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For a More Vigorous State Constitutionalism

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Articles

For a More Vigorous State Constitutionalism

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INTRODUCTION

> *Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of governments, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.*[1]

Federalism created "dual delegated sovereign powers."[2] "Judi-

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1. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

2. Seminole Tribe v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting).

cial federalism" refers to the sovereign power of the United States Supreme Court to interpret and apply the federal Constitution's Bill of Rights, and the distinct sovereign power of state supreme courts to interpret and apply the state analog of those rights in their own state constitutions.[3] Distinct sovereignty means a state supreme court is entitled to independently interpret its constitution based upon its unique text and history, or the state's unique attitudes towards certain constitutional protections.[4] Perhaps more importantly, it means that even where there are no unique state sources, state supreme courts may take full advantage of federalism by making their own considered judgments concerning the appropriate meaning of shared constitutional text, and thereby contribute to the national dialogue on the meaning of constitutionally protected liberties.[5]

This article explores the opportunity and obligation bestowed upon state supreme courts by judicial federalism, and inquires whether the Rhode Island Supreme Court has taken advantage of the federalist model to: (1) give the Declaration of Rights in Article I of the Rhode Island Constitution independent vitality and meaning for the people of this state; and (2) add its voice and considered views to the nation's constitutional discourse. This article suggests that the Rhode Island Supreme Court has not taken full advantage of judicial federalism, and that the court, in interpreting the Declaration of Rights, has instead adopted a philosophy of reflexive deference to decisions of the United States Supreme Court interpreting corresponding rights in the federal Bill of Rights. To borrow a phrase from Justice David Souter, the result has been to reduce the Rhode Island Declaration of Rights to a "mere row of shadows" alongside the federal Bill of Rights,[6] and to effectively cede to the United States Supreme Court the Rhode Island Supreme Court's own sovereign authority to determine state constitutional meaning. This article advocates that the Rhode Island

3. *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1015-16 (1997).

4. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 101-02 (2000); *see also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).

5. *See* Friedman, *supra* note 4, at 100-01.

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

Supreme Court take a more active and vigorous role in investigating unique sources that may give insight as to the intended meaning of state constitutional protections. Where there are none, the court must fully exercise the opportunity – and even the obligation – to become an active and independent participant in the national debate over what our constitutional protections should be, and then give them independent force in this state. The court should do so both as a matter of federalism, and to honor Rhode Island's state constitutional history and the present command of article 1, section 24, declaring "[t]he rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."[7]

This obligation is not the state supreme court's alone. The responsibility for a more vigorous state constitutionalism is shared by the state bar; in fact, it must start with the bar. For the court to adequately investigate Rhode Island's unique state constitution, or effectively participate in the national constitutional dialogue on fundamental rights, the bar must do both as well. Consequently, the call of this article is for both the bench and the bar to change the way they think about state constitutionalism. For the bar, this involves a commitment to assert, analyze and argue constitutional claims using the state constitution as *the* rights-creating document. It involves a commitment to advocating that the court decide state constitutional issues before federal ones, and that it critically examine federal constitutional precedent before attaching its meaning to our state constitution. For the bench, it involves

7. This article's critique is not aimed at the Rhode Island Supreme Court's investigation and analysis of state constitutional protections when presented with a claim based *solely* on the state constitution. It is directed at the court's approach in cases involving both federal and state claims under analogous, but distinct, provisions of the federal and state constitutions. When faced with only a state constitutional claim the court has shown itself quite willing and capable of vigorously examining the sources and history, as well as competing strands of constitutional philosophy, relevant to the constitutional provision at issue. *See, e.g.,* Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) (right to keep and bear arms); Almond v. R.I. Lottery Comm'n, 756 A.2d 186 (R.I. 2000) (separation of powers); *In re* Advisory Opinion to the Governor (Ethics Commission), 732 A.2d 55 (R.I. 1999) (separation of powers); Bandoni v. State, 715 A.2d 580 (R.I. 1998) (art. 1, section 23 – Victims Rights amendment). The suggestion here is that the court has a responsibility and obligation to engage in that same vigorous investigation of state constitutional meaning even where an analogous federal claim is brought.

a commitment to addressing state constitutional claims first when both federal and state claims are made; to independently and critically examining the merits of constitutional positions taken by other courts, including the U.S. Supreme Court; and to using its sovereign power to give meaning and content to Rhode Island's foundational state document, thereby adding its voice to the national discourse on constitutional matters. In sum, the bar must recognize the Rhode Island Constitution as the primary repository of individual liberties and protections, and the Rhode Island Supreme Court must assert its role as the primary guardian of those rights with the non-delegable responsibility to define them.

Part I of this article explores basic notions underlying judicial federalism. Part II describes two analytical approaches that state courts have taken to state constitutional interpretation, including how those courts have utilized these approaches, the fundamental differences between them and which approach takes full advantage of the opportunity and obligations of federalism. Part III examines the development of the Rhode Island Constitution and the Rhode Island Supreme Court's role as guardian of state constitutional rights. Part IV argues that the rights in article I of the Rhode Island Constitution, the state Declaration of Rights with analogs in the United States Constitution's Bill of Rights, have been reduced to a "mere row of shadows" of their federal counterparts. The article concludes by suggesting it is the responsibility and the obligation of both the bench and bar to more vigorously and independently examine the contours and protections of the fundamental rights in the Rhode Island Constitution.

To begin, it is important to examine and understand the opportunity presented by judicial federalism, and how state supreme courts have generally responded to this opportunity.

I. BASIC NOTIONS OF JUDICIAL FEDERALISM

"State power is a vital element in federalism's design," [8] because by giving state and national governments powers allowing each to monitor and check the abuses of the other, federalism protects liberty. In *The Federalist No. 51*, James Madison observed

8. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1010 (2003).

that "[i]n the compound republic of America, the power surrendered by the people is divided between two distinct governments .... *Hence a double security arises to the rights of the people.*"[9] In their state constitution, the people of a state are free to subject their government to more or fewer restrictions than the federal Constitution imposes on the national government.[10] They may create a state bill of rights establishing a more extensive – or even a less extensive – set of rights, privileges and liberties defining the scope of the state's power over the individual than does the federal Bill of Rights.[11] "The genius of federalism is that the fundamental rights of citizens are protected not only by the United States Constitution but also by [state constitutions]."[12] "State constitutions allow the people of each state to choose their own theory of government and of law, within what the nation requires, to take responsibility for their own liberties, not only in courts but in the daily practice of government."[13] They are foundational documents where the people of a state "record their moral values, their definition of justice, [and] their hopes for the common good."[14] Critical examination, interpretation and application of these documents "lead all of us to face closer to home some fundamental values that the public has become accustomed to have decided for them by the faraway oracles in the marble temple."[15]

It is the sole responsibility of the United States Supreme Court to interpret and apply the Bill of Rights and its fundamental protections restraining the federal government's power over the individual, and to determine which of those federal constitutional rights also restrain state governments.[16] The Due Process Clause of the Fourteenth Amendment declares that no state shall

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9. Davenport v. Garcia, 834 S.W.2d 4, 14 (Tex. 1992) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added)).

10. Gardner, *supra* note 7, at 1016.

11. *Id.*

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

13. Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984).

14. A. E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 1, 14 (1988).

15. Hans A. Linde, *First Things First: Rediscovering The States' Bills of Rights*, 9 U. BALT. L. REV. 379, 395 (1980).

16. *See* U.S. CONST. art. III, § 2.

"deprive any person of life, liberty, or property, without due process of law."[17] Liberty has been understood to have a substantive aspect barring certain government actions.[18] It is comprised of rights deemed fundamental and protected from invasion by the states.[19] "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those [expressly] recognized by the Bill of Rights,"[20] and the U.S. Supreme Court has held that the Due Process Clause incorporates most of the Bill of Rights as limitations on state action as well.[21] For example, the Court has held that the Due Process Clause incorporates the following federal rights of individuals against the states: the Sixth Amendment right to trial by jury in criminal cases;[22] the right to compensation for property taken by the state;[23] the rights of speech, press and religion covered by the First Amendment;[24] the Fourth Amendment right to be free from unreasonable searches and seizures;[25] the Fifth Amendment privilege against compelled self-incrimination;[26] and the Sixth Amendment rights to counsel,[27] to a speedy trial,[28] to a public trial,[29] to confrontation of opposing witnesses,[30] and to compulsory process for obtaining witnesses.[31] The

17. U.S. CONST. amend. XIV, § 1.
18. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).
19. *Id.* at 847.
20. *Id.*
21. *Id.*
22. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see also* U.S. CONST. amend. VI.
23. *Duncan*, 391 U.S. at 148 (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897)); *see also* U.S. CONST. amend. XIV.
24. *Duncan*, 391 U.S. at 148. (citing Fiske v. Kansas, 274 U.S. 380, 387 (1927)); *see also* U.S. CONST. amend. I.
25. *Duncan*, 391 U.S. at 148 (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)); *see also* U.S. CONST. amend. IV.
26. *Duncan*, 391 U.S. at 148 (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)); *see also* U.S. CONST. amend. V.
27. *Duncan*, 391 U.S. at 148 (citing Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963)); *see also* U.S. CONST. amend. VI.
28. *Id.* (citing Klopfer v. North Carolina, 386 U.S. 213, 223 (1967)); *see also* U.S. CONST. amend. VI.
29. *Duncan*, 391 U.S. at 148 (citing *In re* Oliver, 333 U.S. 257, 271-72 (1948)); *see also* U.S. CONST. amend. VI.
30. *Duncan*, 391 U.S. at 148 (citing Pointer v. Texas, 380 U.S. 400, 403 (1965)); *see also* U.S. CONST. amend. VI.
31. *Duncan*, 391 U.S. at 148 (citing Washington v. Texas, 388 U.S. 14, 23 (1967)); *see also* U.S. CONST. amend. VI.

Court has also held that under the "substantive due process" doctrine, the Due Process Clause protects certain unenumerated rights as well.[32] For example, it provides a sphere of liberty for personal decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education."[33]

State constitutions may also contain declarations of rights restraining state government which parallel the federal Bill of Rights and the Due Process Clause. Interpreting their content is the sole responsibility of state supreme courts, and the U.S. Supreme Court has acknowledged that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."[34] "[A] state court is entirely free to read its own State's constitution more broadly than [the United States Supreme] Court reads the Federal Constitution, or [even] to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee."[35] Federalism permits states to adopt more expansive individual liberties in their own constitutions,[36] and state supreme court judges have the power and responsibility to determine if they have.[37]

That power and responsibility is not a duty that can or should be delegated to the United States Supreme Court.[38] State supreme court judges take oaths to support and uphold their state constitutions faithfully and diligently, and are therefore obliged to faithfully and diligently apply them.[39] "[S]tate constitutions have their own unique origins, history, language, and structure – all of which warrant independent attention and elucidation."[40] Because "[s]tate courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their

32. *See, e.g.*, Tennessee v. Lane, 124 S. Ct. 1978, 2011 (2004) (Scalia, J., dissenting).

33. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

34. Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940).

35. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).

36. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

37. *See Aladdin's Castle, Inc.*, 455 U.S. at 293.

38. *See* People v. Mitchell, 650 N.E.2d 1014, 1025 (Ill. 1995) (Heiple, J., dissenting).

39. *See* State v. Perry, 610 So. 2d 746, 751 (La. 1992); R.I. GEN. LAWS § 8-3-1(a) (1997).

40. Delaware v. Van Arsdall, 475 U.S. 673, 707 (1986) (Stevens, J., dissenting).

citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound,"[41] they must decide what their state constitutions mean.

These principles are widely and generally accepted. The crucial question in state courts today, however, is no longer "whether to give independent attention to state constitutional issues, but how."[42] One commentator has opined that "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."[43]

II. ANALYTICAL APPROACHES TO STATE CONSTITUTIONAL INTERPRETATION

The two predominant analytical approaches to state constitutional interpretation used by state supreme courts today are the "primacy" approach and the "supplemental," or "interstitial," approach.[44] The distinction between the two arises out of differing views of judicial federalism. Specifically, differing views on the degree of deference to be accorded decisions of the United States Supreme Court, and on the value of a state supreme court adding its perspective and voice to the national constitutional dialogue.[45]

A. *The Supplemental Approach*

The "supplemental," or "interstitial," approach to state constitutionalism has a diminished view of the value of constitutional discourse and a more singular and hierarchical view of the state and federal judicial systems. Courts following the supplemental approach tend to view majority decisions of the United States Supreme Court, whether decided by a majority of five or nine, as the predominant voice in constitutional affairs and thus entitled to great deference.[46]

Supplementalism calls for state supreme courts to assume "the dominance of federal law and focus on the gap-filling poten-

41. *Id.*
42. Linde, *supra* note 13 at 166.
43. Williams, *supra* note 3, at 1018.
44. *See* Gardner, *supra* note 8, at 1055.
45. *See id.*
46. *See id.*

tial of state constitutions."[47] The state court will look first to the federal Constitution, and only if the federal Constitution does not provide relief will it then turn to the state constitution to determine whether a departure from federal precedent is justified.[48] State courts following this approach will generally use a set of interpretative criteria to determine if there is something unique about the state constitution that justifies departure from federal precedent,[49] such as "differences in the constitutional text, structure, or history; differences in controlling state precedent; and differences in the concerns or values of the local populace."[50] The supplemental approach is based on the notion that the Supreme Court's interpretation of the federal Constitution should authoritatively set limits on the meaning of similar provisions in state constitutions.[51] By extension, the Supreme Court's decisions are therefore presumptively correct under this approach, and only an "objectively verifiable difference between state and federal constitutional analysis – whether textual, decisional, or historical – [can] justify a state court's interpretational divergence from the Federal Constitution."[52] Weight is given to Supreme Court decisions not because of the soundness of their reasoning, but because the state supreme court implicitly places the United States Supreme Court at the apex of the constitutional decision-making hierarchy.

Judicial opinions favoring the supplemental approach hold that "our national judicial history and traditions closely wed federal and state constitutional doctrine,"[53] and that "a considerable measure of cooperation must exist in a truly effective federalist system . . . under what is publicly perceived as a single system of

47. Friedman, *supra* note 4, at 104 (quoting Colloquium, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

48. *Id.* The supplemental approach has also been called the "criteria approach" because it "utilizes a set of interpretive criteria for determining whether deviation from U.S. Supreme Court precedent is warranted in a particular case." *Id.*

49. *Id.*

50. Gardner, *supra* note 8, at 1055.

51. Williams, *supra* note 3, at 1046.

52. *Id.* at 1023.

53. State v. Hunt, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring).

law."[54] To supplementalist courts:

> Federal constitutional construction does not merely set minimum standards for protected rights which the states are free to increase; it strikes a balance among competing rights and interests that is itself of constitutional significance. While states may have more latitude in adjusting this balance than they do in reducing guaranteed protections, that latitude is not unlimited. *State courts are not free from federal constitutional considerations in determining fundamental rights.* The delicate balance among those rights and other interests must be maintained.[55]

In short, courts adopting the supplemental approach prefer an analysis that emphasizes the national voice in state affairs to an analysis that would augment the state's voice in national affairs.[56] These courts assert that faithfully adhering to the use of articulated criteria ensures that a state court's decision is "made for well founded legal reasons and not by merely substituting [the state court's] notion of justice for that of . . . the United States Supreme Court."[57] Courts adopting the supplemental approach are concerned that departures from Supreme Court precedent would result in the "inevitable shadowing of the moral authority of the United States Supreme Court . . . [and in losing the] resolute trust in that Court as the guardian of our liberties."[58]

Primacy courts, on the other hand, do not share this concern to the same degree.[59] They are persuaded to embrace the responsibility of critically evaluating federal constitutional doctrine before ascribing its contents to their state constitution.

B. *The Primacy Approach*

Primacy entails two commitments by state supreme courts and the advocates who appear before them. The first commitment is to begin constitutional analysis with the state constitution and

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54. *Id.*

55. Davenport v. Garcia, 834 S.W.2d 4, 43 (Tex. 1992) (Hecht, J., concurring) (emphasis added).

56. *See id.* at 42.

57. State v. Gunwall, 720 P.2d 808, 813 (1986).

58. State v. Hempele, 576 A.2d 793, 815 (N.J. 1990) (O'Hern, J., concurring in part, dissenting in part).

59. *See* Friedman, *supra* note 4, at 106.

its text, and to resort to adjudging federal constitutional rights only when the state constitution itself does not provide relief. The second is "to rely upon federal decisional law only for guidance in illuminating the issues presented by analysis of the state constitutional text."[60] Primacy theory regards a state's constitution "as a text with a particular and significant meaning for the state's citizens,"[61] which may differ from the significance and meaning of particular provisions of the federal Constitution. The primacy approach adheres to the notion that "[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."[62]

Primacy's mandate simply means that state courts use "the familiar tools of constitutional interpretation in determining the meaning of a state constitutional provision."[63] Those tools include the state constitution's text, structure, original intent and history, and previous interpretations of similar textual provisions by other state and federal courts.[64] As former Justice Hans Linde, credited as the originator of the primacy approach,[65] has stated:

> 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. The answer may turn out the same as it would under federal law. The state's law may turn out to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[66]

Under the primacy approach, state courts are responsible for reaching independent conclusions as to the meaning of their state

60. *Id.*
61. *Id.*
62. Williams, *supra* note 3, at 1048.
63. Friedman, *supra* note 4, at 106.
64. *Id.* at 106-07.
65. *Id.* at 106.
66. Linde, *supra* note 13, at 179 (emphasis added).

constitutions even when the text is the same as that found in the federal Constitution.[67] A basic premise of primacy holds that "the theory and methods of contemporary Supreme Court opinions do not furnish the only proper model for decisions in the state courts."[68] Consistent with the nation's experiment in federalism, primacy recognizes the legitimate right, and indeed the obligation, of state supreme courts interpreting their state constitutions to independently evaluate federal Supreme Court rulings, and exercise independent judgment about their correctness before importing them into their state constitutional jurisprudence.[69]

The benefit of this approach is two-fold. First, when a state court rejects the reasoning of Supreme Court precedents that narrowly construe the scope of an individual right, the decision serves as a public critique of the national ruling, and it can influence public and official opinion concerning its propriety.[70] Second, the state court's decision may influence or add to a nationwide consensus at the state level, a factor the Supreme Court may consider in the course of its own constitutional decision-making.[71]

State judicial opinions advocating primacy reflect three general themes: (1) When both state and federal constitutional issues are raised, the state issues should be resolved before the federal issues are addressed; (2) There are sound reasons for limited deference to Supreme Court decisions when interpreting parallel rights under the federal Constitution; and (3) There is strength in the diversity of opinions that are thereby promoted.

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67. *Id.* at 181-82.
68. *Id.* at 166.
69. *See* Gardner, *supra* note 8, at 1061, 1064.
70. *See id.* at 1033.
71. *See id.* A recent example of the latter effect is the Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* held that a Texas statute making it a crime to engage in certain intimate conduct violated the Fourteenth Amendment's Due Process Clause as applied to adult males engaging in consensual sodomy in the privacy of their home, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Lawrence*, 539 U.S. at 578. In deciding that *Bowers* should be overruled and its reasoning rejected, the *Lawrence* majority noted that there had been substantial criticism of the Court's reasoning in *Bowers* and that the highest courts of five different states declined to follow it when interpreting provisions in their own state constitutions parallel to the Fourteenth Amendment's Due Process Clause. *Id.* at 576-77. Those state court decisions helped persuade the Court that the rationale underpinning *Bowers* could not withstand careful analysis. *See id.* at 570-71.

1. *First Things First*

State courts called upon to address both state and federal constitutional issues should address the state issues before the federal because it fundamentally diminishes, and even "disparage[s],"[72] the very existence of state constitutional rights when a state court declines to address the nature of the rights, instead choosing to answer federal constitutional questions first. More practically, when a state court decision is based on state rather than federal grounds, it ends the litigation without the necessity of federal review;[73] however, when a state court decides a federal constitutional claim, it is no more than the decision of an intermediate court, and its ruling is subject to review by the Supreme Court, which in turn creates the need for the Supreme Court to monitor and review the application of federal constitutional law by the state courts.[74] While state supreme courts are "left free and unfettered" to interpret their own state constitutions, [75] the Supreme Court is obligated to determine the validity of state action under the federal Constitution when that is the basis of a state court decision. In this vein, the Vermont Supreme Court has opined:

> The most important reason for disposing of the state law claims is our duty to the litigants. The defendant in this case has specifically invoked the protections of the Vermont Constitution. Our rulings on his federal claims are all subject to federal reversal. Review of his claims under the Vermont Constitution, however, may yield adequate and independent state grounds to support our judgment, thereby giving a final disposition to some of the claims at issue in this appeal. *If our state constitution is to mean anything, it must be enforced where it is the only law capable of providing a final answer to a claim, and a party, such as this defendant, has invoked its protections.*[76]

Many courts broaden the rule that a state court will not ex-

72. Massachusetts v. Upton, 366 U.S. 727, 738 (1984) (Stevens, J., concurring).
73. *See* State v. Perry, 610 So. 2d 746, 750 (La. 1992).
74. *See* State v. Badger, 450 A.2d 336, 346-47 (Vt. 1982).
75. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).
76. *Badger*, 450 A.2d at 347 (emphasis added).

press an opinion on a constitutional issue if the matter can be resolved on nonconstitutional grounds to also mean that a state court will not decide a case on federal constitutional grounds if it can be decided on state constitutional grounds.[77] For instance, the Maine Supreme Court has succinctly stated that a "policy of judicial restraint impels us to forbear from ruling on federal constitutional questions when the provisions of our state constitution may settle the matter."[78] One jurist has offered that the principal justification for this "first-things-first" approach is that unless an individual has been denied a remedy against the state under the state constitution, he or she has not yet been denied due process under the Fourteenth Amendment, and the federal Constitution does not apply.[79] Stated another way, "if the individual may obtain a remedy under state law, there has been no denial of due process and thus no occasion for the federal [C]onstitution even to come into play."[80] State constitutional law is analyzed first, "'not for the sake of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.'"[81]

In *Massachusetts v. Upton*, Justice Stevens opined, in a concurring opinion, that in order to maintain the proper balance between the respective jurisdictions of state and federal courts it is "important that state judges do not unnecessarily invite [the United States Supreme] Court to undertake review of state-court judgments. . . ."[82] Stevens further explained that to do so "reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts."[83] Although the Bill of Rights "is the ultimate guardian of individual rights,"[84] the "fundamental premise" of our federal system is that the states "remain the primary guardian of the liberty of the people."[85] As a conse-

77. *See, e.g.*, *Perry*, 610 So. 2d at 750; City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985); *Badger*, 450 A.2d at 347.
78. *Jacobsky*, 496 A.2d at 648.
79. Freedom Socialist Party v. Bradbury, 48 P.3d 199, 205 (Or. 2002) (Landau, J., concurring).
80. *Id.*
81. *Id.* (quoting Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981)).
82. 466 U.S. 727, 737 (1984) (Stevens, J., concurring).
83. *Id.*
84. *Id.* at 739.
85. *Id.*

quence of those principles, primacy courts look to the state constitutions they are ultimately responsible for before looking to the federal Constitution for which they ultimately are not.

2. *Cautious, Not Blind, Deference*

When interpreting state constitutions, state supreme courts often look to federal decisions addressing cognate federal provisions. Primacy theory is defined by the view, however, that federal constitutional decisions are only entitled to persuasive weight as guideposts in interpreting specific state constitutions,[86] and only when they are found to be "'logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees.'"[87] Primacy theory rejects the notion that a Supreme Court decision is entitled to deference because that Court is first among equals, or because it is at the apex of a unified judicial structure.[88] Just as the U.S. Supreme Court is not bound by decisions of the Rhode Island Supreme Court when construing the federal Constitution, the Rhode Island Supreme Court is not bound by decisions of the U.S. Supreme Court when interpreting the Rhode Island Constitution, because "[r]egardless of the language employed in the two documents, they are separate and distinct,"[89] and each court has the duty to interpret its own constitutional document.

This does not mean that state courts applying the primacy approach should not have "high respect for opinions of the Supreme Court, particularly when they provide insight into the origins of provisions common to the state and federal bills of rights."[90] However, that respect must diminish by degrees where the historical origins of state rights reflect different emphases and concerns, or where the Supreme Court's interpretation and appli-

86. *See* Friedman, *supra* note 4, at 95.

87. Davenport v. Garcia, 834 S.W.2d 4, 20 n.53 (Tex. 1992) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)).

88. *See* Friedman, *supra* note 4, at 95. Instead, primacy courts "undertake[] an independent constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law *only for guidance.*" *Id.* (emphasis added).

89. People v. Mitchell, 650 N.E.2d 1014, 1025 (Ill. 1995) (Heiple, J., dissenting).

90. State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983).

cation of a constitutional right is based upon what Justice Linde called "a contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time and among the several states."[91] Linde has argued that the mere fact that state and federal constitutions use substantially identical terms and generally seek to serve the same objective does not, however, "say much toward demonstrating the correct application of such a constitutional text. In particular, the proposition does not support 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."[92]

Linde has further asserted that state constitutional guarantees "were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics."[93] It should be axiomatic that state courts do not "abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law"[94] by making it explicitly clear that the individual liberties in their state constitutions are to be merely coextensive with whatever the Supreme Court decides the extent of federal constitutional rights should be. Thus, according to the primacy approach, state supreme courts should conduct independent analyses of their state constitutions, "unless there are particular reasons to conform" to Supreme Court precedent.[95]

3. *Diversity and the Value of Constitutional Dialogue*[96]

Another important justification for the primacy approach is diversity of opinion. There is strength in the diversity and competition of ideas on constitutional matters. "[R]ather than threaten[ing] the federal system, . . . [primacy] is more likely to

91. *Id.*
92. *Id.* at 1322.
93. *Id.* at 1323.
94. *Id.*
95. State v. Hunt, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring).
96. Freidman, *supra* note 4, at 112.

create a healthy debate [concerning constitutional] law."[97]

> Similar constitutional concepts can be developed in a variety of ways. The path chosen by the United States Supreme Court is not necessarily the best, the most protective of our constitutional rights, or the most reflective of the intent of the Framers. State supreme courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis' words, "as a laboratory" testing competing interpretations of constitutional concepts that may better serve the people of those states.[98]

In short, true dual sovereignty is "not a weakness but a strength of our system of government,"[99] and "[d]iversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well as in those of the United States Supreme Court."[100] What is vital is the strength of the idea, not whether it comes from a state or federal court, and primacy offers the possibility that "[t]he national jurisprudence benefits as states across [the] country offer [their own] contributions. As individual voices develop strength and tone, so does the grand chorus improve."[101]

It has been suggested that this diversity of opinion results in a type of dialogue between state and federal courts, and the dialogue itself has constitutional value.[102] In his article entitled *The Constitutional Value of Dialogue and the New Judicial Federalism*, Lawrence Friedman asserted that dialogue between state and federal courts is "an expectation of our constitutional order and as a necessary implication of federalism, a complement to the complex system of checks and balances."[103] By acknowledging a state supreme court's right to independently interpret state constitutional text paralleling the Bill of Rights, the Supreme Court has "invite[d] state courts to participate in the development of consti-

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97. Id. at 961 (quoting Colloquium, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1396 (1982)).

98. *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting)) (citation omitted).

99. People v. Scott, 593 N.E.2d 1328, 1348 (1992) (Kaye, J., concurring).

100. State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

101. Davenport v. Garcia, 834 S.W.2d 4, 22 (Tex. 1992).

102. *See* Friedman, *supra* note 4, at 93, 133.

103. *Id.* at 113.

tutional law."[104] This invitation creates an opportunity for the state court to "engage in discourse with its federal counterpart about the meaning of shared constitutional text – discourse about such aspects of law and governance as the meaning of liberty, equality, and due process . . . . Such discourse offers a means by which the U.S. Supreme Court's actions may be assessed, evaluated, and balanced."[105]

State court interpretations of cognate provisions can themselves be "appreciated, analyzed, and contrasted with federal precedent by federal and state court judges, legislators, [and] executive branch personnel."[106] Friedman has asserted that there can be more than one legitimate interpretation of a particular text, as demonstrated by the sometimes fractured opinions of the Supreme Court, especially in light of the broad phrases in which constitutional rights are generally enumerated.[107] The true legitimacy of a particular interpretation does not depend upon whether a state or federal supreme court is doing the interpreting, but rather upon "the extent to which the interpretation at issue is sound and plausible. And a particular interpretation of constitutional text typically will be considered sound and plausible when it is based upon an accepted mode of constitutional argument, correctly applied in the case at hand."[108]

Another commentator, Paul W. Kahn, has written that "[t]he diversity of state courts is best understood as a diversity of interpretive bodies, . . . [and e]ach state court has the authority to put into place, within its community, its unique interpretation of that common object" of American constitutionalism.[109] Kahn refers to "interpretive debate,"[110] that is, the "debate over the meaning and requirements of law."[111] He has declared that "[t]he nation's commitment to a rule of law that protects certain principles and values against political interests presents each generation with a

104. *Id.* at 125.
105. *Id.* at 126.
106. *Id.* at 129.
107. *See id.* at 135.
108. *Id.* at 134.
109. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993).
110. *Id.* at 1155.
111. *Id.*

puzzle, not an answer,"[112] and that the interpretive debate to solve such puzzles should take place in the state courts as well as the federal courts.[113] The interpretive inquiry, whether exercised by federal or state court judges, turns to "any number of texts, precedents, or historical events, as well as moral intuitions and principled arguments. The best interpretation is that which achieves the greatest harmony among these diverse sources."[114] The effort of each judge is simply to construct the best interpretation of which he or she is capable. Kahn argues that it is vital to our system of federalism that state courts accept the invitation to engage in this dialogue with the federal courts:

> [A]uthority exercised responsibly is a ground for respecting an interpretation. A state court interpreting American constitutionalism is, therefore, a powerful counterforce to federal court interpretation of the United States Constitution. The explanation of American citizenship is too important a task to leave to the federal courts alone.
>
> This state-court function accords with a longstanding justification of federalism under which state governments provide a forum for discussion, disagreement, and opposition to actions of the national government.[115]

This dialogic vision of state constitutionalism gives voice to a state court's understanding of the constitutional values and principles of the national community where there are no identifiable bases for showing the state's constitutional values are unique, or even where there are.[116] Only the primacy approach allows state courts to speak to the Supreme Court on its own terms and debate the meaning of shared constitutional texts.[117]

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112. *Id.*
113. *See id.*
114. *Id.* at 1161.
115. *Id.* at 1166.
116. *See id.* at 1152, 1166; Friedman, *supra* note 4, at 133.
117. *See* Friedman, *supra* note 4, at 133-34.

C. *Fundamental Differences Between the Supplemental and Primacy Approaches*

One can readily see the fundamental differences between the primacy and supplemental approaches. First, when a litigant raises both state and federal constitutional arguments, the primacy approach begins by addressing the state constitutional claim first, determining what its scope is as a matter of state constitutional law.[118] In reaching that determination, a primacy court will review the text and history of the provision, any contemporaneous legislative enactments, and prior judicial decisions from that state bearing on the topic.[119] Primacy courts will also review decisions from other federal and state courts addressing the issue, but decisions by a majority of the Supreme Court will influence the state supreme court only by their innate persuasiveness, logic and reasoning.[120] Deference to a Supreme Court decision is based upon the merits of the Court's rationale, not its status. Only if the state constitutional protection does not afford relief will the state supreme court address the litigant's rights under the federal Constitution.[121]

Supplementalism, on the other hand, addresses the federal constitutional right first, leaving state constitutions unexplored, undeveloped and unaddressed, so long as the federal Constitution provides relief.[122] When it is necessary to resort to the state constitution, courts using the supplemental approach give substantial weight to Supreme Court decisions, and presume that the Supreme Court's resolution of the federal constitutional issue is the best resolution of the analogous state constitutional issue, unless there is some compelling historical or textual state basis for providing more expansive protections.[123]

Where a state constitutional provision has a substantially different text, origin and/or history than its federal counterpart, the primacy and supplemental approaches do not differ significantly. Courts adhering to either approach will explore the meaning and

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118. *See id.* at 106.
119. *See id.* at 106-07; Gardner, *supra* note 8, at 1055.
120. *See* Friedman, *supra* note 4, at 106; Gardner, *supra* note 8, at 1055.
121. Friedman, *supra* note 4, at 106.
122. *See* Gardner, *supra* note 8, at 1055.
123. *See id.*

import of those textual or historical differences.[124] The primacy and supplemental approaches part company, however, when these factors reveal no significant differences. In those circumstances, supplementalism places a higher value on national uniformity than on contributing to the national discourse on constitutional issues.[125] Primacy, conversely, is not at all reluctant to add to that discourse, and to independently consider the merits of national constitutional decisions.[126] For example, a five-to-four Supreme Court decision on a federal constitutional issue is likely to be the definitive word for the supplementalist state supreme court when interpreting its own constitution, notwithstanding the fact that the Supreme Court decision may have overruled numerous lower federal court and state supreme court decisions.[127] Under the primacy approach, however, both the majority and dissenting views of that same Supreme Court decision are open to searching and discerning criticism, and if the majority's interpretation, rationale and/or conclusion is determined to be unpersuasive, it will not be imported into the state constitutional jurisprudence.[128] Primacy thus contemplates two distinct court systems with distinct powers and obligations, two systems that communicate with one another about what are, or should be, common constitutional values and principles.

Given this foundation, the remainder of this article will focus on discerning the Rhode Island Supreme Court's view of state constitutionalism and how it views its own role in the federalist scheme. Does it view the Declaration of Certain Constitutional Rights and Principles (Declaration of Rights), found in article I of the state constitution,[129] as an independent repository of constitutional liberties that it is bound to investigate, analyze, explain and expound upon before reaching federal constitutional issues? Or is it viewed as mostly a redundant backdrop to the federal Constitution, either unintended or ill-suited to have any significant independent meaning or value? Does the Rhode Island Supreme Court engage in debate with the U.S. Supreme Court on the proper ex-

124. *See id.*
125. *See id.* at 1057.
126. *See* Friedman, *supra* note 4, at 133.
127. *See id.* at 109.
128. *See id.* at 133.
129. *See* R.I. CONST. art. I.

tent of constitutional rights found in both the state and federal constitutions, or does it simply defer to the Court's decisions without considering their merits? And if it does, why does it do so? How should it implement its responsibility to give the Declaration of Rights meaning and content? To answer these questions, some insight is gathered by beginning at the beginning, by sketching an outline of the origin and development of the Declaration of Rights in article I of the Rhode Island Constitution, and discerning the Rhode Island Supreme Court's intended role as the guardian of those state constitutional rights.

III. ORIGIN AND DEVELOPMENT OF THE RHODE ISLAND SUPREME COURT'S ROLE AS GUARDIAN OF STATE CONSTITUTIONAL RIGHTS

In the matter of *In re Advisory Opinion (Chief Justice)*, Associate Justice Thomas F. Kelleher described the longstanding relationship between the Rhode Island General Assembly and the state's highest court.[130] That history provides the starting point for understanding the origin of the Rhode Island Supreme Court's role as guardian of state constitutional rights, and what the extent of its role should be today.

A. *The Pre-1776 Charter Government*

In 1643, Roger Williams and the colonists who settled at the head of Narragansett Bay received a patent from the English Parliament[131] "[giving] the inhabitants of Providence, Portsmouth, Newport, and later Warwick a 'free and absolute Charter of Civil Incorporation.'"[132] It was adopted in 1647 at a General Court of Election, which also enacted legislation establishing a General Court of Trials for the whole colony.[133] This court consisted of a president, who was the chief officer of the colony, and assistants from each of the four towns.[134] The 1647 General Court of Election

130. *See id.* at 1328-34.

131. *See id.* at 1328.

132. *Id.* (quoting WILLIAM R. STAPLES, PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY OF "THE INCORPORATION OF PROVIDENCE PLANTATIONS," AND THE CODE OF LAWS ADOPTED BY THAT ASSEMBLY IN 1647 VIII, IX (1847)).

133. *Id.* (citing JOHN RUSSELL BARTLETT, 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 147, 191 (1856)).

134. *Id.* (citing JOHN RUSSELL BARTLETT, 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 194-95

also adopted a legal code,[135] codifying the parts of the common and statutory laws of England it deemed binding on the colony, so as to conform to "the nature and constitution of their place."[136] The code also contained a commitment to setting limitations on the lawmaking power, which the colony would respect.[137]

After the English monarchy was restored, the colony sought and received a Royal Charter,[138] which was accepted by a General Assembly of "freemen" in Newport in November 1663.[139] It called for an annual election of a governor, a deputy governor and ten assistants, who were collectively called the General Assembly.[140] This legislative body was empowered to make or repeal any law not contrary or repugnant to the laws of England.[141] The judicial structure formed in 1647 was not fundamentally altered and the General Court of Trials was retained,[142] but "[f]rom time to time several inferior courts were also created."[143] Because legislative and judicial functions were combined in the same body of men, namely the governor, deputy governor, and assistants,[144] "the

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(1856)); *see also* PATRICK T. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT: 1776-1841 20 (1977).

135. *See* CONLEY, *supra* note 134, at 19.

136. WILLIAM R. STAPLES, PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY OF "THE INCORPORATION OF PROVIDENCE PLANTATIONS," AND THE CODE OF LAWS ADOPTED BY THAT ASSEMBLY IN 1647 3 (1847).

137. *See* CONLEY, *supra* note 134, at 19-20; *see also* JOHN RUSSELL BARTLETT, 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 158 (1856):

> And now, forasmuch as our Charter gives us powre to make such Lawes, Constitutions, Penalties and Officers of Justice for the execution thereof as we, or the greater part of vs shall, by free consent, agree vnto, and *yet does premise that those Lawes, Constitutions, and Penalties soe made shall be conformable to the Lawes of England, soe far as the nature and constitution of our place will admit*, to the end that we may show ourselves . . . willingly and exceedingly desirous to preserve every man safe in his person, name and estate . . . .

Id. (emphasis added).

138. *In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1329 (R.I. 1986) (Kelleher, J., dissenting).

139. *Id.* at 1329.

140. CONLEY, *supra* note 134, at 23, 24.

141. *Id.* at 24.

142. PATRICK T. CONLEY, LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND: 1636-1998 14, 21 (1998).

143. *Id.*

144. *See id.* at 18.

General Assembly often exercised functions now considered the exclusive domain of the judicial branch,"[145] and it exercised "extensive control over the judicial affairs of the colony."[146]

In 1666, the General Court of Trials and General Jail Delivery was created by statute.[147] That court, like the prior General Court of Trials, "was to consist of the governor, the deputy governor, and assistants."[148] Any litigant's appeal rights were to the General Assembly, "which was authorized to alter, amend, or reverse such judgments and give a new judgment thereupon 'as to the said assembly shall appear to be agreeable in law and equity.'"[149] In 1719, the General Court was renamed the Superior Court of Judicature, Court of Assize, and General Jail Delivery,[150] but it still consisted of the same personnel, and appeals were still taken by petition to the full General Assembly.[151] That same year, the General Assembly became bicameral, and the "governor, deputy governor, and assistants [sat] as the 'upper' house and the deputies of the several towns compris[ed] the 'lower' house."[152]

1746 saw the governor and his assistants removed from the superior court bench, replaced by a chief justice and four associates; according to historian Patrick T. Conley, however, "this change did not significantly diminish legislative influence. Judges could still be members of the [General] Assembly, so those deputies or assistants appointed to the bench usually retained their

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145. *Id.* at 21.

146. *Id.* at 19. This legislative control of the judiciary is not terribly surprising, however. Rhode Island, like other early colonies, developed from an English tradition that did not feature a separation of powers as we know it today. Ellen E. Sward, *A History of Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 364 (2003). In fact,

> The early colonies had even more reason to combine these functions, as there were so few people in the colonies that it was impracticable to try and set up different governmental entities to perform different tasks. Thus, the early colonies often had a single body that performed all of these functions, usually called the General Court or General Assembly.

Id. at 364-65.

147. *In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1329 (R.I. 1986) (Kelleher, J., dissenting) (citing 1730 R.I. Pub. Laws 8).

148. *Id.*

149. *Id.* (quoting 1730 R.I. Pub. Laws 29).

150. *Id.*

151. *Id.*

152. *Id.*

legislative posts."[153] Petition could also still be made to the General Assembly for appellate review and "the legislature established a formal procedure for receiving, 'hearing and determining' petitions praying for relief from court decisions, thus strengthening and reaffirming its appellate powers, which were similar to those possessed by the English House of Lords."[154] According to Conley, the petition process and the annual appointment of judges persisted not only throughout the colonial period, but up until the establishment of the state constitution in 1843.[155] As the Rhode Island Supreme Court was to later note in *Gorham v. Robinson*,[156] under the Charter, the General Assembly

> had the power to remove any of the judges at any time; and, as to the principles of the separation of powers and of the independence of the judiciary, [we cannot see that they were given] much recognition under a system of government in which all the judges of the highest court were annually elected by the General Assembly, which also claimed and, whenever it chose, exercised the power to adjudicate cases and to reverse the decisions and judgments of the [state's highest court].[157]

Under the Charter, therefore, no "independent" judiciary existed under any meaningful definition of that term.[158]

B. *The Post-1776 Charter Government*

Following the Declaration of Independence, the authority of general sovereignty passed to each of the former colonial states, and the Continental Congress passed a resolution advising the colonies to form new governments.[159] Most did, drafting their own state constitutions to define the limits of the state's authority and to include declarations of rights, often based on rights developed at common law.[160] In the 1770's and 1780's, Americans began to

153. CONLEY, *supra* note 142, at 21-22.
154. *Id.* at 22.
155. *See id.*
156. 186 A. 832 (R.I. 1936).
157. *Id.* at 841 (emphasis omitted).
158. *See id.*
159. *See* Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 989-90 (1996).
160. *See id.* at 990, 995.

conceive of "a constitution as a written delimitation of the grant of power made by the people to the government,"[161] which led to "'the important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government.'"[162] These new constitutions emphasized a liberty that "was personal or private, the protection of individual rights against all governmental encroachments, particularly by the legislature."[163] The governments established by these constitutions were "no longer designed merely to promote the collective happiness of the people, but also, . . . 'to protect citizens in their personal liberty and their property' even against the public will."[164]

Rhode Islanders did not, however, take the opportunity to adopt such a constitution or create such a government, and for the next sixty-seven years the Charter remained the state's governing document.[165] Consequently, the only limit on the state's power against the individual remained in the Charter, which stated only that laws enacted by the General Assembly had to be consistent with the laws of England,[166] and the ultimate authority to make that determination remained in the General Assembly itself as the "court of last resort."[167] Conley has noted that "[a]lthough the retention of the colonial charter was unusual, few people were disturbed by its continued operation"[168] perhaps because at the time, "rights-related controversies among Rhode Islanders were rare."[169]

Another explanation, not inconsistent with Conley's, is suggested by Professor Gordon S. Wood's observation that "[i]t is difficult for us today to appreciate the respect and wonder with which nearly all Englishmen held Parliament" in the seventeenth and

161. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 601 (1969).

162. *Id.* (quoting THE FEDERALIST NO. 53, at 409 (Alexander Hamilton) (John C. Hamilton ed., 1998)).

163. *Id.* at 609.

164. *Id.*

165. *See In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1330 (R.I. 1986) (Kelleher, J., dissenting).

166. *See* CONLEY, *supra* note 142, at 18.

167. *See In re Advisory Opinion (Chief Justice)*, 507 A.2d at 1329; CONLEY, *supra* note 142, at 18.

168. CONLEY, *supra* note 142, at 174, 205.

169. *Id.* at 178.

eighteenth centuries.[170] "Parliament was the great defender against tyranny. It was the august author of the Bill of Rights of 1689, the historical protector of the people's property, and the eternal bulwark of their liberties against the encroachments of the Crown."[171] In the centuries following the signing of the Magna Carta in 1215, English history saw a continuing struggle over rights and continued attempts by the English people to place limits on their king.[172] The struggle was "finally settled in the Glorious Revolution of 1688 and 1689,"[173] when Parliament set forth a Declaration of Rights "which became a statute or Bill of Rights when the new King William III approved them."[174] The statute declared certain actions of the crown illegal and "asserted certain rights and freedoms possessed by Englishmen, including the right to bear arms, to petition the king, to have free elections and frequent Parliaments in which speech would be free, and to have no excessive bail or fines."[175] Parliament was also the king's highest court,[176] and as Professor Wood has described:

> The English Bill of Rights was designed to protect the subjects not from the power of Parliament but from the power of the king. Indeed, it was inconceivable that Parliament could endanger the subjects' rights. Only the crown could do that. Parliament was the highest court in the land and was therefore the bulwark and guardian of the people's rights and liberties; there was no point in limiting it. Consequently, there were no legal or constitutional restrictions placed on the actions of the English Parliament . . . .[177]

By the last quarter of the eighteenth century, most Englishmen believed that all "moral and natural law limitations on the

170. GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 118 (2004).
171. *Id.*
172. *See* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1424 (1999) (article based on the McCorkle Lecture delivered at the University of Virginia School of Law on March 11, 1999).
173. *Id.* at 1425.
174. *Id.*
175. *Id.*
176. *Id.* at 1423.
177. *Id.* at 1425.

Parliament were strictly theoretical, without legal meaning, and relevant only in so far as they impinged on the minds of the lawmakers."[178] Consequently, "every act of Parliament was in a sense a part of the [English] constitution, and all law, customary and statutory, was thus constitutional."[179]

The English Parliament was composed of the "three estates of the realm – Crown, Lords, and Commons – who, together, represent[ed] the sovereignty of the people."[180] Each were thought to make a valuable and effective contribution to law-making, and "roughly corresponded to Aristotle's ideal form of 'mixed government,' which included elements of the monarchy, aristocracy, and democracy, each of which had virtues that would act as a check on the vices of the others."[181] The Crown, joined with the Lords, would suppress the tendencies of the Commons; the Lords and Commons the arbitrariness of the Crown; and the Commons and the Crown the oligarchic tendencies of the aristocratic Lords.[182] "Because the entire realm was represented within it, Parliament was considered to be both omnipotent and omnicompetent"[183] with its own internal system of checks and balances.[184] It was not simply the highest court among others in the land, but was "the sovereign lawmaker of the realm, whose power, [even if] arbitrary and unreasonable, was uncontrollable."[185]

As a consequence, "[b]y the time of the American [R]evolution, [ ] most educated Englishmen had become convinced that their rights existed only against the crown. Against their representative or sovereign Parliament, which was the guardian of these rights, they existed not at all."[186] It has been argued that for this reason, Americans generally embraced the idea of legislative supremacy, the legislature then being invested with the sovereignty of the populace.[187] If this was the general view of the American Revolu-

178. WOOD, *supra* note 161, at 260.
179. *Id.* at 261.
180. Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 55 (2003).
181. *Id.* at 58.
182. *Id.* at 61.
183. *Id.* at 58.
184. *Id.* at 61.
185. WOOD, *supra* note 161, at 265.
186. Wood, *supra* note 172, at 1426.
187. *See* Harrington, *supra* note 180, at 54.

tion, it was also the view of early Rhode Islanders. "Of necessity, this meant that the legislatures themselves were the judges of the constitutionality of their own actions. Indeed, it was often said in this period that the Constitution was a 'rule of the legislature only,' and was not judicially enforceable in the courts."[188]

Moreover, the idea that the judiciary would be subject to the control of the legislature, as reflected in Rhode Island's Charter government, was not an exceptional or novel idea in the time immediately following the American Revolution. Although the doctrine of separation of powers would eventually become what James Madison would call "a first principle of free government,"[189] Professor Wood has written that "Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions."[190] Some historians believe that separation of powers in the 1776 constitutions meant "nothing more than a prohibition of plural office holding."[191]

> Despite John Adams's warnings in his *Thoughts on Government* that "an upright and skillful administration of justice" required the judicial power "to be distinct from both the legislative and executive, and independent upon both," most of the early constitution-makers had little sense that judicial independence meant independence from the people. . . . [C]onstitutional provisions giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what the colonial assemblies had been struggling for in their eighteenth century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure . . . , and in fact they meant to increase it.[192]

According to Professor Wood, "[t]he expanded meaning of separation of powers, . . . along with a new conception of judicial

188. *Id.*
189. WOOD, *supra* note 161, at 152.
190. *Id.* at 153-54.
191. *Id.* at 156.
192. *Id.* at 161.

independence, had to await the experience of the years ahead."[193]

And so it did. Within a relatively short time after the Revolution, the "democratic despotism" of the legislative assemblies that seemed so contradictory in 1775 and 1776 began to emerge. [194] In the period between 1776 and 1803, American perception of legislative power underwent a radical transformation.[195] The rise of legislative arbitrariness caused the belief in legislative supremacy to give way to a different understanding of the legislature's role.[196] Instead of being supreme, legislatures were increasingly viewed as merely one of the people's agents, whose powers were more limited in scope than previously thought.[197] This gave rise to the realization that some other authority must have the power to determine when the legislature had gone beyond the scope of its powers or intruded on the rights retained by the people.[198] In other words, Americans were faced with the dilemma of protecting individual rights and limiting popular government, while at the same time not denying the sovereign power of the majority of the people.[199] As Professor Wood has concluded:

> This dilemma led Americans to think freshly about a number of constitutional issues, ... Most difficult of all was the formulating of a defense of individual rights and liberties against the people themselves – against Parliament, so to speak. . . .
>
> The secret was to identify the popular legislatures with the former monarchial power (which is what is meant by the term "democratical despotism") and involve the traditional language of the rights of Englishmen in these new republican circumstances. . . . Since, unlike England, the representative legislatures were the source of the problem, not the solution, some other bulwark for individual rights would have to be found. This meant that the crucial issues of individual rights had to be taken out of the

193. *Id.*
194. *See* Wood, *supra* note 172, at 1434.
195. Harrington, *supra* note 180, at 54.
196. *Id.*
197. *Id.*
198. *Id.*
199. Wood, *supra* note 172, at 1435.

> hands of the popular legislatures and placed in the hands of some other institution, which turned out to be the courts.[200]

By the 1780's, Americans began looking to the judiciary as a means of restraining, in Professor Wood's words, "the rampaging and unstable popular legislatures."[201] The judiciary in several states began to gingerly, and sometimes ambiguously, move, in isolated cases to impose restraints on what the legislatures were enacting as law, effectively saying to the legislatures: "Here is the limit of your authority; and, hither, shall you go, but no further."[202] In Rhode Island, this revolution in constitutional thinking and the ordering of government was asserted not by the legislatively and annually appointed judiciary, but instead by a member of the bar, James Mitchell Varnum, in the 1786 case of *Trevett v. Weeden*.[203]

Trevett arose after the General Assembly passed an Emitting Act authorizing the issuance of paper currency that would be "'good and lawful [t]ender, . . . [and would] [d]ischarge of all debts [then] due and contracted."[204] As the value of this currency declined, many merchants refused to accept the paper money in defiance of the Emitting Act.[205] The General Assembly responded with the passage of a Forcing Act, making it a criminal offense to refuse the paper money, and more importantly, providing that the violators were to be tried at a special court without the benefit of a jury.[206] In *Trevett*, John Trevett filed an information under the Forcing Act against John Weeden, a Newport businessman who refused to accept the paper money.[207] In Weeden's defense, Varnum urged the court to use its power to review the Force Act and declare it unconstitutional and void.[208]

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200. *Id.*
201. *Id.* at 1436.
202. WOOD, *supra* note 161, at 455 (quoting George Wythe of Virginia, who is claimed to have spoken the words in 1782).
203. *See* Harrington, *supra* note 180, at 79. The opinion of *Trevett* is unreported. *Id.* at 79 n.111.
204. *Id.* at 79 (quoting An Act for Emitting One Hundred Thousand Pounds, 1786 R.I. Acts & Resolves 13, 16).
205. *Id.*
206. *Id.*
207. *Id.*
208. Patrick T. Conley, *Founding Lawyers: Doing Justice to the Legal Ar-*

Varnum made two distinct arguments. Quoting Bacon and Coke,[209] he first contended "that acts contrary to common right and reason were not law and 'that the power of construing a statute is in the Judges; for they have authority over all laws, more especially over statutes, to mold them according to reason and convenience to the best and truest use.'"[210] But, "Varnum also resorted to a more modern distinction between the fundamental law of the constitution and ordinary statutory law, arguing that the [General Assembly] could never make a law contrary to the principles of the constitution, not simply because such a law was inherently unjust but because the principles of the constitution 'were ordained by the people anterior to and created the powers of the General Assembly.'"[211]

According to Varnum, a constitution or charter was a compact of the people surrendering some of their natural rights to the government, and "'[t]he aggregate of this surrender forms the power of government,' including the power to make laws."[212] "'Consequently the Legislature cannot intermeddle with the retained rights of the people,'"[213] and the judiciary's special task was to "'reject all acts of the Legislature that are contrary to the trust reposed in them by the people.'"[214] Varnum asserted that "the trial by jury is a fundamental right, a part of our legal constitution,"[215] and that "the Legislature cannot deprive the citizens of this right."[216]

Varnum was not alone in his reassessment of the limits of legislative supremacy. Several months later, in May 1787, it was ar-

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chitects of Rhode Island Statehood, 50 R.I.B.J. 15, 34 (2002); WOOD, *supra* note 161, at 459.

209. WOOD, *supra* note 161, at 459.

210. *Id.* at 459-60 (quoting James M. Varnum, during the unreported case of *Trevitt v. Weedon*, tried before the Honorable Superior Court in the County of Newport, September Term, 1786).

211. *Id.* at 460.

212. *Id.*

213. *Id.*

214. *Id.*

215. Harrington, *supra* note 180, at 79.

216. *Id.* In addition to the right to trial by jury being part of the unwritten English Constitution, the Royal Charter of 1663, which bounded the Rhode Island General Assembly's authority, retained the right to trial by jury. *See* Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 82-83 (2003).

gued in a local newspaper, the Providence Gazette, that all legislative acts were "'liable to examination and scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect.'"[217] In another *Providence Gazette* article in August of that same year, it was asserted that "legislators who enacted laws that 'violate[d] . . . fundamental principles . . . [were] substituting *power* for *right*.'"[218]

Despite Varnum's "learned and eloquent" arguments in *Trevitt* [219] and the urging of the contemporary media, neither the members of the court nor the General Assembly embraced the realignment of power from the legislature to judiciary. Contemporary accounts of the case state merely that the judges dismissed the case because "the information [was] not cognizable before them,"[220] apparently deciding not to proceed because the case was heard in a special session and not a special court as required by the statute, and consequently side-stepping the constitutional issue raised by Varnum.[221] Other accounts, however, reported that three of the *Trevitt* judges declared the statute void: one asserting that the court lacked jurisdiction, and the rest not setting forth a reason.[222] This was sufficient cause for the General Assembly to summon the judges to appear before them to explain the decision.[223] After some debate, the legislature decided not to pursue impeachment, but four of the five judges were not reappointed in the next session.[224]

After *Trevett*, Rhode Islanders began taking small, subtle steps toward enhanced legal protection of individual liberties. In 1798, three significant laws were adopted.[225] The first of these acts

217. WOOD, *supra* note 161, at 456 (quoting PROVIDENCE GAZETTE & COUNTRY J., May 12, 1787).
218. William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 352 (2004) (quoting PROVIDENCE GAZETTE & COUNTRY J., Aug. 5, 1786, at 2).
219. *See* Conley, *supra* note 208, at 34.
220. Harrington, *supra* note 180, at 80.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *See* CONLEY, *supra* note 134, at 172 ("These additions were embodied

changed the name of the highest court to the "Supreme Judicial Court," and provided that the justices could no longer be members of either house of the General Assembly.[226] This ensured that those officers exercising judicial authority would be separate and distinct from the legislative officers, although the justices would continue to be appointed annually.[227] The second and third acts were rights-creating. The second act was an "Act Relative to Religious Freedom and the Maintenance of Ministers," and the third was an "Act Declaratory of Certain Rights of the People of this State."[228] The Religious Freedom Act was a statutory guarantee of religious liberty, while the Act Declaratory of Certain Rights was a "statutory bill of rights" that listed a number of "'political axioms or truths,' which were declared 'to be of paramount obligation in all legislative, judicial and executive proceedings.'"[229] Those political truths included:

> [1] the right of all to a legal remedy for injuries or wrongs to property and character, [2] protection against unreasonable search and seizure, [3] immunity from double jeopardy, [4] protection from excessive bail and cruel and unusual punishment, [5] the privilege of *habeas corpus*, [6] a guarantee of procedural due process, [7] the termination of imprisonment for debt once the debtor's estate had been delivered up for the benefit of his creditors, [8] a bar on *ex post facto* laws, [9] freedom from involuntary self-incrimination, and [10] a presumption of innocence until guilt was proven.[230]

While these political rights and liberties were declared "paramount,"[231] and while there was finally a court distinct from the legislature to enforce them as statutory rights, the court was still subject to the will of the legislature. Either of the laws could be repealed in whole or in part by the General Assembly, and it

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in the *Digest of 1798*, the first compilation and revision of the general laws since 1767.").

226. *See In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1330 (1986) (Kelleher, J., dissenting).

227. *See id.*

228. *See* CONLEY, *supra* note 134, at 172.

229. *Id.* at 173.

230. *Id.*

231. *See id.*

still had the power to function as an appeals court to review any decision of the supreme judicial court that might concern those rights.[232] Indeed, the *Digest of 1798* contained a reaffirmation of the General Assembly's final appellate authority, setting forth a petition process permitting any person to petition the General Assembly "praying that any judgment, rule of court, or determination whatever, may be set aside."[233] The General Assembly could also simply remove the justices responsible for the decision at the next annual election.[234] Four decades later, however, "the omnipotence and adamancy of the legislature, and the absence of a constitutional bill of rights became grievances severe enough" to create a movement for the establishment of a new constitutional document.[235]

C. *The Struggle for a Constitutional Government*

The "agitation [for reform eventually] prompted the General Assembly to authorize a constitutional convention," scheduled for November 1841.[236] The reformers "exhorted the adult male citizenry to disregard the landholding qualifications [for voting] and to go to the polls to elect delegates to a People's Convention, which would meet in October"[237]. The Landholders Convention was authorized by the Charter government and did not produce a draft constitution; the People's Convention, however, "presented a proposed constitution to the white male population for ratification, regardless of whether they were landholders."[238] This document called for a separation of power between the judiciary and the legislature, and for the independence of the judiciary. It provided, in relevant part:

Article III

Of the Distribution of Powers

232. *See* Patrick T. Conley, *Article VI, Section 4: A Case Study in Constitutional Obsolescence*, 53 R.I.B.J. 7, 9 (2004).
233. *Id.*
234. *See In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1330 (1986) (Kelleher, J., dissenting).
235. CONLEY, *supra* note 142, at 205.
236. *Id.* at 242. 245.
237. *Id.* at 246.
238. *Id.*

1. The power of Government shall be distributed into three departments, the Legislative, the Executive and the Judicial.

2. No person or persons connected with one of these departments shall exercise any of the powers belonging to either of the others, except in cases herein directed or permitted.

Article IV

Of the Legislative Department

The Legislative power shall be vested in two distinct Houses, the one to be called the House of Representatives, the other the Senate, and both together the General Assembly.

. . . .

Article IX

General Provisions

1. This Constitution shall be the Supreme Law of the State; and all laws contrary to, or inconsistent with the same, which may be passed by the General Assembly, shall be null and void.

. . . .

4. *No jurisdiction shall hereafter be entertained by the General Assembly in cases of . . . appeal from judicial decisions, nor in any other matters appertaining to the jurisdiction of the Judges and Courts of law.* But the General Assembly shall confer upon the Courts of the State all necessary powers affording relief in the cases herein named; and the General Assembly shall exercise all other jurisdiction and authority, which they have heretofore entertained, and which is not prohibited by, or repugnant to this Constitution.

. . . .

Article XI

Of the Judiciary

1. The Judicial Power of the State shall be vested in one Supreme Court, and in such other Courts inferior to the Supreme Court, as the Legislature may, from time to time, ordain and establish.[239]

The new constitutional scheme envisioned by the People's Constitution represented a dramatic departure from the Charter, providing for a clear separation of judicial and legislative power, and prohibiting the General Assembly from exercising judicial power.

In response, the Landholder's Convention was reconvened and produced a draft of an alternative constitution, sometimes referred to as the Landholder's or Freemen's Constitution.[240] Although this proposed constitution, drafted by a Convention called by the General Assembly, ostensibly called for a separation of powers, it effectively rejected separation of judicial and legislative power and called for a continuing co-mingling of those powers in the General Assembly as had been the practice under the Charter. It provided, in relevant part:

Article Third

[Of the Distribution of Powers.

Section 1. The powers of the government shall be distributed into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted.]

Article Fourth

Of the Legislative Power

239. R.I. CONST. art. III, §§ 2, 3; art. IV, § 1; art. IX, §§ 1, 4; art. XI § 1 (Proposed Draft 1841), *reprinted in* 2 ELISHA R. POTTER, R.I. CONSTITUTION (1843) (emphasis added). These proposals were finally adopted by the People's Convention in Providence on Nov. 18, 1841. *See* POTTER, *supra*.

240. *See* Conley, *supra* note 142, at 249-50.

> Section 1. This Constitution shall be the supreme law of the State, and all laws enacted contrary thereto, shall be void.
>
> Sec. 2. The Legislative power, under this Constitution, shall be vested in two distinct Houses, or Branches, . . . the one to be styled the Senate, the other the House of Representatives; and both together, the General Assembly.
>
> . . . .
>
> Sec. 10. *The General Assembly shall continue to exercise the judicial power, . . . and all other powers they have heretofore exercised not inconsistent with this Constitution.*
>
> . . . .
>
> Article Eleventh
>
> Of the Judicial Power
>
> Sec. 1. The Judicial power of this state shall be vested in one Supreme Judicial Court, and in such other inferior Courts as the General Assembly may from time to time ordain and establish;[241]

The Landholders' proposed constitution essentially called for a continuation of the relationship between the supreme judicial court and the General Assembly as had existed under the Charter, while the ultimate judicial authority and responsibility for individual liberties would remain in the General Assembly.

After the Freemen's Constitution was narrowly defeated at the polls, two rival governments were subsequently elected – one under the People's Constitution, and one "Law and Order" government under the Charter – which gave rise to a period of turmoil known as the Dorr Rebellion.[242] When the Law and Order party prevailed, it convened another constitutional convention in the fall of 1842 which substantially framed the present state con-

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241. R.I. CONST. art. III, §§ 1, 2; art. IV, §§ 1, 2, 10; art. XI § 1 (Proposed Draft 1842), *reprinted in* 2 POTTER, *supra* note 239.

242. *See* CONLEY, *supra* note 142, 250-66

stitution.[243] That constitution was remarkable for its ambiguity with respect to the separation of judicial and legislative powers. Whereas the People's Constitution and the Freemen's Constitution took opposed but clearly expressed positions on the appropriate political and governmental structure, the constitution that was ultimately enacted seems to have been deliberately ambiguous, leaving the question unresolved. It provided, in relevant part:

> Article Third
>
> Of the Distribution of Powers
>
> The powers of government shall be distributed into three departments; the Legislative, Executive, and Judicial.
>
> Article Fourth
>
> Of the Legislative Powers
>
> Section 1. The Constitution shall be the supreme law of the State, and any law inconsistent therewith shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.
>
> Sec. 2. The Legislative power, under this Constitution, shall be vested in two Houses, the one to be called the Senate, the other the House of Representatives; and both together the General Assembly.
>
> . . . .
>
> Sec. 10. *The General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution.*
>
> . . . .
>
> Article Tenth
>
> Of the Judicial Power
>
> Section 1. The Judicial power of this State shall be vested in one Supreme Court, and in such inferior courts as the

243. *Id.* at 266.

> General Assembly may, from time to time, ordain and establish.[244]

While the People's Constitution specifically removed the ultimate judicial power from the General Assembly and placed it solely in the supreme court, the Freemen's, or Landholder's, Constitution specifically reserved ultimate judicial power to the General Assembly.[245] The constitution that was ultimately adopted in 1842, however, did not specifically address the General Assembly's exercise of judicial power. That decision, we shall see, was ultimately left to a future day. The framers seem to have chosen ambiguity over making a clear decision on separation of the legislative and judicial branches of government in Rhode Island.

The new state constitution, however, did achieve two notable objectives. First, it shifted the already established commitment to the paramount political axioms and truths in the *Digest of 1798* from statutory law to the stiffer bedrock of state constitutional law. Article I of the constitution contained twenty-three sections and became the "Declaration of Certain Constitutional Rights and Principles."[246] Among the twenty-three sections, section 3 was based on the Religious Freedom Act enacted in 1798, while sections 5 through 14 incorporated with almost no change the ten sections of the 1798 statutory declaration of rights.[247]

The second, more subtle change was to give the state's supreme court justices what Chief Justice Samuel Ames would subsequently call a "firmer tenure,"[248] "a comparatively stable tenure of office."[249] The new constitution provided, in article X, section 4, that the judges of the supreme court would still be elected by the two houses of the legislature in grand committee, as they had under the Charter, but that:

> Each judge shall hold his office until the place be declared vacant by a resolution of the general assembly to that ef-

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244. R.I. CONST. art. III; art. IV, §§ 1, 2, 10; art. X, § 1 (Proposed 1842), *reprinted in* 2 POTTER, *supra* note 239. These provisions were adopted by the Convention assembled at Newport. *See* POTTER, *supra* note 239.

245. *See supra* notes 239, 241 and accompanying text.

246. Kevin D. Leitao, *Rhode Island's Forgotten Bill of Rights*, 1 ROGER WILLIAMS U. L. REV. 31, 58 (1996).

247. *Id.*

248. G. & D. Taylor & Co. v. Place, 4 R.I. 324, 352 (1856).

249. *Id.* at 353.

> fect; which resolution shall be voted for by a majority of all members elected to the house in which it may originate, and be concurred in by the same majority of the other house. Such a resolution shall not be entertained at any other than the annual session for the election of public officers; and in default of the passage thereof at said session, the judge shall hold his place as is herein provided.[250]

In addition, section 6 provided that the compensation of the judges of the supreme court could not be diminished during their continuance in office.[251] While the General Assembly still retained the right to elect and "un-elect" supreme court justices, the emphasis was subtly changed from determining year to year whether they should continue in office, to determining, in some year, whether they should be removed from their judicial offices. Lauding this constitutional change, Chief Justice Ames later wrote:

> The plain import of all this, when compared, . . . with the state of things it was intended to remedy, is, that the people of the state, when they adopted this constitution, desired to have, in their court of last resort, so far as such better constitutional provision would enable it, an educated and independent judiciary, with a comparatively stable tenure of office, ...[252]

The text had, however, left open the question of whether the principle of separation of powers and the vesting of judicial power in the supreme court deprived the General Assembly of the judicial power it had exercised under the Charter. There is evidence the General Assembly thought it did not. The first digest of laws enacted after the constitution became effective, the *General Laws of 1844*, contained an act modernizing the method of petitioning the General Assembly for review of decisions of the court.[253] It is evident that the General Assembly was preparing to continue its pre-constitutional position as the state's ultimate appellate au-

250. *In re* Opinion of Judges, 51 A.2d 221, 221 (R.I 1902); *see also Place*, 4 R.I. at 346; R.I. CONST. art. X, § 4.

251. *See* Gorham v. Robinson, 186 A. 832, 843 (R.I. 1936); *see also* R.I. CONST. art. X, § 6.

252. *Place*, 4 R.I. at 353.

253. Conley, *supra* note 232, at 10.

thority.

As we shall see, however, the state's supreme court viewed the new constitutional order, and in particular the new relationship between the judiciary and the legislators, quite differently. The tension between the command of separation of powers – with the judicial power being in the supreme court and the General Assembly's view that it could continue to fully exercise judicial appellate power – soon began its path to the Rhode Island Supreme Court. In 1854, the General Assembly ordered a new trial for garnishees of a company indebted to another firm; prior to this order, the courts had rejected a claim for a new trial.[254] This exercise of judicial power by the General Assembly was then challenged under the new constitution.[255] The court's subsequent interpretation of the document's separation of powers, in a decision authored by Chief Justice Ames in *G. & D. Taylor & Co. v. Place*,[256] fundamentally altered the constitutional arrangement of judicial and legislative roles. The *G. & D. Taylor & Co.* court held that the General Assembly's action constituted the exercise of judicial power,[257] and that the distribution of powers in Rhode Island

> was, in our constitution, made for the special purpose of depriving the general assembly of their long exercised judicial power, which, rightly or wrongly, that body had assumed under the charter. . . . *It was the assumption of judicial power by the general assembly, which must have been specially aimed at by this clause of distribution* . . . .[258]

Chief Justice Ames asserted that "[a]n independent, responsible judiciary is the only safeguard of our property, lives, and liberties."[259] He emphatically recognized the role of the court in preserving the liberties of Rhode Island citizens from the actions of the state government, including actions of the legislative branch. Moreover, as historian Patrick T. Conley has written, "[t]he legislature *acquiesced* in this bold decision in 1857, when its

254. *Place*, 4 R.I. at 324-25.
255. *See id.* at 324.
256. *See id.*
257. *See id.*
258. *Id.* at 348-52 (citation omitted) (emphasis added).
259. *Id.* at 343.

new digest of general laws revised the petition process to exclude the traditional review of court cases."[260] Thus, the separation of powers and independence of the judiciary were imbued with a significantly stronger character in the constitutional scheme.

After sixty-seven years with no individual liberties or rights protecting them from the actions of their state government, save what the General Assembly would approve of giving them for as long as it deemed appropriate, the citizens of Rhode Island created a constitution describing rights they deemed fundamental, defining the limits of their state government's ability to interfere in those areas of personal liberty, and providing for the power and obligation of the Rhode Island Supreme Court to be the primary guardian of those rights. In this regard, the 1842 Rhode Island Constitution represented a "massive rethinking" of the principal means of protecting the liberties of the state's citizens,[261] and created a stronger and less dependent state supreme court as the guardian of those liberties to protect them from infringement by state government.[262]

D. *Post-Civil War Development*

Prior to the adoption of the Fourteenth Amendment in 1868, the United States Supreme Court had acknowledged that the federal Bill of Rights did not protect against state action, but that

> [e]ach state [has] established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . In their several constitutions [the states] have imposed restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively . . . .[263]

Consequently, state supreme courts were acknowledged to be the primary guarantors of individual rights and civil liberties against

260. Conley, *supra* note 232, at 10 (citation omitted) (emphasis added).
261. Wood, *supra* note 172, at 1436.
262. *See id.*
263. Holland, *supra* note 159, at 997-98 (quoting Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833)).

state infringement.[264] State court interpretations of constitutional liberties even served as models for later U.S. Supreme Court interpretations of the federal Constitution, "shap[ing] federal law in the areas of judicial review, substantive due process, freedom of speech, religion, eminent domain, the right to bear arms, and the rights of the accused."[265]

The enactment of the Fourteenth Amendment in 1868 added an additional measure of protection from state government action. As discussed earlier, by using the Amendment's Due Process Clause,[266] the Supreme Court began to apply selected provisions of the federal Bill of Rights against state action.[267] It was a gradual process, taking "another hundred years and much disputed reasoning to equate most of the first eight amendments with due process under the [F]ourteenth."[268] Even then, the federal constitutional standards established only a minimum level of protection, protecting citizens only when their state constitutions and state supreme courts did not already do so.

However, as the U.S. Supreme Court increasingly weighed in on issues of individual rights and liberties, lawyers and state supreme courts tended to rely on Supreme Court decisions addressing federal constitutional rights provisions when addressing analogous state constitutional rights in state proceedings, leading to a federalization of constitutional rights. This was perhaps due to what Wisconsin Justice Shirley Abrahamson has described as

> "an understandable human tendency on the part of state judges to view a Supreme Court decision on a particular topic as the absolute, final truth." . . . "It is easier for state judges and for lawyers to go along with the United

264. *Id.* at 998.

265. *Id.* (citing Honorable Robert F. Utter & Sanford E. Pitter, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 641 (1987)).

266. *See* U.S. CONST. amend. XIV, § 1.

267. Holland, *supra* note 159, at 1002. Prior to the enactment of the Fourteenth Amendment, the federal Bill of Rights was seen as protecting individual rights "solely against encroachment by the federal government." *Id.* However, after the Amendment was passed, "the United States Supreme Court began to hold that selected provisions of the Federal Bill of Rights also afforded protection against state action," pursuant to a process known as the "incorporation doctrine." *Id.*

268. Linde, *supra* note 13, at 174.

> States Supreme Court than to strike out on their own to analyze the state constitution."[269]

Stated another way, "[j]udges are accustomed to thinking in a hierarchical way, and the United States Supreme Court is at the top of the ladder."[270] This focus on Supreme Court constitutional decisions did not invalidate state constitutional guarantees; it just left them unattended, effectively leaving the Supreme Court as the primary interpreter and guardian of fundamental liberties instead of state supreme courts, contrary to the general understanding of a significant portion of this nation's history.

When Rhode Island's citizens adopted a state constitution in 1842, thereby enacting state constitutional protections to be interpreted and applied by the Rhode Island Supreme Court, did they expect or intend that their state constitutional rights would be federalized? That is, did they expect or intend that the state constitution would be effectively interpreted and applied by the U.S Supreme Court rather than the state supreme court? In all likelihood, the Rhode Island citizens who adopted the state constitution did not expect or intend this result. Furthermore, even if the 1842 state constitution could be so construed, the Rhode Island Constitution in its present form cannot be construed to confer upon the U.S. Supreme Court the authority to define and declare the rights arising under the state constitution. That authority is given to one body only: the Rhode Island Supreme Court.

The 1986 Rhode Island Constitutional Convention amended the state constitution to add a provision asserting the Rhode Island Supreme Court's role as the primary guardian of the fundamental liberties it declared.[271] Article I's "Declaration of Certain Constitutional Rights and Principles" was amended to conclude with the following statement of intent: "'*The rights guaranteed by this [C]onstitution are not dependent on those guaranteed by the Constitution of the United States.*'"[272] While in the process of passing this amendment, the framers of the amendment, which ulti-

269. *Id.* at 177 (quoting Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 964 (1982)).

270. Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L. Q. 723, 732 (1990).

271. *See* Robert H. Whorf, *"Coervive Ambiguity" In the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 402-03 (1997).

272. *Id.* at 402-03 (quoting R.I. CONST. art. I, § 24) (emphasis added).

mately became section 24 of article I of the Rhode Island Constitution,[273] recognized evidence that the

> U.S. Supreme Court ha[d], in recent years, moved to a narrower application of individual rights and that some other state courts . . . [were] taking a more expansive interpretation of individual rights under state constitutions than under the Bill of Rights and the [Fourteenth] Amendment . . . [and that] the rights of the individual . . . whether enumerated in the [state c]onstitution or based on prior rights exercised by the people, are guaranteed *irrespective* of the U.S. Constitutional protection.[274]

Section 24 is an implicit recognition of a new judicial federalism, and of the primacy approach to state constitutionalism in particular. The section affirmed that Rhode Island's state constitutional guarantees were meant, as Justice Linde has described, to "remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics."[275] It placed the constitutional obligation on the Rhode Island Supreme Court to resist any inclination to uncritically and deferentially cede its responsibility to uphold state constitutional guarantees to the United States Supreme Court, and constituted a foundational statement declaring that the people of Rhode Island declined to entrust their constitutional rights entirely to the federal courts. It was a significant constitutional marker, obliging the state supreme court to exercise its full rights and responsibilities under federalism as the primary guardian of state constitutional rights and liberties, and to critically interpret their proper meaning and scope.

At about the same time that Rhode Island citizens were amending the state constitution to embrace the primacy approach to state constitutionalism, the Rhode Island Supreme Court issued an opinion that was as resounding a declaration of judicial independence as Chief Justice Ames's decision in *G. & D. Taylor &*

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273. *See id.*; R.I. CONST. art. I, § 24.

274. Whorf, *supra* note 271, at 403 (internal quotations omitted) (emphasis added).

275. State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

Co.[276] was – if not more so. In a nonbinding advisory opinion, three justices of the Rhode Island Supreme Court opined that the General Assembly no longer had the constitutional authority to remove a justice by a majority vote of both the House and Senate in grand committee, and that a justice could only be removed by the impeachment process.[277] According to the opinion, that power had been repealed by implication most probably in 1854, but certainly by 1893.[278] These justices offered the following rationale for their decision:

> The power of the Legislature to remove Supreme Court justices by joint resolution was limited from the very beginning, conditioned specifically on the occurrence of a legislative session that met annually for the election of public officers. With the effective abolition of that session in 1854, and more certainly in 1893, there was and is no longer any constitutionally ordained forum in which this power can be exercised.[279]

They believed that article X, section 4, as set forth in the state constitution in 1842, made the timing of the exercise of the power of removal "vital to the power itself,"[280] and that when the constitution was amended to eliminate the described "time and occasion for the exercise of the power, [the power itself] ceased to exist."[281] They construed the constitution to permit the removal of a Rhode Island Supreme Court justice only through the constitutionally prescribed process of impeachment.[282]

Although the issue addressed by the justices' advisory opinion was never adjudicated in a litigated case, a 1994 constitutional amendment was approved that eliminated the removal language set forth in article X and replaced it with the single sentence that implicitly approved the advisory opinion and the desirability of a truly independent judiciary.[283] The amendment stated that "Jus-

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276. 4 R.I. 324 (1856); *see also* discussion *supra* Part IV.B.
277. *In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1320, 1327 (R.I. 1986).
278. *Id.* at 1323.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 1327.
283. *See* Burton P. Jenks, III, *Rhode Island's New Judicial Merit Selection*

tices of the Supreme Court shall hold office during good behavior,"[284] giving Rhode Island Supreme Court justices life tenure subject only to impeachment. The justices' newly confirmed independence was a significant and substantial enhancement of its role vis-à-vis the legislature as the guardian of the liberties, privileges and protections set forth in the Rhode Island Constitution, just as article I, section 24 was a command for a significant and substantial enhancement of its role in interpreting and protecting those liberties vis-à-vis the United States Supreme Court. Through their constitution, Rhode Islanders sent a strong message concerning the role they expected their state supreme court to play as guardian of their constitutional liberties, whether analogous rights appeared in the federal Constitution or not. The question is whether the court has met that expectation.

IV. ARTICLE I RIGHTS: INDEPENDENT VITALITY OR ROW OF SHADOWS?

Although the Rhode Island Supreme Court has never cited article I, section 24, it has recognized that "our constitution was made by Rhode Islanders for a Rhode Island government,"[285] and that "'state charters . . . were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials.'"[286] It has also consistently acknowledged that the state and federal constitutions provide a "double-barreled" source of protection,[287] and that a state court is free to adopt stronger constitutional protections under the state constitution than the U.S. Supreme Court might adopt under the federal Constitution,[288] even when the text of the documents is similar or

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Law, 1 ROGER WILLIAMS U. L. REV. 63, 64 n.8 (1996).

284. *Id.* (quoting R.I. CONST. art. X, § 5).

285. *In re* Advisory Opinion to the Senate, 278 A.2d 852, 854-55 (R.I. 1971).

286. State v. Benoit, 417 A.2d 895, 899 (R.I. 1980) (quoting People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975)).

287. *See, e.g.*, Pimental v. Dep't of Transp., 561 A.2d 1348, 1350 (R.I. 1989); State v. von Bulow, 475 A.2d 995, 1019 (R.I. 1986); State v. Sitko, 460 A.2d 1, 2 (R.I. 1983); State v. Luther, 351 A.2d 594, 594 (R.I. 1976); State v. Maloof, 333 A.2d 676, 681 (R.I. 1975).

288. *See, e.g.*, Pontbriand v. Sundlun, 699 A.2d 856, 869 n.20 (R.I. 1997); State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997); R.I. Grand Jury v. Doe, 641 A.2d 1295, 1296 (R.I. 1994); State v. Werner, 615 A.2d 1010, 1012 (R.I. 1992); State v. Bertram, 591 A.2d 14, 21 (R.I. 1991); Town of Barrington v. Blake, 568 A.2d 1015, 1018 (R.I. 1990); *Pimental*, 561 A.2d at 1350; *von Bulow*, 475

identical.[289] The Rhode Island Supreme Court has also frequently taken notice of article I's preamble by declaring that the court has a "paramount obligation" to maintain and preserve the fundamental rights set forth in that article.[290]

The affirmation that article I rights are "fundamental,"[291] "paramount,"[292] and "made by Rhode Islanders for a Rhode Island government"[293] could reasonably lead one to conclude that the Rhode Island Supreme Court applies the primacy approach when constitutional claims are made under both the state and federal constitutions. One might reasonably conclude that the court would be inclined to look first to the state constitution to determine what the Rhode Island framers intended by the words chosen to protect them against infringement of their liberties. Additionally, in light of the 1986 amendment adding section 24 to article I, it would be reasonable to conclude that the court would critically examine the U.S. Supreme Court's interpretation of analogous rights, independently explore and define the contours of the protections adopted in the state constitution, and determine the most appropriate tests to describe and protect those rights. One could reasonably conclude these things; but one would be wrong.

Instead, the Rhode Island Supreme Court has consistently addressed the federal Constitution first, interpreting and determining the federal constitutional right before the state right is addressed. When it does address the state constitutional question, it has deferred to the U.S. Supreme Court's interpretation of the analogous right under the federal Constitution, adopting it as the appropriate one for the Rhode Island Constitution as well. The constitutional rights in article I have become, consequently, more shadow than substance.

A.2d at 1019; Duquette v. Godbout, 471 A.2d 1359, 1361 (R.I. 1984); *Sitko*, 460 A.2d at 2-3; *Benoit*, 417 A.2d at 899; *Maloof*, 333 A.2d at 681.

289. *See, e.g.*, *Pontbriand*, 699 A.2d at 869; *Pimental*, 561 A.2d at 1350.

290. *Sitko*, 460 A.2d at 3; *Maloof*, 333 A.2d at 678; *see also* Bandoni v. State, 715 A.2d 580, 614 (R.I. 1998) (referring to the preamble and calling the Rhode Island Constitution's Declaration of Rights "the repository of Rhode Islanders' fundamental rights.").

291. *Bandoni*, 715 A.2d at 614.

292. *Sitko*, 460 A.2d at 3; *Maloof*, 333 A.2d at 678.

293. *In re* Advisory Opinion to the Senate, 278 A.2d 852, 854-55 (R.I. 1971).

A. *The Rhode Island Supreme Court's Lockstep Approach to State Constitutionalism*

The Rhode Island Supreme Court has shown a marked disinclination to give the state's Declaration of Rights any meaning apart from that given to the analogous rights of the federal Bill of Rights by the U.S. Supreme Court or, more importantly, to critically examine the federal interpretation of those constitutional protections. The court has repeatedly declared that "[t]he decision to depart from [the] minimum standards [of the federal Constitution] and to increase the level of protection [under the state constitution] should be made guardedly and should be supported by principled rationale."[294] For example, in the context of claims of unreasonable searches and seizures, the court has said that the manner in which the U.S. Supreme Court has interpreted the protections of the Fourth Amendment should "command respect"[295] and should "receive great deference,"[296] by state courts when interpreting their own state constitutional document. Presumably, this deference is due to the court's view of federalism, and the proper relationship that it believes it should assume with the U.S. Supreme Court, although the court does not explain why this deference is necessary.

In terms of state constitutionalism, the succinct rule adopted by the court reflects, in form, the "supplemental approach" to state constitutional interpretation.[297] In actual substance, however, the court's approach is even more deferential than the supplemental approach; it reflects a "lockstep approach" with United States Supreme Court decisions that interpret parallel provisions of the federal Constitution. [298] In fact, the more recent Rhode Island Su-

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294. State v. Benoit, 417 A.2d 895, 899 (R.I. 1980); *see also* State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997) (quoting the same language from *Benoit*, 417 A.2d at 899); *In re* Advisory to the Governor, 666 A.2d 813, 816 (R.I. 1995) (same); State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992) (same); *Pimental*, 561 A.2d at 1350-51 (quoting similar language); Duquette v. Godbout, 471 A.2d 1359, 1361 (R.I. 1984) (same).

295. *Benoit*, 417 A.2d at 899.

296. *Pimental*, 561 A.2d at 1350.

297. *See* discussion *supra* Part III.A-B.

298. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 421-24 (1998) (explaining the "lockstep approach" to state constitutionalism and highlighting its strengths and weaknesses).

preme Court cases involving parallel federal and state constitutional claims demonstrate an aversion to even investigating whether greater protection should be warranted under the state constitution. For example, in *Pontbriand v. Sundlun*,[299] where the court addressed the right to privacy under the federal and state constitutions, the court declared in a footnote that "[a]lthough this court has the power and the right to effectuate a higher level of constitutional safeguards for Rhode Island citizens under our own constitutional provisions than provided by the United States Constitution, *we shall not reach such contention absent strict necessity*."[300] The court left unsaid what would constitute the necessity sufficient to persuade it to even reach and consider a claim that the state constitution does, or should, provide greater protection than the federal Constitution. The court found that there was no such necessity in *Pontbriand*, notwithstanding the fact that the federal Constitution did not provide any constitutional relief, and that a state constitutional claim was contemporaneously asserted.[301] Implicit in the *Pontbriand* court's statement is a state constitutional policy that the court will follow the U.S. Supreme Court's interpretation of the federal Constitution unless there is a strict necessity to depart from it.[302] Whatever "strict necessity" may mean, it does not suggest a practice of critical and searching evaluation of state constitutional doctrine.

Even when the court has granted greater protection, it has later reversed itself. For instance, in considering the exigency exception to the warrant requirement for searches and seizures in *State v. Benoit*,[303] the court first elected to follow the rationale of the dissent in the leading United States Supreme Court decision on the issue, rather than following the majority opinion, thereby granting greater protection against unreasonable searches and seizures than in the federal context.[304] Twelve years later, however, in *State v. Werner*,[305] the court reversed its decision in *Benoit*

299. 699 A.2d 856 (R.I. 1997).
300. *Id.* at 869 n.20 (citations omitted) (emphasis added).
301. *See id.* at 869, 869 n.20.
302. *See id.* at 869 n.20 ("[W]e shall not reach such contentions [that the state constitution offers higher protections than the federal Constitution] absent strict necessity.").
303. 417 A.2d 895 (R.I. 1980).
304. *Id.* at 899-00.
305. 615 A.2d 1010, 1013 (R.I. 1992).

on the grounds that federal case law that guided the court's original departure from the federal precedent had been "stabilized by the Supreme Court."[306] The court decided to "eliminate the conflicting interpretations" of the state and federal constitutions "[i]n light of the Supreme Court's clarification of the exigency issue."[307]

Another example is *State v. Holliday*,[308] where the Rhode Island Supreme Court found that the right to counsel issue before it had not been addressed by the U.S. Supreme Court, [309] and went on to decide whether relief was available under the state constitution.[310] It resolved the state constitutional issue, however, simply by stating that it "[did] not perceive" that the federal constitutional requirements of the Sixth Amendment were "any more rigorous" than the state constitutional requirements for the right to counsel,[311] and predicted that the defendant would be entitled to the requested relief under the federal Constitution and that therefore the defendant was entitled to such relief under the state constitution.[312] Twenty-four years later, however, in *In re Advisory Opinion to the Governor*,[313] the court declared that *Holliday* was decided without "precise guidance from the United States Supreme Court,"[314] and that its "prognostication . . . was inaccurate."[315] Consequently, "considerations of public policy motivate[d] [the court] to conform [its] reading" of the state constitution to the United States Supreme Court's reading of the federal Constitution.[316]

These examples demonstrate that the court unequivocally views Supreme Court decisions concerning analogous constitutional provisions as: 1) presumptively correct readings of the federal Constitution; and 2) *presumptively correct interpretations of the Rhode Island Constitution*, notwithstanding the disparate origins, drafters and even eras of enactment. The court's approach to

306. *Id.* at 1013.
307. *Id.* at 1014.
308. 280 A.2d 333 (R.I. 1971).
309. *Id.* at 335.
310. *See id.* at 336.
311. *See id.*
312. *Id.*
313. 666 A.2d 813 (R.I. 1995).
314. *Id.* at 816.
315. *Id.*
316. *Id.* at 817.

state constitutionalism reflects a lockstep, hierarchical view of constitutional jurisprudence that is at odds with article I, section 24 of the Rhode Island Constitution, does not take full advantage of the opportunities presented by the principles of federalism, and, it is respectfully submitted, does not fully meet a state supreme court's obligations under federalism or its own state constitution.

Nor does the court's approach fit comfortably with its own repeated assertion that its object in construing the Rhode Island Constitution is to effectuate the intent of its framers.[317] None of the decisions stating the "guarded and principled" departure rule – allowing departure only when there is "strict necessity" – have demonstrated that the framers of the 1842 state constitution were content to enact a Declaration of Rights that was either identical or merely coextensive with the federal Bill of Rights.[318] Nor have any of the court's post-1986 decisions stating the rule demonstrated that the framers of the 1986 state constitutional amendment had any such intent either.[319] In fact, the enactment of section 24 can only fairly be interpreted as demonstrating that the 1986 framers had exactly the opposite intent: to encourage independent evaluation of state constitutional issues. Rather, the "guarded and principled" rule seems to simply reflect the court's unexplained preference for a limited and highly deferential view of its perceived relationship with the U.S. Supreme Court when it comes to exploring and deciding constitutional questions – even state constitutional questions – and its reluctance to fully utilize its sovereign constitutional authority under the principles of judicial federalism.

A court engaging in "lockstep interpretation" ostensibly is engaging in a form of state constitutional interpretation because it "necessarily entails a conclusion about the meaning of the state constitution: The state provision means what the federal analogue

317. *See, e.g.*, Mosby v. Devine, 851 A.2d 1031, 1038 (R.I. 2004); City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995); Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 739 (R.I. 1992); *In re* Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 7 (R.I. 1992); State v. Cianci, 591 A.2d 1193, 1201 (R.I. 1991).

318. *See, e.g.*, Pontbriand v. Sundlun, 699 A.2d 856, 869 & n.20 (R.I. 1997); State v. Benoit, 417 A.2d 895, 899 (R.I. 1980).

319. *See, e.g.*, State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997); *In re* Advisory to the Governor, 666 A.2d 813, 816 (R.I. 1995); State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992); *Pimental,* 561 A.2d at 1350-51.

means."[320] Lockstep interpretation does not typically involve an investigation into whether the state constitution was intended to mean the same as the federal Constitution.[321] Instead, the approach involves a decision by the state supreme court that a particular interpretation is what the state constitution *should* mean in relation to the federal Constitution. "Lockstep interpretation reflects a belief in the primacy of the [federal] Constitution in matters affecting individual rights,"[322] and it "invokes [and defers to] the interpretive expertise of the federal courts."[323] One commentator has observed that the lockstep approach affords the maximum possible deference to state actors because it "eliminates the state constitution as an independent restriction on state governmental activity,"[324] "embodies a deferential application of judicial review,"[325] and "allows a [state] court to avoid the potentially controversial task of determining that a government action, though valid under the [federal] Constitution, nevertheless violates the state charter."[326]

The first fundamental problem with a lockstep approach is its "assumption that the state constitution does not merit independent [investigation],"[327] whether it be investigation of the text and history, or whether it be a critical investigation of competing strains of constitutional thought regarding a particular liberty or protection found in both the state and federal constitutions. This assumption has been described as "an unwarranted abdication of a court's interpretive duty,"[328] and, even worse, as "an extreme case of judicial self-abnegation."[329] Moreover, making such an assumption is unmistakably inconsistent with the constitutional directive of article I, section 24 of the Rhode Island Constitution.[330]

Another drawback to the lockstep approach taken by the

320. Schapiro, *supra* note 297, at 422.
321. *See id.* at 421-22.
322. *Id.* at 424.
323. *Id.* at 422.
324. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 693 (2000).
325. *Id.*
326. Schapiro, *supra* note 298, at 421.
327. Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 86-87 (1998).
328. *Id.* at 87.
329. Schapiro, *supra* note 297, at 422.
330. *See* R.I. CONST. art. I, § 24.

Rhode Island Supreme Court is that it causes the court to go forward in deciding an issue of federal constitutional law, which is sometimes settled and sometimes not, when the case may be decided on state constitutional grounds instead. Although the court routinely follows the rule that it will not decide a constitutional matter when there is another non-constitutional state ground on which the matter can be decided,[331] the court has recently reaffirmed that, where the contention is between state and federal constitutional law, it "'will refrain from passing on a constitutional question when it is clear that the case before [it] can be decided on another point and that a determination of such a question is not indispensably necessary for a disposition of the case.'"[332] The same principle of judicial restraint ought to apply to cases where a foray into federal constitutional law is not indispensably necessary for a disposition of the case because a determination under the state constitution would make such an exercise unnecessary. The court should not declare federal constitutional rights when a declaration of state constitutional rights could resolve the dispute. It should fully address the state constitutional responsibilities and obligations that are its exclusive charge, and only decide the case on federal constitutional grounds if the state constitution does not provide relief.

An additional shortcoming of the lockstep approach is that the way in which the Rhode Island Supreme Court chooses to defer to federal constitutional decisions invites federal judicial review. A state court decision that addresses and expounds upon questions of federal constitutional law is subject to review by the U.S. Supreme Court unless "'the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'"[333] "[A]dequacy 'is itself a federal question'" that the U.S. Supreme Court decides. [334] Where a state supreme court has stated that it will apply the "same analysis" to a state constitutional claim as is applied to a parallel fed-

331. *See, e.g.*, Dahl v. Begin, 660 A.2d 730, 732 (R.I. 1995); Town of Barrington v. Blake, 532 A.2d 955, 955 (R.I. 1987).

332. Mosby v. Devine, 851 A.2d 1031, 1038 (R.I. 2004) (quoting McElroy v. Hawksley, 196 A.2d 172, 176 (R.I. 1963)).

333. Lee v. Kemna, 534 U.S. 362, 375 (2002) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)).

334. *Id.* (quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965)).

eral constitutional claim, or that the federal and state constitutional protections are "identical," the Supreme Court considers the state court decision to rest sufficiently upon federal grounds to support jurisdiction.[335]

The Rhode Island Supreme Court has tended to describe the scope of state constitutional protections by using terms dangerously similar to "same analysis" and "identical," thereby increasing the likelihood that the U.S. Supreme Court would consider these state decisions as resting sufficiently upon federal grounds to support federal jurisdiction for review. For example, the Rhode Island Supreme Court has determined that the right to equal protection under article I, section 2 of the Rhode Island Constitution is "on par with,"[336] "similar to,"[337] and "coextensive" with the parallel right in the federal Constitution;[338] the right to the privilege against self-incrimination under article I, section 13 is "tantamount to" and "coextensive with" the federal right;[339] that the protection against unreasonable searches and seizures in article I, section 6 is generally "identical to the Fourth Amendment;"[340] that the right to religious freedom under article I, section 3 is "no more restrictive" of the government than the religious rights under the First Amendment;[341] that the right of privacy under the state constitution is identical in scope to the right under the federal Constitution;[342] that the free speech provisions of article I, section 21 do not "afford[ ] more extensive protection . . . than the United States Constitution presently affords;"[343] and that the same three-

335. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 106 (2003).

336. Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 738 (R.I. 1992).

337. *In re* Advisory Opinion to the Governor, 659 A.2d 95, 100 (R.I. 1995).

338. *In re* Jeramie N., 688 A.2d 823, 828 (R.I. 1997). *Compare* R.I. CONST. art. I, § 2, *with* U.S. CONST. amend. XIV.

339. R.I. Grand Jury v. Doe, 641 A.2d 1295, 1297 (R.I. 1994) ("coextensive with"); State v. Bertram, 591 A.2d 14, 21 (R.I. 1991) ("tantamount to"). *Compare* R.I. CONST. art. I, § 13, *with* U.S. CONST. amend. V.

340. State v. Taylor, 621 A.2d 1252, 1254 (R.I. 1993). *Compare* R.I. CONST. art. I, § 6, *with* U.S. CONST. amend. IV.

341. *In re* Palmer, 386 A.2d 1112, 1114 n.1 (R.I. 1978). *Compare* R.I. CONST. art. I, § 3, *with* U.S. CONST. amend. I.

342. Pontbriand v. Sundlun, 699 A.2d 856, 869 (R.I. 1997) ("[W]e shall treat the constitutional protections afforded by the Federal and State Constitutions as being of identical scope.").

343. Town of Barrington v. Blake, 568 A.2d 1015, 1018 (R.I. 1990). *Com-*

pronged test employed by the U.S. Supreme Court to the prohibition of impairment of contracts under the federal Constitution also applies to the impairment of contractual language under article I, section 12 of the state constitution.[344] As a consequence, the Rhode Island Supreme Court decisions with respect to each of these *state* constitutional rights is subject to the review, interpretation and final authority of the U.S. Supreme Court. Thus, it is not the Rhode Island Supreme Court that is ultimately the final arbiter on Rhode Island constitutional meaning; it is the United States Supreme Court.

B. *The Rhode Island Supreme Court's Obligation and Responsibility for a More Vigorous Approach to State Constitutionalism*

By asserting that the state constitutional right is identical, tantamount to, or coextensive with the federal right, the state supreme court is arguably committing itself to the proposition that it will follow the U.S. Supreme Court's interpretation of the federal Constitution when a parallel state constitutional right is at issue no matter what constitutional path a majority of that court wishes to travel. Describing state constitutional rights in that way not only creates a potential extra layer of review for the litigants, but it effectively transfers the final interpretive authority for the state constitution from the Rhode Island Supreme Court to the U.S. Supreme Court. It is respectfully submitted that the court has an obligation and responsibility to take a more active, vigorous and independent approach to interpreting and applying state constitutional provisions, notwithstanding the fact that the state constitution may have federal analogs that the U.S. Supreme Court has previously interpreted.

If the Rhode Island Supreme Court independently determines that a state constitutional provision is to be interpreted in the same manner and breadth as an analogous federal constitutional provision in a given case, that is its prerogative. However, it must make clear that it is simply agreeing with the federal interpreta-

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pare R.I. CONST. art. I, § 21, *with* U.S. CONST. amend. I.

344. *See, e.g.*, R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co., 716 A.2d 730, 736 (R.I. 1998). *Compare* R.I. CONST. art. I, § 12, *with* U.S. CONST. art. I., § 10, cl. 1.

tion as the *best* interpretation as to the extent of the state right at issue, and thus is gleaning from the federal interpretation what the state constitution likely means rather than simply adopting the federal rule of law without further analysis. The court must state that it is deciding the case on an adequate and independent state ground to avoid permitting its own interpretive authority to be supplanted by the U.S. Supreme Court.[345]

The court should determine state constitutional claims before federal ones when both are raised, and decline to reach the federal constitutional issue when the state constitution affords the relief requested.[346] Even if the court elects to continue to address federal constitutional claims first, when the federal Constitution does not provide relief and a state constitutional claim has been raised, the court must vigorously explore the state constitution to determine if it is, or if it should be, more protective of the particular right at issue, and whether it can supply the relief requested by the litigant. This process necessarily entails a full state constitutional analysis. Where the state constitutional provision has its own text, history or origin, it is the obligation of the court to explore these factors, and to explain why it thinks that the state provision says more or less than its federal counterpart. Furthermore, even where the text of a Rhode Island constitutional provision is identical to its federal counterpart, and even where there is no separately discernable clarifying history or origin, the court still has an obligation to examine the reasoning, logic and analysis of a U.S. Supreme Court majority opinion to determine its persuasive

345. The only case the author discovered in which the Rhode Island Supreme Court specifically indicated that state constitutional provision provided a "'bona fide separate, adequate, and independent ground[]'" for its decision is *State v. von Bulow*, 475 A.2d 995, 1019 (R.I. 1984) (quoting Michigan v. Long, 463 U.S. 1032, 1033 (1983)). In that decision, the court first addressed the federal constitutional issues concerning the suppression of evidence under the federal Constitution's Fourth Amendment prohibition against unreasonable searches and seizures. *See id.* at 1018-19. Even though the court determined that the defendant was entitled to relief under the federal Constitution, it went on to say the defendant would have been entitled to relief under article 1, section 6 of the Rhode Island Constitution *even if* the Fourth Amendment did not protect him, and described that state law ground as an adequate and independent ground for its decision. *Id.* at 1019; *compare* R.I. CONST. art. I, § 6, *with* U.S. CONST. amend. IV. By doing so, the court quashed any potential federal review of the decision, and the entire discussion of the federal constitutional issue became dicta.

346. *See* discussion *supra* Part III.C-D.

weight on the merits before adopting that rationale for the state provision. In a five-to-four decision by the U.S. Supreme Court, there are almost an equal number of justices who disagree with the majority's reasoning, logic and analysis – presumably finding it unpersuasive – as there are justices agreeing with the majority's disposition. Moreover, prior federal circuit courts of appeals' decisions, as well as state supreme court decisions, both before and after the five-to-four decision may also reject the reasoning, logic and analysis of that five-to-four decision. It is incumbent on the Rhode Island Supreme Court to evaluate the persuasiveness of those dissenting views, to reach its own conclusion as to the merits and desirability of the Supreme Court majority decision in order to protect the fundamental liberties of this state's citizenry, and to add its own voice and considered opinion to the national constitutional debate. That is its right and obligation under the principles of federalism and the Rhode Island Constitution. The Rhode Island Supreme Court has been charged by the people of this state, through the state constitution, "to say what [the] law is, to be the guardian of our constitutional rights, and to uphold [the state constitution's] paramount provisions in all judicial proceedings."[347]

An example of the importance of a more vigorous approach to state constitutionalism is illustrated by the current state of jurisprudence with respect to the free exercise of religion. In 1968, in one sentence of a per curiam decision in *Bowerman v. O'Connor*,[348] the Rhode Island Supreme Court offered its analysis of the state constitution's religion clause, embodied in article I, section 3, stating: "Nor can we agree with appellees that the language of the constitution of this state prohibiting establishment of religion or the interference with the free exercise thereof is more restrictive than the language of the federal [C]onstitution . . . ."[349] While *Bowerman* was an Establishment Clause case, ten years later in *In re Palmer*,[350] a Free Exercise Clause case, the court reiterated its bare conclusion "that the language of article [I], section 3 of the Rhode Island Constitution is no more restrictive as to religious

347. Bandoni v. State, 715 A.2d 580, 602 (R.I. 1990) (Flanders, J., dissenting).
348. 247 A.2d 82 (1968).
349. *Id.* at 83; *see also* R.I. CONST. art. I, § 3.
350. 386 A.2d 1112 (R.I. 1978).

freedoms than the language of the [federal] Constitution."[351] At that time, equating the two clauses was uncontroversial; it simply meant that free exercise claims under the state constitution would be decided under the same test used by the U.S. Supreme Court under the federal Constitution, – namely the compelling state interest test,[352] which has been described as "the most demanding test known to constitutional law."[353]

In 1990, however, in what Professor Michael W. McConnell has described as "undoubtedly the most important development in the law of religious freedom in decades,"[354] the United States Supreme Court abandoned the compelling interest test for free exercise claims under the First Amendment in a five-to-four decision in *Employment Div., Dept. of Human Res. v. Smith.*[355] The *Smith* decision has been heavily criticized by a number of Supreme Court justices,[356] commentators,[357] and state courts,[358] who all appeared to agree with Justice Sandra Day O'Connor that *Smith* "dramatically depart[ed] from well-settled First Amendment jurisprudence,"[359] and was "incompatible with our Nation's fundamental commitment to individual religious liberty."[360] Writing for the *Smith* majority, Justice Antonin Scalia saw the Supreme Court's free exercise jurisprudence quite differently, declaring that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[361] According to the majority, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general appli-

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351. *Id.* at 1114 n.1.
352. *See id.* at 1115.
353. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
354. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).
355. 494 U.S. 872, 876-90 (1990).
356. *See, e.g., id.* at 892 (O'Connor, J., concurring) (indicating that Justices Brennan, Marshall, and Blackmun joined in the relevant portion of her concurrence).
357. *See, e.g.*, McConnell, *supra* note 354, at 1152-53.
358. *See, e.g.*, Open Door Baptist Church v. Clark County, 995 P.2d 33, 43-45 (Wash. 2000); State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994); Attorney General v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994).
359. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).
360. *Id.*
361. *Id.* at 878-79.

cability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[362] Under the compelling interest test, however, the right of free exercise did just that absent a compelling government interest outweighing the individual's protected religious liberty.

As a result of *Smith's* clarification or correction of federal constitutional law, the Rhode Island Supreme Court would be faced with a choice in any future state constitutional free exercise claim: follow the Supreme Court along its new path or give independent effect to the state constitution's religion clause. There are significant textual and historical markers to suggest that article I, section 3 of the state constitution has always embodied an expansive religious liberty best implemented by the compelling interest test;[363] but even if there were not, the court would still be obliged to weigh the merits of competing views of the First Amendment as found in the U.S. Supreme Court decisions themselves, and as found in law reviews, journals and other state supreme court decisions as well. It is obligated to do so to fully carry out its role in giving meaning to the liberties protected by the state constitution, and to be an active participant in the federalist model by adding its views to the national debate over the strength and vigor of the right to free exercise of religion. This is its obligation for every claim properly and distinctly made under the state constitution.[364]

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362. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

363. *See generally* Thomas R. Bender, *Dusting Off Article 1, Section 3: The Possibility of Constitutionally Required Exemptions From Rhode Island General Laws*, 53 R.I.B.J. 13 *passim* (2004).

364. The call presented here is not only to the Rhode Island Supreme Court, however, because there is an indispensable component without which the court cannot explore, analyze or expound upon the state constitution and create a thoughtful body of state constitutional jurisprudence. As alluded to earlier, that indispensable component is competent arguments by the Rhode Island Bar compelling the court to analyze state constitutional claims independent from federal constitutional jurisprudence. As Justice Souter wrote as a member of the New Hampshire Supreme Court:

> It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensibly 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

CONCLUSION

"Checking arbitrary power and protecting our precious liberties are the twin towers of constitutional adjudication, the quintessence of constitutional law, and the most important jurisprudential duties that [the] justices of the highest court in this state can possibly perform."[365] Utilizing the primacy approach would ensure that the Rhode Island Supreme Court's state constitutional adjudication takes full advantage of the genius of federalism's "split[ting] the atom of sovereignty."[366] The primacy approach would also ensure that the Declaration of Rights in Article 1 of the Rhode Island Constitution becomes the source of truly independent fundamental rights of paramount importance, and not simply "a mere row of shadows,"[367] or, as one former Rhode Island Supreme Court justice has described, a "smaller and less meaningful . . . parchment pasquinade of its intended meaning."[368] The primacy approach ensures that the Rhode Island Supreme Court fulfills its obligation as the sole guardian and expositor of state constitutional protections belonging to Rhode Islanders, and stresses the importance of the state constitution as a statement of the democratic principles and liberties Rhode Islanders believe in.

In 1842, the citizens of Rhode Island made a historic decision to embed certain rights, liberties and privileges in a state constitution to cabin the authority and activities of state government, and to establish a sphere of personal individual liberty.[369] At the time there was no other document with this purpose. Those same citizens restructured their state government to place the responsibility for defining and enforcing the boundary between the indi-

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> 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.

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

365. Mosby v. Devine, 851 A.2d 1031, 1082 (R.I. 2004) (Flanders, J., dissenting).

366. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

367. *Bradberry*, 522 A.2d at 1389 (Souter, J., concurring).

368. Bandoni v. State, 715 A.2d 580, 603 (R.I. 1998) (Flanders, J., dissenting).

369. *See* discussion *supra* Part IV.

vidual and the state in the Rhode Island Supreme Court.[370] That the U.S. Supreme Court later began to interpret the federal Constitution to establish minimum protections for citizens from their state governments did not change the Rhode Island people's original delegation of power and responsibility for the state constitution. That power and responsibility continued and continues to lie with the Rhode Island Supreme Court. Both that power and the genius of federalism is lost when a state court cedes its interpretive responsibility for the state constitution to the U.S. Supreme Court by uncritically following that Court's majority decisions. The Rhode Island Constitution is a unique document enacted by a unique people, evidencing the sovereignty permitted them in our federalist system. Rhode Island judges and lawyers should begin their dialogue about constitutional rights with its provisions, and using their own ideas as well as the teachings and ideas of other state and federal courts, give these provisions independent meaning, presence and value. We should not leave it to others to decide what our state constitution means and then struggle to divine the meaning they have chosen. We should do it ourselves, for ourselves.

"[S]tate constitutions offer those . . . who will argue and decide constitutional cases the chance to question familiar formulas, [and] to follow [their] own theories to a conclusion."[371] These documents also "allow the people of each state to choose their own theory of government and of law, within what the nation requires, to take responsibility for their own liberties."[372] The challenge to the bench and bar of this state is to thoughtfully and conscientiously take advantage of these opportunities, and to undertake that responsibility.

370. *See* discussion *supra* Part IV.B.
371. Linde, *supra* note 13, at 199.
372. *Id.*