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State Constitutional Law: Federalism in the Common Law Tradition

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STATE CONSTITUTIONAL LAW: FEDERALISM IN THE COMMON LAW TRADITION

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DEVELOPMENTS IN STATE CONSTITUTIONAL LAW. Edited by *Bradley D. McGraw.* St. Paul, Minn.: West Publishing Co. 1985. Pp. xxiii, 335.

In *State v. Jewett,* decided last summer by the Supreme Court of Vermont, that court confronted a problem that has become all too familiar to state courts in recent years: "[A] state constitutional issue has been squarely raised, but neither party has presented any substantive analysis or argument on this issue."[1] The absence of analysis or argument, the court held, constituted inadequate briefing and deprived the court of the record it needed to address the proper ambit of the applicable state constitutional provision. Perhaps because the case involved an appeal from a criminal conviction, the court did not simply decline to consider the issue but instead ordered supplemental briefs. Counsel were directed to inform themselves and the court about historical data, textual analysis, case law from other states, and economic, sociological, and ethical materials that might illuminate the relevant state constitutional provision. Among the resources to which the court directed counsel was *Developments in State Constitutional Law.*

Developments in State Constitutional Law is a collection of essays delivered at a conference held in March 1984 in Williamsburg, Virginia. The conference was organized by the Conference of Chief Justices, the National Center for State Courts, and the Marshall-Wythe School of Law of the College of William and Mary. Its purpose was to assist state courts in an area where the law has been, in the words of Chief Justice Edward Hennessey of the Supreme Judicial Court of Massachusetts, "disjointed, uncoordinated, and uncommunicated."[2] The essays produced for the conference should indeed point state courts in the direction of a more sophisticated inquiry into the role properly to be assigned to state constitutions as they emerge from the

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1. State v. Jewett, 500 A.2d 233, 234 (Vt. 1985).

2. McGraw, *Preface* (p. vii).

long shadow cast, for the last sixty years, by the Constitution of the United States. Unavoidably, *Developments,* by its emphasis on the general, systemic consideration of the underlying issues and arguments, leaves unresolved many of the specific problems that an emergent state constitutional law poses for state courts. It is therefore especially noteworthy that the essays hold out promise for the preparation of additional resources in the future, since they signal a revival of interest in the subject of state constitutions by the scholarly community.[3] The dearth of scholarly analyses, due chiefly to the preoccupation of constitutional scholars with the work of the United States Supreme Court interpreting the United States Constitution,[4] has unquestionably increased the difficulties that state courts have encountered in their nascent efforts to take state constitutional rights seriously.

Because the principal objective of the conference was to heighten the consciousness of the bench and the bar about state constitutions, it is useful briefly to summarize the considerable light which the essays shed on the present state of state constitutional law.[5] As is typical when many contributors address the same overall topic, the essays tend to overlap. Following the lead of Professor A.E. Dick Howard's excellent introductory overview,[6] I shall therefore focus on the essayists' joint contributions rather than on each essay by itself.

An important item on the conference agenda was the identification of existing resources that serve to assist in the interpretation of state constitutions. Unanimously persuaded of the legitimacy of independent state constitutions and of the capacity of state supreme courts to implement their provisions, the essayists urged state judges to cast a wide net. In the words of Ronald Collins, "state law must be asserted, by bench and bar, as if it actually were *law* in the sense that it imposes limits on government [that are] independent of those mandated by the

3. The faculty essayists are Ronald K.L. Collins, Adjunct Professor of Law, Willamette University; A.E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, University of Virginia; William W. Greenhalgh, Professor of Law, Georgetown University Law Center; James C. Kirby, Jr., Professor of Law, University of Tennessee; Sanford Levinson, Professor, University of Texas School of Law; Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law; and Robert F. Williams, Associate Professor of Law, Rutgers University School of Law, Camden. The other essayists are distinguished state jurists: Justice Shirley A. Abrahamson, Wisconsin Supreme Court; Justice Hans A. Linde, Oregon Supreme Court; Justice Stanley Mosk, California Supreme Court; Justice Stewart G. Pollock, New Jersey Supreme Court; and Justice Robert F. Utter, Washington Supreme Court.

4. Collins, *Reliance on State Constitutions: Some Random Thoughts* (pp. 5-6).

5. To supplement the substantive analyses of the various essays, many of which are extensively footnoted, *Developments* includes a comprehensive bibliography entitled "State Constitutional Law Resources" (pp. 317-35). In addition, Professor Greenhalgh's essay concludes with a topic-by-topic list of state court cases that have interpreted state court constitutions to provide criminal defendants greater protection than they are currently afforded under the federal constitution. Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It* (pp. 222-34).

6. Howard, *Introduction: A Frequent Recurrence to Fundamental Principles* (p. xi).

federal Constitution."[7]

Analysis of a state constitutional provision, Justice Robert F. Utter suggests, involves a critical examination of text, an inquiry into intent, and an appraisal of current values.[8] With regard to textual analysis, a number of essayists caution against the ready assumption that state constitutions should be read as sharing an identity of design with the federal Constitution.[9] It unfortunately always bears repeating that close reading of particular language is essential to informed understanding.[10] Many state constitutions contain provisions, such as those conferring rights to public education,[11] to environmental protection,[12] and to equal protection of the laws without regard to "ancestry, national origin, sex or physical or mental disability,"[13] that have no federal counterparts. Other state constitutional provisions may bear a misleading linguistic similarity to federal provisions drafted for different purposes at a different time in history.[14] Even when the language of the state and federal constitutions is identical, state courts should not reflexively rely on federal precedents to the exclusion of considered inferences drawing on local historical, political, and social factors. Instead, state courts should consult the precedents of sister states construing similar state constitutional provisions, just as state courts have always looked to the law of other states for new common law developments in torts and contracts and property.

Given the indeterminacy of constitutional language, state courts will frequently want to inquire into the intent of those responsible for its drafting or adoption. State constitutional conventions have not regularly spawned state equivalents of *The Federalist,*[15] although tempo-

7. Collins, *supra* note 4 (p.3; emphasis in original); *see also* Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights* (pp. 239-45).

8. Utter, *supra* note 7 (pp. 250-61).

9. Collins, *supra* note 4 (p. 6); Linde, *E Pluribus — Constitutional Theory and State Courts* (pp. 278-81); Utter, *supra* note 7 (p. 248).

10. Collins, *supra* note 4 (pp. 5-7). The general aversion to the careful reading of statutes, and by extension of constitutions, is noted in Peters, *Common Law Judging in a Statutory World: An Address,* 43 U. PITT. L. REV. 995, 998-1000 (1982).

11. For a series of Connecticut cases seeking to define rights under Connecticut's constitutional guarantee of free public education, CONN. CONST. art. VIII, § 1, compare Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (*Horton I*); Horton v. Meskill, 187 Conn. 187, 445 A.2d 579 (1982) (*Horton II*); and Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099 (1985) (*Horton III*) (all illustrating an expansive view of art. 8, § 1), with Campbell v. Board of Educ., 193 Conn. 93, 475 A.2d 289 (1984) (illustrating a more restrictive reading of art. 8, § 1, relying in part on analogies drawn from federal constitutional precedents). *See generally* Comment, *Academic or Disciplinary Decisions: When is Due Process Required?* Campbell v. Board of Education, 6 U. BRIDGEPORT L. REV. 391 (1985).

12. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright* (p. 146).

13. CONN. CONST. amends., art. XXI.

14. Some state constitutions in fact antedated the federal constitution. Howard, *supra* note 6 (pp. xii-xiii).

15. Linde, *supra* note 9 (p. 294).

rally proximate judicial opinions occasionally may reflect the contemporaneous understanding of recently adopted constitutional language. In the absence of useful precedents about the meaning of individual provisions, courts must look to the agenda of the constitution as a whole in the context of the historical and sociological issues that occupied center stage at the time of ratification. As Professor Robert Williams notes, some state constitutions contain constitutional guarantees that were intended as principles of government rather than as rights appropriate for judicial enforcement. Constitutions written during the Jacksonian era, designed to protect against legislative grants of special privileges to favored minorities, do not carry the same meaning as do constitutions concerned about governmental discrimination against minorities.[16] State constitutions thus exhibit much greater diversity in origin and in agenda — some were intended, for example, to facilitate acceptance into the union[17] — than we are accustomed to contemplate from a federal vantage point.

State constitutions must, furthermore, be construed to relate open-ended constitutional language to modern-day reality. The insights derived from historical analysis may be inconclusive or may be irrelevant to conditions that no longer resemble those that were contemplated when the constitution was promulgated. In such circumstances, state courts, operating within the proper, albeit indefinite, boundaries of judicial restraint, should interpret their constitutions to enable the state's constitutional law to reflect modern values. Although state constitutions are more readily amended than is the federal constitution,[18] state judges bear an independent responsibility for making state constitutions adaptable to current conditions.

Even this brief summary should make it clear that the *Developments* resource catalogue still requires a good deal of innovative research and thought for the supplemental briefs in *State v. Jewett.*[19] Recalling Connecticut's troublesome state constitutional cases of recent years, I must observe that the necessarily generalized instruction given by *Developments* would not have provided specific guidance for answers to such questions as competing local and state claims for funding of public school education or conflicting interests of political speech and private property at large shopping centers.[20] That is not

16. Williams, *Equality and State Constitutional Law* (pp. 76-77).

17. Utter, *supra* note 7 (p. 244) (describing the circumstances surrounding the state of Washington's Constitutional Convention of 1889).

18. The manner and the consequence of the state amendment process are discussed in Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?* (pp. 175-82), and in Linde, *supra* note 9 (p. 291).

19. 500 A.2d 233 (Vt. 1985); *see* text accompanying note 1 *supra.*

20. In *Horton III,* 195 Conn. 24, 486 A.2d 1099 (1985), the Connecticut Supreme Court struggled to devise a standard of review for legislative response to a state-created right to public education that would accommodate the vindication of a right that had been denominated fundamental in *Horton I,* 172 Conn. 615, 376 A.2d 359 (1977), and yet recognize the political realities

surprising because even in federal constitutional law, except for inquiries into the legitimacy of judicial review, the relevant point of reference is not constitutional law writ large but rather the law of the commerce clause or of the first amendment, or even the law of free exercise of religion or of free speech within the first amendment.[21] Because of generations of neglect — for which state courts undoubtedly bear a great deal of the responsibility — state constitutional law is still in its infancy. There are as yet few areas in which state constitutional learning has produced definitive legal models.[22]

In light of the relative sparsity of state constitutional law at the present time, the crucial question to me is the extent to which state courts can or should eschew all reliance on federal law in the development of relevant local precedents. That question should, I believe, be answered less doctrinally than many of the essayists in *Developments* would advocate.

In thinking about federalism as viewed from the state perspective, I believe it is useful to break down the question of state-federal constitutional overlap into three component parts, which bear varying degrees of separate attention. First, is a federal construction of a federal constitutional provision ever *binding* on a state court's construction of a state constitution? Second, can state courts ever *compel* state litigants to exhaust the remedies independently afforded to them under the state constitution before permitting them recourse to federal constitutional rights? Third, can federal construction of a federal consti-

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with which the legislature had been confronted. In Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984), in which the court was asked to determine the extent to which the private owner of a shopping center was required, by the state constitution, to permit access for the exercise of rights of free speech, the court divided over appropriate standards of constitutional construction. Professor Levinson describes the state and federal history of such litigation and notes the significance of a potential conflict between the presumed "content-neutrality" of free speech guarantees and the countervailing right of the state, exercising its police power, to regulate a public forum. Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law* (p. 57). Professor Kay has analyzed the difficult questions of the scope of constitutional review that the case presented. Kay, *The Jurisprudence of the Connecticut Constitution,* 16 CONN. L. REV. 667 (1984). Professor Macgill notes that *Westfarms* required the court to confront, at one time, previously untested state constitutional principles of free speech and virtually unexplored doctrines of state action. Macgill, *Anomaly, Adequacy, and the Connecticut Constitution,* 16 CONN. L. REV. 681 (1984). State judges would welcome further elaboration of the problems identified by each of these articles.

21. *See* Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking,* 36 STAN. L. REV. 675, 680-82 (1984).

22. Two of the *Developments* essays begin to take on this challenging task. Professor Kirby notes that state courts under their due process or their equal protection clauses are scrutinizing the reasonableness of legislative regulation of business activities. "The most significant development," he notes, "is the trend under equal protection toward an intermediate standard of review that causes statutory classifications to be reviewed on the basis of actual instead of imagined and hypothetical factual bases." Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions* (pp. 109-10). Justice Pollock observes that common law principles such as the public trust doctrine may supplement state constitutional provisions in the area of land use regulation. Pollock, *supra* note 12 (pp. 154-57).

tutional provision ever be *relevant* to a state court's formulation of independent state constitutional principles?

As to the first question, I concur wholeheartedly with all of the essayists that every state has the independent authority to interpret its own constitution without being bound by federal precedents. It is indeed ironic that state court authority definitively to interpret state statutes is universally taken for granted while state court authority to interpret the state's organic document, its constitution, is deemed controversial. Under our federal system of dual sovereignty, state constitutions embody the reservation to the states of all residual power not expressly or impliedly conferred upon the federal government.[23] State courts therefore must be empowered to determine, in light of state interests and state history, what meaning to attribute to provisions contained in state constitutions. If such provisions are interpreted to provide rights less than those guaranteed by the federal Constitution, then in application, but not in interpretation, state law must give way to the supremacy of federal law under the federal Constitution. As Professor Greenhalgh reminds us, until 1914, the authority of the United States Supreme Court to review state court judgments "was limited to cases in which the state court either held against a federal claim while upholding a state law, or held a federal law invalid."[24] Although the United States Supreme Court now has the jurisdiction to review any state court interpretation of any federal claim, the authority thus bestowed does not extend to overturning state interpretations of state constitutions that confer independent state-based rights greater than those provided by federal law.

Although *Michigan v. Long*[25] imposes limitations of process upon the division of authority over state and federal constitutional rights, it does not fundamentally undermine the principles of dual sovereignty. State court judges may regret a shift that replaces the presumption that state constitutional decisions were independently based in state law, and hence unreviewable, with a presumption that such decisions were federally derived, and hence within the Supreme Court's jurisdiction. Along with Justice Stevens, we may wonder why an overburdened federal court needs to concern itself with matters within state court competence.[26] Nonetheless, state courts can learn to put

23. *See* THE FEDERALIST No. 51, at 339 (A. Hamilton or J. Madison) (Modern Library ed. 1937), *quoted in* Utter, *supra* note 7 (p. 241) (quoting Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237, 635 P.2d 108, 113 (1981)).

24. Greenhalgh, *supra* note 5 (p. 213).

25. 463 U.S. 1032, 1040-41 (1983):

"[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

26. Michigan v. Long, 463 U.S. at 1065-72 (Stevens, J., dissenting); *see also, e.g.*, California

on the record their intention that their decisions interpreting their state constitutions are independent of federal law. Only if the United States Supreme Court were to go behind such statements of intent, to interpolate ambiguity where none existed,[27] would state authority be in jeopardy.

The second question concerns the authority of state courts to insist on invocation of state constitutional remedies before a litigant may have recourse to his federal constitutional rights. The foremost spokesman for that position is Justice Hans A. Linde. Although his essay in *Developments* restates his view, it is most clearly articulated in an earlier article:

> Every state supreme court, I suppose, has declared that it will not needlessly decide a case on a constitutional ground if other legal issues can dispose of the case. The identical principle applies when examining that part of the state's law which is in its own constitution. In my view, a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time. The same court probably would not let itself be pushed into striking down a state law before considering that law's proper interpretation. The principle is the same.[28]

In Justice Linde's view, there is a hierarchical relationship between state and federal constitutions in which the position of first priority is assigned to the state constitutions. With all respect to a friend and a colleague whom I much admire, I wonder!

One logical inference from the Linde position assigning a first priority to the state constitution is that state constitutional rights may not be waived by litigants preferring to rely on the federal Constitution. Such an anti-waiver rule raises both practical and jurisprudential difficulties. Suppose, for example, that a defendant in a criminal prosecution maintains that his confession should have been suppressed

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v. Carney, 105 S. Ct. 2066, 2071-74 (1985) (Stevens, J., dissenting); South Dakota v. Neville, 459 U.S. 553, 566-71 (1983) (Stevens, J., dissenting).

27. In *Michigan v. Long*, the Court purported to continue to recognize the independent authority of state construction of state constitutions: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 463 U.S. at 1041. Several of the essayists view this representation with skepticism. *See, e.g.*, Wilkes, *supra* note 18 (pp. 182-83); Greenhalgh, *supra* note 5 (pp. 216-17). I agree with Justice Mosk that, if state police officers can learn to master the prophylactic rules of Miranda v. Arizona, 384 U.S. 436 (1966), state supreme court justices can learn to articulate that "any federal precedents mentioned in the opinion — in the words of *Michigan v. Long* — 'are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.' " Mosk, *State Constitutionalism after Warren: Avoiding the Potomac's Ebb and Flow* (p. 207). Faced with such an articulation, the Supreme Court of the United States would be hard put to reconcile federal review of a state court's declaration of state constitutional rights with continued adherence to the principles of federalism. *Id.*

28. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980).

because local police continued his custodial interrogation despite his unequivocal request for the assistance of counsel. Under federal law, this is a fairly straightforward *Miranda*[29] case, simplified by the bright-line rule of *Edwards v. Arizona*[30] and *Smith v. Illinois.*[31] As a federal case, the dispositive issues are normally factual and limited in scope: Was the accused in custody during the interrogation? Did the accused invoke his right to counsel? Did the accused subsequently waive his right to counsel? There may well be no state constitutional guidelines whatsoever about implementation of a right against self-incrimination in a custodial setting.[32] If in such circumstances defense counsel elects to rely upon what is alleged to be a clear violation of federal law under *Miranda,* it is doubtful that a state court would be well-advised to require counsel, often a heavily overburdened public defender, to engage in time-consuming primary research in the state historical library. No reason of policy serves to distinguish state constitutional rights in this context from other constitutional rights that have generally been thought to be subject to knowing and intelligent relinquishment or abandonment.[33] Finally, the logic of federalism, in a system in which state courts are charged with the enforcement of federal as well as state law, counsels against the engrafting of state law conditions onto federally guaranteed rights.[34]

A less draconian inference from the Linde position would invoke its strictures only when a party has chosen to rely on both state and federal constitutional rights. It may of course be the case that counsel have extensively researched and forcefully argued the implications to be drawn from the language of the relevant state constitutional provisions. Let me postpone consideration of that case. More often, as was true in *State v. Jewett,*[35] counsel will have cited the state constitution without much if anything by way of exegesis. Since a court may always insist on adequate briefing of any issue, a fortiori a court may

29. Miranda v. Arizona, 384 U.S. 436 (1966).

30. 451 U.S. 477 (1981).

31. 105 S.Ct. 490 (1984).

32. This is a problem that is exacerbated by the fact that state courts, in Justice Linde's view, cannot selectively incorporate federal constitutional doctrine, but must instead ground their decisions in the letter and spirit of their own state constitutions.

33. *See, e.g.,* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (right of an accused to counsel may be waived). Counsel should of course understand that victory in a state court on a federal issue leaves that victory subject to federal review and to the vagaries of unanticipated changes in federal law. For that reason, the short-run attraction of waiving a state claim must be weighed against the long-term advantage of a dispositive resolution in a state court. In that balance, waiver may well be difficult to justify. Nonetheless, it should not be precluded.

34. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923); *see* Henry v. Mississippi, 379 U.S. 443, 447 (1965); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 120-29 (1978).

35. 500 A.2d 233 (Vt. 1985); *see* text accompanying note 1 *supra.*

reserve to itself the decision whether it is willing to undertake independent construction of relatively unexplored state constitutional provisions without the assistance of counsel. It is worth remembering that adequate consideration of a state constitutional provision, by bench or bar, is usually, in Justice Linde's view, a demanding undertaking. Neither federal cases, nor familiar, federally articulated statements of the underlying issue, are reliable guidelines for state constitutional law.[36] If, for any number of prudential reasons,[37] the court determines in the absence of an adequate supporting brief not to address the state constitutional issue, I believe the court would not, for that reason, be discharged of its duty to resolve any questions of federal constitutional law that had been properly presented. Similarly, if the supplemental briefs ordered in *State v. Jewett* prove to be disappointing, the Vermont court could not indefinitely postpone decision on whatever federal issues the case may concurrently have raised. Despite a court's fervent wish that counsel fully educate themselves and the judiciary about the language, intent, history, and values of the state constitution, a court cannot order a tie-in sale of state and federal constitutional rights.

The least controversial version of assigning a preferred position to state constitutional rights would be to look first to state constitutional rights when counsel have presented an adequate analytic record for both state and federal constitutional claims. In that situation, the current practice of state supreme courts apparently varies: some, like Oregon, consider state claims first, while others, like New Jersey, resolve federal claims initially, looking to the federal law to provide a backdrop for the construction of state constitutional rights.[38] My own

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36. In his *Developments* essay, Justice Linde deplores the current association of individual rights and fair procedures with federal law,

> even when they [are] also guaranteed in the state constitutions. . . . People do not claim rights against self-incrimination, they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.

Linde, *supra* note 9 (p. 279).

37. In adverting to prudential considerations, I do not mean to suggest that I subscribe to the view of those critics of the new federalism who fear, as Justice Abrahamson puts it, that "the state court cannot take the heat that comes from deciding the tough individual rights cases." Abrahamson, *Homegrown Justice: The State Constitutions* (p. 308). State court judges have always understood that they operate in closer proximity to the electorate than do their federal counterparts. Tough cases that may lead to unpopular results arise regularly in state court litigation that in no way implicates the state constitution. In recent Connecticut case law, for example, a statutory holding that a statute of limitations barred a prosecution for murder, State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983), was as inherently controversial as the constitutional holding, in another prosecution for murder, that egregious prosecutorial misconduct required a new trial. State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 105 S. Ct. 967 (1985). I refer instead to a philosophy of prudence that acknowledges the desirability of an accommodation between principles and reality, between abstract theories and practical wisdom. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

38. *See* Collins, *supra* note 4 (pp. 8-9 & n.74).

view is more eclectic. Although I agree with Justice Linde that reflexive state court deference to federal claims is unwarranted, I believe the question of what claims to consider, and in what sequence, is a matter of choice best decided in the context of the particular case before the court. Courts are fortunate when they have the freedom to select the vehicle for the enunciation or elaboration of doctrine. In exercising powers of judicial review, state courts act with appropriate prudence when they recognize that law, like politics, is the art of the possible, that judicial decisions that postpone final judgment may sometimes usefully permit principled consideration of an issue by other branches of government and the public, in short that such decisions may avoid needless confrontation.[39] The choice of the right case for the development of a new area in the law is an important part of the common law tradition that looks to incremental pragmatism and seasoned skepticism, to a search for a fit between the law that was and the law that will be.[40] State supreme court judges are generalists whose expertise is in the methodology of the common law. Whether our agenda is the reconsideration of common law cases, the contextual construction of statutes,[41] or the development of constitutional principles, we best serve the interests of justice if we build upon our common law strengths and make haste slowly.

Viewing state constitutional law from the relativist vantage point of the common law tradition, rather than from the absolutist vantage point of dual sovereignty, enables us also to define a proper answer to my third question, the role of federal precedents in the formulation of state constitutional law. At the outset, such a viewpoint is conducive to taking a more relaxed attitude than do some of the *Developments* essayists toward the prevalence of federally derived nomenclature for overlapping state and federal constitutional rights. For better or worse, the prophylactic rules of *Miranda*[42] are today firmly embedded in the legal landscape of the law of self-incrimination. Federally based rules relating to *Terry*[43] stops are engrained in our law of search and seizure. The fact that lawyers and judges unconsciously reach for such metaphors in thinking about all constitutional rights is undoubtedly a psychological impediment to independent construction of state constitutions. But aversion to inappropriate analogies should not overshadow the reality that some, nay most, federal constitutional law is worthy of serious consideration in the interpretation of state constitutions. Just as it is wrong to assume that state constitutions are mere

39. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 69-72 (1962).

40. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92-101 (1981); Kronman, *supra* note 37.

41. *See* Peters, *supra* note 10, at 998-1005.

42. Miranda v. Arizona, 384 U.S. 436 (1966).

43. Terry v. Ohio, 392 U.S. 1 (1968).

mirror images of the Federal Constitution, so it is wrong to assume that independent state constitutions share no principles with their federal counterpart. The interstices of open-ended state constitutions remain to be filled, and many of them will best be filled by adopting into state law, on a case-by-case basis, persuasive constitutional doctrines from federal law and from sister states. Plausible candidates for incorporation, for reading federal law into state constitutions, are the doctrines establishing a preferred position for free speech in the hierarchy of individual rights and requiring special scrutiny of laws discriminating on the basis of race. Some of the barely unsuccessful dissenting opinions of United States Supreme Court Justices might usefully be incorporated into state constitutional doctrine as well.[44] In order to establish for state constitutional law the vital role to which state judges aspire, we cannot automatically abandon sources of insight, whatever their origin or their linguistic formulation. The teachings of the common law tradition, which emphasizes the value of gradual reform in preference to dramatic change, counsel the wisdom of searching for commonality rather than discontinuity in state and federal constitutions.

To say that the differences between federal and state constitutional law should not be overstated is not to subscribe to a view of state constitutional law that relegates the state constitution to the role of an interstitial supplement to the Federal Constitution. State courts must have the strength and the will to undertake the painstaking task of assigning independent meaning to independent state constitutions. In that painstaking task, let us welcome assistance whatever its auspices, confident that our traditional learning in the common law will enable us to meet the challenge.

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44. In an area where state courts have a good deal of institutional competence — the review of criminal convictions — reliance on state constitutions has often taken the form of adapting some aspect of federal constitutional law to local needs for supervision of local police or prosecutorial authorities. Thus, in State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985), the Connecticut Supreme Court recently decided to rely on Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964), rather than on Illinois v. Gates, 462 U.S. 213 (1983). Similarly, in State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied,* 105 S. Ct. 967 (1985), the court distinguished the holding of Smith v. Phillips, 455 U.S. 209 (1982). The interpretation of the state constitution in these cases, and in similar decisions in other jurisdictions, was immeasurably facilitated by the doctrinal development of federal law under the fourth and fifth amendments to the United States Constitution. That law can be a useful model even when state courts determine to depart from it. *See* Mosk, *supra* note 27.