiny language was employed. Stated Justice Wintersheimer: "[A] careful examination of the record in this case indicates there is a reasonable basis for K.R.S. 510.100 because Kentucky's interest in eradicating such behavior is compelling." *Id.* (Wintersheimer, J., dissenting).

homosexual and heterosexual sexual behavior because the health risks posed by AIDS were more prevalent in the homosexual population.[191]

In making the determination that sexual orientation was not an immutable characteristic, Justice Wintersheimer deviated from Justice Leibson's mode of thinking by characterizing homosexuality as a personal preference that is subject to change.[192] Conversely, Justice Leibson's majority opinion focused upon sexual orientation being a final and immutable characteristic akin to gender and race.[193] As previously stated, Justice Leibson's determination was premised in large part upon the persuasive medical and scientific data provided by the briefs of appellee and *amicus curiae*.[194] At several points in his opinion, Justice Wintersheimer cited "defense experts" to support his conclusion that homosexuals are more sexually promiscuous and more likely to transmit infectious diseases.[195] While clearly advocating a different position than Justice Leibson on the issue, Justice Wintersheimer's reliance upon data contained in the parties' briefs is important from a state constitutional law standpoint.

Regardless of whether one agrees with the ultimate holding in *Wasson*, it cannot be said that the opinion is merely a reactionary response to a United States Supreme Court opinion with which one finds fault. It would be difficult indeed to put forth an argument that *Wasson* did not provide the citizens and courts of Kentucky with a rich piece of state constitutional material that will prove valuable to litigants and courts. The depth of research and reasoning throughout the opinion belies such a conclusion.

One need only compare the *Wasson* opinion with Justice Leibson's earlier work to see how vastly different the state constitutional law analyses are, and how *Wasson* was a natural outgrowth of Justice Leibson's gradual yet expanding experimentation with state constitutional law. For example, when, almost a decade earlier, Justice Leibson wrote the majority opinion in *Fannin v. Williams*,[196] he discussed the intent of the drafters of the provision at issue rather cursorily, relying on the clarity of the text itself. Also, while he cited Kentucky precedent, Justice Leibson did not discuss Kentucky's unique historical background and traditions. The end result was that while the narrow issue before the court was disposed of, *Fannin* failed

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[191] *See id.* at 517 (Wintersheimer, J., dissenting).
[192] *See id.* at 516 (Wintersheimer, J., dissenting).
[193] *See id.* at 499.
[194] *See id.* at 500.
[195] *Id.* at 511, 516, 517 (Wintersheimer, J., dissenting).
[196] Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

to provide a broad workable outline for litigants to follow in framing state constitutional challenges and briefs.

Conversely, *Wasson* provided exactly the type of analysis and guidance integral to the development of a rich and complex state constitutional jurisprudence. The opinion was well-reasoned and thoughtfully analyzed. The substantial historical survey of both the Kentucky Constitution and relevant binding and persuasive case law provided an ample basis for the ultimate conclusion that federal decisional law was not applicable and that its adoption would run contrary to both the spirit and intent of the state Constitution.

CONCLUSION

Justice Leibson's early retirement from the Kentucky Supreme Court makes any forecasts about the future of state constitutional law adjudication on the Kentucky Supreme Court speculative. Only time will tell whether the current court members have the drive to continue the justice's work.[197]

What is not speculative is the legacy that Justice Leibson gave to the people of Kentucky. Through thoughtful analyses and an unrelenting dedication to continual education, Justice Leibson was able to offer the people of Kentucky an individualized jurisprudence that closely reflected the intent of the framers of their Constitution. At the same time, the people's right to privacy, to equal protection under the law, and to accountability and responsibility in government was expanded beyond the minimum federal requirements.

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[197] In the years since Justice Leibson's death (which followed soon after his retirement), there has been one case decided by the Kentucky court that employed the *Tabler* equal protection test. In *St. Luke Hosp., Inc. v. Health Policy Bd.*, 913 S.W.2d 1 (Ky. Ct. App. 1996), the court was called upon to decide whether section 59 of the Kentucky Constitution prohibiting local or special legislation had been violated. The statute at issue granted exceptions from the state's certificate-of-need requirement for existing hospitals that wished to establish neonatal care facilities. Writing for the majority, Justice Schroder reaffirmed *Tabler*'s central holding, that speculative or imaginative justifications for treating entities differently would not pass constitutional muster. The court required the appellant to demonstrate that the classification was based on a "substantial and justifiable reason" even though, as in *Tabler* and *Wasson*, there was no "suspect" or "protected" class involved. While the opinion itself is somewhat terse and lacking in-depth analysis of the provision at issue, it is nonetheless a hopeful sign of the future vitality of Justice Leibson's work.

On a broader level, study of Justice Leibson's tenure on the Kentucky Supreme Court provides support for the proposition that state constitutional law can succeed and flourish given time and dedication. Justice Leibson gave that time and dedication, creating a constitutionally sound body of law independent of the United States Constitution. While some, like Professor Gardner, may doubt that states can develop a coherent state constitutional discourse, the career of Justice Charles M. Leibson demonstrates that such discourse is both possible and desirable; it only needs sufficient time to prove itself.