

Washington Law Review

Volume 64
Number 1 *Dedication to Professor Charles E.
Corker; Symposium on State Constitutional Law*

1-1-1989

Foreword: The Once "New Judicial Federalism" & Its Critics

Ronald K.L. Collins
University of Washington School of Law

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Ronald K. Collins, Symposium, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 Wash. L. Rev. 5 (1989).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol64/iss1/4>

This Symposium is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

FOREWORD: THE ONCE “NEW JUDICIAL FEDERALISM” & ITS CRITICS*

Ronald K.L. Collins**

The first critic of the once “new judicial federalism”¹ is also the person credited with being its “intellectual godfather”²—Hans Linde. Back in the pristine years of this constitutional experiment, then Professor Linde warned: A state court cannot undertake “to evolve an independent jurisprudence under the state constitution . . . by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result.”³ Perhaps his influence in this area is attributable to the fact that he is, in a certain sense, both critic and “crusader.”

Of course, the claim needs to be explained.⁴ Even so, the larger point remains: from the outset, there have been troubling tenets of the “new federalism” which have made it quite vulnerable to criticism. As this constitutional movement enters the close of its second decade, scholarly criticism⁵ continues. It is that body of criticism which I will

* Copyright 1988, R. Collins.

** Visiting Professor of Law, American University (Washington, D.C.) and Temple University (Philadelphia, PA); former law clerk to Justice Hans A. Linde, Oregon Supreme Court.

1. See Collins, *Foreword: Reliance on State Constitutions—Beyond the “New Federalism,”* 8 U. PUGET SOUND L. REV. vi (1985) [hereinafter Collins, *Beyond the “New Federalism”*] (“The ‘new federalism’ isn’t new anymore.”).

2. Toobin, *Better Than Burger*, NEW REPUBLIC MAG., Mar. 4, 1985, at 10, 11.

3. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 146 (1970) [hereinafter Linde, *Without “Due Process”*]; see also Linde, Book Reviews, 52 OR. L. REV. 325, 338 (1973) (“The selection of a state or federal ground of constitutional protection should not be a choice of judicial tactics . . .”).

4. What Linde opposed was the reactive or irresponsible use of state law. Unlike later critics, however, he actively called for the *systematic* use of state law in a way that “give[s] as much attention and respect to the different constitutional sources” and at the same time strives “for some continuity and consistency in their use.” Linde, *Without “Due Process,” supra* note 3, at 146; see also Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 193–200 (1984).

5. See, e.g., Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DEN. U.L. REV. 85 (1985); Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) [hereinafter Maltz, *False Prophet*]; Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS 98 (1988) [hereinafter Maltz, *Lockstep Analysis*]; Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) [hereinafter Maltz, *State Court Activism*]; Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13 (1988); see also authorities cited *infra* notes 6, 7. An informative critique of several of the points advanced by these critics is presented in McAfee, *The Illinois Bill of*

consider, if only in a preliminary manner, in this Foreword to the *Washington Law Review* Symposium on state constitutional law.

* * * *

The central claims of the critics may be summarized this way: (1) reliance on state law is largely, if not entirely, result-oriented in a way that usurps the powers of the coordinate branches of state government; (2) such reliance is illegitimate in that it insulates certain constitutional decisions from federal review; (3) most rights-affirming rulings simply cannot be squared with historical intent; (4) absent clear historical or textual warrant, state law decisions which deviate from federal standards are either illegitimate per se or illegitimate to the extent that they are not the product of "neutral criteria" which rely heavily upon historical and textual considerations; (5) variant state constitutional rulings undermine the need for uniformity in decisionmaking; (6) the "new federalism" really does not further the goals of federalism; and (7) state constitutional interpretation frustrates the political process.

At the outset, it may be helpful to identify several of the premises implicit in many or all of the above claims: (1) federal decisional law is the analytical yardstick by which to determine the legitimacy of state law decisions; (2) the ultimate constitutional responsibility for judging individual rights claims ought to be delegated to the United States Supreme Court; (3) historical intent should be given paramount jurisprudential weight at the state level; (4) state constitutional provisions which are similar or identical to their federal analogues are functionally irrelevant; (5) in principle, there are no meaningful differences between the various models of what has been called the "new federalism"; and (6) federal supremacy and minimum standards notwithstanding, uniformity as a norm is significantly more important in constitutional law than in other areas of law. Obviously, a number of these premises, like the claims to which they correspond, either overlap or closely parallel others. Accordingly, I will address both the claims and the premises in a more general sense.

Since the early 1970's, what has troubled the critics of the once "new judicial federalism" is the *strategic* use of state constitutional law in a way that expands the rights domain while insulating such state court decisions from otherwise adverse federal court review. For example, this judicial "tactic" is most controversial when state courts rely on *both* state and federal law to vindicate some uncertain claim of

Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine, 12 S. ILL. U.L.J. 1, 33-87 (1987).

constitutional right. Thus, Professor (now Dean) Scott Bice argued early along that “[i]f a state court bases a decision on independent state and federal grounds to gain [an] ‘insulation effect,’ its action is illegitimate.”⁶ Similarly, California Attorney General (now Governor) George Deukmejian and Clifford Thompson complained:

Easily the most troubling and the least justifiable feature of the California Supreme Court’s mode of state constitutional interpretation is its “dual reliance” technique. By invoking the state constitution the court insulates its decisions from federal judicial review; by simultaneously invoking the Federal Constitution, the court effectively blocks popular review through the initiative process.⁷

Clearly, what is really at issue here is “judicial restraint.” The critics take scholarly umbrage at a form of decisionmaking that uses the shibboleth of the “new federalism” as a device to push state judicial power beyond its perceived constituted limits. For them the revival of interest in state law is but another form of “result-oriented” jurisprudence, this time in the service of the cause of rights-maximization.

* * * *

Assuming *arguendo* that such state constitutional decisions, even a significant number of them, are expansive in a way that gives rise to the charge of rule by judicial fiat, the real issue is: how do we determine them to be so? For most, if not all, critics of the “new judicial federalism” this question is answered by reference to contemporary Supreme Court case law. In other words, this relational focus posits that national decisional law is the proper and primary yardstick by which to measure the legitimacy of state court rulings construing state bills and declarations of rights. Thus, if a Kentucky court rejects a federal decisional formula bearing on the law of search and seizure, the state ruling is seen as presumptively (if not conclusively) suspect. Of course, the critics allow for the presumption to be overcome if the state court can muster up the requisite textual specificity, historical support or “neutral criteria” to “*justify*” this deviation from federal case law. Failing this, our Kentucky judges are likely to be branded men⁸ if they depart from federal law.

6. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 757 (1972).

7. Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996–97 (1979). Of course, the latter assertion is not quite true as evidenced by the passage of the so-called “Victims’ Bill of Rights” initiative. See CAL. CONST. art. I, § 28.

8. With the exception of Court of Appeals Judge Judy M. West, no women currently sit on the state supreme or intermediate appellate courts in Kentucky.

However jurisprudentially suspect our hypothetical Kentucky decision might otherwise be, it should not be deemed so simply or primarily because it is not situated in the shadow of federal decisional law. That is, the relational focus test is itself both ideologically biased and analytically deficient. I say this for nine reasons.

First, the critics invoke the relational focus test in individual rights cases only. The test does not appear to have any currency, at least in the critics' view, outside of this sphere of the law. Hence, if our Kentucky court relied on its own law and announced a separation of powers standard different from the one articulated recently in *Morrison v. Olson*,⁹ the critics' presumption of illegitimacy probably would not attach. The same would be true if a state court charted its own course in state antitrust law, this in the face of parallel federal statutory law as interpreted by the Supreme Court.¹⁰ Likewise, what about home rule? Should the thoughtful arguments later advanced in this issue by Professor Michael Libonati,¹¹ for example, be presumed valid or invalid by virtue of their compatibility with the parallel federal allocation of powers principle set forth in *Garcia v. San Antonio Metropolitan Transit Authority*?¹² To the extent that the relational focus test is arbitrarily confined to the law bearing on individual rights questions, the critics' test is itself vulnerable to the charge of result-oriented jurisprudence.

Second, the critics almost uniformly remain silent in the face of state constitutional decisions which produce results equivalent to

9. 108 S. Ct. 2597 (1988).

10. See generally Frank, Book Reviews, 63 TEX. L. REV. 1339, 1345-46 n.36 (1985). This principle of variation has been defended by government lawyers. See ANTITRUST ENFORCEMENT: HORIZONTAL MERGER GUIDELINES OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 3 n.8 (Mar. 10, 1987) (on file with author); see also Barrett, *Attorneys General Flex Their Muscles: State Officials Join Forces to Press Consumer and Antitrust Concerns*, Wall St. J., July 13, 1988, § 2, at 21, col. 3.

And what about state administrative law, where state statutes may derive from the federal Administrative Procedure Act? Are the state APAs to be interpreted in unison with their national counterpart? For a thoughtful discussion of this point, see Bonfield, *State Law in the Teaching of Administrative Laws: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 103-35 (1982); see also LINDE, BUNN, PAFF & CHURCH, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 458-563 (1981) (regarding differing federal and state delegated authority rules).

11. See Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51 (1989). The same principles announced in the text hold true with reference to the student contribution to the home rule question. See Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155 (1989).

12. 469 U.S. 528 (1985). My point is not that the *Garcia* principle offers no guidance to state judges considering home rule questions. Rather, the federal principle is not, and should not, be held to be jurisprudentially determinative or even presumptively determinative. Consider Libonati, *Intergovernmental Relations in State Constitutional Law: A Historical Overview*, 496 ANNALS 107, 115 (1988).

Supreme Court precedents, this even when the analysis employed in the former is dubious. For example, in *State v. Felmet*,¹³ a public fora access to shopping center case, the North Carolina Supreme Court echoed the fourteenth amendment holding in *Hudgens v. NLRB*.¹⁴ But the state court did so by a cavalier assertion that such expressive activities amount to an unprotected “abuse” of expression under the state constitution.¹⁵ This bold and bear assertion was all the court offered. The result, though not the reasoning, obtained in the case may be justifiable,¹⁶ but it does not become so simply because the result mirrors federal decisional law. Similarly, when the Idaho Supreme Court¹⁷ elected to follow the *Illinois v. Gates*¹⁸ fourth amendment probable cause formula, it aligned federal and state law in the face of a state statute codifying the *Aguilar-Spinelli*¹⁹ probable cause standard. In different respects, both the North Carolina and Idaho rulings are jurisprudentially objectionable. Yet insofar as they render results identical to their federal counterpart, the handiwork of such state judges does not suffer the critics’ harangues. In other words, “judicial activism,” thus understood, is a label reserved for rights-affirming but not for rights-denying state decisions. (Little wonder, then, that in some quarters “expansionist” decisionmaking is the expression preferred by the critics.) The relational focus employed by

13. 302 N.C. 173, 273 S.E.2d 708, 712 (1981).

14. 424 U.S. 507 (1976).

15. N.C. CONST. art. I, § 14 provides: “Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.” The best discussion of the “abuse” provision may be found in an Oregon line of cases leading up to *State v. Robertson*, 293 Or. 402, 649 P.2d 569, 587–90 (1982).

16. Consider *Cologne v. Westfarms Ass’n*, 192 Conn. 48, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985).

As I view it, the state constitutional law problem with the “shopping center” line of cases is essentially twofold: First, if there is warrant to dispense with “state action” in this area, what principle should guide courts where claimants seek to set the requirement aside in other areas? The most thoughtful examination of this general issue has been provided by Professor David Skover. I say this even though I have some reservations about certain tenets of his thesis. See Skover, *The Washington Constitutional “State Action” Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985). Second, there is the question (typically overlooked or not analyzed) of protecting property rights as a matter of state constitutional law, the constitutional texts of which are often facially more restrictive than the fifth amendment. See Collins, *Bills & Declarations of Rights Digest*, in *THE AMERICAN BENCH 2520–23* (3d ed. 1985); Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 9–10 (1981) [hereinafter Collins, *Reliance on State Constitutions*].

17. See *State v. Lang*, 105 Idaho 683, 685 & n.1, 672 P.2d 561, 563 & n.1 (1983). *But cf.* *State v. Painter*, 296 Or. 422, 676 P.2d 309, 312–14 (1984).

18. 462 U.S. 213 (1983).

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

the critics of the "new federalism" is well suited to this (result-conclusive?) enterprise.

Third, though there is division in the ranks,²⁰ some of the more modest critics hold that the relational focus, replete with its "neutral criteria" test,²¹ is only to be tapped when state law is relied upon to *expand* constitutional protection beyond the national boundaries. Hence, the test does not come into play where: (a) an equivalent level of protection is given, even if for different reasons; or (b) a lesser level of state law protection is recognized;²² or (c) where an issue arises which has not been considered the Supreme Court; or (d) where the text of the state law either has no federal analogue or where it is notably different from its federal counterpart. Under this jurisprudential regime, the state constitution is divided into provisions of independent and dependent staying power.²³ Textual differences render a provision viable, while textual similarity renders a provision nugatory.²⁴ The problem of the divided constitution does not alarm the critics of the "new judicial federalism" who have their eyes trained on federal law.

Fourth, even if one concedes the value of the critics' "neutral criteria" in the state constitutional interpretive enterprise, the criteria typically tendered are importantly incomplete. The standard criteria the critics suggest to justify divergence from federal case law are: Text, history, structure, pre-federal precedent state decisional law; and local traditions.²⁵ One missing criterion, of course, is analytical soundness,

20. Compare Deukmejian & Thompson, *supra* note 7, at 986 (arguing that criteria should be used to "determine whether a decision should be based upon federal or state constitutional grants") with Hudnut, *supra* note 5, at 99 (arguing that criteria should be used to determine "when to provide greater protection under the state constitution"). For the extreme view, see Maltz, *False Prophet*, *supra* note 5, at 443 ("[T]he decision by a state court to follow the lockstep approach for resolving state constitutional claims reflects the view that there is no need for additional judicial review when some judicial review exists already at the federal level."); Maltz, *Lockstep Analysis*, *supra* note 5, at 101 (same). But see Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1111–35 (1985); McAfee, *supra* note 5, at 51–75; Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's 'Forced Linkage' Amendment*, 39 U. FLA. L. REV. 653, 676–82 (1987).

21. See, e.g., *State v. Hunt*, 91 N.J. 338, 364–68, 450 A.2d 952, 965–67 (1982) (Handler, J., concurring); *State v. Gunwall*, 106 Wash. 2d 54, 61–63, 720 P.2d 808, 812–13 (1986); *State v. Simpson*, 95 Wash. 2d 170, 200–02, 622 P.2d 1199, 1217–18 (1980) (Horowitz, J., dissenting). See generally Collins, *Reliance on State Constitutions*, *supra* note 16, at 17–18 & n.60.

22. See Collins, *Reliance on State Constitutions*, *supra* note 16, at 15–16; Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 327–28 (1986); Gormley, *Ten Adventures in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 29, 46–50 (1988).

23. For an elaboration of this point, see Collins, *supra* note 20, at 1117–23.

24. See *id.* at 1111–16.

25. If what the critics desire is "judicial restraint," this criterion is ill-suited to that end. The criterion, to put it kindly, is troublesome to work with as a principle of law because its open-

Foreword

which at least includes the first four criteria. Consider this point in light of the following hypothetical. Assume the year is 1966 and our Kentucky court must decide whether its state search and seizure clause²⁶ should be limited to tangible items only. The state and federal texts are virtually identical, the texts²⁷ of both being patterned after the Revolutionary-era Virginia and Pennsylvania Declarations of Rights.²⁸ As is often the case with such provisions, neither the structure of the state constitution nor the meager history of its bill of rights²⁹ offers any sufficient guidance. Likewise, local tradition is

ended potential makes it easily manipulable. Perhaps sensitive to this point, one critic recently sought to discern a principle of tradition (a “constitutional attitude”) from a state constitutional text. In doing so, he drew on the following language, omitting, however, reference to the italicized language:

[F]requent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry[,] and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free[;] *the people ought, therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right, in a legal way, to exact due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the State.*

Teachout, *supra* note 5, at 46 (footnote omitted) (*citing* Vt. Const. ch. I, art. 18 [italicized language added]). On this occasion, and in the interests of brevity, I offer two interpretive points counter to the narrowing ones given at *id.* at 47. First, the Vermont provision is concerned with “principles” over particular historical conceptions. Consider R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–37, 148 (1977). This point may be of great consequence in the state constitutional interpretive process. *See, e.g.,* State v. Robertson, 293 Or. 402, 434, 649 P.2d 569, 588 (1982) (“Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle.”). Second, when the italicized language is read in tandem with the language above it, it is not at all clear that the provision counsels judges to be narrow-minded when vindicating rights in the name of “justice” or when taking steps to insure that lawmakers and executive officials proceed with the requisite constitutional “moderation.” *See, e.g.,* Skover, *supra* note 16, at 276–81. *See generally* I A. HOWARD, *COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* 281–87 (1974); Jarrard, *A Frequent Recurrence to Fundamental Principles*, (1986) (unpublished manuscript on file with author).

26. KY. CONST. § 10.

27. As argued in note 29, *infra*, the critics of the “new judicial federalism” can be skeptical of the kind of textualism that emphasizes the different wordings in state constitutions, wordings which suggest protection beyond federal law. For one example of such text-based arguments, see Feldman & Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 123–44 (1988). By the same token, the textualists do have their doubts about the historical intent project. *See, e.g.,* Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D.L. REV. 157, 228, 241, 270, 272–79 (1987).

28. *See* 2 B. SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* 235 (1980) (VA. CONST. of 1776, § 10); *id.* at 265 (PA. CONST. 1776, § 10); *see also* B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 88 (1977).

29. Because most state bills or declaration of rights clauses were borrowed without any or much debate from other states, it is not unusual to find little or no helpful historical evidence at the state level. *See* Collins, *Litigating State Constitutional Issues: The Government’s Case*, 1 EMERGING ISSUES ST. CONST. L. 201, 204–06 (1988) (journal published by the National

hardly determinative. Assume as well that at this point in time federal fourth amendment law holds that the search and seizure clause applies only to tangible items. As applied, the critics' "neutral criteria" would outlaw state court reliance on the very kinds of arguments advanced by Justice Brandeis in his famous *Olmstead* dissent.³⁰ The point here is not that state judges ought to adopt discarded Supreme Court dissents. Rather, there may well be times when the analytically sounder argument is contrary to current federal precedent.³¹ Analytical soundness is not included among the critics' criteria probably because it would sometimes prove incompatible with their rights-minimizing view of law.

Fifth, most of the exponents of the relational focus view of things either deny or discount the possibility of there being occasions when state courts, properly relying on state law, may decline to incorporate certain federal decisional law rules into the corpus of state law.³² For

Association of Attorneys General, Wash., D.C.). And at the very least, history suggests that most state bills and declarations of rights were intended to have independent force if only because prior to incorporation "the protections of the federal Bill of Rights [had] 'no application' to the states; 'they [were] restrictions upon the power of the United States; they [were] not restrictions upon the states.'" Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 81 (1988) (footnote omitted); accord Feldman & Abney, *supra* note 27, at 116.

I do not dismiss the usefulness of historical evidence as one criterion. Consider, e.g., McCabe, *State Constitutions and The 'Open Fields' Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of 'Possessions'*, 13 VT. L. REV. 179 (1988). But see Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MARSHALL J. PRAC. & PRO. 189, 214 (1975). Still, I sense that the critics of the "new judicial federalism" attach far too much weight to it and in doing so: (1) they do not understand how the state provisions came to be law; or (2) they do understand the latter but rely on the historical criterion as a trump card to diminish the rights domain; or (3) they resort to history as a way of circumventing the consequences of textualism (see note 27, *supra*); or (4) they do not fully appreciate the shortcomings of determinative historicism. As to the last point, consider the varying views of Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985), and Utter & Larson, *Church & State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 478 (1988) ("The history of the establishment clauses of the Washington State Constitution does not necessarily control current interpretation.").

30. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting). The *Olmstead* rule was abandoned by a 7-1 margin in *Katz v. United States*, 389 U.S. 347, 353 (1967). For a more recent example of the general kind of issue identified in the text, see *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988) (holding that police use of a radio transmitter attached to an auto amounts to a search under state law).

31. See *infra* note 34. The same sort of considerations ought to inform examination of various death penalty issues. Consider Comment, *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 WASH. L. REV. 111 (1989).

32. See *supra* note 22. Professor Maltz, at least as of late, does not discount the possibility. He even criticizes the proponents of the "new judicial federalism" for ignoring it. Maltz, *False Prophet*, *supra* note 5, at 443-49; Maltz, *Lockstep Analysis*, *supra* note 5, at 103-06. In light of my prior writings on this subject, see *supra* note 22, I am unsure why he takes issue with me or

example, as matter of state law, some state judges may be hesitant or unwilling to create jurisprudential shelter for substantive due process or a commercial speech doctrine of the kind presently in place under federal law. Though the texts of the corresponding guarantees may be identical or similar, and though history, structure and local tradition may not provide a determinative answer, there nevertheless may be sound analytical reasons for rejecting federal formulae. Relational concerns notwithstanding, state courts should be willing to repudiate logically unsound theories while interpreting their own law, provided, of course, that they in no way abridge or interfere with any rights due under the national Constitution. This point, among others, is made by Professor G. Alan Tarr³³ in his useful contribution to this Symposium:

[B]ecause state judges can interpret their constitutions independently—without reference to federal . . . norms—they may conclude that state constitutions require less, more, or the same level of separation of church and state as is required under the federal Establishment Clause. . . . [Thus,] the meaning of state provisions does not depend upon the meaning of their federal counterparts.³⁴

It is precisely that focus, sensitive to the concerns of analytical soundness, that provides scholar and judge with the necessary tools to formulate, for example, a satisfactory state constitutional jurisprudence of church and state.³⁵ By contrast, the critics and the activists they challenge both understand the state constitutional interpretative

what the difference is between us on this particular point. Furthermore, he does fault me for criticizing an Oregon court plurality opinion which refused to incorporate the *Miranda* rule into state law. Maltz, *False Prophet*, *supra* note 5, at 445; Maltz, *Lockstep Analysis*, *supra* note 5, at 103. My criticism of the Oregon plurality opinion, which is entirely consistent with my earlier and current views, is not with the principle that the plurality could reject federal standards. Rather, my complaint was that the more persuasive argument counseled otherwise. See *State v. Smith*, 301 Or. 681, 725 P.2d 894 (1986) (Linde, J., dissenting); Collins, *supra* note 29, at 213–14.

33. Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).

34. *Id.* at 79. Justice Berkeley Lent of the Oregon Supreme Court recently made a similar point in a unanimous opinion:

We note that there is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretations of Article I, section 9 [the parallel Oregon clause]. . . . Article I, section 9 and the Fourth Amendment have a common source in the early state constitutions, but they have textual and substantive differences. Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provisions independently. . . . Majority opinions of the Supreme Court may be persuasive, but so may concurring and dissenting opinions of that court What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.

State v. Campbell, 306 Or. 157, 759 P.2d 1040, 1044 n.7 (1988).

35. Without passing on the substantive merits of a recent church-state article authored by Justice Robert Utter and Professor Edward Larson, their conclusions do comport with the general principle advanced in the text. See Utter & Larson, *supra* note 29.

process as essentially a one-directional venture. They differ, of course, only in the directions to which they point courts.

Sixth, in those situations where either novel constitutional questions arise or where there is uncertainty about the application of federal decisional law, some critics would counsel state judges to forego independent state law decisionmaking. The relational focus implores state courts to rely on federal law in order that a matter may ultimately be considered by the nation's high court. The evil to be avoided is "insulation" from federal review. Of course, this mindset deprives state citizens of one of the basic protections of state law—final judgments. That is, a state law-based ruling, constitutional or otherwise, which affirms some claim of right is unreviewable by a federal tribunal and is therefore determinative, while an analogous federal-law-based ruling may subject the rights claimant to further litigation.³⁶ That state law is stripped of its necessary and proper sovereign status is of little or no moment to critics of the "new judicial federalism."

Seventh, the critics typically either recognize no distinctions between the various models of state law-based decisionmaking³⁷ or they discount such differences. Consequently, they do not appreciate the possibility of there existing a truly independent (i.e., "up-down"³⁸) form of the "new judicial federalism."³⁹ If this possibility is allowed, as it has been in practice and theory,⁴⁰ then the concept of federalism can certainly be squared with independent reliance on state law. That is, the federalism principle need not be viewed as a utilitarian argu-

36. A variation of the point in the text is well illustrated by a 1984 Washington religion case, where a church-state challenge was affirmed on federal first amendment grounds even though the primary relief sought was under the state constitution. *Witters v. State Comm'n for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984). Two years later, the Supreme Court reversed and remanded the case, ironically instructing the state court to consider the matter under its own constitution. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); see Collins, *High Court's Rights-Claims Record: A Challenge to 'New Federalism,'* NAT'L L.J., Aug. 31, 1987, at 26, col.1. As of this date, four years after the original state supreme court ruling, a final judgment has not been obtained. However the Washington high court ultimately decides this case (and my guess is that a majority will deny the state law claim), the fact remains that had this issue been resolved initially, much effort and public and private expense could have been saved. See generally Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 EMERGING ISSUES ST. CONST. L. 217, 221 (1988) (criticizing "the waste of resources" in such cases).

37. See Collins & Galie, *supra* note 22, at 322-39.

38. See *supra* note 22 and accompanying text.

39. See, e.g., Maltz, *False Prophet*, *supra* note 5, at 443-49; Maltz, *Lockstep Analysis*, *supra* note 5, at 102-03.

40. See, e.g., *Serna v. Superior Court*, 40 Cal. 3d 239, 707 P.2d 793, 219 Cal. Rptr. 420 (1985); *supra* note 22.

ment to justify state court activism. Moreover, and contrary to the critics,⁴¹ when a state court relies on its supreme law to invalidate a state statute, the federalism principle is implicated. The obvious reason is that, *practically speaking*, absent adherence to state constitutional law constraints, the citizenry of a state must be content to accept only those protections conceded to them by another sovereign acting through the federal judiciary. Because the very institution of judicial review is anti-majoritarian, it simply will not do to argue that the federalism principle is not implicated insofar as the contest is between a state court and a state legislature. Any argument that re-allocates the division of power between the nation and its states so as to deny the retention of “local [constitutional] rule”⁴² is itself a false federalism.⁴³

Eighth, a related argument sometimes leveled by the critics is that independent reliance on state law creates “uniformity problems.” One critic has identified three such “problems:” (1) “where state and federal constitutional laws differ, there will be less certainty as to which laws apply to whom and individuals will be less certain of the consequences of their actions;” (2) “double protection will result in different constitutional rights for citizens of different states;” and (3) “[p]rosecutors and police need to know the rules of the game.”⁴⁴

One obvious reply is that such “problems” are created first and foremost by our dual constitutional system itself and not by judicial interpretation of it. For example, if a state legislature declined to pass a “victims’ rights” measure, otherwise valid under federal law, because it was inconsistent with a certain state constitutional provision, the “uniformity problem” would be the same.⁴⁵ As for different constitutional rights for citizens of different states, this should not be seen as problematic given federal constitutional minimums. Admittedly, a person’s life or liberty may hang in the constitutional balance of such diversity, but that same life or liberty may depend as well on statutory law provisions which themselves differ from state to state. Moreover,

41. See, e.g., Maltz, *State Court Activism*, *supra* note 5, at 1018–19.

42. *Id.* at 1018.

43. If the argument advanced in the text were not the case, and if the federalism principle were not here implicated, then why did a number of the 18th and 19th century state constitutions (including post-1816 ones) outlaw *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts despite the fact that such acts were already illegal under article 1, section 10 of the federal Constitution?

44. Hudnut, *supra* note 5, at 92, 93 (footnotes omitted).

45. The same holds true for state executive officials. See Amestoy & Brill, *State Constitutions from the Attorney General’s Perspective: An Institutional Schizophrenia*, 1 EMERGING ISSUES ST. CONST. L. 229, 230, 233–34 (1988); see also *supra* note 10.

I suspect that many more rights, virtually as important to the average citizen, depend on the common law of contracts, torts and property, all of which likewise differ from state to state.⁴⁶ Should the uniformity argument require centralization of those areas of law as well?⁴⁷ And finally, there is the point that state constitutional diversity demands the impossible of prosecutors and police. If the state standard is the higher one, if, say, a state has rejected a "good faith exception" to the exclusionary rule or a "public safety exception" to a confessions rule, then the state rules govern. Where, then, is there any problem in discerning the "rules of the game"? By the logic of the critics, a similar "problem" would be generated by state statutes which govern police conduct in the same areas affected by the state constitution. But here again, the "problem" is readily remedied by reference to the higher standard.

Finally, the relational focus standard's purported emphasis on the virtues of judicial restraint ignores or downplays a significant check on state court power—judicial elections. As Chief Justice William Rehnquist put it: "I think that those who undertake these [state constitutional] 'experiments,' to use Justice Brandeis' term, must be willing to assume the responsibility for doing so."⁴⁸ And even before the widely noted 1986 California judicial retention elections,⁴⁹ a judge of that state admitted to being quite "frightened about the reactions of the lay person."⁵⁰ By the same token, this electoral fact has itself been held out as a reason justifying more policymaking latitude for state judges:

46. In this same regard, Judge Judith Kaye of the New York Court of Appeals has pointed out that state common law may likewise be employed to protect individual rights claims, this in addition to similar claims based on federal or state constitutional law grounds. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 17, 25-27 (1988).

47. For a further elaboration of the diversity point as it pertains to state constitutions, see Collins, *Beyond the "New Federalism," supra* note 1, at xxvi n.137 (1984).

48. Remarks of the Chief Justice, Nat'l Conf. of Chief Justices, Williamsburg, Virginia (Jan. 27, 1988), *quoted in* Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?* 64 WASH. L. REV. 19, 46 n.172 (1989).

49. See Uelmen, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333 (1988).

50. In 1981, Superior Court Judge Bruce Dodds, speaking at a conference on the "new judicial federalism," said:

I must admit that I am a little more frightened of Justice Linde's position than Justice Mosk is. I deal with this on an individual basis. I listen to the police officers and to the people on the streets. I also have to run for election. The average person just doesn't understand the distinctions you are making. I am frightened about the reactions of the lay person. The average person believes the U.S. Supreme Court sets the ultimate standards. Now you are suggesting that the state courts can go beyond these minimum standards. If you try to explain that to a layman, you will have a tough time doing it.

“As elected representatives, like legislators, [state judges] feel less hesitant to offer their policy views than do appointed judges. The manner of their selection gives state judges a defense against being regarded as a ‘bevy of platonic guardians.’”⁵¹ These and other related points are ably set out by Justice Robert Utter (who weathered a stormy election challenge) in his contribution to this Symposium.⁵²

That judicial elections and state constitutional amendments⁵³ do bring legal realism into the state court chambers is, in one sense, undeniable. That these democratic elements can diminish the appetite for judicial activism also seems undeniable. These bare bone assertions notwithstanding, I am not quite sure where they do, or should, leave us.⁵⁴ For example, as an empirical matter, how much do judicial elections actually influence judicial behavior?⁵⁵ And as a normative matter, how much democratic influence on judicial decisionmaking, either in affirming or denying rights claims, is desirable or even tolerable? Without now answering these questions, I think it enough for these purposes to say that the critics have largely argued around these matters in their efforts to discredit the once “new judicial federalism.”

* * * *

As noted at the outset of this Foreword, the once “new judicial federalism” is certainly vulnerable to criticism. On that score, I too have voiced⁵⁶ criticisms. But on this occasion my point has been to demonstrate, if only in an introductory way, how much of the criticism leveled by the critics is itself vulnerable to attack. What both the critics and their counterparts need to do most is to move beyond their incen-

Welsh & Collins, *Taking State Constitutions Seriously*, 14 THE CENTER MAG. 6, 33–34 (Sept.-Oct. 1981).

51. Linde, *Observations of a State Court Judge*, in JUDGES & LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 118 (R. Katzmann ed. 1988); see also Keyser, *State Constitutions & Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051, 1077, 1080 (1985).

52. Utter, *supra* note 48.

53. See Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); May, *The Constitutional Initiative: A Threat to Rights?*, in HUMAN RIGHTS IN THE STATES 163 (S. Friedelbaum ed. 1988); May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153 n.1 (1987); Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984).

54. For a general discussion of this point, see *Symposium on Judicial Election, Selection & Accountability*, 61 S. CAL. L. REV. 1555-2220 (1988); Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, *id.* at 1969; Linde, *Elective Judges: Some Comparative Comments*, *id.* at 1995.

55. Consider P. DUBOIS, FROM BALLOT TO BENCH 248–49 (1980).

56. See Collins, *Reliance on State Constitutions*, *supra* note 16; see also Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 218 n.115 (1988).

sant relational focus battles and proceed to discussions of substantive law. Thus, questions should not be couched in terms of “more or less” protection, but rather in terms of the soundness of the arguments presented. For example, should the state be allowed to introduce evidence of a confession illegally obtained so long as it does so for impeachment purposes? That is a difficult question of constitutional criminal procedure. In my opinion, the question is best answered by consideration of the appropriate remedy (perhaps other than the exclusionary rule) to enforce the underlying right. If the decisions of the Supreme Court, or for that matter Kentucky courts, shed light on that analytical point, then resort to them would be desirable—but for that reason alone.

In short, the critics and their counterparts need to direct more of their attention to examining state constitutional substantive and procedural law arguments and less time to developing yet more grand relational focus theories of judicial review. Not surprisingly, just such an approach to law and scholarship is revealing itself in Oregon,⁵⁷ where the once “new judicial federalism” continues to thrive.

57. See, e.g., Buttlar, *Oregon's Constitutional Renaissance: Federalism Revisited*, 13 VT. L. REV. 107 (1988); Schuman, *The Right to “Equal Privileges and Immunities”: A States Version of “Equal Protection,”* 13 VT. L. REV. 221 (1988); Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986). See generally *A Symposium on State Constitutional Revision*, 67 OR. L. REV. 1-238 (1988).