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# IN THE GLARE OF THE SUPREME COURT: CONTINUING METHODOLOGY AND LEGITIMACY PROBLEMS IN INDEPENDENT STATE CONSTITUTIONAL RIGHTS ADJUDICATION

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> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.
>
> —Justice Hans A. Linde
> Oregon Supreme Court[1]

> In interpreting the New Jersey Constitution, we look for direction to the United States Supreme Court, whose opinions can provide "valuable sources of wisdom for us." . . . But although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.
>
> —Justice Robert L. Clifford
> New Jersey Supreme Court[2]

It is a great honor, as well as an important opportunity, to address the Conference of Chief Justices on the topic of state constitutional law. The Conference of Chief Justices has played an important role over the past several decades in the evolution of the new judicial federalism,[3] in which state courts have recognized that their own state

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1 Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984); *see also id.* at 177.

2 State v. Hempele, 576 A.2d 793, 800 (N.J. 1990).

3 *See* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

constitutions can be legitimate sources of rights beyond those provided in the Federal Constitution.[4]

Fifteen years ago I had a similar opportunity to address the Conference of Chief Justices, in which I discussed the legitimacy problems that had arisen during the early years of the new judicial federalism.[5] I noted then that charges of unprincipled, result-oriented decision-making were being aimed at state courts that had interpreted their state constitutions to provide broader rights than those recognized under similar or identical provisions of the Federal Constitution. These charges, often coming from dissenters on the state courts themselves, questioned the legitimacy of independent state constitutional decisions. Partially as a result of these criticisms, I noted that state courts were turning to a criteria, or factor approach to justify divergence from, or disagreement with, the United States Supreme Court's interpretations of the Federal Constitution. These concerns have continued and may have actually increased over the past fifteen years. The purpose of this Article is to reflect on these developments.

The idea that state courts may interpret their "potentially applicable state constitutional provisions"[6] to provide more, or broader, rights protections than are recognized by the United States Supreme Court under the Federal Constitution should no longer be seen as a cute trick[7] or "simply a flexing of state constitutional muscle."[8] It has now become an accepted, albeit still sometimes controversial, feature

4 In addition to a number of programs on state constitutional law at its meetings, the Conference of Chief Justices cosponsored the National Conference on Developments in State Constitutional Law in Williamsburg, Virginia in March, 1984. *See* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (Bradley D. McGraw ed., 1985).

5 Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984). I had a similar opportunity in 1989 to address the Conference, in which I reported on methodology problems like those discussed earlier and herein.

6 Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003, 1004 n.5 (1994) ("The term 'potentially applicable state constitutional provisions' is superior to terms such as 'analogous,' 'related,' or 'parallel,' which imply a subordinate status for the state constitution.").

7 H.C. Macgill, *Introduction—Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) ("There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not 'real' constitutional law at all."); *see also* Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 732 (1991) ("Furthermore, state judges experience a sense of chutzpah in expressing disagreement with the United States Supreme Court."); Robert F. Williams, *The Claus von Bulow Case: Chutzpah and State Constitutional Law?*, 26 CONN. L. REV. 711, 712, 718–19 (1994).

of our jurisprudence. It has been correctly noted that the new judicial federalism is not new anymore.[9] So I will hereafter refer to it as judicial federalism.[10]

Tallies are periodically made and updated of the numbers of cases in which state courts have, under their own constitutions, recognized rights beyond those in the Federal Constitution.[11] Most of us have stopped counting. There is continuing evidence of state courts actively turning to their state constitutions to reach results beyond those required under the Federal Constitution.[12]

On the other hand, as we have been reminded by Professor Barry Latzer, many state courts are, after independent analysis of state constitutional claims, deciding to *follow* United States Supreme Court federal constitutional rights analysis.[13] This reflects a maturing of judicial federalism. Finally, though, many state courts still continue to collapse state and federal constitutional analysis, and to decide cases as though the two constitutions were the same.[14] There is still much

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8 State v. Miller, 630 A.2d 1315, 1328 (Conn. 1993) (Callahan, J., concurring in part and dissenting in part).

9 Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5 (1989); Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi (1985).

10 I resisted the impulse to name this article "The End of the New Judicial Federalism."

11 Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 600–01 (1986).

12 *See* Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992) (when state courts base their decisions solely on state constitutional grounds, laws are more often declared unconstitutional than when decisions are based on both federal and state, or only federal, constitutional grounds).

13 *See* BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995); BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991); Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17 (1991) [hereinafter Latzer, *Into the '90s*]; Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 JUDICATURE 190, 190–91 (1991); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864–65 (1991); *see also* Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25 (1994).

14 The Maryland Court of Appeals, for example, has taken to referring to similar state and federal constitutional provisions as "in *pari materia*." *See* Hof v. State, 655 A.2d 370, 373 n.3 (Md. 1995); Henderson v. State, 597 A.2d 486, 488 (Md. 1991); Craig v. State, 588 A.2d 328, 334 (Md. 1991); WBAL-TV Div., Hearst Corp. v. State, 477 A.2d 776, 781 n.4 (Md. 1984). This approach is criticized in Michael R. Braudes, *When Constitutions Collide: A Study in Federalism in the Criminal Law Context*, 18 U. BALT. L. REV. 55 (1988).

work left to be done. The initial thrill of discovery of the existence of state constitutional rights may have given way to the responsibility of determining how to enforce them. The question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.

## I. STATE CONSTITUTIONAL METHODOLOGIES: TEACHING AND SEQUENCE

In the past several decades, during which judicial federalism came of age, state courts adopted a variety of methodologies in approaching litigants' arguments that they should be accorded more rights under the state constitution than were currently (or were likely to be) recognized under the Federal Constitution. One of the first methodologies was espoused by then-Professor Hans A. Linde of the University of Oregon School of Law.[15] Linde applied his approach when he joined the Oregon Supreme Court.[16] This "primacy" approach, or "first things first" method has appealed to a number of scholars,[17] judges,[18] and even to Justice John Paul Stevens of the United States Supreme Court.[19]

By contrast, a number of scholars and judges have supported analysis of federal constitutional law first, with state constitutional law being used as a supplementary or interstitial source of rights.[20] Finally, others have espoused a dual sovereignty approach, in which both constitutions are examined, and even if the state constitution is interpreted to provide the rights sought by the litigants, the Federal

15 Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970).

16 *See, e.g.*, State v. Kennedy, 666 P.2d 1316 (Or. 1983).

17 *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (2d ed. 1996).

18 *See, e.g.*, Traylor v. State, 596 So. 2d 957, 961–64 (Fla. 1992); R. Communications, Inc. v. Sharp, 875 S.W.2d 314, 315 (Tex. 1994); Daniel Gordon, *Good Intentions—Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994).

19 *See* Delaware v. Van Arsdall, 475 U.S. 673, 698–708 (1986) (Stevens, J., dissenting); *see also* Massachusetts v. Upton, 466 U.S. 727, 736 (1984) (Stevens, J., concurring).

20 *See, e.g.*, Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 708 (1983) ("The challenge is to develop a jurisprudence of state constitutional law, a jurisprudence that will make more predictable the recourse to and the results of state constitutional law analysis."); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1326, 1361 (1982).

Constitution is also analyzed.[21] Scholars continue to catalog the different sequential approaches to state and federal constitutional analysis, identifying more complex typologies beyond the three outlined here.[22] I have argued that it is not the *sequence* that matters, but rather the focus on truly *independent* state constitutional interpretation, in whatever sequence it occurs.[23] It is substance, not form, that counts most.

A different approach is reflected in those states in which the highest state court has written a "teaching opinion" alerting the bar and bench to the possibilities of independent state constitutional analysis, and educating them in the techniques of making state constitutional arguments. New Jersey Justice Alan B. Handler's 1982 concurring opinion in *State v. Hunt*[24] was, to my knowledge, the first example of such an opinion, followed in 1986 by Washington's *State v. Gunwall* decision.[25] To a certain extent, also, the United States Supreme Court's opinions in the *Pruneyard*[26] and *Michigan v. Long*[27] cases are other examples of teaching "from above."

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21 *See* Patchogue-Medford Congress of Teachers v. Board of Educ., 510 N.E.2d 325 (N.Y. 1987); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

22 *See generally* Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH. L. REV. 75 (1993); Wallace P. Carson Jr., *Last Things Last: A Methodological Approach to Legal Arguments in State Courts*, 19 WILLAMETTE L. REV. 641 (1983); Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, PUBLIUS: J. FEDERALISM, Summer 1986, at 111, *reprinted in* 55 U. CIN. L. REV. 317 (1986); Peter J. Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role*, 4 EMERGING ISSUES ST. CONST. L. 225 (1991); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399 (1993); Robert F. Utter, *Advancing State Constitutions in Court*, TRIAL, Oct. 1991, at 41; Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987).

23 *See* Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 172–73 (1986–1987); *see also* Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 639 n.11 (1994).

24 450 A.2d 952, 962 (N.J. 1982).

25 720 P.2d 808 (Wash. 1986).

26 Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); *see also* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

27 463 U.S. 1032 (1983). A survey of over 500 decisions, however, from all 50 states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the basis for their constitutional decisions." Felicia A. Rosenfeld, Note, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988);

The most explicit teaching opinion, however, remains that written in 1985 by the late Justice Thomas L. Hayes of Vermont in *State v. Jewett*.[28] The opinion outlined the approaches to state constitutional interpretation (historical, textual, comparison to sibling jurisdictions, and analysis of economic and social materials), cautioning, however, that "[i]t would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented."[29] Justice Hayes explained the reasoning behind writing an opinion aimed at the bar in connection with the court's order that counsel file supplemental briefs on the state constitutional issues in *Jewett*:

> There was some discussion on the court about publishing a law review article advising lawyers to look to the state constitution, but I had the feeling that if we took that course the article would be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school. I believed an article would not get our message across. Ultimately the court agreed that if we were to tell our lawyers: "Look to your Vermont constitution and, when you do, brief it adequately," we could do so only in a judicial opinion.[30]

The Pennsylvania Supreme Court, in a 1991 opinion by Justice Ralph Cappy, has followed the approach of the Vermont Supreme Court in *Jewett*, but included the teaching section within an opinion

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*see also* Arizona v. Evans, 115 S. Ct. 1185, 1201 (1995) (Ginsburg, J., dissenting) (disagreeing with *Michigan v. Long*) ("State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints, it has been observed, may limit the ability of this Court to enforce the federal constitutional guarantees . . . . Prime among the institutional constraints, this Court is reluctant to intrude too deeply into areas traditionally regulated by the States. This aspect of federalism does not touch or concern state courts interpreting state law."); Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379 (1988) (pointing out that more cases were reinstated on state grounds after *Michigan v. Long* than before the decision).

28 500 A.2d 233 (Vt. 1985). The Vermont court reiterated this approach in State v. DeLaBruere, 577 A.2d 254, 268 (Vt. 1990); *see also* State v. Zumbo, 601 A.2d 986, 988 (Vt. 1991) ("Defendant fails to provide a substantive analysis as to why the Vermont Constitution should provide a different answer for his argument than the federal constitution."); State v. Jenne, 591 A.2d 85, 89 (Vt. 1991) ("Vermont's constitutional guarantee to a fair cross-section . . . does not, in this case, provide any greater protection than that afforded by the federal constitution."); *infra* notes 154–57 and accompanying text.

29 *Jewett*, 500 A.2d at 235.

30 Thomas L. Hayes, *Clio in the Courtroom*, 56 VT. HIST. 147, 149 (1988); *see also* State v. Earl, 716 P.2d 803, 805–06 (Utah 1986).

deciding the merits of a search and seizure case much like New Jersey's *Hunt* decision.[31] Teaching opinions often appear in concurrences,[32] dissents,[33] and in lower court opinions.[34] The Wyoming Supreme Court included, as an appendix to an opinion, a bibliography of state constitutional law articles.[35]

## II. The Criteria Approach: Looking for Factors to Justify Divergence

A related approach to methodology concerns, typified by New Jersey's *State v. Hunt* opinion,[36] Washington's *State v. Gunwall* decision,[37] and Pennsylvania's *Edmunds* case,[38] is the "criteria" or "factor"[39] approach. Under this methodology, the state supreme court, in what seems like a teaching opinion, sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution. These criteria, then, are used by advocates to present, and judges to decide, claims made under the state constitution in cases where there

31 Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). *See generally* Ken Gormley, *Foreword: New Constitutional Vigor for the Nation's Oldest Court*, 64 Temp. L. Rev. 215, 217–19 (1991) (discussing *Edmunds*). Other examples of teaching opinions are *Traylor v. State*, 596 So. 2d 957, 961–64 (Fla. 1992); *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991); *Immuno, AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991).

32 North Dakota Justice Beryl J. Levine, in a concurring opinion, called attention to the majority's footnote indicating that only the *federal* constitutional issue was before the court. She noted that "although the footnote serves as a red flag, it may not alert the color blind," and noted the possibility of independent state constitutional interpretation. State v. Thompson, 369 N.W.2d 363, 372–74 (N.D. 1985) (Levine, J., concurring specially); *see also* State v. Wheaton, 825 P.2d 501, 504 (Idaho 1992) (Bistline, J., concurring specially); State v. Gronski, 910 P.2d 561, 565 (Wyo. 1996); Saldana v. State, 846 P.2d 604, 621 (Wyo. 1993) (Golden, J., concurring).

33 *See, e.g.*, People v. Rister, 803 P.2d 483, 494–98 (Colo. 1990) (Quinn, J., dissenting); *Saldana*, 846 P.2d at 624 (Urbigkit, J., dissenting); Duffy v. State, 789 P.2d 821, 847–48, (Wyo. 1990) (Urbrigkit, J., dissenting).

34 *See, e.g.*, State v. Geisler, 594 A.2d 985, 988 (Conn. App. Ct. 1991); Wells v. State, 348 S.E.2d 681, 684–86 (Ga. Ct. App. 1986) (Beasley, J., concurring specially); Nugin v. State, 334 S.E.2d 921, 922 (Ga. Ct. App. 1985) (Beasley, J., concurring specially); State v. Graham, 584 A.2d 878 (N.J. Super. Ct. App. Div. 1991); State v. Mollica, 524 A.2d 1303 (N.J. Super. Ct. App. Div. 1987); *see also* Williams, *supra* note 23, at 149 n.27.

35 Dworkin v. L.F.P., Inc. 839 P.2d 903, 920–22 (Wyo. 1992).

36 450 A.2d 952 (N.J. 1982).

37 720 P.2d 808 (Wash. 1986).

38 Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).

39 Steve McAllister, Comment, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. Kan. L. Rev. 593, 605 (1987) ("factor analysis").

is also a federal claim that is unlikely to prevail. On the one hand, the criteria approach is laudable because it teaches and calls attention to the nature of state constitutional arguments. On the other hand, however, I have been critical of this approach for a number of reasons that I believe have demonstrated themselves in the past fifteen years.

In *Hunt*, the New Jersey Supreme Court found a defendant's telephone billing records to be protected from a warrantless search and seizure under the New Jersey Constitution, diverging from a contrary holding by the United States Supreme Court as to a pen register listing of numbers dialed in *Smith v. Maryland*.[40] Justice Handler's concurring opinion cautioned:

> There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach.[41]
>
> . . . .
>
> It is therefore appropriate, in my estimation, to identify and explain standards or criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights.[42]

Justice Handler's concurring opinion in *Hunt* became the Court's majority position the next year with his opinion in *State v. Williams*.[43] In 1987 Justice Handler, writing for the Court, stated that the state constitution should be interpreted to provide greater rights than those

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40 442 U.S. 735 (1979).

41 *Hunt*, 450 A.2d at 963–64 (Handler, J., concurring). Justice Handler noted the possibility that state court constitutional interpretations could be overruled by state constitutional amendments. *Id.* at 964 n.1 (Handler, J., concurring); *see also* New Jersey Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 770 (N.J. 1994) (describing origins of New Jersey criteria approach).

42 *Hunt*, 450 A.2d at 965 (Handler, J., concurring); *see also* Right to Choose v. Byrne, 450 A.2d 925, 932 (N.J. 1982) ("[W]e proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution. . . . Our caution eminates, in part, from our recognition of the general advisability in a federal system of uniform interpretation of identical constitutional provisions."); Pollock, *supra* note 20, at 718 (supporting criteria).

43 459 A.2d 641, 650–51 (N.J. 1983). The Court noted that it had, in "important cases," relied on the state constitution. "We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional history, legal traditions, strong public policy and special state concerns warrant such action." *Id.* at 650.

required under federal constitutional law "only when justified by '[s]ound policy reasons.'"[44]

The New Jersey approach, while teaching about state constitutional arguments, also seems to require[45] some objectively verifiable difference between state and federal constitutional analysis—whether textual, decisional, or historical—to justify a state court's interpretational divergence from the Federal Constitution. This view, in turn, seems to imply that the United States Supreme Court decision is presumptively correct, and that in the absence of one or more of the criteria identified, it is illegitimate for a state court to reject the reasoning or result of a Supreme Court decision in the same or similar context. In fact, Justice Morris Pashman had written separately in *Hunt* to caution against this result.[46]

Under this approach, a state court is compelled to focus on the Supreme Court's decision, and to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent.[47] It is a *relational*, or *comparative* approach, which analyzes the relationship between, or comparison of, federal and state constitutional law. The stated criteria form a checklist of hurdles or prerequisites for the applicability of a state's highest law. A truly independent state constitutional interpretation "that will stand the test of detached criticism"[48] is, under this approach, not enough.

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44 State v. Stever, 527 A.2d 408, 415 (N.J. 1987), *cert. denied*, 484 U.S. 954 (1987); *see also* State v. Koedatich, 572 A.2d 622, 627–28 (N.J. 1990).

45 In a law review article, Justice Handler stated: "I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy or tradition." Alan B. Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 204 (1983); *see also id.* at 206 n.29; *Hunt*, 450 A.2d at 967 n.3 (Handler, concurring).

46 *Hunt*, 450 A.2d at 960 (Pashman, J., concurring) ("Although the factors listed are potentially broad, they impose clear limits."); *see also Right to Choose*, 450 A.2d at 949 (Pashman, J., concurring in part and dissenting in part).

47 *See* Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318 (1977) ("The court must convince the legal community and the citizenry at large that it was justified in its disagreements with the Supreme Court and that the state constitution supports different outcomes." (footnote omitted)).

48 A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934 (1976); *see also* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 159 (1961). *But see* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) (citing the importance of constitutional decisions even when they are vulnerable to academic criticism).

The requirement of justification in this manner raises several critical issues: (1) Is disagreement over substantive constitutional interpretation illegitimate? (2) Does the persuasive power of Supreme Court decisions depend upon the Court's institutional position or the soundness of its reasoning? I argued before the Conference of Chief Justices in 1983, and in print in 1984, that this approach attributes too much to Supreme Court decisions.[49]

The Washington Supreme Court's 1986 adoption of the criteria approach in *State v. Gunwall*[50] further illustrates the problems with this appealing, and apparently lawyer and judge-like technique. *Gunwall* came three years after *State v. Ringer*,[51] and two years after *State v. Coe*,[52] two decisions that generated intense criticism of the Washington Supreme Court's state constitutional jurisprudence, and probably contributed in part to a change in court personnel in the 1984 election.[53]

*Gunwall*, like New Jersey's *Hunt* decision, dealt with the warrantless seizure of long-distance telephone billing records under circumstances where a warrant would not be required under the Federal Constitution. Justice James A. Anderson stated as an issue the question of when "is it appropriate for this court to resort to independent state constitutional grounds to decide a case, rather than deferring to comparable provisions of the United States Constitution as interpreted by the United States Supreme Court?"[54] He answered:

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49 *See* Williams, *supra* note 5.

50 720 P.2d 808 (Wash. 1986); *see also* State v. Stroud, 720 P.2d 436, 444 (Wash. 1986) (Durham, J., concurring) ("We should adopt an independent analysis of Const. art. I, § 7 on the basis of principles, not results.").

51 674 P.2d 1240 (Wash. 1983).

52 679 P.2d 353 (Wash. 1984).

53 For a general description of the 1984 Washington judicial elections, see CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 183–85 (1988); *see also* Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1159 (1992) ("Four new justices had joined the court.").

Charles Sheldon reports:

> In the 1984 election for seats on the supreme court, a number of the successful candidates spoke of a return to a more balanced approach to the rights of the accused and the rights of society, indicating a reluctance to pursue state constitutional grounds that might add to the protection afforded the accused.

Charles H. Sheldon, *"All Sail and No Anchor" in New Federalism Cases—Attempted Remedial Efforts by the Supreme Court of Washington*, ST. CONST. COMMENTARIES & NOTES, Winter 1990, at 8, 10.

54 *Gunwall*, 720 P.2d at 810.

> The following non-exclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.[55]

These criteria are, of course, strikingly similar to those adopted in New Jersey in *Hunt*, and Justice Anderson in fact credited *Hunt* by citing it. The opinion treats each criterion in some depth. In this sense, the opinion, like that in *Hunt*, serves an important teaching function.

The Washington court went on to apply the criteria and conclude that, in fact, this was a circumstance in which it would "resort" to the state constitution to reach a conclusion different from that reached by the United States Supreme Court. Like New Jersey, the Washington Supreme Court rejected the United State Supreme Court's *Smith v. Maryland*[56] decision.

On the one hand, the court expressed the position that when it decides whether to disagree with the United States Supreme Court's interpretations of the Federal Constitution "it will consider these criteria to the end that our decision will be made for well founded legal reasons and not by *merely substituting our notion of justice for* that of . . . the United States Supreme Court."[57] On the other hand, however, the court characterized the factors on which it would base divergence as "*nonexclusive* neutral criteria."[58]

Calls for, or application of, a criteria or factor approach have also surfaced in other states such as Illinois,[59] Kentucky,[60] Michigan,[61] Mas-

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55 *Id.* at 811.

56 442 U.S. 735 (1979).

57 *Gunwall*, 720 P.2d at 813 (emphasis added).

58 *Id.* at 811 (emphasis added).

59 *See, e.g.*, People v. Fitzpatrick, 633 N.E.2d 685, 690 (Ill. 1994) (Freeman, J., dissenting); People v. Levin, 623 N.E.2d 317, 328 (Ill. 1993); People v. DiGuida, 604 N.E.2d 336, 342–47 (Ill. 1992); People v. Tisler, 469 N.E.2d 147, 155–57, 165 (Ill. 1984); *see generally*, Thomas B. McAffee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1 (1987); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269 (1994).

60 *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 504, 514 (Ky. 1992) (Lambert, J., & Wintersheimer, J., dissenting).

61 *See, e.g.*, Sitz v. Department of State Police, 506 N.W.2d 209, 216 (Mich. 1993); Doe v. Department of Soc. Servs., 487 N.W.2d 166, 176 n.31 (Mich. 1992); People v. Bullock, 485 N.W.2d 866, 871–74 (Mich. 1992).

sachusetts,[62] and Connecticut.[63] These calls also represent, in an important sense, a challenge to the legitimacy of independent state constitutionalism itself.[64]

## III. State Experience with the Criteria Approach

After the *Hunt* opinion in New Jersey, the *Gunwall* opinion in Washington, the *Edmunds* opinion in Pennsylvania, and criteria cases in other states, one might have thought that the state constitutional interpretation would have followed a predictable course. This was, after all, one of the primary rationales for the criteria approach. Later cases indicate, however, that this has not happened and that the criteria themselves have taken on a focus of their own.

### A. *Washington*

In Washington, for example, in *Sofie v. Fibreboard Corp.*,[65] in interpreting the state constitutional civil jury guarantee, Justice Robert Utter noted:

> Chief Justice Callow relies on *Gunwall* and *Hunt* to support his implication that this court should defer to Supreme Court interpretation of a comparable federal provision unless an analysis of the six *Gunwall* criteria indicate that we should take an independent course.
>
> . . . .
>
> After criticism that the *Gunwall* criteria could be misinterpreted to support the view now espoused by the dissent this court clarified the test in *State v. Wethered.* In *Wethered,* we reemphasized the statement that the *Gunwall* factors were nonexclusive and added

62 *See, e.g.*, Guiney v. Police Comm'r of Boston, 582 N.E.2d 523, 527–28 (Mass. 1991) (Nolan, J., dissenting); Commonwealth v. Amendola, 550 N.E.2d 121, 127 (Mass. 1990) (Nolan, J., dissenting).

63 *See, e.g.*, State v. Joyce, 639 A.2d 1007, 1011 n.7 (Conn. 1994); State v. Miller, 630 A.2d 1315, 1323–27 (Conn. 1993); State v. Diaz, 628 A.2d 567, 576–85 (Conn. 1993); State v. Geisler, 610 A.2d 1225, 1232–34 (Conn. 1992); State v. Linares, 630 A.2d 1340, 1353–54 (Conn. App. Ct. 1993); *see also* Robert I. Berdon, *An Analytical Framework for Raising State Constitutional Claims in Connecticut,* 14 Quinnipiac L. Rev. 191 (1994); Michael J. Besso, *Commenting on the Connecticut Constitution* 27 Conn. L. Rev. 185, 217 (1994); Martin B. Margulies, *The Uses and Misuses of History: A Reply to Michael Besso,* 27 Conn. L. Rev. 231, 234–35 (1994); Wesley D. Dupont, Note, *Automobile Searches and Judicial Decisionmaking Under State Constitutions:* State v. Miller, 27 Conn. L. Rev. 699, 715–17, 720 (1995).

64 *See infra* notes 158–63 and accompanying text.

65 771 P.2d 711 (Wash. 1989).

> that they were to be used as interpretive principles of our state constitution.[66]

The criticism to which Justice Utter referred was a law review Note, arguing that the criteria approach could limit independent state constitutional interpretation.[67] This rigidity and limiting effect of the criteria were predictable. They make it appear, as Chief Justice Keith Callow argued in his *Sofie* dissent, that Supreme Court interpretations should be followed unless one or more of the criteria are met. This is a presumption of correctness. It makes the criteria themselves, and their relationship to the Supreme Court decision casting the "shadow"[68] (or shining the glare) over the state case, the focus of attention rather than the question of independently interpreting the *state constitution.* They can distract attention from the real issue before the court: How is that state constitutional provision to be interpreted and applied to the facts of this case?

In another example of this counterproductive fixation on the criteria, the Washington Supreme Court held in several cases that litigants must not only raise[69] state constitutional claims, but must also brief and present arguments *based on the Gunwall criteria.* For example, in *Forbes v. Seattle* in 1990 the court stated:

> In *State v. Gunwall* we enumerated several nonexclusive neutral criteria which must be met before this court considers state constitutional analysis. As a matter of policy, examination of the *Gunwall* criteria is essential in order for the process of state constitutional analysis to be "articulable, reasonable and reasoned." Because Forbes has failed to discuss the minimum criteria mentioned in *Gunwall,* we decline to undertake a separate analysis of Const. art. 1, § 5 at this time. Accordingly, Forbes free speech claims will be decided under federal constitutional law.[70]

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66 *Id.* at 725 (citations omitted) (footnote omitted). Chief Justice Callow had criticized the majority for not utilizing the *Gunwall* criteria. *Id.* at 730. Justice Durham dissented, in part because he did not believe *Wethered* in any way clarified the use of the *Gunwall* criteria, nor did it respond to criticisms of the *Gunwall* criteria. Rather, he contended, *Wethered* simply stated that state constitutional analysis required counsel to brief the *Gunwall* criteria. *Id.* at 737–38.

67 Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution*—State v. Gunwall, 62 WASH. L. REV. 569 (1987) (criticizing *Gunwall* approach as limiting and requiring too much focus on federal constitutional doctrine).

68 Williams, *supra* note 5.

69 *See, e.g.*, Clark v. Pacificorp, 809 P.2d 176, 188 (Wash. 1991); State v. Long, 778 P.2d 1027, 1030 (Wash. 1989); State v. Herzog, 771 P.2d 739, 742 (Wash. 1989).

70 785 P.2d 431, 433–34 (Wash. 1990) (citations omitted); *see also* State v. Mierz, 901 P.2d 286, 292 n.10 (Wash. 1995); State v. Clark, 875 P.2d 613, 615 n.2 (Wash. 1994); Seattle v. Webster, 802 P.2d 1333, 1340 n.19 (Wash. 1990); City of Spokane v.

This approach goes far beyond a teaching opinion, or educational effort such as Vermont's *Jewett* opinion, and imposes a prescriptive approach to briefing cases and presenting arguments, similar to the prescriptive effect the criteria approach seems to have on state courts themselves.[71] As a result, the Washington Supreme Court, over a number of years, appears to have declined to address many important state constitutional arguments actually raised by the parties.[72]

The use of the criteria approach in Washington has resurfaced recently. In several cases which have utilized a full-blown *Gunwall* criteria analysis, dissenters have disagreed with the *way the criteria were analyzed.* For example, in *State v. Gocken,* the court performed an elab-

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Douglass, 795 P.2d 693, 695 (Wash. 1990); State v. Motherwell, 788 P.2d 1066, 1074 (Wash. 1990); Mota v. State, 788 P.2d 538, 542 (Wash. 1990); Snedigar v. Hoddersen, 786 P.2d 781, 787–88 (Wash. 1990); Halquist v. Department of Corrections, 783 P.2d 1065, 1067–68 (Wash. 1989); State v. Carver, 781 P.2d 1308, 1312 (Wash. 1989); State v. Jones, 772 P.2d 496, 501 n.11 (Wash. 1989); LaMon v. Butler, 770 P.2d 1027, 1038 (Wash. 1989); State v. Irizarry, 763 P.2d 432, 435–36 (Wash. 1988) (Utter, J., concurring); State v. Worrell, 761 P.2d 56, 57 n.1 (Wash. 1988); State v. Reece, 757 P.2d 947, 953–54 (Wash. 1988); State v. Wethered, 755 P.2d 797, 800–01 (Wash. 1988).

71 Connecticut has not gone quite this far, but is strict with counsel. *See, e.g.,* State v. Zarick, 630 A.2d 565, 574 n.15 (Conn. 1993); State v. Johnson, 630 A.2d 69, 71 (Conn. 1993); State v. Tucker, 629 A.2d 1067, 1070 n.5 (Conn. 1993); State v. Williams, 629 A.2d 402, 409 n.6 (Conn. 1993) ("less than extensive analysis"); State v. Reddick, 619 A.2d 453, 457 n.7, 462 n.22 (Conn. 1993); State v. Genotti, 601 A.2d 1013, 1021 (Conn. 1992); State v. Joly, 593 A.2d 96, 109 n.16 (Conn. 1991); State v. Perez, 591 A.2d 119, 123–24 (Conn. 1991); Talton v. Warden, State Prison, 634 A.2d 912, 916 n.5 (Conn. App. Ct. 1993); *see also* Savastano v. Nurnberg, 569 N.E.2d 421, 424 n.7 (N.Y. 1990); State v. Jensen, 818 P.2d 551, 552 n.2 (Utah 1991); Wisconsin v. Pitsch, 369 N.W.2d 711, 721 (Wis. 1985). *But see* State v. Joyce, 639 A.2d 1007, 1012 (Conn. 1994) ("Under appropriate circumstances, review of state constitutional claims may be undertaken despite the failure of the defendant to brief the state constitutional issue in a prior appeal."); State v. Oquendo, 613 A.2d 1300, 1307 n.6 (Conn. 1992) (although defendant's analysis of state constitution is "less than exhaustive, he has clearly invoked his rights thereunder and, accordingly, we shall consider his claim"); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond,* 24 CONN. L. REV. 675, 702 n.146 (1992).

According to a 1986 poll, 56 percent of the state high court judges are unwilling to entertain state law claims that have not been raised below, and only 15 percent favor the idea of the court raising the matter *sua sponte.* Ronald K.L. Collins et al., *supra* note 11; *see* Griffin v. Eller, 922 P.2d 788, 805 (Wash. 1996) (Talmadge, J., dissenting) ("This Court has the inherent authority to reach constitutional issues that determine a case.").

72 The Washington Court recently distinguished between the need to brief the *Gunwall* criteria for new issues of state constitutional law but not for cases where the court has already recognized expanded protections. State v. Hendrickson, 917 P.2d 563, 567 n.1 (Wash. 1996).

orate *Gunwall* analysis in a double jeopardy context.[73] Justice Charles Johnson dissented, arguing that the *Gunwall* analysis was flawed.[74] Justice Barbara A. Madsen concurred in part and dissented in part, stating that *Gunwall* should not be treated as "a talisman." "Most importantly, independent state constitutional analysis is lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than our own state courts."[75]

In *Richmond v. Thompson*,[76] the majority noted that although "Thompson's *Gunwall* analysis is incomplete, amicus ACLU-W has presented a factor-by-factor analysis, and the Court of Appeals analyzed the State Constitution."[77] It performed a complete *Gunwall* analysis, rejecting a claim based on the right to petition the government. Justice James Dolliver, dissenting, contended that the majority had applied the criteria approach in too rigid a manner. "The court need not fulfill every—or any—*Gunwall* factor to justify a broader reading of a parallel state constitutional provision."[78]

In *State v. Thorne*, the Washington court refused to reach a state constitutional due process claim, because of improper *Gunwall* briefing.[79] Justice Barbara A. Madsen dissented:

> Since this court has already recognized greater protection *in the very context presented in this case*, it is unnecessary for the defendant to present a *Gunwall* argument to receive state constitutional protection. To hold to the contrary, as the majority does, is to elevate form over substance and to unjustly deny the defendant the protections he deserves as a Washington State citizen.[80]

### *B. New Jersey*

In New Jersey, also, there has been dissatisfaction with the course of state constitutional adjudication. In 1989, interestingly in another

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73 896 P.2d 1269, 1270–73 (Wash. 1995).

74 *Id.* at 1275–81.

75 *Id.* at 1274–75; *see also* State v. Rose, 909 P.2d 280 (Wash. 1996) (not using *Gunwall* analysis); State v. Johnson, 909 P.2d 293 (Wash. 1996) (using *Gunwall* analysis).

76 922 P.2d 1343 (Wash. 1996).

77 *Id.* at 1349.

78 *Id.* at 1355; *see also* Stage v. Manussier, 921 P.2d 473, 489–90 (Wash. 1996) (Madsen, J., dissenting); State v. Rivers, 921 P.2d 495, 507 (Wash. 1996) (Sanders, J., dissenting) (Gunwall approach "has been criticized for placing too much emphasis on the United States constitution as a starting point . . . ; however, it is helpful for present purposes").

79 921 P.2d 514, 533 (Wash. 1996).

80 *Id.* at 537.

case called *State v. Hunt*,[81] Justice Handler complained of the Court's approach to constitutional questions in death penalty adjudications.

> Its passive acceptance of the Supreme Court's lead on this fundamental issue is both baffling and unsettling for several reasons.
>
> First, the Court gravely misunderstands the weight that a state should attribute to the federal constitution with respect to the criminal law of capital-murder. . . . Consequently, this Court's frequent attempts to clone the federal constitution to determine and define critical capital-murder issues and rights is more than a doctrinal distraction. It has become a major barrier to the development of a cohesive body of substantive and procedural law to govern the prosecution of these complex and unique causes.
>
> Second, in terms of capital-murder jurisprudence, the Supreme Court's approach boarders on the chaotic. For example, we have only recently rejected the federal court's own shifting constitutional analysis of what culpable state of mind is necessary in order for a murder to rise to the level of a capital offense. We most emphatically pronounced that protections under the New Jersey Constitution are different from and greater than those under the federal Constitution. Yet, in *Ramseur*, on the equally important issue of fair and impartial juries, the Court said that "the protections regarding death qualification afforded under the New Jersey Constitution are no different from or greater than those under the federal Constitution." It should be apparent that the Court has become engaged in the random selection of constitutional protections, sometimes federal, sometimes state; its approach to capital-murder jurisprudence is becoming indistinguishable from the federal approach in its lack of consistency.[82]

In none of the death penalty decisions, and there have been many in New Jersey since capital punishment was upheld in 1987,[83] is there any extended discussion of the *Hunt* criteria and their application to the variety of state constitutional issues in death penalty litigation.[84]

In 1990, New Jersey Justice Stewart Pollock noted that in deciding a search and seizure case, even in favor of the rights claimant based on *federal* constitutional law, the New Jersey Supreme Court failed to address the *state* constitutional argument that had been raised.

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81 558 A.2d 1259 (N.J. 1989) (Handler, J., concurring in part and dissenting in part).

82 *Id.* at 1291–92 (citations omitted).

83 *See* State v. Ramseur, 524 A.2d 188 (N.J. 1987).

84 *See, e.g.*, State v. Koedatich, 572 A.2d 622, 627–28 (N.J. 1990). For a law review argument based on the *Hunt* criteria, see Edward Devine et al., *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 310–24, 376–93 (1984).

> Here, defendants rely not only on the fourth amendment to the United States Constitution, but also on article 1, paragraph 7 of the New Jersey Constitution. Like its federal counterpart, that article of the State Constitution prohibits unreasonable searches and seizures. I believe that Court should address both parts of defendants' argument. The failure to analyze defendants' state-law argument may require us to review that argument in the future if the United States Supreme Court should agree that the dissent, not the Court, has correctly applied federal law.[85]

### *C. Pennsylvania*

Pennsylvania has also attempted an application of a criteria approach in the 1991 *Edmunds*[86] decision. The Pennsylvania courts, though, have not followed any consistent pattern.[87] Justice Nicholas Papadakos noted in a later case, in dissent:

> I am dismayed also at the form of analysis of the Pennsylvania Constitution employed by the majority. It has been my impression for the past year that we had set forth a dramatically new way of assessing state constitutional issues, especially Article I, section 8 cases predicated on independent state grounds. I take the central message of *Edmunds* to be that mere assertions of independent state constitutional grounds are not acceptable: no longer can the state constitution be viewed as an all-purpose surrogate for informed analysis, to be taken from the shelf and opened like a can of beans to feed those who periodically hunger for answers in that document. Instead, *Edmunds* mandated a structured analytical form to be used in applicable cases.
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> . . . .

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85 State v. Lund, 573 A.2d 1376, 1385 (N.J. 1990).

86 Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); *see supra* note 31 and accompanying text. *Edmunds* was criticized for denigrating United State Supreme Court precedents by including "case-law from other states" as a factor but not mentioning United States Supreme Court opinions. Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1136–37 (1992). This is, of course, a different critique of the criteria approach from the one made here. Pennsylvania's "horizontal federalism" criterion, however, is different from the New Jersey and Washington approach, and does focus attention somewhat away from the glare of the Supreme Court decision.

87 *See, e.g.*, United Artists Theater Circuit, Inc. v. Philadelphia, 635 A.2d 612, 615–20 (Pa. 1993); Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 541–49 (Pa. 1993); Commonwealth v. Hess, 617 A.2d 307, 313–15 (Pa. 1992); Commonwealth v. Lewis, 598 A.2d 975, 978–79 (Pa. 1991). Professor Ken Gormley supported the *Edmunds* criteria approach in *The Pennsylvania Constitution After Edmunds*, 3 WIDENER J. PUB. L. 55 (1993).

> I believe I am quite correct in stating that we decided *Edmunds* in order to guard against precisely this kind of opinion. Even assuming arguendo that the majority could make its case on independent state grounds (which I do not believe), there is no evidence they have done so here. I take very little comfort in the fact that although we adopted a significant and path-breaking analysis one year ago, neither the courts below nor the majority opinion herein have shown any recognition of its existence as precedent. And still we wonder why our courts often are criticized for being like little puppies who chase their own tails rather than run forward.[88]

The *Edmunds* approach was applied as a rigid briefing requirement by both the Pennsylvania Supreme Court and the lower courts.[89] Then in 1995, after a four-year experiment with the *Edmunds* criteria approach, the Pennsylvania Supreme Court stated:

> In *Edmunds*, this Court set forth certain factors that we found helpful in our analysis herein. We reiterate, the factors set forth are helpful. The failure of a litigant to present his state constitutional arguments in the form set forth in *Edmunds* does not constitute a fatal defect, although we continue to strongly encourage use of that format.[90]

Commenting on this revised approach, Pennsylvania Superior Court Judge Phyllis W. Beck observed, "[A]s access to the court is of primary importance to the individual, it is particularly appropriate that a litigant seeking to enlarge the rights of the individual, via state constitutional law, be free from a technical procedure that may not always

88 Commonwealth v. Kohl, 615 A.2d 308, 320–21 (Pa. 1992) (Papadakos, J., dissenting) (citations omitted); *see also* Commonwealth v. Rodriguez, 614 A.2d 1378, 1385 (Pa. 1992) (Papadakos, J., dissenting) ("*Edmunds*, however, mandates much more, as I am growing weary of reminding this Court.").

89 *See, e.g.*, Commonwealth v. Morley, 681 A.2d 1254, 1257–58 (Pa. 1996); Commonwealth v. Breeland, 664 A.2d 1355, 1359 n.3 (Pa. Super. Ct. 1995); Commonwealth v. Herrick, 660 A.2d 51, 57 (Pa. Super. Ct. 1995).

90 Commonwealth v. Swinehart, 664 A.2d 957, 961 n.6 (Pa. 1995); *see also* Commonwealth v. White, 669 A.2d 896, 899 (Pa. 1995) (referring to dicta in *Edmunds*, and noting that it "expresses the idea that it may be helpful to address the concerns listed therein, not that these concerns must be addressed in order for a claim asserted under the Pennsylvania Constitution to be cognizable."). Justice Frank Montemuro concurred, but argued that the court should require, and employ, the *Edmunds* analysis, and impose a stronger presumption in favor of following the United States Supreme Court. *Id.* at 903–05.

serve to advance the inquiry at hand."[91] The Pennsylvania court continues to apply the *Edmunds* analysis.[92]

### *D. Illinois*

In 1984, in *People v. Tisler*,[93] after evaluating the state constitutional argument in a search and seizure context,[94] the Illinois Supreme Court stated:

> After having accepted the pronouncements of the Supreme Court in deciding fourth amendment cases as the appropriate construction of the search and seizure provisions of the Illinois Constitution for so many years, we should not suddenly change course and go our separate way simply to accommodate the desire of the defendant to circumvent what he perceives as a narrowing of his fourth amendment rights under the Supreme Court's decision . . . . Any variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution must be based on more substantial grounds. We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.[95]

Justice William Clark concurred specially, noting that although he agreed with the outcome of the majority opinion, he disagreed with the methodology.

> I believe the majority's stance on this issue is dangerous because it limits our power to interpret our own State Constitution in the future.
>
> Under the majority's analysis, this court would be precluded from protecting the civil liberties of Illinois citizens should the United States Supreme Court decide to consistently favor police efficiency over the rights of the accused. Although the majority's reasoning may seem harmless today, it would preclude this court from

91 Phyllis W. Beck, *Foreword: Stepping Over the Procedural Threshold in the Presentation of State Constitutional Claims*, 68 TEMP. L. REV. 1035, 1038–39 (1995). Judge Beck had enforced the rigid *Edmunds* briefing requirements in *Commonwealth v. Brown*, 654 A.2d 1096, 1099 (Pa. Super. Ct. 1995).

92 *See, e.g.*, Commonwealth v. Matos, 672 A.2d 769, 772–76 (Pa. 1996).

93 469 N.E.2d 147 (Ill. 1984).

94 *Id.* at 155–57.

95 *Id.* at 157 (citations omitted); *see also id.* at 161–63 (Ward, J., concurring).

> protecting the individual liberties of Illinois citizens should such protection become essential in the future.[96]

Thus *Tisler* serves both as Illinois' most important teaching opinion and the basis for its criteria approach. This debate about methodology is still going on twelve years later in Illinois.

In 1992, for example, the Illinois court unanimously rejected a state constitutional claim without applying the factor approach.[97] Later that same year, the court, while denying the necessity of "lockstep" with the Supreme Court, unanimously rejected a state constitutional claim after a detailed criteria analysis.[98] In 1994, a majority of the court found broader protection under the Illinois Constitution's *face-to-face* confrontation clause, language not found in the Federal Constitution.[99] The dissenters argued that was not an adequate criterion on which to base a different outcome from that reached by the United States Supreme Court.[100]

Late in 1994, the disagreement over methodology began to heat up. In *People v. McCauley*[101] the court once again rejected the lockstep approach and held that the state constitution did not permit waiver of self-incrimination rights where an attorney was present and seeking to represent the defendant. In dissent, Justice Ben Miller argued that there were no valid criteria met for divergence.[102] In 1995, in *People v. Mitchell*[103] the court, while once again acknowledging its power to disagree, rejected a state constitutional argument, relying on the *Tisler* criteria approach.[104] Justice James Heiple dissented:

> Before turning to the merits of the "plain touch" doctrine, I note my disagreement with the majority's conclusion that the Illinois Supreme Court, in interpreting the search and seizure clause of the Illinois Constitution, is bound to follow the decisions of the United States Supreme Court which interpret the search and seizure clause of the Federal Constitution. There is no reason for deference in this area of constitutional interpretation. It would be similarly un-

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96 *Id.* at 163–64 (Clark, J., concurring specially).

97 People v. Perry, 590 N.E.2d 454, 456 (Ill. 1992).

98 People v. DiGuida, 604 N.E.2d 336, 342–47 (Ill. 1992); *see also* People v. Levin, 623 N.E.2d 317, 327–28 (Ill. 1993).

99 People v. Fitzpatrick, 633 N.E.2d 685 (Ill. 1994).

100 *Id.* at 690 (Freeman, J., dissenting) ("However, there must, at least, be some substantive basis for our departure. We have not, heretofore, found the difference in phrasing adequate to provide such a basis.").

101 645 N.E.2d 923 (Ill. 1995).

102 *Id.* at 944–45 (Miller, J., concurring in part and dissenting in part).

103 650 N.E.2d 1014 (Ill. 1995).

104 *Id.* at 1017 ("Certain *judicially crafted limitations*, however, define the exercise of that right.") (emphasis added).

> supportable to suggest that the United States Supreme Court, in interpreting a provision of the Federal Constitution, is bound by decisions of the Illinois Supreme Court which interpret a similar provision of the Illinois Constitution. Regardless of the language employed in the two documents, they are separate and distinct. The United States Supreme Court has the responsibility to interpret the Federal Constitution; the Illinois Supreme Court has the responsibility to interpret its State constitution. These are nondelegable duties.
>
> . . . .
>
> Governance involves choices. Every expansion of government power is a diminution of individual liberty. A balance must be struck between lawlessness and personal freedom.[105]

In two 1996 cases, the debate over application of the criteria approach escalated. In *People v. Washington*[106] the Illinois Supreme Court disagreed with the United States Supreme Court and held that the state constitutional due process clause required a "free-standing" claim of innocence based on new evidence to be heard. Although acknowledging that the tests were identical and that nothing in the Constitutional Convention records of 1970 indicated any intent for a different meaning, the Court rejected the lockstep approach[107] and reached a result different from federal constitutional decisions.[108] Justice Miller dissented:

> The majority fails to explain, as an initial matter, why the due process clause of the Illinois Constitution should be interpreted differently from the due process clause of the United States Constitution. Invoking the flawed decision in *People v. McCauley* the majority simply declares that we are under no obligation to construe provisions of the Illinois Constitution in lockstep with the United States Supreme Court's interpretation of corresponding provisions of the United States Constitution. Before adopting an interpretation that varies from one given by the United States Supreme Court, however, we should seek some legitimate, objective ground for distinguishing the language of the state constitution from that of the United States Constitution.

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105 *Id.* at 1025 (Heiple, J., dissenting).

106 665 N.E.2d 1330 (Ill. 1996). For an instructive discussion of *Washington*, see Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins: *Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 160 (1996).

107 *Washington*, 665 N.E.2d at 1335 ("We labor under no self-imposed constraint to follow federal precedent . . . .") (citing People v. McCauley, 645 N.E.2d 923 (Ill. 1994)); *see also id.* ("It is no criticism to read *Herrera* as a conflicted decision.").

108 *See* Herrera v. Collins, 506 U.S. 390 (1993).

> . . . .
>
> Although the approach exemplified in *Tisler* has not been without exception, it represents the better analysis, in my view, and one that I would continue to adhere to. In the present case, the majority acknowledges that the language of the federal and state due process guarantees is identical and, further, that there is nothing in the debates of the 1970 state constitutional convention that suggests that the drafters intended the Illinois provision to mean something different from its federal counterpart. The majority nonetheless concludes that the due process clause of the Illinois Constitution requires a different and more expansive meaning than the same language commands under the federal constitution, and that notions of procedural and substantive due process separately sustain the defendant's action here. Neither ground is persuasive.[109]

Later in 1996, in *People v. Krueger*,[110] the court rejected the United States Supreme Court's "bare majority"[111] expansion of the good-faith exception to the exclusionary rule.[112] The majority stated: "We acknowledge that this court has long applied the lockstep doctrine to follow Supreme Court decisions in fourth amendment cases. We knowingly depart from that tradition here, for the reasons set forth below."[113] The court relied on the seventy-year-old Illinois exclusionary rule and rejected the Supreme Court's rationale for the good-faith exception.[114] Again Justice Miller dissented.

> I do not agree with the majority's conclusion that the Illinois Constitution forbids in this case what the United States Constitution clearly allows.
>
> . . . .
>
> In the present case, the majority does not point to anything in either the text or history of our state constitution that would warrant this court in reaching a result different from the one reached by the United States Supreme Court in *Krull*. In the absence of a valid ground for distinguishing the language of article I, section 6, of the Illinois Constitution from the fourth amendment, I would adhere to *Krull* and recognize, in our own state constitution, a good-faith exception to the exclusionary rule when searches and seizures are conducted under statutes that are later held invalid.[115]

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109 *Washington*, 665 N.E.2d at 1341–42 (Miller, J., dissenting) (citations omitted).

110 675 N.E.2d 604 (Ill. 1996).

111 *Id.* at 610.

112 *See* Illinois v. Krull, 480 U.S. 340 (1987).

113 *Krueger*, 675 N.E.2d. at 611 (citations omitted).

114 *Id.* at 612 ("Consequently, to adopt Krull's extended good-faith exception would drastically change *this state's constitutional law*." (emphasis added)).

115 *Id.* at 613.

### *E. Connecticut*

Connecticut has had an experience similar to, but more recent than, that of Washington. In 1992, in *State v. Geisler*[116] the Connecticut Supreme Court embarked on criteria analysis. Since then the court has purported to apply this criteria approach[117] and to require counsel raising state constitutional claims to brief their arguments using *Geisler* criteria.[118]

In 1995, the court linked criteria analysis and required briefing format:

> The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party—the state or the defendant—can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. Finally, not every *Geisler* factor is relevant in all cases.[119]

The Connecticut court has been very rigid on the required briefing format based on criteria.[120]

In 1993, in *State v. Miller*[121] the Connecticut court, engaging in criteria analysis[122] reached a result in a search and seizure case that was more protective in the inventory search context than federal constitutional law. Justice Callahan challenged the decisionmaking process:

> [I] believe that the majority is reaching to expand the scope of the state constitution when such an expansion has scant support and

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116 610 A.2d 1225, 1232–34 (Conn. 1992).

117 *See, e.g.*, State v. Webb, 680 A.2d 147, 159 (Conn. 1996); Washington v. Meachum, 680 A.2d 262, 275 (Conn. 1996); State v. Trine, 673 A.2d 1098, 1107 n.12 (Conn. 1996); Benjamin v. Bailey, 662 A.2d 1226, 1231 (Conn. 1995); State v. Morales, 657 A.2d 585, 589 n.10 (Conn. 1995); State v. Linares, 655 A.2d 737, 753 (Conn. 1995); State v. Miller, 630 A.2d 1315, 1323–24 (Conn. 1993).

118 *See supra* note 71.

119 *Morales*, 657 A.2d at 589 n.10 (citations omitted).

120 *See supra* note 71; *see also* State v. Faust, 678 A.2d 910, 917 n.10 (Conn. 1996); State v. Nixon, 651 A.2d 1264, 1267 n.4 (Conn. 1995); State v. Taheri, 675 A.2d 458, 462 n.5 (Conn. App. Ct. 1996); State v. Beliveau, 650 A.2d 591, 594 n.3 (Conn. App. Ct. 1994). *But see* State v. Scarpiello, 670 A.2d 856, 862 n.8 (Conn. App. Ct. 1996) ("The defendant has failed to provide us with a separate analysis of his claim under the Connecticut constitution, and we therefore choose not to review this claim under the Connecticut constitution. This failure, however, does not mean that we are not able to afford review of such a claim if we decide to do so.") (citations omitted).

121 630 A.2d 1315 (Conn. 1993); *see supra* note 63.

122 *Miller*, 630 A.2d. at 1323.

> serves no useful purpose. The majority concedes that neither textually nor historically is there any justification for the application of the state warrant requirement to this set of facts. It, nonetheless, discovers that Connecticut citizens are entitled to greater protection from searches and seizures, when there is probable cause to believe that their motor vehicles are the repositories of weapons or contraband, than that provided by the federal constitution.
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> . . . .
>
> . . . . The majority opinion appears to be simply a flexing of state constitutional muscle for its own sake.[123]

In 1996, though, the court once more declined to reach a claim because of the nature of the briefing.[124] Justice Flemming Norcott dissented:

> Although we have articulated several "tools of analysis" that are to be considered "to the extent applicable" in construing the state constitution . . . I have never understood these criteria to be anything other than guidelines for the benefit of counsel, who can use them adequately to alert us to a serious state constitutional claim and provide us with a framework within which to evaluate it. These areas of analysis normally provide informative and even compelling sources of authority, and the comprehensive, organized exploration of them by the parties is of substantial benefit to the court and is to be encouraged. I do not believe, however, that by identifying these criteria, we established a rigid formula, the components of which must be formally and specifically invoked in order for a claim to be reviewed, despite the functional sufficiency of the analysis presented. To apply them as such would elevate form over substance, and in no case decided since *Geisler* have we indicated that they are to be applied as technical briefing requirements. In fact, this court has never directly and specifically delineated what constitutes a minimally adequate analysis of this type of claim.[125]

Scholars have been critical of the Connecticut criteria approach.[126] In Connecticut, like in the other states analyzed here, the criteria approach *itself* has become the focal of state constitutional analysis in at least some of the cases.[127] This reflects a debate over the legitimacy of independent state constitutional law itself.

Thus in Washington the criteria approach seems to have taken on a "life of its own" in state constitutional law cases, while in New Jersey and Pennsylvania it does not seem to have resulted in any predictable

123 *Id.* at 1327, 1328 (Callahan, J., concurring in part and dissenting in part).

124 State v. Hill, 675 A.2d 866, 875 n.23 (Conn. 1996).

126 *Id.* at 882–83 (Norcott, J., dissenting) (citations omitted).

127 *See supra* note 63.

approach to state constitutional claims.[128] In neither instance did it live up to its billing, and possibly has actually been counterproductive.

## IV. A Case Study of Criteria in Action: The New Jersey and Washington Garbage Search Cases

In *California v. Greenwood*[129] the United States Supreme Court held in a six to three decision that the Federal Fourth Amendment does not prohibit police from seizing and searching garbage which has been left out for collection. The Court concluded that garbage was not protected because persons who leave it at the curb had not "manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."[130] Interestingly, as it has done on a number of occasions, the Supreme Court in *Greenwood* reminded us that "[i]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct that does the Federal Constitution."[131]

In July 1990, the New Jersey Supreme Court rejected the *Greenwood* holding and concluded that warrantless searches of garbage are unconstitutional under Article I, paragraph 7 of the New Jersey Constitution.[132] Justice Robert Clifford, writing for the majority in *State v. Hempele*, first analyzed the federal *Greenwood* case and then invoked

128 *See, e.g.*, State v. Hamilton, 636 A.2d 760 (Conn. 1994); *Miller*, 630 A.2d at 1315.

129 *See, e.g.*, State v. Muhammad, 678 A.2d 164, 173, 191 (N.J. 1996); Doe v. Poritz, 662 A.2d 367, 414 (N.J. 1995) ("Although plaintiff has presented no argument for justifying expansion of equal protection beyond the federal right in this case, we nevertheless proceed with the state constitutional analysis.") (citations omitted); State v. Smith, 637 A.2d 158, 163 (N.J. 1994); State v. Sanchez, 609 A.2d 400, 407–09 (N.J. 1992); State v. Dunne, 590 A.2d 1144, 1148 (N.J. 1991); State v. DeLuca, 527 A.2d 1355, 1357 (N.J. 1987); State v. Stever, 527 A.2d 408, 415 (N.J. 1987); State v. Hartley, 511 A.2d 80, 97–99 (N.J. 1986); State v. Pierce, 642 A.2d 947, 959–60 (N.J. 1994). For an early analysis, see Jose L. Fernandez, Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 Rutgers L.J. 491 (1984).

130 486 U.S. 35 (1988).

131 *Id.*

132 *Id.* at 43. The First Circuit has ruled that a homeowner has no reasonable expectation of privacy in shredded papers set out for collection in trash bags. United States v. Scott, 975 F.2d 927 (1st Cir. 1992); *see* Gordon J. MacDonald, Note, *Stray Katz: Is Shredded Trash Private?* 79 Cornell L. Rev. 452 (1994). The Supreme Court's decision in *Greenwood* and its approach to "legislative or social facts" (whether an expectation of privacy in one's garbage is one that society would recognize as reasonable) is perceptively discussed in the context of state constitutional law in Neil Colman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 Temp. L. Rev. 1229, 1240–41 (1992).

the nautical metaphor quoted at the introduction of this Article.[133] Interestingly, his quote referring to United States Supreme Court decisions as providing "valuable sources of wisdom for us" cited *State v. Hunt*, but was from Justice Pashman's concurring opinion which disagreed with Justice Handler's criteria approach and criticized it as limiting and reflecting a misplaced presumption of correctness for United States Supreme Court decisions.[134] Justice Clifford acknowledged the textual similarity between the federal and state search and seizure provisions. He then noted that the Supreme Court may be "hesitant to impose on a national level far-reaching constitutional rules binding on each and every state."[135] He continued:

> The Supreme Court must be especially cautious in fourth-amendment cases. When determining whether a search warrant is necessary in a specific circumstance, the Court must take note of the disparity in warrant-application procedures among the several states, and must consider whether a warrant requirement in that situation might overload the procedure in any one state. In contrast, we are fortunate to have in New Jersey a procedure that allows for the speedy and reliable issuance of search warrants based on probable cause. A warrant requirement is not so great a burden in New Jersey as it might be in other states.[136]

Justice Clifford indicated that in contrast to the federal test requiring (1) a subjective expectation of privacy, and (2) that the expectation of privacy be one that society is prepared to recognize as reasonable, the New Jersey Constitution required simply that "an expectation of privacy be reasonable."[137] He concluded that it was reasonable for people to prefer that their garbage remain private, and that because the

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133 State v. Hempele, 576 A.2d 793 (N.J. 1990); *see* Stanley H. Friedelbaum, *Refuse Disposal, Search and Seizure, and Privacy Rights in New Jersey; A Counter-Active Response to a Federal Precedent*, ST. CONST. COMMENTARIES & NOTES, Fall 1990, at 17; Stanley H. Friedelbaum, *Supreme Courts in Conflict: The Drama of Disagreement*, INTERGOVERNMENTAL PERSPECTIVE, Fall 1991, at 27; Latzer, *Into the '90s*, *supra* note 13, at 26–27; Colleen D. Brennan, Comment, 21 SETON HALL L. REV. 207 (1990).

134 *Hempele*, 576 A.2d at 800. This is very much like Justice Pollock's observation in 1982: "Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete." Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982).

135 State v. Hunt, 450 A.2d 952, 967 (N.J. 1982); *see also supra* note 46 and accompanying text.

136 *Hempele*, 576 A.2d at 800 (quoting *Hunt*, 450 A.2d at 960 (Pashman, J., concurring)).

137 *Id.* at 800–01 (citations omitted). This seems to be an analysis of strategic concerns. *See infra* note 179 and accompanying text.

garbage was in containers concealing their contents, people were entitled to such preference.

The question of "reasonableness" in this context is one on which reasonable people may differ. The Justices of the United States Supreme Court differed in *Greenwood.* The dissenters in *Hempele* differed from Justice Clifford's majority opinion. The *Hempele* majority differed from the *Greenwood* majority. The important point is that the focus of the whole *Hempele* opinion was the Supreme Court's opinion in *Greenwood.* The Supreme Court decision did, in fact, cast a giant shadow over the decision in *Hempele.* In the final analysis, a majority of the New Jersey Supreme Court disagreed with, and authoritatively rejected, the majority opinion of the United States Supreme Court. Justice Clifford concluded:

> Our decision today does not follow the course set by the Supreme Court because "we are persuaded that the equities so strongly favor protection of a person's privacy interest that we should apply our own standard rather than defer to the federal provision." We are aware that our ruling conflicts . . . [with] virtually every other court that has considered the issue. . . .
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> . . . As the trial court . . . so eloquently put it, "the trouble with those cases is that they are *flatly and simply wrong* as the matter of the way people think about garbage." Garbage can reveal much that is personal. We do not find it unreasonable for people to want their garbage to remain private and to expect that it will remain private from the meddling of the State.[138]

Justice Daniel O'Hern dissented:

> This case is not about garbage. This case is about the values of federalism. . . .
>
> . . . The issue is the basis on which we shall depart from Supreme Court precedent in interpreting counterpart guarantees of our Constitution. . . .
>
> For me, it is not enough to say that because we disagree with a majority opinion of the Supreme Court, we should invoke our State Constitution to achieve a contrary result. It sounds plausible, but one of the unanticipated consequences of that supposedly benign doctrine of state-constitutional rights is an inevitable shadowing of the moral authority of the United States Supreme Court. Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties.
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> . . . .
>
> Respect for law flows from a belief in its objectivity. To the extent possible, we ought not personalize constitutional doctrine.

138 *Hempele,* 576 A.2d at 801.

> When we do otherwise, we vindicate the worst fears of the critics of judicial activism. The fourth amendment is the fourth amendment. It ought not mean one thing in Trenton and another across the Delaware River in Morrisville, Pennsylvania.
>
> In truth, the constitutional vision that we have shared as a people is not one of state-constitutional guarantees of freedom. Whether God-given or the result of social compact, the content of our freedom under law is drawn from the Bill of Rights. I rather doubt that most American think otherwise. . . . For good or ill, this unique American vision of freedom has been nurtured by the United States Supreme Court. There may come a time when the Supreme Court might abdicate its responsibility and we would have to act, but this is surely not it. Where that Court has drawn the line in this case does not significantly endanger our freedoms. I would abide by its judgment. If there is a New Jersey view on this issue, the legislature can vindicate it in time.[139]

Justice Marie Garibaldi also dissented, based on a focus on the United States Supreme Court's *Greenwood* decision. She stated: "An examination of the 'divergence criteria' developed in *State v. Hunt* and reaffirmed in *State v. Williams*, . . . indicates that there are no independent state-constitutional grounds to justify our divergence from federal law in this area."[140]

About four months after *Hempele*, the Washington Supreme Court reached the same conclusion, rejecting *Greenwood*. In *State v. Boland*,[141] Justice James Dolliver's majority opinion referred to the *Gunwall* criteria, noting:

> The purpose of these factors is twofold: first, to lend assistance to counsel where briefing might be appropriately directed in cases in which independent state grounds are urged; and second, to help ensure that if the court does use independent state grounds in reaching its conclusion it will consider the six factors to the end that the decision shall be based on well founded legal reasons and not by merely substituting its own notion of justice for that of duly elected legislative bodies or the United States Supreme Court.[142]

The majority found all six *Gunwall* criteria to be fulfilled, as an apparent threshold matter, and then proceeded to "resort to analysis of the issue on independent state grounds."[143] By contrast to New Jersey's approach, in which application of the criteria (when this ap-

139 *Id.* at 814–15 (emphasis added) (citations omitted).

140 *Id.* at 815–16.

141 *Id.* at 817 (citations omitted).

142 800 P.2d 1112 (Wash. 1990).

143 *Id.* at 1114 (citation omitted).

proach is actually used) is an integral part of resolving the question of whether the state constitution should be interpreted more broadly than its federal counterpart, Washington's approach appears to be a two-stage inquiry. First, are the criteria satisfied? If all of the criteria are satisfied, the court moves on to "independent" interpretation of the state constitution. In *Boland,* Justice Dolliver concluded: "Having found the six *Gunwall* criteria fulfilled in this case, we now resort to an analysis of the issue on independent state grounds."[144] He relied on *Gunwall's* analysis of the first, second, third, and fifth factors (also on search and seizure), and therefore analyzed only the fourth and sixth factors to reach the conclusion that all six were met.

Much of the Washington court's disagreement with the United States Supreme Court's *Greenwood* decision, and added justification beyond the New Jersey *Hempele* conclusion, was based on the text of Article I, section 7 which, in contrast to the federal Fourth Amendment, provides: "No person shall be disturbed on his private affairs, or his home invaded, without authority of law." This textual analysis, however, seems the same as analyzing the first and second criteria, which had already taken place in *Gunwall,* and was accepted as applicable in *Boland.* The court noted:

> While there is an identical result in *Hempele* and this case, we note one important doctrinal difference. In the dissent in *Hempele,* Justice Garibaldi attacks the majority opinion on federalism grounds and argues that the test established under federal precedent more appropriately comports with the reasonable expectation of privacy that most New Jersey citizens have in their garbage than the test developed by the majority. This argument has some merit in that the language of the Fourth Amendment and article 1, section 7 of the New Jersey Constitution are identical. The same argument, however, does not apply when comparing Washington's constitution and the Fourth Amendment. Under Const. art. 1, § 7, the focus is whether the "private affairs" of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable.
>
> In rendering our opinion, we acknowledge that the United States Supreme Court has held to the contrary under the Fourth Amendment in *Greenwood.* We also recognize that the opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects they squarely address. However, we decline to follow federal precedent for two reasons. First, *Greenwood* is based in part on the fact the court felt society unwilling to accept as objectively rea-

144 *Id.*

> sonable a privacy expectation in garbage *left outside the curtilage of the home for collection.* As Chief Judge Alexander points out in his dissent below, this court has previously held the location of a search is indeterminative when inquiring into whether the State has unreasonably intruded into an individual's private affairs. Thus, the fact defendant placed his garbage at the curb rather than in his backyard has no bearing on whether an unreasonable intrusion into his *private affairs* occurred. Second, the reasoning upon which *Greenwood* is based conflicts directly with this court's interpretation of Const. art I, § 7. In explaining why society was unwilling to accept an expectation of privacy in garbage, the Supreme Court analogized to *Smith v. Maryland,* wherein the court held the Fourth Amendment did not prohibit the installation of a pen register at the telephone company for the purpose of recording telephone numbers of a criminal suspect. The main reason for the court's conclusion was that a person voluntarily conveys the numbers to the telephone company, thereby losing all legitimate privacy expectations in the numbers. However, we held to the contrary in *Gunwall* . . . .[145]

It seems from this analysis that Washington constitutional law arguably protects against searches of a person's garbage regardless of what the United States Supreme Court held in *Greenwood.* The use of criteria, though, reorients the focus from Washington constitutional text and doctrine, to a comparison of such state constitutional text and doctrine to federal constitutional law. This is a relational approach. If a claim is properly made under a state constitution, why would the court bother to discuss what federal constitutional law or the United States Supreme Court would conclude about the problem?

In *Boland,* Justice Richard Guy dissented: "I disagree that the factors set forth in *State v. Gunwall* have been met. Therefore there is no basis upon which the majority can conclude that a broader interpretation of privacy rights, under article 1, section 7 of the Washington State Constitution is warranted."[146] The rest of the dissenting opinion consisted of disagreement on the majority's findings with respect to the *Gunwall* criteria. Therefore, Justice Guy argued there was no basis on which the majority could conclude that garbage searches were protected by the Washington Constitution. He argued that the *Gunwall* criteria were adopted to "ensure that resort to independent state grounds will be based on *well founded legal reasons* and not by substitution of a court's own notion of justice for that of . . . the United States Supreme Court."[147] Justice Guy therefore ascribed an explicit pre-

145 *Id.*

146 *Id.* at 1116–17 (citations omitted).

147 *Id.* at 1118 (citation omitted).

sumption of correctness to the United States Supreme Court decision (*Greenwood*), with the criteria operating to limit contrary results under the state constitution. This approach is exactly what New Jersey Justice Pashman warned of in *State v. Hunt* in 1982, and for which the dissenters in New Jersey's *Hempele* case argued. Majority and dissent here focus on their disagreement on the *application of the criteria* rather than on the content and application of the state constitutional provision at issue. Is a dissenter's accusation that the majority has misapplied the criteria any different from an accusation that the majority has simply resorted to the state constitution in a result-oriented attempt to "evade" United States Supreme Court precedent?[148]

The Supreme Judicial Court of Massachusetts,[149] the Colorado Supreme Court,[150] the Connecticut Supreme Court,[151] the North Dakota Supreme Court[152] and the Indiana Supreme Court,[153] decided to uphold garbage searches and followed the United States Supreme Court's *Greenwood* decision. The Massachusetts decision was unani-

148 *Id.* at 1120 (citations omitted). For an analysis of *Boland*, together with a criticism of the *Gunwall* criteria, see James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington Constitution*, 66 WASH. L. REV. 1099 (1991). Justice Utter defended the approach in Utter, *supra* note 53; *see also* Kelly Kunsch, *Washington State Constitutional Research: A Recipe for a* Gunwall *Analysis*, 49 WASH. ST. B. NEWS 31 (1995) (October issue).

149 *See* Williams, *supra* note 5. He writes:

> [S]tate judges may be particularly sensitive, and even defensive, to charges that their decisions are result oriented or that their disagreement with the Supreme Court is based purely on ideological differences. These charges are typically leveled by dissenters or by those who merely disagree with the state court's substantive result. Nevertheless, these are the kinds of pressures that have forced state courts to develop standards or criteria by which to justify an independent state constitutional interpretation which arguably conflicts with a prior Supreme Court interpretation of a similar or identical federal constitutional provision.

*Id.* at 357–58 (footnotes omitted).

150 Commonwealth v. Pratt, 555 N.E.2d 559, 567–68 (Mass. 1990); *see* Latzer, *Into the '90s*, *supra* note 13, at 27 ("*Hempele* will probably receive much more attention in the literature than *Pratt* . . . ."). The Massachusetts Court also held that garbage in a dumpster on commercial property was protected from warrantless searches. Commonwealth v. Krisco Corp., 653 N.E.2d 579 (Mass. 1995).

151 People v. Hillman, 834 P.2d 1271 (Colo. 1992).

152 State v. DeFusco, 620 A.2d 746 (Conn. 1993). One commentator reported that there was negative media reaction to the decision, but that an attempt to overturn the decision by a proposed constitutional amendment failed in the legislature. Ann R. Johnson, Note, State v. DeFusco: *Warrantless Garbage Searches Under the Connecticut Constitution*, 14 QUINNIPIAC L. REV. 143, 171 n.210, 171–72 (1994).

153 State v. Rydberg, 519 N.W.2d 306 (N.D. 1994); *see also* State v. Carriere, 545 N.W.2d 773 (N.D. 1996) (reaffirming *Rydberg*).

mous, with no discussion of the state cases disagreeing with *Greenwood.* The Colorado decision was four to three, with the majority and dissenting opinions analyzing out-of-state cases and law review literature, as well as the *Greenwood* opinions, both majority and dissent. The Connecticut decision was three to two, and like Colorado, contained a full exploration of both the federal and state cases. The North Dakota case was unanimous, and acknowledged the other state cases but followed the federal result. The Indiana case was closely divided and also contained a complete treatment of both the federal and state cases.

In 1996, the Vermont Supreme Court, in a three to two decision, followed New Jersey and Washington, rejecting the United States Supreme Court's *Greenwood* decision.[154] The majority analyzed both the federal and the state cases. Justice John Dooley's dissent stated that he "strongly agree[d] with the creation of an independent state constitutional jurisprudence that keeps essential decisions about protected liberties as much as possible within Vermont."[155] He quoted from the Vermont Court's famous *State v. Jewett* decision[156] in support of a criteria approach, concluding that the majority opinion was a "restated *Greenwood* dissent."[157]

## V. Reasons to Distrust the Criteria Approach

The truth is that reasonable people—judges, lawyers, political observers, and citizens—can reasonably differ over whether people's telephone toll billing records or their garbage should be vulnerable to warrantless police searches. They can disagree about most other constitutional questions. There is simply no clear or plain constitutional guidance. The debate is about people's view of the reasonableness of citizens' expectation of privacy in these things. But it is not a valid argument to say that a *state* constitution *should not be interpreted* to provide against such warrantless searches *because* the United States Supreme Court has already held that the *Federal Constitution* is not violated by such searches, based on its national view of "reasonableness."

At its core, the criteria approach is based on a notion that interpretations of the Federal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions. Justice Stevens has referred to this presumption of correctness as evidence of a

154 Moran v. State, 644 N.E.2d 536 (Ind. 1995).

155 State v. Morris, 680 A.2d 90 (Vt. 1996).

156 *Id.* at 106 (Dooley, J., dissenting).

157 *See supra* notes 28–30 and accompanying text.

"misplaced sense of duty."[158] Justice Linde referred to it as the "non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions."[159] State supreme court justices' views of "reasonableness," though, particularly only within their own states, are just as valid as those of United States Supreme Court justices. Of course the decisions of the United States Supreme Court deserve a careful, respectful reading. But only when state judges are convinced *by their reasoning* should they adopt them.[160] As Justice Linde noted:

> This court like others has high respect for the opinions of the Supreme Court, particularly when they provide insight into the origins of provisions common to the state and federal bills of rights *rather than only a contemporary "balance" of pragmatic considerations about which reasonable people may differ over time and among the several states.*[161]

The United States Supreme Court decisions in *Smith v. Maryland* and *Greenwood v. California,* both rejected by the New Jersey and Washington courts, as well as other state courts, reflect the sort of "contemporary 'balance' of pragmatic considerations about which reasonable

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158 *Morris,* 680 A.2d at 104 (Dooley, J., dissenting); *see also* State v. Read, 680 A.2d 944, 951–53 (Vt. 1996) (applying *Jewett* as a criteria requirement).

159 Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting).

160 State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983); *see also* State v. Flick, 495 A.2d 339, 343 (Me. 1985) (quoting Justice Linde); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Justice Brennan writes:

> The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the Federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

*Id.* at 502.

161 *See* Brennan, *supra* note 159; Frederic S. Le Clercq, *The Process of Selecting Constitutional Standards: Some Incongruities of Tennessee Practice,* 61 TENN. L. REV. 573 (1994); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation,* 12 ALASKA L. REV. 1 (1995); Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law,* 49 U. PITT. L. REV. 729, 741 (1988).

people may differ" that Justice Linde was describing. Such decisions are not entitled to a presumption of correctness when a state court interprets its own constitution. The criteria approach, as articulated most clearly in New Jersey and Washington, and as applied in practice, seems to result in such a presumption of correctness. Although in the recent garbage search cases, majorities on both the Washington and New Jersey courts did disagree with the Supreme Court's decision, the criteria approach (most pronounced in Washington) shifts the debate away from analyzing the state constitution to a preoccupation with the shadow cast by the United States Supreme Court decision. For these reasons, the emerging criteria approach, while very appealing to lawyers and judges, is one that should be avoided because the underlying premise on which it is based is invalid. Decisions of the United States Supreme Court declining to recognize rights should not be accorded special weight in state constitutional interpretation. They should not carry any presumptive validity.

The type of criteria, factors, and standards listed by the New Jersey, Washington, and Pennsylvania justices and other commentators reflect circumstances under which state courts have interpreted their constitutions to provide more extensive rights than their federal counterpart.[162] They properly serve as important guides for scholars, courts, and advocates. But they should not serve as limitations on state court authority to disagree with Supreme Court constitutional analysis even if none of the factors are present. A state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the United States Supreme Court has said when interpreting a different constitution under different institutional circumstances.[163]

Wisconsin Chief Justice Shirley Abrahamson, in discussing the garbage search cases,[164] addressed the still controversial question of

162 *Kennedy*, 666 P.2d at 1321 (emphasis added). For an exhaustive analysis of balancing in constitutional interpretation, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

163 *See., e.g.*, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934–44 (1976); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 185–95 (1983); Kent M. Williams, Note, *Property Rights Protection Under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1273–1300 (1991).

164 *See* Commonwealth v. DeJohn, 403 A.2d 1283, 1289 (Pa. 1979) ("As we believe that *Miller* establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and seizures.").

disagreement between state judges and the United States Supreme Court.

> But should not different opinions about individual rights in search and seizure cases be expected and accepted?
>
> Differences in interpretation of the state and federal constitutions should be viewed, I believe, as examples of the difficulties of interpreting language, especially the broad phrases of a bill of rights. . . .
>
> We accept division of opinion within the United States Supreme Court on interpretations of constitutional language. . . . Why should state courts not closely examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?"[165]

These views recognize the legitimacy of a reasoned difference of opinion, not as a "mere" result-oriented disagreement, but rather as the product of honestly held alternative ways of looking at a problem of constitutional interpretation and the consequences of resolving it in a certain way. This attitude has to include rejection of the criteria approach. Former Justice Joseph Grodin of California has made a similar point,[166] as have others.[167]

Other commentators, however, have called for the criteria approach.[168] For example, Professor James A. Gardner, in his well-

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165 Abrahamson, *supra* note 7, at 725–33.

166 *Id.* at 731.

167 Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions,* 15 HASTINGS CONST. L.Q. 391 (1988). He writes:

> The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds. In the absence of such factors, however, state courts are still obliged to find meaning in the provisions of the state constitutions. And . . . neither logic nor history requires that they accord state constitutional language the same meaning as the United States Supreme Court has accorded a comparable provision of the federal Constitution.

*Id.* at 400; *see also* Peter Linzer, *Why Bother with State Bills of Rights?,* 68 TEX. L. REV. 1573, 1584–85, 1607–08, 1610 (1990).

168 *See, e.g.,* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation,* 22 RUTGERS L.J. 841 (1991). He writes:

> [R]ather than blindly following federal precedent, state judges should independently seek their own best interpretation of their state constitutions. This does not mean that they should altogether ignore federal rulings—they may be adopted or rejected, depending on their inherent persuasiveness. But when state judges forthrightly assert their own perspectives, it is argued, the result is a healthier and more vibrant federalism.

*Id.* at 849; *see also id.* at 847 n.24, 854–55.

known 1992 article, *The Failed Discourse of State Constitutionalism*,[169] criticized state constitutional decisions for not utilizing a "'discourse of distinctness'. . . a language and set of conventions enabling participants in the legal system to argue that provisions in the state constitution *mean something different from their federal counterparts.*"[170] This issue is the most important component of the ongoing discussion of legitimacy in state constitutional interpretation.[171]

The garbage search cases involve a disagreement about people's reasonable expectation of privacy. Justice Abrahamson reports that she conducted "her own unscientific survey of Wisconsinites' views on garbage." The "general consensus" was that one's garbage is private. "These views raise questions about how a court determines society's reasonable expectation of privacy."[172] Simply to say that protection under a state constitution *may* be more extensive than under the Federal Constitution begs the question of what those protections should and will be. The highest state courts decide what the state constitution means. The dialogue should be on the meaning of the state constitution itself, rather than on comparing it with, or relating it to, the Federal Constitution.[173] The current, relational or criteria-based dialogue is focused on the wrong question. Justice Abrahamson's forthright recognition of the real locus of discretion in the state high courts is refreshing.

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169 *See, e.g.*, Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751; George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 987–96 (1979); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223 (1996); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85 (1985); Pollock, *supra* note 20, at 718; Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005, 1030–32 (1989); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

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

171 *Id.* at 778 (emphasis added); *see also id.* at 804 ("[A] discourse of distinctiveness [is] a way of explaining differences between the state and federal constitutions."). For an opinion relying on Gardner's critique, calling for criteria, see State v. Canelo, 653 A.2d 1097, 1112 (N.H. 1995) (Thayer, J., dissenting).

172 For the latest discussion, see Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

173 Abrahamson, *supra* note 7, at 729 n.26. Justice Abrahamson considered the problem of "legislative facts" concerning the expectation of privacy in *State v. Rewolinski*, 464 N.W.2d 401, 414 n.1 (Wis. 1990) (Abrahamson, J., dissenting).

Professor Niel McCabe has characterized the garbage search cases as reflecting differences of opinion among federal and state courts about "legislative or social facts"—whether society views as reasonable a person's expectation of privacy in his garbage.[174] Obviously, state courts interpreting their own state constitutions may make findings on such legislative or social facts that differ from a federal court's findings under the Federal Constitution.

In addition to what has already been pointed out with respect to the differences in text and history between the federal and state constitutions, there are a number of other reasons why the presumption of correctness and its resulting criteria approach is a mistake. Others as well as myself have reviewed these reasons elsewhere.[175] In summary, though, there may not be any federal decisions on point to emulate.[176] In Professor Lawrence Sager's "underenforcement thesis"[177] he demonstrates that the United States Supreme Court often underenforces the Federal Constitution out of deference to the states.[178] Thus, federal decisions should hardly be viewed as limiting the interpretation of *state* constitutional provisions through the presumption of correctness approach.

Professor Sager's "strategic concerns thesis" is another argument against the presumption of correctness.[179] Pointing to the substantial

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174 Linde, *supra* note 1.

175 McCabe, *supra* note 131, at 1245–51.

176 *See* Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 374–79 (1993); Williams, *supra* note 5; Williams, *supra* note 23; Williams, *supra* note 71, at 696–701.

177 In striking down an attempt to amend the California Constitution to require the state constitutional criminal procedure provisions to be interpreted in lockstep with federal guarantees, the California Supreme Court observed:

> As a practical matter, ultimate protection of criminal defendants from deprivation of their constitutional rights would be left in the care of the United States Supreme Court. Moreover, the nature and extent of state constitutional guarantees would remain uncertain and undeveloped unless and until the high court had spoken and clarified *federal* constitutional law.

Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990).

178 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218–20 (1978).

179 Professor Sager writes:

> While there is no litmus test for distinguishing these norms, there are indicia of underenforcement. These include a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies . . . .

role of "strategic" considerations in judicial enforcement of constitutional norms, Sager identified the possibility of state and federal courts employing different "strategies" in constitutional interpretation. State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying similar "norms of political morality." Sager concluded:

> State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.
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> . . . .
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> In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.[180]

Under these circumstances, the "jurisdictional redundancy"[181] of a state constitutional "second look"[182] at constitutional questions makes sense.[183] The adoption of different "strategies" in state and federal constitutional interpretation may, as in the search and seizure cases,

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*Id.* at 1218–19.

180 Professor Sager asked, "[T]o what extent, if any, should state judges faced with claims under provisions of their state constitutions feel themselves bound to defer to Supreme Court interpretations of equivalent federal constitutional provisions?" Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985); *see also* Linzer, *supra* note 166, at 1580 ("The gut issue, though, is how closely the state courts should follow federal precedents in applying their states' provisions."); David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES ST. CONST. L. 275 (1989).

181 Sager, *supra* note 179, at 975–76; *see also* Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 535 (1986) (discussing the institutional reasons for the United States Supreme Court's narrow view of standing and concluding that, "[t]hese institutional differences between the federal and state courts suggest that active judicial review of public law issues at the state level is not as troublesome theoretically as it is at the federal level"); Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 TUL. L. REV. 928, 936–58 (1985).

182 Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). The concept of redundancy is common to the understanding of federal systems. *See* Martin Landau, *Federalism, Redundancy and System Reliability*, PUBLIUS: J. FEDERALISM, Fall 1973, at 173, 187–96.

183 Williams, *supra* note 5, at 361.

reflect a difference of opinion about a "contemporary 'balance' of pragmatic considerations."[184]

Professor Louis Bilionis noted that "the *constitutionally significant facts* may be different at the state and federal levels . . . . Indeed, whenever a constitutional methodology admits a need to accommodate institutional considerations, the possibility for different yet equally correct state and federal results exists."[185] By way of example, he cited the reasonable expectation of privacy analysis in search and seizure cases.[186] A state court's view of "constitutionally significant facts" could certainly differ from the United States Supreme Court's view, thus yielding a different outcome.

Recently Professor Paul Kahn argued in favor of an independent state constitutional interpretation, not tied to "unique state sources," as part of the shared national enterprise of constitutional interpretation because, in such matters, there can be no absolute truth. Kahn argued:

> [I] abandon the central premise of most previous works, namely, that the interpretation of a state constitution must rely on unique state sources of law. Those sources include the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community. State constitutional law, it is assumed, can diverge from federal law only if the differences can be traced to one of these sources.
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> . . . .
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> The doctrine of unique state sources dominates the recent literature. . . . That there should be an intersection between state authority and federal sources is ruled out in advance. This intersection, however, is just the position for which I want to argue. It is the position that many state courts find themselves moving toward, not only because of the meager state sources available, but also because state constitutional debate cannot close its eyes to the larger discursive context within which it finds itself.
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> . . . .
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> The doctrine of unique state sources is an approach to constitutional interpretation that rests upon two unexamined assumptions. First, it assumes that differences in the narrow constitution—the formal text and its history—of each state reflect differences in each state's larger constitution. Second, it assumes that constitutional adjudication is a matter of presenting what already exists within those

184 *See* Sager, *supra* note 179. *But see* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

185 State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983) (Linde, J.).

186 Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1808–09 (1992); *see also* McCabe, *supra* note 131 ("legislative or social facts").

> state sources. Both assumptions reflect a fear that the only alternative to an interpretation based upon unique state sources is national uniformity. Interpretive diversity within a common enterprise, however, represents a third possibility that dissipates the fear and undermines the assumptions.
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> . . . .
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> Of course, different courts can and will reach different conclusions about the meaning of such constitutional values.[187]

The criteria, or presumption of the validity of the federal interpretation approach is, almost by definition, inconsistent with Professor Kahn's views.

Justice Robert Utter of Washington, a supporter of the criteria approach, criticized the use of a lockstep approach to interpreting that state's equality provisions, labelling such an approach a virtual "rewrite" of the state constitution without a constitutional convention or the people's consent.[188]

These factors make it particularly important for state courts to look first to their own constitutional provisions, and judicial doctrines which pre-date incorporation of federal Bill of Rights provisions. Secondly, they must look to state constitutional decisions in other jurisdictions for further guidance. As I have earlier argued, United States Supreme Court decisions rejecting asserted federal constitutional rights should persuade state courts confronting similar claims under their state constitutions *only* by their reasoning, discounted for federalism or strategic concerns, or any other type of deference to the states. The decisions should not be followed merely because of the United States Supreme Court's institutional position as the highest court in the land for the resolution of *federal* constitutional claims.[189]

The relational, criteria approach starts from the federal precedent and considers the question of *deviation.* Independent state constitutional interpretation is based on state court *autonomy.* Professor Thomas Morawetz explained this distinction:

> On one hand, many judges write as if congruence with the federal rule is the norm, and deviation from the federal norm is an exception that needs to be justified in the light of special reasons. Judges who proceed from this assumption differ among themselves about the kinds of reasons that warrant deviation. On the other hand, many judges imply that autonomy from federal interpretations of

187 Bilionis, *supra* note 185, at 1808–09.

188 Paul W. Kahn, *Interpretation and Authority in State Constitutionalism,* 106 HARV. L. REV. 1147, 1147, 1152–53, 1160, 1161 (1993) (footnote omitted); *see also* Pitler, *supra* note 171, at 236.

189 State v. Smith, 814 P.2d 652, 661 (Wash. 1991) (Utter, J., concurring).

> federal law is the norm and that congruence between the federal and the state standard is, at best, coincidence.
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> . . . .
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> Thus, from the standpoint of power and authority, it is appropriate to see state courts as needing to justify *deviation* from the federal norm, to justify expanding a right. But from the standpoint of interpretive responsibility, state courts are necessarily autonomous, committed by the very nature of the judicial task to offering a compelling account of the rights in question, an account that may or may not dovetail with the federal understanding.[190]

Professor Morawetz referred to the Connecticut criteria analysis[191] as the "smorgasbord" approach.[192]

## VI. A Crisis of Legitimacy and Methodology in State Constitutional Rights Jurisprudence

> For federal constitutional law, the primary legitimacy concern has involved the relation between the United States Supreme Court and other purportedly more democratic branches, such as Congress or state legislatures. For state constitutional law, in contrast, the major legitimacy concern has involved the relation between state courts and the U.S. Supreme Court: when can a state court interpret its state guarantees to reach a result different from that obtained by the Supreme Court interpreting the Federal Constitution?[193]

The criteria cases discussed earlier reflect a fundamental debate about the legitimacy of independent state constitutional interpretation in cases where there are also similar or identical federal constitutional guarantees. Despite repeated assurances by the United States Supreme Court itself[194] that the practice is unexceptional, the legitimacy debate continues to rage. It is a central question of constitutional theory, albeit one of *state* rather than *federal* constitutional theory. These legitimacy questions in state cases "evading"[195]

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190 *See* Williams, *supra* note 5, at 396–97; Williams, *supra* note 23, at 168–70.

191 Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 Conn. L. Rev. 635, 638–39, 657 (1994).

192 *See supra* notes 116–26 and accompanying text.

193 Morawetz, *supra* note 190, at 644.

194 Tarr, *supra* note 167, at 853.

195 *See supra* note 131 and accompanying text. As early as 1945 in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the United States Supreme Court had advised:

> We are reminded that some state courts have not followed it [a United States Supreme Court decision] in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive

Supreme Court precedent have led some state courts, as described earlier, to attempt to formulate standards or criteria by which to justify their rejection of Supreme Court decisions.[196] This development has been followed by a more disturbing development.

Recent state court decisions all over the country continue the debate reflected in the garbage search decisions and in the *Hunt, Gunwall* and *Edmunds* criteria or factor lines of cases. Split high courts in New York,[197] Texas,[198] California,[199] Michigan,[200] Massachusetts,[201] and Kentucky,[202] while deciding important substantive state constitutional questions and serving an important teaching function, also disputed methodology questions and the situations in which it is legitimate for state courts to diverge from United States Supreme Court precedent.

The New York Court of Appeals had exhibited some tendencies toward the criteria approach as a limiting doctrine.[203] In *People v. P. J. Video, Inc.*,[204] for example, the court distinguished between "interpre-

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> clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.

*Id.* at 312–13 (footnote omitted).

196 *See* Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873 n.2 (1975) (referring to "evasion" cases); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

197 This search is not really new. *See* Gabrielli v. Knickerbocker, 82 P.2d 391, 393 (Cal. 1938) ("[C]ogent reasons must exist before a state court in construing a provision of the state constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal constitution."); *see also* People v. Disbrow, 545 P.2d 272, 283–84 (Cal. 1976) (Richardson, J., dissenting); Zacchini v. Scripps–Howard Broad. Co., 376 N.E.2d 582, 583 (Ohio 1978); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974).

198 People v. Scott, 593 N.E.2d 1328 (N.Y. 1992).

199 Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992); *see also Ex parte* Tucci, 859 S.W.2d 1 (Tex. 1993); Star-Telegram, Inc. v. Walker, 834 S.W.2d 54 (Tex. 1992). *Davenport* is discussed in Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927 (1993).

200 Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991). *See generally* Mark R. Drozdowski, Comment, *Building Castles Out of Sands: An Analysis of the Competing Adjudicative Models Used By the California Supreme Court in* Sands v. Morongo Unified School District, 40 UCLA L. REV. 253 (1992); *see also* Linde, *supra* note 198, at 940.

201 People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

202 Guiney v. Police Comm'r, 582 N.E.2d. 523 (Mass. 1991).

203 Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

204 *See* Galie, *supra* note 22, at 234; *see also* Daniel C. Kramer & Robert Riga, *Acceptance and Rejection of State Constitutional Authority in Civil Liberties Decisions: A Sampling of*

tive" and "non-interpretive" state constitutional construction, but both approaches sounded like the relational, criteria approach:

> If the language of the State Constitution differs from that of its Federal counterpart, then the court may conclude that there is a basis for a different interpretation of it . . . . Such an analysis considers whether the textual language of the State Constitution specifically recognizes rights not enumerated in the Federal Constitution; whether language in the State Constitution is sufficiently unique to support a broader interpretation of the individual right under State law; whether the history of the adoption of the text reveals an intention to make the State provision coextensive with, or broader than, the parallel Federal provision; and whether the very structure and purpose of the State Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the State. A non-interpretive analysis attempts to discover, for example, any pre-existing State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.[205]

Despite these indications of the criteria approach, however, the New York court has not adhered to it in any predictable or uniform way.[206] Methodological problems other than the criteria approach, such as the sequence of state and federal constitutional analysis, and whether to engage in both, have also been handled in different ways by the New York court.[207] These issues came to a head in 1992 in a full debate over the legitimacy of independent state constitutional interpre-

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*Findings in the New York Court of Appeals*, ST. CONST. COMMENTARIES & NOTES, Winter 1992, at 13.

205 501 N.E.2d 556 (N.Y. 1986). Professor Robert M. Pitler has provided a thorough and illuminating analysis of New York's experience with the criteria approach. *See* Pitler, *supra* note 171, at 185–322.

206 *P.J. Video*, 501 N.E.2d at 560.

207 *See, e.g.*, People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990). In *Dunn*, the New York Court of Appeals disagreed with the United States Supreme Court and concluded that a "canine sniff" in a hallway was a search under the New York Constitution, but in this case concluded that the search was based on reasonable suspicion. Two judges concurred in the result, but stated that they would not hold that there was a search. The majority did not rely on the criteria approach.

In several other cases, however, the Court has referred to the *P.J. Video* "general rules governing independent State review . . . ." People v. Harris, 570 N.E.2d 1051, 1053 (N.Y. 1991); People v. Reynolds, 523 N.E.2d 291, 293 (N.Y. 1988); *see* Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1991, 14 PACE L. REV. 353, 357–69 (1994) (discussing *Harris*).

tation. In *People v. Scott* and *People v. Keta*,[208] decided together, the New York Court of Appeals disagreed with the United States Supreme Court in rejecting, respectively, the "open fields" doctrine and the "administrative search" exception in search and seizure cases. Judge Joseph Bellacosa, with Judge Richard Simons and Chief Judge Sol Wachtler in agreement, wrote a bitter, accusatorial dissent aimed at both the substance and methodology of the majority opinions.[209]

> The doctrine that State courts should interpret their own State Constitutions, *where appropriate*, to *supplement* rights guaranteed by the Federal Constitution is not in dispute. Indeed, we have shown our support for that doctrine *where appropriate* with our votes in a long line of cases . . . . We do strenuously disagree with the Court, however, that the doctrine is being "cautiously exercised" . . . and believe that the applications of the doctrine here create a sweeping, new and unsettling interpretation—not mere application of settled principles.[210]

Judge Bellacosa considered the majority view a mere disagreement with the United States Supreme Court, after which "New York's adjudicative process is left bereft of any external or internal doctrinal disciplines."[211] The majority, in his view, had simply "superimpose[d] its preferred view of the constitutional universe."[212]

Judge Judith Kaye concurred with the majority opinions to address the methodological issues raised by Judge Bellacosa.[213] Her observations justify careful consideration:

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208 Immuno, A.G. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991). In *Immuno*, Judge Simons, criticizing the majority's methodology of deciding both the federal and state constitutional issues, stated: "As Judge Kaye notes . . . neither the Court nor its individual Judges have consistently followed any announced standards for departing from Federal law to adopt a different State rule or settled on any preferred methodology for doing so." *Id.* at 1286 n.2 (Simmons, J. concurring) (citations omitted).

209 593 N.E.2d 1328 (N.Y. 1992). *See generally* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at The New York Court of Appeals*, 12 TOURO L. REV. 633 (1996); Eve Cary & Mary R. Falk, People v. Scott *&* People v. Keta*: "Democracy Begins in Conversation"*, 58 BROOK. L. REV. 1279 (1993); Pitler, *supra* note 171, at 218.

210 *Scott*, 593 N.E.2d at 1348–49 (Bellacosa, J., dissenting) ("Simply stated, the common issue is whether this Court has a justifiable basis, within its recently rearticulated method of noninterpretative analysis, to apply New York's mirror equivalent to the Fourth Amendment . . . differently from the United States Supreme Court in these cases.").

211 *Id.* at 1356 (Bellacosa, J., dissenting) (emphasis added).

212 *Id.* (citations omitted).

213 *Id.*; *see also id.* at 1348–49 (Bellacosa, J., dissenting). Such attacks on independent state constitutional interpretation are not new. *See* Williams, *supra* note 5, at 357–58.

> The dissent in this case is distinctive only in the tone of its expression, most especially its accusation that the Court's legal conclusions and analysis are the product of ideology, simply the imposition of a personally preferred view of the constitutional universe . . . .
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> *First*, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether . . . constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court. In that no two cases are identical, it is in the nature of our process that in the end a judgment must be made as to the application of existing precedents to new facts. To some extent that has taken place in the two cases before us . . . . We may disagree in our application of precedents, but our considered judgment hardly justifies attack for lack of principle, or for overthrowing stare decisis.
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> *Second*, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an *ironclad checklist* to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. We must of course be faithful to our precedents, as I believe we are in the cases now before us. But where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law—wherever that may fall on the checklist.
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> . . . .
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> Time and again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review.
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> The Supreme Court is not insulted when we do so.[214]
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> . . . .
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> In those instances where we have gone beyond Supreme Court interpretations of Federal constitutional requirements, our objective has been the protection of fundamental rights, consistent with our Constitution, our precedents and own best human judgments in applying them.[215]

214 *See Scott*, 593 N.E. 2d at 1346 (Kaye, J., concurring).

215 *Id.* at 1346–47 (Kaye, J., concurring) (emphasis added); *see* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1192–96 (1994).

This frank, on-the-bench assessment of the human difficulties of judging complex controversies, based on general state and federal constitutional phrases like "unreasonable search and seizure," is refreshing. It mirrors Justice Abrahamson's off-the-bench discussion of the same problem.[216]

Of the New York dissenters, in fact, at least two had described independent state constitutional law in glowing terms in off-the-bench writings.[217] In this light, it seems just as likely that the *dissent* was "result oriented" as was the majority. The charge of a result-oriented decision can be made in this context only when one makes the United States Supreme Court decision the starting point, or referent, for legal reasoning. As Judge Kaye pointed out, it was not the effect of result orientation, but the exercise of independent *judicial judgment* that drove the majority.

In the Texas case, striking down an overly broad gag rule, Justice Lloyd Doggett's seventy-footnote treatise on independent state constitutional analysis, generally and with specific reference to Texas, was met with a concurring opinion by Justice Nathan Hecht. His concurrence leveled a broad attack on reliance on the state constitution where there was relevant federal free speech doctrine that would ar-

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216 *Scott*, 593 N.E.2d at 1348 (Kaye, J., concurring). For a similar case in New Hampshire, see State v. Canelo, 653 A.2d 1097 (N.H. 1995). Justice W. Stephen Thayer's dissent stated that the court's independent approach to state constitutional analysis does not "give us permission to invent new constitutional protections that some may argue are based on the whim of the majority." *Id.* at 1112 (Thayer, J., dissenting). Justice William Johnson concurred specially: "Such heightened rhetoric adds nothing to the jurisprudence of our State. I know of no one on this court—and, I stress, no one—who decides the cases that come before us on a whim." *Id.* at 1106 (Johnson, J., concurring).

In a 1987 dissent, Justice Thayer had made the following point, after criticizing the majority for deciding a case on state constitutional grounds without discussing a contrary United States Supreme Court decision:

> Our citizens are entitled, and indeed have the right, to seek redress under our State Constitution. However, when interpreting the State Constitution, this court's analysis should, at the very least, distinguish United States Supreme Court decisions concerning the same issue, especially if an inconsistent holding results. The citizens of this State are entitled to know when their *State* Constitution is being interpreted in such a way as to give individuals accused of crimes greater rights than these same individuals are given under the Federal Constitution, because our citizens have the constitutional right to correct the imbalance, if they wish, by constitutional revision.

State v. Denney, 536 A.2d 1242, 1250 (N.H. 1987).

217 Abrahamson, *supra* note 7 and accompanying text; *see also* Beck, *supra* note 91, at 1038.

guably support the same outcome.[218] These opinions taken together, provide a very sophisticated treatment of the current issues in judicial federalism. But, they focus on legitimacy concerns that should not still be bothering state courts. This debate is still going on in Texas.[219]

In the California case, involving prayers at public school graduation, the court held that such prayers were constitutionally impermissible.[220] The five separate opinions, however, disagreed not only as to the merits but also as to the methodology to be employed in cases raising both state and federal constitutional claims.[221] Chief Justice Malcomb Lucas concurred, but argued that the state constitutional claim should not be reached until the United States Supreme Court had resolved the federal constitutional issue.[222] He supported the notion of "deference" to Supreme Court decisions, and departure from them only for "cogent reasons."[223] Justice Stanley Mosk also concurred, but reasoned that state constitutional claims should be reached *before* federal claims.[224] The dissenting justices analyzed the state constitutional claims.[225]

The Michigan case involved the state constitution's "cruel *or* unusual" punishments clause and imposition of a mandatory life sentence without parole for possession of 650 grams of cocaine.[226] Here, by contrast to the Texas and California cases, the United States Supreme Court had already upheld the Michigan life sentence statute.[227] The Michigan court struck down the penalty, though, observing that the Supreme Court decision was only "persuasive authority" for state constitutional interpretation, and that "we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court . . . ."[228] Justice Michael Cavanagh's majority opinion held itself to a "compelling reason"[229] standard for disagreement with the Supreme Court, but found such compelling reasons to

218 Joseph W. Bellacosa, *A New York State Constitution: A Touch of Class*, 59 N.Y. ST. B.J. 14 (April 1987); Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987); *see also* Pitler, *supra* note 171, at 231 n.909.

219 Davenport v. Garcia, 834 S.W.2d 4, 24–45 (Tex. 1992) (Hecht, J., concurring).

220 *See In re* J.W.T., 872 S.W.2d 189 (Tex. 1994).

221 Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 810, 820 (Cal. 1991).

222 *Id.* at 821, 835.

223 *Id.* at 822, 833 (Lucas, C.J., concurring).

224 *Id.* at 834 (quoting Raven v. Deukmejian, 801 P.2d 1077, 1088 (Cal. 1990)).

225 *Id.* at 836 (Mosk, J., concurring).

226 *Id.* at 853–58, 863–64.

227 People v. Bullock, 485 N.W.2d 866, 867 (Mich. 1992).

228 Harmelin v. Michigan, 501 U.S. 957 (1991).

229 *Bullock*, 485 N.W.2d at 870.

be present.[230] This seems like the criteria approach. Justice Dorothy Riley wrote a partial dissent, reasoning that compelling reasons had not been shown sufficiently to justify departure from the Supreme Court decision.[231]

This debate has continued in Michigan.[232] For example, in 1996 in *People v. Bender*,[233] the Michigan court held that a confession must be suppressed where an attorney is present and seeking to advise the defendant and the police fail to inform the defendant of this situation, thus rejecting United States Supreme Court precedent.[234] The majority declined to apply its "compelling reasons" standard to establish a "conclusive presumption artificially linking state constitutional interpretation to federal law."[235] Justice Patricia Boyle dissented:

> Today, without a single foundation in the language, historical context, or the jurisprudence of this Court, a majority of the Court engrafts its own "enlightened" view of the Constitution of 1963, art. I, § 17, on the citizens of the State of Michigan. With nothing more substantial than a disagreement with the United States Supreme Court as the basis for its conclusion, a majority of the Court ignores our obligation to find a principled basis for the creation of new rights and imposes a benefit on suspects that will eliminate voluntary and knowledgeable confessions from the arsenal of society's weapons against crime.
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> . . . .
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> . . . . Although we have repeatedly concluded that our constitution should be interpreted differently only if there is a compelling reason for doing so . . . the lead opinion is not hindered by traditional principles of constitutional interpretation.[236]

The Massachusetts case dealt with random drug testing of police officers.[237] Like the Michigan case, the federal constitutional issue had been answered against the rights claimants, in federal litigation

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230 *Id.* at 871.

231 *Id.* at 872–77.

232 *Id.* at 880, 883–89 (Riley, J., concurring in part and dissenting in part).

233 *See, e.g.*, People v. Mezy, 551 N.W.2d 389, 394 (Mich. 1996); People v. Champion, 549 N.W.2d 849, 852–53 n.3 (Mich. 1996); Kivela v. Department of Treasury, 536 N.W.2d 498, 502–04 (Mich. 1995).

234 551 N.W.2d 71 (Mich. 1996).

235 Moran v. Burbine, 475 U.S. 412 (1986). In *Moran*, the United States Supreme Court had noted that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Id.* at 428.

236 *Bender*, 551 N.W.2d at 79 n.17 (quoting Sitz v. Department of State Police, 506 N.W.2d 209 (Mich. 1993)).

237 *Id.* at 84, 86 (Boyle, J., dissenting).

involving the same litigants.[238] The Massachusetts Supreme Judicial Court, despite the federal ruling, struck down the random drug testing under the state constitution in an opinion by Justice Herbert Wilkins.[239]

Justice Joseph Nolan's dissenting opinion criticized the majority for finding "some hidden meaning" in the state constitution, without "any standard used to deviate from the position of the Supreme Court."[240] Justice Nolan asserted the lack of "compelling reasons" and the absence of "any coherent rationale for this court to disagree with the Supreme Court."[241] This is a call for the criteria approach.

As these recent cases in New Jersey, Washington, New York, Texas, California, Michigan, Massachusetts, and Kentucky show, the legitimacy questions associated with independent state constitutional analysis, by contrast to the merits of the outcome of the case under the state constitution, are still argued vigorously. The relational approach still dominates.

## VII. CONCLUSION

The presumption of correctness relegates state constitutional protections to "a mere row of shadows."[242] These were the words of Justice David H. Souter while serving on the Supreme Court of New Hampshire. Justice Souter observed:

> It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules *a mere row of shadows*; if we place too little, we will render State practice *incoherent*. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.[243]

State constitutional provisions need not, and should not, be reduced to a "row of shadows" through too *much* reliance on federal precedent. Swinging the pendulum in the other direction, however,

238 Guiney v. Police Comm'r, 582 N.E.2d 523, 524 (Mass. 1991).

239 Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989).

240 *Guiney*, 582 N.E.2d at 525–26.

241 *Id.* at 527 (Nolan, J., dissenting).

242 *Id.* (citing Commonwealth v. Cast, 556 N.E.2d 69, 79 (Mass. 1990)).

243 State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

where too *little* reliance on federal precedent will "render State practice incoherent," is also unnecessary. It does not make sense to advocate "zero-based" state constitutional interpretation,[244] with no reference at all to United States Supreme Court interpretations of the Federal Constitution on similar questions. But their overwhelming gravitational pull must be counteracted. With some informed attention to constitutional texts, history, and the lessons of federalism—aided by the insights of practicing and academic lawyers[245]—state courts can and should have coherent, independent doctrines surrounding their state constitutional provisions.[246]

In 1986, Justice William J. Brennan, Jr., commented that the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our time."[247] This development is still unfolding and will require the best thinking of all of us involved with state constitutional law.

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244 *Id.* (emphasis added).

245 Maurice Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 429 (1981).

246 "Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice." State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring specially).

Justice Brennan had the following advice for lawyers: "I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions." Brennan, *supra* note 159, at 502.

247 Oregon Justice Hans A. Linde said that in order "to make an independent argument under the state clause [it] takes homework—in texts, in history, in alternative approaches to analysis." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).