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# Prodigal Reasoning: State Constitutional Law and the Need for a Return to Analysis

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# PRODIGAL REASONING: STATE CONSTITUTIONAL LAW AND THE NEED FOR A RETURN TO ANALYSIS

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## I. INTRODUCTION

The federal Constitution groans under the exegesis and eisegesis of its countless expositors, but a second constitution, often overlooked, also orders the lives of most Americans. State citizens enjoy the additional protection of their state constitution, which applies with a force equal to the federal Constitution.[1] When the Nation's founders "split the atom of autonomy," they situated American citizens within two political realities: "one state and one federal, each protected from incursion by the other."[2] Not only may state constitutions confer rights with no federal corollary (for instance, the right to a remedy for injuries done to a person's land, goods, person, or reputation[3]) but state supreme courts may also construe similar constitutional protections—such as the free exercise of religion versus an unhindered right of the conscience[4]—as having a substantive difference.

The United States Supreme Court consistently acknowledges states' abilities to adopt more expansive liberties in their constitutions than exist in the federal Constitution.[5] Justice William J. Brennan, Jr., recognized the legitimacy of what is sometimes called Judicial Federalism, or New Federalism—the proposition that the rulings of the United States Supreme Court "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[6] Judge Jeffrey S. Sutton has coined the expression "imperfect solutions" to positively refer to states' constitutional alternatives to precedent based on the federal Constitution.[7] He argues that state constitutional law would benefit from greater independence from United

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1. Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 813 (2009).

2. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

3. OHIO CONST. art I, § 16

4. *Id.* art. I, § 7; Humphrey v. Lane, 728 N.E.2d 1039 (2000).

5. E.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

6. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) [hereinafter Brennan].

7. Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 175 (2009) [hereinafter Sutton, *State Constitutional Law*]; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 19 (2018) [hereinafter SUTTON, 51 IMPERFECT SOLUTIONS].

States Supreme Court jurisprudence. Confronted with difficult and divisive constitutional issues, "it may be more appropriate to have fifty-one imperfect solutions rather than one imperfect solution."[8]

These jurists recognize that the federal Constitution is not the fountainhead of all constitutional guarantees.[9] The contrary is often true. In crafting the federal Bill of Rights, the drafters drew from state constitutions.[10] Each of the protections enumerated in the federal Bill of Rights had a prior correspondent in one or more state constitutions.[11]

Despite the reality that a state constitution is "a document of independent force,"[12] the Supreme Court of Ohio has a strained association with Judicial Federalism. Ohio's high court first embraced Judicial Federalism in 1993 with *Arnold v. City of Cleveland*,[13] a decision interpreting Ohio's constitutional gun rights provision based on its historical basis and textual difference from the federal Second Amendment. The Ohio Supreme Court has also departed from the United States Supreme Court on free exercise,[14] eminent domain,[15] and certain warrantless arrests,[16] to name a few. But these are some rare exceptions.[17] The Court often locksteps with the United States Supreme Court.[18] As a matter of policy, there is nothing wrong with this. But alarmingly, principled reasoning has, like a prodigal, departed some of the Court's opinions that break from the lockstep—resulting in decisions that purport to enlarge rights under the Ohio Constitution but waste an opportunity to give good reasons why.[19] Consequently, these decisions reflect unpredictability in Ohio constitutional law, rather than a commitment to basic principles of constitutional interpretation.

Section II lays out the background of Judicial Federalism, including

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8. Sutton, *State Constitutional Law*, *supra* note 7, at 175.

9. Brennan, supra note 6, at 501.

10. *Id.*

11. *Id.*

12. Arnold v. City of Cleveland, 616 N.E.2d 163 (1993), paragraph one of the syllabus.

13. *Id.*; *see also* State v. Mole, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 15.

14. Humphrey v. Lane, 728 N.E.2d 1039 (2000).

15. Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

16. State v. Brown, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, paragraph one of the syllabus.

17. For other instances when the court has held that the Ohio constitution affords greater protection than its federal counterpart, see Justice Judith Ann Lanzinger's concurrence in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 61.

18. *E.g.*, Am. Assn. of Univ. Professors, Cent. Univ. Chapter v. Cent. State Univ., 87 Ohio St.3d 55, 60, 717 N.E.2d 286 (1999) (We affirm, therefore, that the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically.")

19. *E.g.*, State v. Mole, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 78 (Kennedy, J., dissenting) (criticizing a lead opinion which lacked the "careful analysis set forth in the *Arnold* opinion to justify [their] conclusion[s] that the Ohio Constitution affords greater protection"); *see also* State v. Aalim, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862.

exemplary state supreme court decisions that model sound legal analysis. Section III examines Ohio's tradition of Judicial Federalism and recent illustrative cases. Section IV argues that the Ohio Supreme Court should return to and reinforce its tradition of resorting to simple standards when determining whether the Ohio Constitution offers Ohioans greater protection than the federal Constitution.

## II. THE RISE OF JUDICIAL FEDERALISM

### *A. Relationship Between State Supreme Courts and the United States Supreme Court*

As early as 1874, the United States Supreme Court in *Murdock v. City of Memphis* acknowledged the fitness of state courts to adjudicate individuals' federal rights.[20] Facing the contention that certain rights cannot be wholly protected without Supreme Court review, Justice Miller wrote that eighty-five years of living "under the opposite theory" contradicted that argument.[21] The Court understood as axiomatic that state courts do not disregard or resist the influence of clear federal law.[22] Even more obvious was the Court's authority to resolve dispositive federal questions.[23] Therefore, matters "not of a Federal character"—that is, matters arising under a state constitution, statute, or common law—could not be said to necessitate Supreme Court review.[24]

Often, however, state courts are deciding issues that involve both state and federal constitutions.[25] As it remains "emphatically the province and duty" of the federal judiciary to expound the federal Constitution,[26] when the record does not clearly reveal that a state court based its decision on its state constitution rather than the federal Constitution, the United States Supreme Court may "take steps to protect [its] jurisdiction when [it is] given reasonable grounds to believe it exists."[27] In *Herb v. Pitcairn*, Justice Jackson observed that the Court's review only applies to the incorrect adjudication of federal

20. 87 U.S. 590 (1874).

21. *Id.* at 632.

22. *Id.*

23. *Id.*

24. *Id.* at 632-33.

25. RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 166 (1st ed. 2010).

26. Marbury v. Madison, 5 U.S. 137, 177 (1803).

27. Herb v. Pitcairn, 324 U.S. 117, 128 (1945). *See also Murdock*, 87 U.S. at 632 ("when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment and enforce it by its own process.").

rights.[28] Revision of an incorrect, but non-dispositive, federal issue would amount to an impermissible advisory opinion.[29] Thus, to signal to the United States Supreme Court that their review is unnecessary, state courts need to show that their decisions are grounded in an "adequate" and "independent" state basis.[30]

Justice Jackson's concerns in *Herb* found fuller expression in *Michigan v. Long*.[31] Writing for the *Long* majority, Justice O'Connor cited respect for state court independence and the need to avoid advisory opinions as the mainsprings for the Court's abstention from review when faced with "an adequate and independent state ground."[32] When the face of a state court decision rests on or is interwoven with federal law, bearing no marks of reliance on any state grounds, the Supreme Court will presume that the decision reflects the state court's best effort at resolving the federal issue.[33] Such an opinion is not immune from Supreme Court review. The now-familiar rule holds that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, we, of course, will not undertake to review the decision."[34]

*Long* has been criticized for reversing a tradition of presuming the non-reviewability of state court cases, establishing instead a presumption of Supreme Court jurisdiction.[35] On its own terms, however, *Long* sought to resolve the problem of *ad hoc* review of state court decisions and state law.[36] Existing principles had not availed the Court in resolving the "vexing issue" of ascertaining whether a state court's non-federal basis provided independent and adequate support for its judgment.[37] First, the Supreme Court's own review of state law forced the justices to interpret laws with which they were unfamiliar and

28. *Herb*, 324 U.S. at 125-26.

29. *Id.*

30. *Id.* at 125.

31. 463 U.S. 1032.

32. *Id.* at 1040.

33. *Id.* at 1040-41. A state court may rely on federal precedents for guidance, but should plainly state that its use of the federal cases was only for guidance, and that they did not compel the court's decision.

34. *Id.* at 1041.

35. *See* Carol Anne Kann, *Supreme Court Review of State Court Cases: Principled Federalism or Selective Bias?* 36 EMORY L.J. 1277, 1279 (1987) [hereinafter Kann].

36. *Long*, 463 U.S. at 1039.

37. *Id.* at 1038 (quoting Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931)). Among the Court's guiding principles: dismissing the case outright when the decisional grounds were unclear; vacating or continuing to clarify the nature of the state court's judgment; and undertaking a review of state law to determine if the state court had used federal law to guide its application of state law. None of these approaches consistently preserved the relationships between federal and state governments. *Id.* at 1038-39.

which the parties rarely briefed in great detail.[38] Second, vacating the lower decision and continuing the case for clarification was inefficient and time-consuming. This approach also burdened the state courts to demonstrate whether or not the Supreme Court had jurisdiction.[39] Third, the need for uniformity in federal law rendered outright dismissal counterproductive, because in doing so the Court foreclosed review of decisions founded on primarily federal grounds, thus forfeiting opportunities to refine the federal law on particular issues.[40] When "the four corners of the opinion" do not reveal a state court's reliance on a state ground, the state court has potentially compromised a federal issue, undermining federal uniformity.[41]

But uniformity is a contested virtue in a federalist government. As a matter of federalism, "we expect and comfortably tolerate" non-uniform substantive law from state to state.[42] Each state has authority independent from the others and from the central government; legislative diversity is inevitable.[43] Quite the contrary from being a thorn in the nation's side, this diversity is "one of the happy incidents" of federalism.[44] States can and do serve as laboratories, experimenting with new policies that pose no risk to the rest of the country.[45] Professor Lawrence Sager, for one, would not prevent "those state courts which are prepared to enlarge upon the enforcement of underenforced constitutional norms from doing so."[46] The Supreme Court, however, has jealously guarded its role as the final arbiter of the meaning of the U.S. Constitution.[47] The Judiciary Act of 1789 gave the Supreme Court the authority to review losing claims in state courts when state action was alleged to violate the federal Constitution.[48] The Court could not review *prevailing* federal claims of unconstitutionality until 1914.[49] The Court now exercises that authority through 28 U.S.C. § 1257.[50]

*California v. Green* showed that the Supreme Court is not reluctant to rein in a state supreme court's expansion of a Bill of Rights Provision.[51]

38. *Id.* at 1039.

39. *Id.* at 1039-40.

40. *Id.* at 1040.

41. *Id.*

42. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1251 (1978) [hereinafter Sager].

43. *Id.*

44. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

45. *Id.*

46. Sager, *supra* note 42, at 1253.

47. *See, e.g.,* California v. Green, 399 U.S. 149 (1970).

48. Sager, *supra* note 42, at 1242-43.

49. *Id.*

50. 28 U.S.C. § 1257(a).

51. 399 U.S. 149 (1970).

The California Supreme Court held that a belated cross-examination on a witness's out of court statements violates the Confrontation Clause.[52] The United States Supreme Court reversed the state supreme court. By its lights, the Confrontation Clause was not offended as long as the declarant could later be required to explain inconsistences between his former and current testimonies.[53] When full cross-examination remains possible, the Confrontation Clause is satisfied.[54] Thus, the Supreme Court flexed its arms on this federal issue and took advantage of its right to give construction to the federal constitutional provision. *Green* was the first time the United States Supreme Court reversed a state court's expansion on a Bill of Rights protection.[55]

*Green* represents an issue related to Professor Sager's criticism of Supreme Court review (and reversal) of state court expansions on federal guarantees. Professor Sager has argued that it is inappropriate for the Supreme Court to review state court decisions that enforce constitutional rights no further than the margin of that federal constitutional guarantee.[56] The Supreme Court has not shared Professor Sager's favorable perspective on parity. When *Ohio v. Robinette* was first brought before the Ohio Supreme Court (*Robinette I*),[57] Justice Pfeifer, writing for a 4-3 majority, attempted to establish a bright-line rule about consensual interrogations with police officers. The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution share similar wording.[58] *Robinette I* held that any police attempt attempting to initiate a consensual interrogation must first advise the civilian, "At this time you legally are free to go," or words to that effect.[59] Unfortunately for the defendant, the Ohio Supreme Court based its ruling expressly under the federal and state

52. *Id.* at 153.

53. *Id.* at 164.

54. *Id.*

55. Kann, *supra* note 35, at 1278.

56. Sager, *supra* note 42, at 1248 ("If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role which the federal courts perceive themselves constrained to avoid because of institutional concerns.").

57. 653 N.E.2d 695 (1995) ("*Robinette I*").

58. *Compare* OHIO CONST. art. I, § 14 ("The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.") *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

59. *Robinette I,* 653 N.E.2d at 655.

constitutions, bringing the decision squarely in *Long*'s crosshairs.[60]

The United States Supreme Court reversed the Ohio Supreme Court, noting that the proper federal test depends on reasonableness, not a bright-line rule.[61] Justice Ginsburg concurred, suspecting that the Ohio Supreme Court did not actually believe its bright-line rule would apply to the entire country.[62] She recognized Ohio's courts occupied a "unique vantage point," having observed that traffic stops throughout Ohio had routinely led to contraband searches where the officers had no reasonable suspicion of illegal activity.[63] Subtle though it may be, Justice Ginsburg's observation highlights an important capacity of Judicial Federalism: the value of state judges' familiarity with local and regional dynamics when construing constitutional rights as they apply to the state's own citizens.

### *B. State Supreme Court Vanguards*

#### 1. State Court Responses to Federal Doctrines

There are various approaches to state court adoption of federal constitutional doctrine.[64] State courts may "unreflectively" adopt the constitutional boundaries drawn by the United States Supreme Court, applying those boundaries to state constitutional rights.[65] Alternatively, state courts may adopt federal analysis in interpreting their own constitutions on a case-by-case basis.[66] "Prospective lockstepping" occurs when the state court applies federal analysis not only for the case at bar, but for all future matters involving the same constitutional guarantee.[67] State courts may also prospectively adopt a United States Supreme Court's test or standard used in a given constitutional doctrine.[68] It is worth noting that most state courts, on most issues, walk in lockstep with federal courts.[69]

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60. *Id.*

61. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996) ("*Robinette II*").

62. *Id.* at 42.

63. *Id.* at 40.

64. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 193-209 (2009) [hereinafter WILLIAMS].

65. *Id.* at 196-97.

66. *Id.* at 197-200.

67. *Id.* at 200-05.

68. *Id.* at 205-07. This approach is not as strict as prospective lockstepping, because the court adopts a federal method as opposed to a bright line rule. "The state court's actual decision or outcome in a specific case, in other words, might not in all cases conform to federal precedents." *Id.* at 205.

69. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

From a posture of unreflective adoption, state courts apply "federal analysis to a state clause without acknowledging the possibility of a different outcome."[70] This approach may be at the expense of more protective guarantees under the state constitution.[71] Justice Hans Linde of the Oregon Supreme Court has criticized the dearth of analysis that accompanies some state court adoption of federal constitutional interpretations.[72] In *State v. Kennedy*, after the United States Supreme Court had already reversed the Oregon Court of Appeals, Justice Linde addressed the argument that when a state constitution's provisions are "substantially identical" to the federal or other state constitutions, then the presumption follows that the state constitutional framers shared the same objectives as the framers of those constitutions.[73] He permitted that this may be so, but recognized that discovering constitutional objectives is different from discovering the correct application of constitutional meaning.[74] The framers of the Oregon Constitution may have shared the same goal in forbidding Double Jeopardy as the framers of the United States Constitution; but there is no straight line leading to the conclusion that the United States Supreme Court's interpretations of the federal Double Jeopardy clause "presumptively fix its correct meaning also in state constitutions."[75]

Professor Laurence Tribe has expressed similar concerns in the federal context. When Arkansas public schools refused to desegregate after *Brown v. Board of Education*, the Supreme Court in *Cooper v. Aaron* reiterated *Marbury v. Madison*'s basic lesson that federal explication of the United States Constitution, and therefore the interpretation of the Fourteenth Amendment in *Brown*, was the "supreme law of the land."[76] Tribe identifies two possible assumptions inscribed in that pronouncement. First, a Supreme Court constitutional decision effectively "announces a general norm of wide applicability."[77] This reading aggrandizes Supreme Court power over parties not appearing before it, but is justified by the great importance of equality.[78] The second, more odious interpretation of *Cooper*'s pronouncement is that "the Constitution is what the Court says it is, and no more."[79] If

70. WILLIAMS at 197.

71. *See id.*

72. State v. Kennedy, 666 P.2d 1316 (1983).

73. *Id.* at 1322.

74. *Id.*

75. *Id.*

76. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

77. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 33-34 (2d ed. 1988) [hereinafter TRIBE].

78. *Id.* at 34.

79. *Id.*

true, then constitutional meaning does not invite "legitimate dispute" when the Court has rendered a decision.[80] But this view "ignores the reality that . . . the Court is not alone is its responsibility to address that meaning."[81] Among the parties responsible for construing constitutional meaning, Tribe states, are state courts.[82] These criticisms highlight the importance of independent analysis from state courts.

### 2. Constitutional Guarantees Unique to the State

Justice Linde's analysis in *Sterling v. Cupp* is significant for its textual and historical depth, but also for his guidance on the proper sequence of state court adjudication of multiple claims when they include both state and federal issues.[83] In *Sterling*, male prisoners brought claims arising under both the Oregon and the United States Constitutions, complaining of offensive touching and observation by female security guards.[84] Justice Linde announced that state law analysis should precede federal analysis.[85] This makes sense: assuming state law applies at all, it does not *deny* any right flowing from the federal Constitution.[86] A valid state constitutional guarantee will go no lower than the floor of the federal Constitution. Justice Linde cited his opinion in *State v. Scharf* as support.[87] In *Scharf*, the defendant had been denied the right to counsel after being arrested for driving under the influence of alcohol.[88] Justice Linde indicated the state constitutional provisions may extend further than their federal analogues.[89] The state guarantee can provide the protection sought and still harmonize with Fourteenth Amendment due process.[90] And yet, although the United States Constitution only limits state officials, the mere absence of contrary state law does not necessarily authorize state action.[91] State law must

80. *Id.*

81. *Id.*

82. *Id.* at 75. Tribe's discussion deals facially with federal constitutional meaning, but his concerns with Supreme Court preemption of alternative yet legitimate views relates directly to the matter at hand.

83. 625 P.2d 123 (1981).

84. *Id.* at 125.

85. *Id.* at 126.

86. *Id.* "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."

87. *Id.*, fn. 2; State v. Scharf, 605 P.2d 690 (1980) (overruled on other grounds).

88. *Scharf*, 605 P.2d at 691.

89. *Id.*

90. *Id.*

91. *Id.*

affirmatively grant state officials the power to execute certain procedures.[92]

Application of the "state-issue first" principle in *Sterling* did not prevent Linde from critiquing the vague contours of the right to privacy first conjured in *Griswold v. Connecticut*.[93] The prisoners had claimed that the prison's policy of permitting female security guards to frisk male prisoners and observe them while using the toilet or shower violated their (federal) right to privacy and numerous guarantees provided by the Oregon Constitution.[94] Justice Linde characterized the right to privacy as "protean and emotive," quoting Professor Tribe in stating, "[a] concept in danger of embracing everything is a concept in danger of conveying nothing."[95] Federal litigants had seized upon the expansive reach of the federal right, such that Linde suspected that the prisoners had raised it in state court out of habit.[96] As asserted by *prisoners*, however, the right to privacy faced the disadvantage of a federal Constitution with relatively modest penal restrictions, limited to bills of attainder and cruel and unusual punishment.[97]

By contrast, state constitutions "often contain clauses expressly directed toward guaranteeing humane treatment of those prosecuted for crime."[98] Here is an important point on advocacy. As Judge Sutton has written, sometimes "the only way a lawyer can win is through the state constitution because it is the only constitution with a provision on point."[99] The Oregon Constitution, for its part, guaranteed protections which had no federal corollary. For instance, it provided that the purpose of punishment shall be for reformation, not retribution, and shall not affect persons or estates beyond that of the convicted individual.[100] Most important for the prisoners' claim was the provision that "[n]o person arrested, or confined in jail, shall be treated with unnecessary rigor."[101]

Justice Linde traced the history of the Oregon Constitution's provisions back to New Hampshire's 1783 constitution.[102] Ohio and Indiana borrowed similar provisions, and the "unnecessary rigor"

92. *Id.*
93. *Sterling*, 625 P.2d at 126 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
94. *Id.* at 127.
95. *Id.* at 127 (quoting TRIBE, AMERICAN CONSTITUTIONAL LAW 888-889 (1976)).
96. *Id.*
97. *Id.*
98. *Id.*
99. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 7, at 19.
100. *Sterling*, 625 P.2d at 127.
101. OR. CONST. art. I, § 13.
102. *Sterling*, 625 P.2d at 128.

guarantee appeared in Tennessee's constitution in 1796.[103] Acknowledging that texts differ, Justice Linde observed that some state constitutional conventions considered humane penal principles important enough to constitutionalize, even if James Madison did not engrave them into the Bill or Rights or if Congress has not amended the federal Constitution.[104] In this tradition, the Oregon Constitution mandated protections for which the United States Constitution—or cases interpreting it, for that matter—had no analogue.[105]

Oregon's constitutional guarantee against treating inmates with unnecessary rigor proved to be "a more cogent premise" than the federal right to privacy.[106] First, the source of the right was unquestionable. Whereas a "right to privacy" is an interpretative but not textual federal right, the right against "unnecessary rigor" was "expressly included in the political act of adopting a constitution."[107] Justice Linde thus attached importance not only to the explicitness of the constitutional right, but also the revealed political will of Oregonians. Second, protection against "unnecessary rigor" was textually germane to the claim at issue. The same could not be said of the "right to privacy," especially faced with the circumstance that rights of privacy are subject to forfeit after a criminal conviction.[108] The federal claim, in other words, offered protection less consistent and less focused than the state claim, which was drafted to apply to the very circumstances alleged by the prisoners.[109] Third, privacy is an elastic concept, waxing or waning in potency depending on the public policies at play.[110] In a prison context, the public policies often cut in the prison's favor. By contrast, the state claim scrutinizes state action by a necessity test and expressly applies to prisons.[111]

Justice Linde's demonstration of the state claim's superiority showed more than just the advantage of analyzing state claims before federal claims; he also showed state constitutional claims often include greater protection than federal constitutional claims.

103. *Id.*, fn. 11.

104. *Id.* at 129.

105. *Id.* at 128 ("The Oregon Constitution long has included in its Bill of Rights, besides the prohibition of cruel and unusual punishments, no less than five such provisions that have no federal parallel.").

106. *Id.* at 129.

107. *Id.*

108. *Sterling*, 625 P.2d at 129.

109. *Id.*

110. *Id.*

111. *Id.*

### 3. Parallel Guarantees, Different Results

*Sterling* displayed how a state supreme court may proceed when a litigant presents both state and federal claims. Another issue is how a state supreme court chooses to interpret state constitutional provisions when they parallel a federal right. In *Commonwealth v. Edmunds*, the question before the Pennsylvania Supreme Court was whether the good faith exception to the exclusionary rule applied to the Pennsylvania Constitution's similarly-worded guarantee against unreasonable searches and seizures. Pennsylvania's highest court decided that the good-faith exception to the exclusionary rule was not part of the Commonwealth's jurisprudence under Article 1, Section 8 of the Pennsylvania Constitution.[112] In so holding, the court flatly rejected the federal doctrine handed down by the United States Supreme Court in *United States v. Leon*, which held that the Fourth Amendment to the Constitution of the United States does not require the "extreme sanction" of excluding evidence when the officer acted in good faith reliance on an unconstitutional warrant.[113] *Edmunds* is significant not just for rendering a rule contrary to the United States Supreme Court's jurisprudence, but simultaneously establishing "a methodology to be followed in analyzing future state constitutional issues which arise under own Constitution."[114] Justice Ralph Cappy modeled a principled hermeneutic in reaching that result.

First, Justice Cappy discussed the federal case itself. Historical analysis revealed that *Leon* departed from a tradition of excluding unconstitutionally-seized evidence.[115] The exclusionary rule was a judicial remedy to violations of the Fourth Amendment and had its basis in deterring unconstitutional police activity.[116] *Leon* reasoned that excluding evidence acquired pursuant to an officer's good faith reliance on an improper warrant deprives the prosecution from the use of that evidence without correcting undesirable police behavior.[117]

Weary of the withering eye of *Michigan v. Long*, Justice Cappy emphasized the importance of rooting present and future decisions on Pennsylvania law to avoid review or reversal by the United States Supreme Court.[118] Therefore, litigants were directed to brief—and courts directed to apply—at least these four factors: (1) the text of the

112. Commonwealth v. Edmunds, 586 A.2d 887, 894 (1991).

113. United States v. Leon, 468 U.S. 897, 926 (1984).

114. *Id.* at 894.

115. *Edmunds*, 586 A.2d at 892.

116. *Id.*

117. *Id.* at 893.

118. *Id.* at 895.

Pennsylvania constitutional provision; (2) that provision's history, including Pennsylvania court decisions; (3) related case-law from other states; and (4) policy considerations, including "unique issues of state and local concern, and applicability with modern Pennsylvania jurisprudence."[119]

Applying that four-part framework, *Edmunds* began with a review of the Pennsylvania constitution's text, which was similar to the Fourth Amendment's language.[120] Critically, textual proximity was not enough to bind the state's highest court to the meaning preferred by the United States Supreme Court—even if the text is identical.[121]

The historical inquiry, however, proved to be the crucial analysis. Pennsylvanians enjoyed state constitutional protection against unreasonable searches and seizures more than ten years before the federal Constitution was adopted, and more than fifteen years before the Fourth Amendment was ratified.[122] The framers of the federal Constitution looked to the Pennsylvania Constitution and other state constitutions in sourcing much of what became the federal Bill of Rights.[123] Delaware provided a precursor to the federal guarantee against ex-post facto laws; North Carolina created rights for the accused, like trial by jury and the privilege against self-incrimination.[124] Article 1, Section 8 of the Pennsylvania Constitution—guaranteeing citizens the "right to hold themselves, their houses, papers and possessions free from search and seizure" that occurs without a warrant—also preceded the federal Constitution's Fourth Amendment.[125] The primary historical purpose of a warrant was to protect against the noxious British practice of sweeping residences and businesses based on nothing more than general suspicion.[126] A "strong notion of privacy" thus embodied Article 1, Section 8.[127] This privacy interest indwelt the state's exclusionary rule.[128] Justice Cappy contrasted the purposes of the Pennsylvania exclusionary rule with those of the federal exclusionary rule, acknowledging *Leon*'s position that the *sole purpose* of Fourth Amendment's exclusionary rule was to deter police misconduct.[129] To the extent the federal exclusionary rule was ever purposed to safeguard

119. *Id.*
120. *Id.*
121. *Id.* at 895-96
122. *Id.* at 896.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 897.
127. *Id.*
128. *See id.*
129. *Id.*

privacy, by 1973 the United States Supreme Court was vocalizing the central importance of deterring unlawful police conduct rather than redressing the injury to privacy.[130]

Meanwhile, Pennsylvania jurisprudence had remained true to the original motivation undergirding the exclusionary rule: protecting privacy. The United States Supreme Court based the good faith exception to the exclusionary rule on the inability for evidence suppression to correct police misbehavior. Where there is no police misconduct, there is no need for deterrence. But since Pennsylvania's exclusionary rule never rested completely on deterrence, its purpose applied even when officers acted in good faith on unconstitutional warrants. An officer's good faith did not ameliorate the injury to privacy. By elevating privacy above deterrence, the Pennsylvania Supreme Court preserved the Pennsylvania Constitution's exclusionary rule, as its purposes were still served by the suppression of evidence. By history's light, therefore, the Pennsylvania Supreme Court held that the adoption of a "good faith" exception to the exclusionary rule "would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years."[131]

*Edmunds* shows that even when a state's constitutional text is practically identical to the federal text, a state's history is gravid with meaningful differences from the parallel federal guarantee. The use of history can lead to drastically different results.

### 4. The Necessity of Principled State Constitutional Analysis

An important criticism of Ohio Supreme Court's cases expanding protection under the Ohio Constitution, beyond that which exists under the federal document, is the neglect of analysis.[132] It is not controversial that Ohio Constitution is a document of independent force which may extend broader coverage over individual rights than the federal Constitution mandates.[133] But absent an independent analysis of the state constitution's text, history, or early understandings, it remains unclear "why Ohio constitutional law should differ from the federal law."[134]

That trifecta of considerations, and others, have been a boon to other

130. *Id.*

131. *Id.* at 899. The Supreme Court of Pennsylvania also performed analysis on related case-law from other states and policy considerations.

132. *See, e.g.,* State v. Mole, 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 110 (French, J., dissenting); *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862 (*Aalim I*), ¶ 33-34 (Kennedy, J., dissenting).

133. *Aalim I*, 2016-Ohio-8278, ¶ 46.

134. *Mole*, 74 N.E.3d at 399, quoting State v. Brown, 39 N.E.3d 496, 503 (Ohio 2015).

state supreme courts interpreting their constitutions. In *State v. Gunwall*, the Washington Supreme Court set forth nonexclusive criteria relevant for determining when its state constitution should be interpreted to afford more significant rights than the federal Constitution.[135] Sharing some factors in common with the *Edmunds* considerations, these included inquiries into the language, textual differences, constitutional history, preexisting state law, structural differences, and matters of state and local concern.[136] Articulation of these interpretive principles was necessary in light of the growing concern with the expansion of state constitutional rights without an adequate analytical basis.[137] Review of state decisions revealed that the resort to state constitutional law, instead of analogous federal provisions, was often supported by little more than the simple announcement that the decision had a state constitutional basis, with no further explanation.[138]

The problem with these unsupported expansions of constitutional rights is that "they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law."[139] Constitutional principles do not "spring forth from the brow of an Olympian jurist" pondering mysteries, but from an "articulable, reasonable and reasoned" process.[140] By announcing from the bench specific analytical touchstones, the Washington Supreme Court had both practical and jurisprudential goals. First, they intended to guide counsel in briefing their state constitutional claims.[141] Second, they aimed to ensure that, if they did rely on state constitutional grounds, their decision would rest on "well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[142] Thus, a rational, replicable state constitutional hermeneutic promotes both the separation of powers and federalism.

Justice Goodwin Liu of the California Supreme Court has pointed out the infirmities of the "criteria approach."[143] "Most significantly," he says, "the approach treats federal precedent with a presumption of

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

136. *Id.*

137. *Id.* at 811.

138. *Id.* at 811-12.

139. *Id.* at 812.

140. *Id.* (quoting Professor George R. Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7,* 8 U. PUGET SOUND L. REV. 331, 347–48 (1985)).

141. *Id.* at 813.

142. *Id.*

143. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1314 (2017).

correctness that has no sound basis in our federal system."[144] Especially when it comes to state constitutional issues in equal protection, due process, or search and seizure, courts may focus on federal law or adopt federal tests because the authority is abundant and developed.[145] But Justice Liu advises that, rather than trusting in interpretative methodologies, "the crucial point is that state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*."[146]

Nevertheless, showing discipline in the analytical process has the virtue of predictability and replicability, enabling advocates to provide better guidance to their clients. A state court that does not address state constitutional claims with principled reasoning frustrates the already difficult task of advocacy. Next, we will address the refreshingly simple solution Ohio has employed in interpreting its constitution.

## III. JUDICIAL FEDERALISM IN OHIO

### *A. The Ohio Tradition*

#### 1. *Arnold v. Cleveland*

The Ohio tradition of Judicial Federalism begins with *Arnold v. Cleveland*.[147] The Ohio Supreme Court recently recognized that "*Arnold* stands as the court's first clear embrace of Justice William J. Brennan's watershed article."[148] *Arnold* addressed a local ordinance passed in Cleveland, banning the possession and sale of "assault weapons."[149] Some exceptions applied, such as for police officers and members of the armed forces.[150] Any assault weapons found to be in anyone else's possession were seized.[151]

Justice Andrew Douglas's majority opinion acknowledged the controversy that firearms engendered across the country.[152] He recognized the possibility that, if the same issue were debated at the time of the decision, the state constitution might read differently.[153] But

144. *Id.*
145. *Id.* at 1315.
146. *Id.*
147. State v. Mole, 2016-Ohio-5124, ¶ 15.
148. *Id.*
149. Arnold v. Cleveland, 616 N.E.2d 163, 166 (Ohio 1993).
150. *Id.* at 164.
151. *Id.*
152. *Id.* at 169.
153. *Id.*

he set the contemporary dynamics aside, observing that "it is our charge to determine and not to disturb the clear protections provided by the drafters of our Constitution."[154]

The text of the Second Amendment uses the term "militia" instead of referring to individuals. Justice Douglas approached the Second Amendment as being largely concerned with militias.[155] Section 4, Article I of the Ohio Constitution, in contrast, deploys a broader guarantee: "The people have the right to bear arms for their defense and security."[156] Justice Douglas noted that, unlike the federal Constitution's focus on the maintenance of a militia, Section 4, Article I affords Ohioans broader rights to firearms.[157] The language, he found, was clear.[158] The two semicolons suggest three independent clauses, suggesting that "the people of Ohio chose to go even further" than the Second Amendment.[159] Therefore, the Ohio Constitution appeared to secure firearm rights to individuals for the defense of self and property, not limiting the right to militias.[160]

Examining the legislative history, Justice Douglas observed that there was no recorded debate over the meaning of the right-to-bear-arms clause when the Ohio Constitution of 1802 was revised in 1851.[161] This led to the conclusion that the right was uncontroversial at that time.[162] Historical analysis revealed that the right to self-defense has never been unlawful in this nation.[163] Not only is the right to defend oneself one of our fundamental concepts of ordered liberty, but the right to possess a firearm has also been a symbol of freedom.[164] But this liberty is not without boundaries; just as the framers intended for Ohioans to have the right to bear firearms, they also intended for reasonable lines to be

154. *Id.*

155. Justice Douglas did not have the aid of much textual analysis on the Second Amendment. *District of Columbia v. Heller* was decided fifteen years after *Arnold*, and there seemed to be precious little federal analysis of the Second Amendment at the time. Justices Antonin Scalia and John Paul Stevens would "volley" opposing textual arguments on the Second Amendment, Stevens arguing that the omission of firearm uses conventionally associated with individual ownership (such as hunting or self-defense) was "especially striking" by the affirmative inclusion of individual firearm uses in contemporary charters like the Declarations of Rights of Pennsylvania and Vermont. District of Columbia v. Heller, 554 U.S. 570, 642 (2008). But in 1993, the Ohio Supreme Court simply noted that Section 4, Article I of the Ohio Constitution went beyond the militia and secured "to every person a fundamental *individual* right to bear arms." *Arnold*, 616 N.E.2d at 169.

156. OHIO CONST. art. I, § 4.

157. *Arnold*, 616 N.E.2d at 169.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Cleveland*, 616 N.E.2d at 169.

164. *Id.* at 170.

drawn "when certain rights have foreseeable consequences of causing harm to others."[165] On this analysis, the Court determined that the Ohio Constitution confers an affirmative, but not absolute, fundamental right to bear arms.[166]

*Arnold* did not go as far as the Supreme Courts of Washington or Pennsylvania in specifying an analytical methodology in addressing potentially divergent meanings within the state and federal constitutions. But the significance of *Arnold*'s textual and historical grounds for its result cannot be overstated. Anyone can read *Arnold* and appreciate *why* the Court decided the way it did. This is the kind of principled reasoning that promotes trust in the judiciary, enables advocates to more clearly advise their clients, and even gives the losing side the dignity of a well-reasoned, if unfavorable, opinion.

### 2. *Humphrey v. Lane*

Justice Judith French has pointed to *Humphrey v. Lane* as a model of analysis that state courts would do well to imitate when reading stronger guarantees into the Ohio Constitution.[167] Humphrey was a Native American who practiced Native American Spirituality and grew his hair out long in keeping with his faith.[168] He was also an employee of a correctional facility which enforced a grooming policy that required men to keep their hair no further than their collar.[169]

The trial court ruled in Humphrey's favor, finding—by a state constitutional analysis—that the state could not infringe on a sincerely held religious belief without showing a compelling state interest and that the state furthered that interest through the least restrictive means possible.[170] The appellate court reversed, holding that the lower court had used the wrong constitutional standard.[171] The showing of a compelling state interest was unnecessary. Instead, the appellate court applied the recently minted *Smith* analysis, which the United States Supreme Court used to hold that generally applicable, religion-neutral laws, having the incidental effect of burdening religious practice, need not be justified by a compelling state interest.[172] Since the grooming

165. *Id.* at 171.

166. *Id.* The Court went on to decide that the state could regulate firearm ownership based on its police power.

167. Video Recording: Interpreting State Constitutions, The Federalist Society, http://www.fed-soc.org/multimedia/detail/interpreting-state-constitutions-event-audiovideo.

168. Humphrey v. Lane, 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000).

169. *Id.*

170. *Id.* at 1042.

171. *Id.* at 1042-43.

172. *Id.*; *see also* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872

policy was generally applicable and neutral to religion, Humphrey lost on appeal.[173]

Justice Paul Pfeifer began with a textualist inquiry, contrasting the First Amendment to Section 7, Article I of the Ohio Constitution and recognizing that Section 7 is "devoted entirely to the freedom of religion."[174] This textual observation recognized that where the federal Constitution includes free speech and a free press along with the free exercise of religion, the Ohio Constitution reserves an entire section for the free exercise of religion. The specific proscription against "*interference* with the rights of conscience" was broader than the federal Constitution's mandate against laws *prohibiting* the free expression of religion.[175] A policy that does not prohibit religious expression may nevertheless interfere with the rights of conscience. Thus, Ohio's protection extends further than the federal protection.[176] The federal Constitution brooks tangential effects on religion, but the Ohio Constitution shows less tolerance for such tangential effects if they interfere with the conscience.[177]

What happened in *Humphrey* is analytically similar to *Sterling v. Cupp*, insofar as the state Supreme Court rejected a federal approach but found a state hook. In *Sterling*, the state hook was the Oregon Constitution's prohibition against treating prisoners with unnecessary rigor. In *Humphrey*, the state hook was the Ohio Constitution's prohibition against interference with the rights of conscience. *Humphrey* differs from *Sterling* because Article I, Section 7 had a federal corollary: the Free Expression Clause in the federal Constitution. But critically, the Ohio Supreme Court rejected the federal analysis on religion cases and used its own analysis.

The *Humphrey* analysis primarily applies when the state constitutional language differs meaningfully from the federal constitutional text. Unlike *Arnold*, *Humphrey* involved no historical analysis, legislative or judicial. Nor did it look to other states' decisions. But *Humphrey* is significant for its textual and structural analyses and its rejection of a federal test on the same constitutional right. Justice Pfeifer's majority opinion offers principled analysis with respect to exegeting the disparate meanings within the religion guarantees. But if the textual and structural differences are less pronounced, *Humphrey* may be of limited service.

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(1990).

173. *Id.*

174. *Humphrey*, 728 N.E.2d at 1043.

175. *Id.* at 1044 (emphasis added).

176. *Id.*

177. *Id.*

*B. Enlarged Equal Protection Rights and the Search for a Legal Theory*

One of Ohio's significant Judicial Federalism cases is *State v. Mole*.[178] Mole, a police officer, met a 14-year old minor boy on a dating app.[179] The minor initiated contact with Mole, telling him he was 18 years old.[180] Mole was 35.[181] Upon the minor's invitation, early one morning Mole went the minor's house, where they undressed and engaged in oral sex. The boy's mother discovered them. It was then that the police officer learned that the boy was actually 14.[182]

Mole was charged with sexual battery under R.C. 2907.03(A)(13), "which prohibits sexual conduct with a minor when the offender is more than two years older than the minor."[183] Mole argued before that, because the statute lacked a mens rea and because the statute failed "to connect a defendant's occupational status with proscribed sexual activity," the statute violated equal protection and due process.[184] This argument failed at the trial level.[185] Mole appealed, making the same equal protection and due process arguments struck down below.[186] The Eight District held that R.C. 2907.03(A)(13) "violated equal protection and was facially unconstitutional."[187]

Chief Justice Maureen O'Connor's lead opinion identifies *Arnold* as the Ohio Supreme Court's seminal enunciation of the Judicial Federalism, embracing the United States Supreme Court's recurring reminders to "state courts that they are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal constitution."[188] A state court is even free to reject the analysis employed by the United States Supreme Court in explicating corresponding constitutional guarantees.[189] The lead opinion also acknowledged the Ohio Supreme Court's inconsistent employ of the Judicial Federalism. In *Robinette III*, on remand from the United States Supreme Court, the Ohio Supreme Court tracked the federal analysis in construing Section 14, Article I of the Ohio

178. 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368.

179. *Id.* at ¶ 3; Julia Bianco, *Ohio Supreme Court Rules On Police Officer Accused of Having Sex with a Minor*, Cleveland 19 News (July 29, 2016, 10:07 a.m.), http://www.cleveland19.com/story/32572134/matthew-mole-supreme-court.

180. *Mole*, at ¶ 3-4.

181. *Id.* at ¶ 4.

182. *Id.*

183. *Id.* at ¶ 5.

184. *Id.* at ¶ 6.

185. *Id.*

186. *Mole*, 2016-Ohio-5124, ¶ 9.

187. *Id.*

188. *Id.* at ¶ 14 (quoting Arnold v. Cleveland, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993)).

189. *Id.*

Constitution, which has "virtually identical" language to the Fourth Amendment.[190] Unlike the Pennsylvania Supreme Court, the Ohio Supreme Court had tended to treat similar state constitutional language as having the same meaning as that with which the United States Supreme Court had imbued it.

Shortly after *Robinette III*, members of the Ohio Supreme Court proclaimed that they would not "'irreversibly tie [themselves]' to an interpretation of the language of the Ohio Constitution just because it is consistent with language of the federal Constitution."[191] And following in that spirit, the *Mole* lead opinion invalidated R.C. 2907.03(A)(13) and thus

> reaffirm[ed] that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers. We also reaffirm that we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states' constitutions.[192]

The lead opinion recounts the same observation Justice Brennan had made, that "the individual-rights guarantees of the Bill of Rights were based on pre-existing state constitutional guarantees, not the other way around."[193] This historical fact is especially germane when United States Supreme Court rulings "dilute or underenforce" significant individual rights.[194]

But when it came to the equal protection analysis—despite invocations of state court independence—the *Mole* plurality's reasoning is indistinct from federal equal protection analysis. The lead opinion cites both federal and Ohio cases throughout its equal protection analysis, without identifying what, if anything, distinguishes them.[195] The closest *Mole* comes to an *Arnold* analysis was its review of the historical purposes behind amending the sexual-battery statute to include a provision on peace officers, in order to determine whether the

190. *Id.* at ¶ 17; State v. Robinette, 80 Ohio St.3d 234, 238, 685 N.E.2d 762, 765, 1197-Ohio-343 (*Robinette III*).

191. *Mole*, 2016-Ohio-5124, at ¶ 17 (quoting Simmons-Harris v. Goff, 86 Ohio St.3d 1, 10, 711 N.E.2d 203 (1999)).

192. *Id.* at ¶ 21.

193. *Id.* at ¶ 22 (quoting State v. Short, 851 N.W.2d 474, 486 (Iowa 2014)).

194. *Id.*

195. *Id.* at ¶ 27-28.

amendment had a rational basis.[196] But after reading the *Mole* Court's analysis of the government interest, it is clear that, if this is Ohio's equal protection analysis, it is indistinct from the federal analysis.[197] As Justice French's dissent points out, the lead opinion's "puzzling" analysis "does not articulate a new rule or standard for examining equal-protection claims under the Ohio Constitution. Rather, the lead opinion recites a substantially similar rational-basis test under both the Ohio and federal Constitutions."[198]

*Mole* invoked constitutional independence, but did not create a new tier of scrutiny or a new concept of equal protection altogether; rather, it applied the same test used in the federal courts and cited several federal cases for support. And to the extent it reached a different result that a federal court would have reached, it is not clear what analytical considerations the lead opinion applied to the actual constitutional provisions. Thus, despite *Mole*'s purported enlargement of equal protection rights under the Ohio Constitution, it remains unclear what legal theory attorneys ought to raise in achieving the same success for their clients.

### *C. The Importance of Text and History—and Raising the Argument*

Some justices have helpfully signaled what they are looking for in state constitutional analysis, when they are tasked with addressing potential differences between the Ohio and federal constitutions. Justice Sharon Kennedy's *Mole* dissent argues that the interpretation of Ohio's constitutional provisions "should be guided exclusively by the language and history of the clause at issue."[199] As for the cases the *Mole* lead opinion relied on, most of them—unlike the lead opinion itself—"engaged in an *Arnold* analysis by examining the text and history of the provision before taking the formidable step of declaring that a provision of the Ohio Constitution is more protective."[200] Justice French also took issue in *Mole* with the lack of an independent analysis of the language, history, and early understandings of Ohio's equal protection guarantee.[201] She voiced her frustration again in *State v. Aalim I*, in which the majority rendered broad constitutional protection—this time in the due process context—on largely precedential, decisional, and policy bases, but without *Arnold*'s more rigorous constitutional analysis.

196. *Id.* at ¶ 36-42.
197. *Id.* at ¶ 45-68.
198. *Id.* at ¶ 118 (French, J., dissenting).
199. *Id.* at ¶ 91 (Kennedy, J., dissenting).
200. *Id.* at ¶ 82 (Kennedy, J., dissenting).
201. *Id.* at ¶ 117 (French, J., dissenting).

Justice French wrote that the majority had asserted "no basis—other than mere permissibility."[202] Justice Patrick DeWine, in *Aalim II*, noted that the recognition that the Ohio Constitution may provide greater protection does not give the court "unfettered license" to strike down legislation.[203] "Rather, in construing our state Constitution, we are bound by the text of the document as understood in light of our history and traditions."[204]

Thus, in expressing the importance of textual and historical analyses, some members of the court are seeking to anchor cases on principles first articulated in *Arnold*. *Arnold* elevated the text and relevant history, including early understandings of the text, such that these considerations not only disposed of the legal question, but developed the law as well. Lack of an *Arnold* analysis, on the other hand, in the context of equal protection, will be especially problematic given precedent holding that the federal and Ohio equal protection clauses are to be "construed and analyzed identically."[205] Indeed, the issue of whether the Ohio equal protection clause is or is not coextensive with the federal equal protection clause seems to, in practice, depend on the case. *Mole* purported to apply a broader equal protection right under the Ohio Constitution than exists under the federal Constitution.[206] Yet, a few months later, in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, the court noted that the two provisions are equivalent.[207] But a week after *Simpkins*, Ohio's equal protection clause was "coextensive with, or stronger than, that of the federal Constitution."[208]

Equal protection is just one area of law that would benefit from the intentional application of a state constitutional interpretive standards. An *Arnold* analysis of Article I, Section 2's text and history—applied to the question of whether Ohio's equal protection clause substantively differs from the federal equal protection clause—would at least have the virtue of being principled.[209] Justice Patrick Fischer has indicated that both a

202. *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 47 (*Aalim I*) (vacated). For a discussion of the *Aalim* cases, *see* Jesse Knowlden, *State of Ohio v. Aalim: Due Process and Mandatory Transfer of Juveniles to Adult Court*, 87 U. CIN. L. REV. 251 (2018).

203. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 45 (*Aalim II*) (DeWine, J., concurring).

204. *Id.*

205. Am. Assn. of Univ. Professors, Cent. Univ. Chapter v. Cent. State Univ., 87 Ohio St.3d 55, 60, 717 N.E.2d 286 (1999).

206. *Mole* at ¶ 23.

207. 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 46. These cases have not drawn majorities. *Mole* was a three-justice plurality with one justice concurring in the judgment. *Simpkins* was completely splintered, within two justices concurring in the opinion, one justice concurring in the result, two justices voting to dismiss the case as improvidently accepted, and two justices dissenting.

208. State v. Noling, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11.

209. It is beyond the scope of this Article to fully explore the textual and historical differences of

textual comparison of the equal protection clauses and recent decisions "reject the conclusion that the two equal-protection provisions are 'functionally equivalent.'"[210] Ohio's equal protection language was formulated in 1851, seventeen years before the federal Constitution's Fourteenth Amendment was adopted.[211] The language of the two provisions also differs. The federal provision: no state shall "deny to any person within its jurisdiction the equal protection of the laws."[212] The state provision: "political power is inherent in the people. Government is instituted for their equal protection and benefit."[213] Therefore, "it is possible that the two provisions set forth unique protections that are not necessarily contained in both provisions."[214]

Eventually, the Court will address whether it will treat the two provisions identically. But the Court has been clear that it is inappropriate to settle the issue when the litigants do not raise or brief it.[215] In *Simpkins*, among other cases, the parties did not argue that Ohio's equal protection clause provided greater protection than the federal version, and so the court did not consider the possible differences.[216] Thus, it appears that the Ohio Supreme Court is committed to the dispute-resolution model of deciding cases, as opposed to the law-declaration model. That is, it will tend to limit itself to the arguments that the parties raise in their briefs and decide cases based on the record. And considering some of the opinions of Justices Kennedy, French, and DeWine, it appears that what will go a long way with the Ohio Supreme Court is clear analysis of the constitutional text and history, including early understandings of the text and a keen eye for precedent. To brief cases along these lines would not break new ground; it would simply be an application of *Arnold*. But the issues need to be raised in order for the Court to decide them.

So it is that both attorneys and judges share in the responsibility to clarify an approach to Ohio's constitutional law. On one hand, when attorneys fail to advance arguments that the Ohio Constitution differs

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the two equal protection clauses.

210. State v. Moore, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 40 (Fischer, J., concurring).

211. *Id.* at ¶ 39 (Fischer, J., concurring).

212. U.S. CONST. amend. XIV.

213. OHIO CONST. art. I, § 2.

214. *Moore*, 2018-Ohio-3237, at ¶ 39 (Fischer, J., concurring).

215. *Id.* at ¶ 22 ("Most recently, we have considered the two guarantees to be 'functionally equivalent' and employed the same analysis under both provisions. No party has suggested that we do otherwise today. Thus, we agree with the opinion concurring in judgment only that this is not an appropriate case to take up the question whether the provisions should be given different treatment."); *see also id.* at ¶ 40 (Fischer, J., concurring).

216. *See, e.g., Simpkins* at ¶ 46; *Stolz v. J & B. Steel Erectors, Inc.*, 2018-Ohio-5088, ¶ 11; *Moore* at ¶ 22; Cleveland v. Oles, 152 Ohio St.3d 1, 2017-Ohio-5384, 92 N.E.2d 810, ¶ 32 fn. 1.

meaningfully from the federal Constitution, the Court is not likely to make the argument for them.[217] On the other hand, when the Court has treated the issue, it has occasionally purported to expand protection under the Ohio Constitution, but without consistently explaining why the state constitutional guarantee actually affords that protection. It does not clarify matters when the Court teases that the Ohio Constitution's promises are "coextensive with, or stronger than, that of the federal Constitution,"[218] if it does not say *how* it is stronger or *what analysis* applies to make it stronger. Principled guidance as to how the Ohio Constitution differs from the federal Constitution would invite and bolster litigants' constitutional arguments and aid future court compositions in developing caselaw. But on a court that can change membership every couple election cycles, lack of guidance will lead to greater confusion, diminishing the ability of attorneys to shape their clients' expectations about what to expect in state courts.

## IV. CONCLUSION

Federalism provides us with rights under two constitutions. Both are capable of offering unique protection. It is beneficial when the state constitution offers added protection, but without principled reasons for why it is different, courts will render inconsistent outcomes with *ad hoc* analysis. The Ohio Supreme Court's advantage is that, as its membership changes, the analytical perspectives available to Ohio's litigants change. But without a commitment to certain analytical principles, it has, on occasion, broken loose of its moorings in *Arnold*.

Judge Sutton's suggestion that fifty-one imperfect solutions are better than one imperfect (federal) solution is timely and well-taken.[219] For any state court's "imperfect solution"—that is, its own approach to constitutional interpretation—the virtue lies in an opportunity to articulate meaningful differences between the state and federal constitutions. A constitutional provision may be indeterminate, but inquiries into its text and history can yield well-reasoned decisions. Such decisionmaking promotes the judiciary's public image as the branch of government that relies, not on a purse or a sword for justification, but on its fair and principled reasoning. But on the other hand, a state court's vice—the condition keeping its solution imperfect—is the potential for analytical randomness. In Ohio, the non-adherence to *Arnold*'s constitutional guidelines leads, at best, to

217. *Moore* at ¶ 22.

218. State v. Noling, 149 Ohio St.3d 327, 016-Ohio-8252, 75 N.E.3d 141, ¶ 11.

219. Sutton, *State Constitutional Law*, *supra* note 7, at 175-76; SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 7.

uncertainty. Attorneys are hindered from counselling their clients based on reasonable expectations of how courts may apply the Ohio Constitution. At worst, it threatens to turn constitutional exegesis into eisegesis: reading meanings into the text that are not there. Deciding cases out of "judicial necessity"[220] compromises the judiciary's legitimacy in government and exchanges that great preservative of the public trust—force of legal reasoning[221]—for discrete resolutions of cases that seem to be the result of foregone conclusions. But by recommitting itself to a rational, reliable, and replicable hermeneutic—and returning to the standards under *Arnold*—the Ohio Supreme Court can make strides in the long project of perfecting our solution to constitutional differences.

220. *Mole*, 2016-Ohio-5124, ¶ 91.

221. *See* Jeffrey S. Sutton, *A Review of Richard Posner, How Judge's Think (2008)*, 108 MICH. L. REV. 859, 861 (2010).