Pepperdine Law Review

Volume 34 | Issue 1 Article 2

12-15-2006

Intermittent State Constitutionalism

Justin Long

Intermittent State Constitutionalism

Justin Long*

* I thank Michael Dimino, Matt Duncan, Evan Farber, James Gardner, Caitlin Halligan, Tim Kerr, Gordon Lyon, Hon. Robert S. Smith, Cathie Struve, and Robert Williams for their insightful editorial comments and Hon. Albert M. Rosenblatt for his constant encouragement. The editors of the *Pepperdine Law Review* have been especially helpful in the preparation of this Article. Finally, I am, as always, grateful to Ariana Silverman for her support and patience. All remaining errors are my own.

I. INTRODUCTION

State courts are not doing what they are supposed to do—at least when it comes to state constitutions. Beginning with Justice Brennan's famous article in 1977,[1] academic commentary on "New Judicial Federalism" has debated whether and how state high courts should interpret their state constitutions in relation to the Federal Constitution. The vast majority of commentators have argued for a robust state constitutionalism, urging state courts to imbue state constitutions with meaning independent of the federal document, even where the text is similar or identical. The most prominent rationale offered by these scholars, and one frequently developed in those state court decisions that do interpret their constitutions, is what James Gardner has labeled "Romantic Subnationalism."[2] Loosely, this argument supposes that state constitutions are the repositories of the fundamental values of the state's citizens, and assigns an innate "character" to a state Volk that finds expression in its unique charter.[3] Critics of this brand of state constitutionalism, most notably Professor Gardner himself, have attacked the pro-state constitutionalism arguments as disconnected from the actual relationship between state polities and their constitutions.[4]

Meanwhile, in stark contrast to the academic majority's view that state constitutions deserve vigorous and autonomous construction, the state courts have exasperated partisans on both sides of the debate by undertaking this project only inconsistently, if not downright erratically.[5] By examining decisions from a sample of four states closely aligned with the state

---

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (arguing that state courts should respond to the U.S. Supreme Court's retreat from Warren Court era civil liberties protections by giving state constitutions independent meaning to protect rights above the sinking federal floor).

2. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 20-21 (2005).

3. *Id.* at 53-55, 58, 65; *see also* Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 218 (2006) (book review).

4. GARDNER, *supra* note 2, at 56, 66-68.

5. *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998) (describing state constitutional theory as a failure that has not been accepted by the courts); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 779 (1992) (cataloging the failure of seven states to give consistently independent meaning to their state constitutions); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 390-91 (1998) (acknowledging that despite scholarly attention to state constitutions, state courts have been largely content to follow the Supreme Court's interpretation of the Federal Constitution); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 591-92 (1986) (reviewing DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (Bradley D. McGraw ed., 1985)) (describing the author's view, as a state supreme court chief justice, of state constitutional theory as "eclectic" and favoring the application of varying theories depending on the case); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1172 (1985) (describing one state as following, "at least sometimes," a method of state constitutionalism wherein the court turns to its state constitution only to fill in gaps in federal law).

constitutionalism movement, I show how inconsistent state courts still are in interpreting their constitutions.[6] That this inconsistency persists more than ten years after Professor Gardner first demonstrated state courts' lack of enthusiasm for sustained state constitutionalism poses a serious challenge to this purportedly halcyon era of new judicial federalism.[7] I break new ground not because I prove an inconsistency between state practice and academic theory (although my work in that respect updates and confirms the previous evidence), but because I offer a unique new explanation for why this divergence is neither avoidable nor undesirable.[8]

Scholars have devoted little attention to explaining the gap between the seemingly logical and persuasive arguments for robust state constitutionalism in the law reviews and the actual spotty performance of state constitutionalism in the courts.[9] To the limited extent that commentators have sought to cover the distance between "ought" and "is" (rather than debate whether state courts should give their constitutions independent meaning at all), the attempts have ranged from a description of state courts as simply incompetent, to a portrayal of state constitutions as too picayune and political to carry the weight of independent analysis.[10] Some commentators have blamed advocates for not briefing state constitutional arguments[11] or even law schools for not training lawyers to be attuned to

---

6. *See infra* notes 188-291 and accompanying text.

7. *See* GARDNER, *supra* note 2, at 779 (cataloging the failure of seven states to give consistently independent meaning to their state constitutions); Lawrence Friedman & Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 126-27 (2001) (pointing out that many states proudly assert their power to give state constitutions independent meaning, but then frequently rely exclusively on federal analysis in deciding actual cases); John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 *passim* (1993) (reviewing empirically the disparity between state courts' assertions of autonomous state constitutionalism and their differing actual practice); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 25 (1994) (showing empirically that even states with leading decisions supportive of autonomous state constitutionalism still fail to employ independent analysis in most cases).

8. *See infra* Parts IV, V, VI.

9. Of course, legal theorists generally are open to attack for failing to describe real-world practice sufficiently. *See* Stephen D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1044 (1999) (describing a gap between jurisprudence and positive legal doctrine, despite legal theorists' "ostentatious" devotion to closing the gap).

10. *See, e.g.*, Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 470-71 (1996) (describing state constitutions as closer to politics than law and more representative of "entrenched interests" than "a consensus on values" because they are "rife with protection for particular interest groups").

11. *See, e.g.*, Robert F. Williams, *Introduction: The Third State of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 220 (2003) ("Despite the development of the New Judicial Federalism nearly two generations ago, lawyers still fail to properly argue the state constitutional grounds where available.").

state constitutionalism.[12] Some have even argued that state constitutionalism simply has not been around long enough to engage the courts.[13]

To develop my arguments, in Part II of this Article I look more closely at scholars' arguments in favor of a more consistent and vigorous state constitutionalism, followed by a discussion of some of the leading critiques of those theories.[14] Part III will examine the state constitutionalism as actually practiced in state courts, reviewing decisions from Oregon, Washington, New Jersey, and New Hampshire, all states that have adopted independent interpretations of their constitutions but not consistently.[15] Part IV will seek to reconcile theory and practice by describing how state constitutionalism works to establish state-based communities, giving special attention to the culture-making role of lawyers in that process.[16] Specifically, Part IV will emphasize different ways in which framing a political controversy as a state constitutional controversy is the main method for creating a state community, not the particular value or result favored by the state high court.[17] In this sense, the medium is the message. Part V of this Article will explain why performing state constitutionalism only intermittently, even when faced with issues resolvable under state constitutions, is a sufficient approach to state constitutions to develop a sense of belonging in a state community.[18] Because Americans owe allegiance to a variety of overlapping communities, including the Nation, courts and the communities they address will naturally view some public disputes as aspects of a state identity and other disputes as better resolved at different levels of government, or even extra-legally. In Part VI, I argue that the construction of state communities through intermittent state constitutionalism advances laudable goals by strengthening our values of participatory democracy, freedom, and pluralism.[19]

In this Article, I examine the conventional reasons why state courts persist in refusing to apply state constitutions as regularly as outside observers would like, and add two more reasons that theorists have not yet fully developed.[20] The first of these, the "liberal ratchet,"[21] has been often

---

12. *See, e.g.*, Friedman & Baron, *supra* note 7, at 156-57.

13. Abrahamson, *supra* note 5, at 1163 (arguing that lawyers were treating state constitutional arguments cavalierly, in part because the issue was too new). *But see* Ronald K.L. Collins, *Forward: The Once "New Judicial Federalism" & Its Critics,* 64 WASH. L. REV. 5, 5 (1989) (pointing out, in 1989, that the state constitutionalism debate had been ongoing for over a decade, too long still to be called "new") (citation omitted).

14. *See infra* notes 59-187 and accompanying text.

15. *See infra* notes 188-291 and accompanying text.

16. *See infra* notes 292-351 and accompanying text.

17. *See infra* notes 292-351 and accompanying text.

18. *See infra* notes 352-71 and accompanying text.

19. *See infra* notes 372-86 and accompanying text.

20. *See infra* notes 111-63 and accompanying text.

21. This is the idea that state constitutionalism tends to yield more "liberal" results than adhering

noted.[22] The theory has typically been given little weight, however, possibly because it suggests that judicial decision-making is ends-oriented and ideologically driven.[23] Another reason for state court reluctance to follow academic urging on state constitutionalism is, arguably, a nationalist view of law, analogous to "American Exceptionalism" in the transnational context,[24] that crowds out competing visions of the proper sources of judicial decision-making. State courts sometimes seem wary of relying on any legal authority that might implicitly or explicitly undermine the judges' view that *American* law, i.e. national law, is the best and most legitimate legal regime possible.[25] Consistent state constitutionalism has this effect.

After offering potential reasons for why state courts act irregularly in this field, I argue that the gap between the scholars and the judges is not due to judicial ignorance or willfulness, but actually is socially useful.[26] Intermittent, rather than routine, reliance on state constitutions helps foster a sense of communal identity centered on the state. My argument here acknowledges that state constitutions do not reflect the fundamental essence of some mystical state culture, but nevertheless asserts that state constitutions can be (and are) used to encourage a unique state legal culture and a corresponding sense of belonging in the state's citizens.[27] Drawing on insights from scholars of law and culture as well as state constitutionalism, I discuss the role of law in re-creating, as well as reflecting, the culture from which it arises.[28]

Intermittent state constitutionalism plays an important part in building a feeling of state community merely by casting controversial questions as

---

to the Federal Constitution. *See* Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1576-79 (1990) (acknowledging, but denying the force of, the argument that state constitutionalism will tend to protect liberal ideological goals more than conservative goals).

22. *See, e.g.*, Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433 (1988) (noting that it is "virtually guarantee[d] that state court activism will have an overwhelmingly liberal effect" because states are bound to protect individual rights at least as much as the Federal Constitution does).

23. *See generally* Linzer, *supra* note 21, at 1576-79 (noting state court decisions in which both conservative and liberal ends were reached as a result of political ideologies).

24. "American Exceptionalism" in this Article means the tendency to view America and its government as the pinnacle of global progress and as therefore not bound by the ordinary laws and conventions applicable to other jurisdictions.

25. *See, e.g.*, Davenport v. Garcia, 834 S.W.2d 4, 27 (Tex. 1992) (Hecht, J., concurring) (refusing to follow majority's state constitutional interpretation and adopting instead "American" law as determined by the Federal Supreme Court interpreting the Federal Constitution); McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519, 521-22 (N.Y. 2004) (noting special state commitment to civil rights protection, but adopting federal standards and following federal precedents).

26. *See infra* notes 292-95 and accompanying text.

27. *See infra* notes 323-51 and accompanying text.

28. *See infra* notes 301-07 and accompanying text.

resolvable under the state's particular fundamental law. The debate about meaning becomes, itself, a facet of identity for those engaged in it. Locating any particular debate within a state framework represents an assertion by the state court that states are the appropriate community for carrying out that discourse, regardless of which end result one prefers. The language, cultural cues, and legal texts of the state become the raw materials of a real community. In short, the state constitution *constitutes* the state.

This phenomenon need not be frequent, or even regular, to be effective, because individual identities will always be multi-faceted. Some part of each person's identity may attach to a state-wide community, but other aspects will remain firmly nationalistic. States will probably never be the primary community or source of identity for most Americans.[29] On the other hand, states may play some small part, at least once in a while, for nearly all Americans.[30] Intermittent state constitutionalism recognizes and encourages this polyvalent sense of cultural identity.[31]

As part of this explanation, I examine the special role of lawyers as translators of this culture grounded, in part, in state constitutionalism.[32] Conceiving of state constitutionalism as a one-way communication from the state's people to its high court not only fails to respect the culture-constituting effect of state constitutionalism, but also fails to understand the mediating role played by lawyers as translators of popular narratives into legal language and back again.[33] Giving due weight to the role of lawyers in making and re-making culture is important because lawyers do exhibit the sort of state-based communal feeling that critics contend is absent from the average American.[34] The common criticism that Americans are too mobile and too influenced by national cultural forces to feel loyal to a state as a coherent community falls short when applied to lawyers, a group of culture-workers that is marked by relatively unusual geographic isolation within state jurisdictions.[35]

---

29. *See* Michael E. Solimine & James L. Walker, *Federalism, Liberty & State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1468 (1997).

30. *See infra* notes 334-48 and accompanying text.

31. *See infra* note 339 and accompanying text.

32. *See infra* note 324 and accompanying text.

33. *See infra* note 324 and accompanying text.

34. *See infra* note 339 and accompanying text.

35. Multijurisdictional practice seems to be growing, and many lawyers represent their clients' national or even global interests. *See* Am. Bar Ass'n, *Report of the Commission on Multijurisdictional Practice* 10 (2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_ rpt_ 5-17.pdf. Nevertheless, the more typical interaction between a lawyer and client still centers on small-business contracts, petty crimes, property transactions, and estate planning. Lawsuits filed in state courts, which are more likely to handle these smaller-scale disputes, vastly outnumbered federal filings. *See* Nat'l Ctr. for State Cts., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* 13 (Brian J. Ostrom et al. eds., 2003), *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Overview.pdf (reporting that nearly 93 million cases were begun in state courts in 2001, compared with just over 2 million federal cases). A

While the argument that intermittent state constitutionalism fosters a state-based community is primarily descriptive, I further assert that building such a community is normatively worthwhile.[36] The most important reason for encouraging the development of state communities as one facet of citizens' identities derives from the basic premise of "Our Federalism": participatory democracy is enhanced when as much autonomy as possible is given to the smallest possible community.[37] When Americans feel that part of their loyalty belongs to their state, they experience a sense that important problems can be debated and resolved at the state level.[38] This feeling encourages political activism at a level of government far easier for the average person to influence than the federal government in Washington. When issues labeled "constitutional" are made accessible in this way, the conventional equation of "constitutional" with "important" means that even "fundamental" issues are treated as resolvable by the state community.[39] This idea is far from original—rather, it is inherent in the Federal Constitution as intended by the Framers.

A growing sense of state-based identity also necessarily implies greater cultural diversity among the states as each state's people diverge somewhat from their neighbors to construct their own collective identities.[40] This diversity has several beneficial effects. Competition among states permits people to vote with their feet—a culturally amenable legal regime in one state will attract citizens from other states with less agreeable communal conditions.[41] Furthermore, cultural diversity centered on state-based identities fosters a healthy pluralism that strengthens the bonds tying the national community together. If state-based identities are recognized and valued as part of the American experience, even though they may be different from one another, we are more likely to reject the jingoism associated with American Exceptionalism.[42] States, as cultural communities, can teach us that speaking different legal talk from our

---

bar association study confirms what common sense suggests: most clients are not General Electric, and most lawyers don't work for Skadden, Arps. *See* Am. Bar Ass'n, *Lawyer Demographics*, *available at* http://www.abanet.org/market research/lawyer_demographics_2006.pdf (reporting that, nationwide, 76% of law firms had five or fewer lawyers in 2000).

36. *See infra* Part VI.
37. *See infra* Part VI.
38. *See infra* Part VI.
39. *See infra* Part VI.
40. *See infra* Part VI.
41. *See infra* Part VI.
42. *See infra* Part VI.

neighbors, or carrying out different public debates, does not impair our membership in a distinct national community.[43]

A. Definition of Key Terms

Before proceeding further, I must explain the terms I use. Independent state constitutional interpretation includes decisions fitting in any of three analytical categories: "primacy," "dualism," or "interstitialism."[44] In a decision following the "primacy" approach, a state court will evaluate a legal claim under its state constitution first, before reaching a federal question.[45] Only if the state constitution does not protect the right will the court go on to examine whether the Federal Constitution offers greater protection.[46] Under a jurisprudence of "dualism," a court will examine both the state and Federal Constitutions, regardless of whether one or the other disposes of the case.[47] This practice can result in decisions founded on both sources of law, leaving the federal reasoning unreviewable by the United States Supreme Court[48] and the state reasoning mostly immune from change within the state.[49] The "interstitial" approach requires a state court to first examine the Federal Constitution.[50] If that Constitution (and federal decisions interpreting it) does not support the claim, the court will examine the state constitution to determine if it offers any reason to depart from the presumptively correct federal standard.[51] While these approaches each describe varying levels of state autonomy, for purposes of this Article I treat each of them as coherent with autonomous state constitutionalism.

In contrast, the much-derided "lockstep" approach is not a true state constitutional theory at all.[52] Under "lockstep" analysis state courts bind the meaning of state constitutional provisions to their parallel federal

---

43. *See infra* Part VI.

44. *See generally* Jason J. Legg, Comment, *The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court*, 60 ALB. L. REV. 1799, 1803-05 (1997) (describing these three theories of state constitutionalism as well as the "lockstep" approach).

45. *Id.* at 1804.

46. *Id.*

47. *Id.* at 1803.

48. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (establishing the "clear statement" rule of the "adequate and independent" doctrine for federal jurisdiction over state court judgments). *See generally* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 244 (2003) (discussing the federal review of judgments by state courts).

49. Legg, *supra* note 44, at 1803.

50. *Id.* at 1804.

51. *Id.* at 1804-05.

52. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 182 (1998) (describing lockstep approach as rendering state constitutions superfluous); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502-18 (2005) (examining state decisions holding state constitutional clauses to federal standards).

counterparts, either case by case or as a broad rule.[53] Once a state court concludes that the claim falls under a section of the state constitution that has a federal analogue, all further state-law analysis is abandoned and the court treats the question as one of purely Federal Constitutional law.[54] In this Article, I argue that decisions exhibiting lockstep analysis indicate a refusal to interpret the state constitution and an implicit holding by the state court that the issue presented should be nationally uniform and ultimately resolved by the Federal Supreme Court.[55]

"Intermittent state constitutionalism" rejects the descriptive power of the three interpretive categories for any level of analysis beyond an individual case. Instead, the phrase describes a state court that alters its theoretical approach from case to case—even when the court has explicitly adopted one theory or another in a so-called "teaching opinion." Intermittent state constitutionalism reflects variance, within a state, among the three main interpretive approaches described above, plus occasional decisions following federal law in lockstep. The later parts of this Article will offer some explanations for why courts depart from their chosen theories of state constitutionalism.

In testing whether a state follows intermittent state constitutionalism, I consider only those decisions where the state high court declared that the state constitutional issue was raised. Although courts do occasionally dismiss properly briefed state constitutional claims without addressing them, either sub silentio or with a catch-all conclusion, for practical reasons those cases are not included in my study here. Fortunately, courts typically give explicit recognition of a properly presented state constitutional question in any case following any of the conventional theories, from primacy to lockstep, even if the analysis follows federal law. Our inquiry will, so that the party raising the question knows it has been considered. I do not limit the inquiry to cases addressing state constitutional clauses with exact textual parallels in the Federal Constitution because a surprising number of decisions confronting clauses without any federal parallel still rely on federal precedents as the basis for decision.[56] Similarly, although the bulk of the commentary and case law in this field refers to claims of individual

53. Legg, *supra* note 44, at 1803.

54. *Id.*

55. *See infra* notes 384-93 and accompanying text.

56. *See, e.g.*, Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993) (noting that the "equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct" but applying federal precedent and equal protection jurisprudence anyway).

rights,[57] I consider structural questions decided under the state constitutions to be part of this project, as well.[58]

II. STATE CONSTITUTIONALISM'S EVER-OPTIMISTIC ACADEMIC ADVOCATES (AND THEIR CRITICS)

Although state constitutionalism came before the Federal Constitution in time, the federal document has utterly overwhelmed those of the states in mainstream legal discussion. Law schools teach entire courses on "Constitutional Law" without ever mentioning the fifty constitutions complementing, and in some cases predating, the one written in Philadelphia.[59] Academic commentators blithely discuss constitutional verities without a passing word for the often different situation in the states. Justice William Brennan escaped the conventions of this nationalist mindset in 1977 to provoke modern state constitutionalism, known as New Judicial Federalism.[60] Justice Brennan's *State Constitutions and the Protection of Individual Rights*[61] promoted a great awakening of state constitutionalism as the antidote to the United States Supreme Court's increasing tendency to defer to government actors, rather than maintain or expand Warren Court era

57. Many scholars seem to have drawn a sharp distinction between individual rights and structure-of-government disputes under state constitutions, and subsequently devoted far more attention to individual rights. *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (4th ed. 2006) (limiting a two-volume treatise on "state constitutional law" to questions surrounding the litigation of individual-rights cases); *see also* Robert F. Williams, *A Research Agenda in State Constitutional Law*, 66 TEMP. L. REV. 1145, 1147 (urging a shift from scholarship too focused on rights to one attentive to intrastate structural issues, like the line-item veto). This rights/structure distinction seems not to reflect the perspective of the judges, who are confronted with litigants making rights arguments under either type of dispute. For example, a criminal defendant argues she has a "right" to have the evidence suppressed, while a governor argues he has a "right" to fire a commissioner; to the judges deciding the cases, there seems little reason to employ different kinds of legal analysis to the different cases. The structural disputes can certainly have secondary effects on individual rights (an exhaustion requirement imposed on challenges to administrative agency action, for example, obviously limits individuals' freedom to challenge the executive branch), and individual rights disputes can affect governmental structure (a right to a public education compels the state to establish the bureaucratic apparatus necessary to provide that benefit). *See* GARDNER, *supra* note 2, at 260-65 (describing how state constitutional structural decisions also affect individual rights and the state's ability to resist federal authority where appropriate). *Cf.* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYRACUSE L. REV. 1, 7 (2005) (explaining that "all constitutional rights cost money," such that the distinction between positive and negative rights is not theoretically meaningful); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 975 (1979) (describing how increased protection of individual rights shifts structural balance of power away from the legislature toward the state courts).

58. *See infra* notes 104, 142-45 and accompanying text.

59. *See* Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 933 (1993) (describing basic courses in constitutional law as so federally focused that they give law students no reason to look for state constitutional issues).

60. *See generally* Brennan, *supra* note 1.

61. *Id.*

human rights protections.[62] By arguing that the state courts could, and should, elevate individual protections above those provided by Supreme Court interpretations of the Federal Constitution, all without the possibility of review or reversal in the Supreme Court, Justice Brennan provided substantial intellectual and political cover to those state court judges who already felt inclined to avoid the conservative federal holdings.[63] Justice Brennan's article, by itself, was little more than a collection of cases showing a conservative trend by his colleagues, another collection of cases showing states providing greater human rights protections than the federal cases, and an observation of the truism that state courts are legally entitled to interpret their state constitutions as more protective of liberty than the Federal Constitution.[64] The real ground-breaking had already been accomplished seven years earlier, by Hans Linde, then a professor and later a Justice of the Oregon Supreme Court.[65] Nevertheless, Justice Brennan's insight inspired an army of scholars and jurists.[66] Contemporary state constitutionalism was born.

Interestingly, regular reviews of state constitutional progress in symposia have revealed a vibrant, sophisticated, and growing scholarly debate on state constitutional theory as the years and decades since Justice Brennan's article have passed.[67] This academic enthusiasm and dedication

62. While states certainly had their own constitutions before Justice Brennan's article was published, the courts seem to have paid little attention to them as restraints on state power. *See* Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984) (explaining that gag orders, public prayer, and other highly dubious infringements of individual liberty were tolerated and enforced by state courts when those courts were restrained only by their state constitutions, before the Federal Bill of Rights was incorporated into the Fourteenth Amendment). In this sense, Justice Brennan's article was an "awakening" and not a "revival," because there was virtually no vestigial state constitutionalism to restore. *But see* Abrahamson, *supra* note 5, at 1144-47 (arguing that 19th century state courts did engage in state constitutional interpretation and blaming, among other things, federalization of criminal procedure rights for the later decline in state constitutionalism). Naturally, advocates of state constitutionalism may prefer to emphasize the restoration of a glorious past than confront the difficulties inherent in establishing, for the first time, a new field of jurisprudence.

63. Brennan, *supra* note 1, at 501-02.

64. *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1244 (1994) (criticizing Justice Brennan's 1977 view of federalism and states' capacity to protect individual rights as "weak").

65. *See* Hans A. Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182 (1970) (arguing that the state constitution should be the first line of defense for civil liberties, not the federal Fourteenth Amendment).

66. *See* Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 765 (1998) (describing Justice Brennan's influence on state constitutionalism, its advocates and critics alike).

67. For example, the law reviews at Rutgers-Camden, Touro, and Albany law schools (among

remain unmatched by the judiciary. Empirical work revealing persistent failure by many state courts to join the revolution[68] has been met with scholarly apologia explaining that the phenomenon has not reached widespread practice because of gaps in legal education,[69] renewing exhortations to the courts to get with the program,[70] and redoubling efforts to refine scholarly theories of state constitutionalism to make them more persuasive to courts.[71] In this Article, I argue that the time has come to stop showing why state courts *should* give strong independent interpretations to their constitutions and start explaining why they actually *do not*.[72] I attempt to show that even the best of these scholarly arguments are unlikely to be persuasive in state courts, at least not consistently, although Part V will argue that this inevitably inconsistent response by the courts is normatively attractive.[73] For now, I introduce some of the leading arguments that thirty years of scholarly work has produced.

A. Academic Arguments for Vigorous State Constitutionalism

Perhaps the most controversial of these arguments for state constitutionalism is the idea that state constitutions are the repositiories of the authoring community's fundamental values,[74] exactly parallel to the popular conception of the Federal Constitution as a source of morality as well as law. In this view, the people of each state have developed a "character" derived from the state's unique history, geography, economy, and relationship to the rest of the country.[75] State courts themselves have

---

others) have all run regularly recurring state constitutional studies. *See, e.g.*, Robert F. Williams, *Introduction (Seventeenth Annual Issue on State Constitutional Law)*, 36 RUTGERS L.J. 1073 (2005); *Annual New York State Constitutional Issue*, 21 TOURO L. REV. iii (2005); Albany Law Review, State Constitutional Commentary, http://lawreview.als.edu/scc.php (last visited Oct. 11, 2006).

68. *See* Schapiro, *supra* note 5, at 396-97 (noting that although most scholars argue for autonomous state constitutionalism, state courts tend to be deferential to federal sources of law).

69. *See* Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1086 (1997) (noting that when it comes to the development of rich state constitutionalism, "[t]he law schools could do much more to help").

70. *See, e.g.*, Hans A. Linde, *The State and Federal Courts in Governance: Vive la Difference!*, 46 WM. & MARY L. REV. 1273, 1287-88 (2005) (urging state courts, on state autonomy grounds, to abandon federal doctrines of justiciability not found in the text of state constitutions and not compelled by prudence).

71. *See, e.g.*, Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416 (2006) (developing a complex and subtle analysis of Massachusetts state equal protection doctrine as a response to seeming inconsistency in state constitutional interpretation).

72. *See infra* notes 164-87 and accompanying text.

73. *See infra* Part V.

74. Shaw, *supra* note 7, at 1028.

75. *See, e.g.*, Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children:" Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1641 (2004) (describing state constitutions as "the product of the democratic aspirations of people united by a highly localized culture and history"); Ronald L. Nelson, *Welcome to the "Last*

sometimes adopted this justification for construing a state constitutional clause differently from its parallel federal provision.[76] As a practical matter, this approach may have developed as a partial response to the paucity of historical information about state constitutions.[77] Even newer constitutions may lack enough legislative history to justify application of a broad text to a new fact pattern. More theoretically, the state "character" advocates argue that the people of a state have encoded their deepest collective values in the state constitution and a state court that fails to give adequate attention to the unique state culture is failing to give a true, full meaning to the constitution.[78] This approach carries echoes of Ronald Dworkin's concept of legal coherency, wherein the judge's task is to read each aspect of law such that it best fits and justifies the rest of the entire legal corpus.[79] If state constitutions reflect the core values of the founding community, then even seemingly trivial clauses (like New York's regulation of ski trails)[80] should be read as if they contributed an essential part to the coherent and profound moral lesson issuing from the people of the state to its government.[81] The

---

Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation, 12 ALASKA L. REV. 1, 5-8 (arguing that geographical and historical features of Alaska provide support for a unique constitutional interpretation there); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 35 (1988) (arguing for robust independent state constitutionalism because it is "expressive of that state's own particular constitutional heritage"); Shaw, *supra* note 7, at 1028 (advancing "primacy" as an interpretive theory that permits states to express their own values rather than the "lowest common denominator of broadly shared national values").

76. *See, e.g.*, Ravin v. State, 537 P.2d 494, 504 (Alaska 1975) (applying state constitutional right to privacy to invalidate a marijuana-possession conviction, explaining that the Alaskan "territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states").

77. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 198 (1983) (noting the frequent difficulty in accessing historical information about the drafting of state constitutions); Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857*, 37 WILLAMETTE L. REV. 469, 529-30 (2001) (noting the absence of legislative history or debate about the Oregon Constitution's takings clause).

78. James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1221 (1998).

79. RONALD DWORKIN, LAW'S EMPIRE 380 (1986) (describing the constitutional law approach of "Hercules," the ideal judge who integrates all aspects of law to best explain the law and institutional structures of society).

80. *See* N.Y. CONST. art. XIV, § 1 (regulating the number, length, and width of ski trails on state forest lands); John S. Banta, *Whiteface Mountain Ski Center: Land Use Policy and Direction*, 26 VT. L. REV. 641, 644-47 (2002) (describing the history and environmental context of state constitutional restraints on skiing at the Lake Placid Olympics and other venues within state conservation lands).

81. The ease of amending most state constitutions may tend to increase the number of administrative-type constitutional provisions. Similarly, the Federal Constitution is effectively

concept of a people entrusting its collective ethos to a constitutional document resonates so closely with the common conception of what the Federal Constitution is,[82] and what any other constitution ought to be, that it has remained attractive to state constitutionalists. Interestingly, the federal courts, perhaps through some combination of federal convention and humility, have endorsed the concept of states as culturally distinct polities, at least in some circumstances.[83]

A second argument for strong state constitutionalism is the famously liberal Justice Brennan's original point that giving greater weight to state constitutions necessarily means giving greater protection to individual liberties, and state courts should do so unapologetically.[84] One leading scholar has even defined New Judicial Federalism as "the phenomenon where state courts interpret their state constitutions to provide more rights than are recognized by the United States Supreme Court under the Federal Constitution."[85] While this explicitly ideology-tainted position has faced resistance from many quarters, it remains the match that lit the modern state constitutionalist fire, and its heat persists.[86]

(albeit not formally) amended by U.S. Supreme Court decisions straying far afield from the plain text. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) (explaining that sovereign immunity extends well beyond the Constitutional text, saying "[t]hough its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more"); *see also* Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 28-29 (1996) (explaining that, in many areas of law, the functional equivalent of the state constitutional amendment at the federal level is the judicial opinion). Supreme Court decisions, even Constitutional decisions, can be just as technical and seemingly trivial as any state constitutional amendment. *See, e.g.*, Marshall v. Marshall, 126 S. Ct. 1735, 1741 (2006) (describing the probate exception to federal court jurisdiction, a doctrine not "compelled by the text of the Constitution or federal statute" but "stemming in large measure from misty understandings of English legal history").

82. *See* Gardner, *supra* note 78, at 1221 (noting that "the technique of appealing to American character seems to be a settled feature of American constitutional argument"); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 453-55 (1989) (arguing that European values have overtaken scholars' perception of American constitutionalism and advocating the restoration of a constitutionalism more grounded in national culture). *But see* Earl M. Maltz, *James Gardner and the Idea of State Constitutionalism*, 24 RUTGERS L.J. 1019, 1021 (1993) (arguing that the Federal Constitution was not drafted as a collection of grand moral values, but rather as an act of political expediency as much as any state constitution).

83. *See, e.g.*, Miller v. California, 413 U.S. 15, 31 (1973) (rejecting a national community standard for obscenity and permitting the establishment of state-wide standards, even for a state as large and diverse as California).

84. Brennan, *supra* note 1, at 495, 501-02.

85. Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883, 883 (2006).

86. *See* Delaware v. Van Arsdall, 475 U.S. 673, 706-07 (1986) (Stevens, J., dissenting) (arguing for expanded state constitutional autonomy as a greater protection for individual liberties, notwithstanding Justice Stevens's ordinary support for a vigorous federal government).

A basic aspect of American federalism, as expressed through the Constitution's Supremacy Clause,[87] compels states to offer their citizens no fewer rights than the Federal Constitution demands.[88] While it is true that in a few areas of law, this greater liberty may be more closely associated with "conservative" political ideology than with the political left,[89] the rights-enhancing tilt of independent state constitutionalism favors "liberal" results overall.[90] The contention that state courts are free to (and usually do) adopt the federal floor for themselves as a matter of state constitutional law does not make state constitutionalism conservative; it simply is not invariably *more* liberal than the Federal Supreme Court.[91] If you are offered a bet where you can never lose money but once in a while you will win some, you have gotten a good deal. Likewise, a system that can be more liberal but can never be more conservative works as a ratchet. For judges who favor such results, state constitutionalism offers an opportunity to prevent the federal courts' retreat from rights protection from reaching their states.[92] This approach stands in stark contrast to state constitutionalism prior to the Federal Supreme Court's incorporation of the Federal Bill of Rights as applicable to the states, when the states offered less liberty protection in a variety of areas than they would later be required to provide by the Warren Court federal floor.[93]

---

87. U.S. CONST. art. VI, cl. 2.

88. Of course, state courts remain free to interpret their constitutions as falling below the federal rights-protection floor, but only so long as they decline to give effect to that result. To argue for a state constitutional holding different from federal law, then, is necessarily to argue for a greater regime of rights protection than federally required.

89. State constitutions may track more conservative/libertarian positions on issues of private property rights, economic regulation of business, affirmative action, and gun control, for example. Of course, if there is a countervailing federal interest in regulation, it will prevail; a state constitution could not effectively protect the liberty to carry automatic weapons if the same weapons are banned by federal law.

90. *But cf.* DWORKIN, *supra* note 79, at 358 (criticizing the idea that the conventional left/right political spectrum applies to judging).

91. *Contra* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 194 (1991) (describing as "conservative" state court decisions that adopt federal reasoning under the state constitution).

92. *But cf.* Sunstein, *supra* note 57, at 14 (complaining that considerable constitutional innovation at the state level has failed to yield real results improving conditions for the poor).

93. *See* TARR, *supra* note 52, at 178 (observing that, prior to the Burger Court's retreat from Fourteenth Amendment-incorporated federal civil liberties, "[s]tate courts had never developed a body of state civil-liberties law"); Theodore W. Ruger, *New Federalism: Introduction*, 16 WASH. U. J.L. & POL'Y 89, 91 (2004) (describing states historic resistance to liberal national programs like "emancipation, anti-discrimination laws, [and] wage-and-hour legislation," while states supported right-wing agendas like "slavery, segregation, child labor and underenforcement of domestic violence laws"). *Contra* Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1835-38 (2004) (arguing

Independent state constitutionalism may also be justified by a "laboratories of democracy" argument.[94] This approach, reminiscent of Darwinian evolution, suggests that state courts should give independent readings to their state constitutions to create diversity among states.[95] By favoring diversity over uniformity, the argument goes, state courts strengthen the country by providing living examples of which constitutional policies succeed and which fail.[96] When one state looks to its neighbor and realizes far too many crimes are going unpunished because the neighbor has adopted an over-protective interpretation of its state constitutional privacy clause, the observing state will wisely refrain from making the same mistake. For this experimentalism to work, states must engage in discernibly different constitutional jurisprudence yet have internal social situations sufficiently similar to support the comparison.[97]

A more restrained argument for robust state constitutionalism is taken directly from the Federal Supreme Court's prudential principle that sub-constitutional laws should be construed first to avoid interpreting the Constitution unless logically necessary.[98] Under this theory, state high courts should follow the same principle: if the state constitution prohibits a challenged government action, the court need not reach the Federal Constitution at all, and out of a sense of judicial restraint should avoid Constitutional dicta.[99] This position strongly supports the "primacy" theory of state constitutionalism because it requires the court to confront the state constitutional claim first, even if the claim fails.[100] A secondary advantage of this approach is the creation of a large body of state constitutional precedents, which in turn are then available to advocates and courts to expand and refine state constitutional doctrines. Some scholars view the

---

that state constitutions were effective protections of individual rights until the U.S. Supreme Court began holding states to federal standards through Fourteenth Amendment incorporation of federal rights, whereupon states abandoned independent state constitutionalism).

94. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that a "[s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

95. *See* James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 486-87 (1996) (explaining how judges use the "labortories metaphor" to justify reading the Federal Constitution narrowly and state constitutions broadly).

96. *See id.* at 486.

97. *See id.* at 481. *Cf.* Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 642 (1999) (challenging the notion that constitutionalism necessarily has utilitarian, policy-optimizing purposes and so questioning the usefulness of comparativism).

98. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring) (describing principles of constitutional avoidance); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (applying canon of construction that laws should be read to avoid deciding possible unconstitutionality).

99. *See* Deukmejian & Thompson, *supra* note 57, at 998-99 (attacking the California Supreme Court for engaging in constitutional dicta).

100. For a discussion on the "primacy approach" see *supra* note 44.

production of a corpus of state constitutional precedents as itself a worthwhile project.[101]

A related argument employed by commentators in support of vigorous state constitutionalism is similarly deferential to the moral authority of the Federal Constitution. Under this theory, state courts should engage in independent interpretations of their own constitutions, but should feel free to borrow liberally from federal precedents and federal concepts, all for the sake of promoting a broader national dialogue on constitutional rights.[102] Paul Kahn and James Gardner are the leading expositors of this approach, both arguing that state constitutions offer courts a haven to engage with principles of generic American constitutionalism freely without being tied to the United States Supreme Court's procrustean doctrines.[103] To his credit, Professor Gardner, especially, emphasizes that state constitutional *structural* decisions are just as significant as individual rights decisions for building the state as an effective check on federal authority.[104] This argument has two major advantages: it comports with traditional understandings of the federal union, under which both state and federal governments exist to check and balance each other in the name of the people's liberty, and it comes closest to explaining state courts' continued reliance on Supreme Court writings as the starting point (and often ending point) for state constitutional analysis.

Judicial efficiency, too, may best be served by consistently independent state constitutionalism. Cases resolved on state bases alone cannot face review in the Supreme Court because the results are supported by an adequate and independent state ground, sparing that court and the parties the time and expense of further appellate litigation.[105] The threat of Supreme

---

101. *See, e.g.*, Friesen, *supra* note 69, at 1086 (arguing for the creation of "wealth" in the form of a deep body of state constitutional precedents).

102. GARDNER, *supra* note 2, at 254-57 (arguing that state courts need not interpret duplicative constitutional provisions identically to federal courts, but that they may rely on "Supreme Court rulings as a point of reference").

103. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) (arguing that state courts should seek to interpret a transcendent "American constitutionalism" more than unique state sources); GARDNER, *supra* note 2, at 253-67 (arguing that state courts can use state constitutions to engage the federal government on questions of national constitutionalism). For a discussion of the powerful influence of Gardner's 2005 book on state constitutionalism scholarship, see Rossi, *supra* note 3.

104. GARDNER, *supra* note 2, at 260-65 (describing how state constitutional structural decisions also affect the state's capacity to negotiate and resist federal encroachments).

105. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); Deukmejian & Thompson, *supra* note 57, at 996-97 (noting the Federal Supreme Court's incapacity to review state court decisions founded on an independent state ground).

Court review of state court decisions resting on a lockstep analysis or just federal law is real, even when the state supreme court interprets federal law to restrain other branches of state government in a manner that would be perfectly permissible if conducted under the authority of the state constitution.[106] If the state supreme court later rejects the federal reasoning on remand, the Federal Supreme Court's decision loses all relevance to the actual parties to the controversy that was once before it.[107]

There is, finally, an argument more in tune with the simple philosophy of the mountaineer George Leigh Mallory: state courts should give meaning to state constitutions because they are there.[108] As commentators are fond of pointing out, state judges have taken oaths to uphold their state constitutions.[109] Stubborn and exclusive reliance on decisions of the Federal Supreme Court, rather than a good-faith independent examination of the state constitution, is analogous to an impermissible delegation of authority. State judges are no more authorized to permit federal judges to define state law for them than they would be authorized to permit a law professor[110] (or any other stranger) to write the court's opinion. This approach says nothing about *how* state courts should interpret their constitutions, so long as the interpretation is centered on the state's own law rather than that of another jurisdiction.

B. Criticisms of the Autonomous State Constitutional Theories

Each of the arguments for a consistently autonomous state constitutionalism has its accompanying critiques. The first theory, premised on the states' fundamental values, may be the weakest. Professor Gardner

---

106. *See, e.g.*, Kansas v. Marsh, 126 S. Ct. 2516, 2520-21 (2006) (reversing, where jurisdiction depended on the lower court's application of solely federal law, a state supreme court judgment prohibiting the state from conducting an execution). *Cf.* Robert F. Williams, *The Claus von Bulow Case: Chutzpah and State Constitutional Law?*, 26 CONN. L. REV. 711, 718 (1994) (describing the failure of the state to obtain certiorari in the U.S. Supreme Court after it lost a criminal case in the state supreme court based on both federal and state constitutional law).

107. *See, e.g.*, People v. Caballes, 851 N.E.2d 26, 30 (Ill. 2006) (rejecting a Federal Supreme Court decision based on federal law in favor of a new state constitutional analysis that maintained the result previously reversed by the Federal Supreme Court).

108. *Climbing Mount Everest is Work for Supermen*, N.Y. TIMES, Mar. 18, 1923, at X11 (quoting Mallory as justifying his attempt to climb Mt. Everest with the line, "Because it's there").

109. *See, e.g.*, Abrahamson, *supra* note 5, at 1168 (describing the lockstep approach as violating "the state judge's oath to support the state constitution"); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1513 (1998) (arguing that a state judge breaks her oath and her duty to her state by failing to interpret the state constitution independently of the Federal Supreme Court). On the normative force of oaths generally, see Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555 (2006).

110. *Cf.* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1345 n.8 (2000) (describing disciplinary proceedings against a judge who permitted law professors to draft some of his opinions).

has demonstrated, with devastating precision, how the state populations from whom these fundamental values are supposedly drawn are too internally diverse, externally homogeneous, and mobile to sustain truly independent state cultures with corresponding differences in profound, core values.[111] As a result, reaching state constitutional decisions on the basis of a state's innate "character," the theory Professor Gardner calls "Romantic Subnationalism," is misguided at best.[112] For example, according to one seemingly plausible stereotype, the people of Vermont live in a rural, mountainous state historically isolated from its neighbors, with a cultural and political history to match. The state supreme court might use such "facts" of pop anthropology to support an independent state constitutional interpretation, rejecting the position urging uniformity with the other states.[113] Yet, real Vermonters do not match this essentialized image of a laconic lone farmer. They watch the same advertisements and television shows and movies from New York and Hollywood that the rest of the country enjoys; they prefer the same national household brands, they day-trade in the same Wall Street companies, and they dress in the same national fashions. Is a Vermonter who feels deeply interconnected to other states and who cares greatly about what people in the other states think any less of a participant in the state constitutional culture than the stereotypical Green Mountain shepherd? Consider this stereotype: everyone knows that red-state Texans are conservative libertarians with unimpeachable devotion to frontier-style laissez-faire economics.[114] Nevertheless, a state constitutional decision based on that characterization would be irrational, in light of a survey showing that nearly two-thirds of Texans support New Deal-style government-provided full employment.[115]

Reliance on Romantic Subnationalism, aside from lacking empirical support, fails to uphold the important judicial responsibility to provide equal

111. *See* GARDNER, *supra* note 2, at 53-79. *But see* Pam Belluck, *The Not-So United States*, N.Y. TIMES, Apr. 23, 2006, § 4, at 4 (describing an apparently growing cultural divide among different states).

112. GARDNER, *supra* note 2, at 21.

113. *Cf.* Baker v. State, 744 A.2d 864, 885 (Vt. 1999) (describing Vermont's law permitting first-cousin marriages as part of a tradition of non-uniformity).

114. *See* Texas Politics § 2.1, Low Taxes, Low Services Political Culture, http://texaspolitics.laits.utexas.edu/html/cult/0201.html (last visited Oct. 12, 2006) ("The 'low taxes, low services' credo has endured across generations of both Democratic and Republican dominance of state government.").

115. Sunstein, *supra* note 57, at 18 ("In 1998, 64 percent of Texans agreed that 'the government should see to it that everybody who wants to work can find a job.'") (citation omitted). Even a reactionary Texas politician, then a state supreme court justice, has denied that Texas's constitutional history is distinctive. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1090 (1995) (describing the Texas constitution as "more imitative than experimental").

justice under the law. The theory carries the insidious threat of cultural imperialism: there is the risk that the politically connected lawyers who become judges on high courts, who tend to come from the dominant racial and religious groups within a state,[116] look out from their "marble palace"[117] and view the interwoven strands of power and resistance from a sharply confined perspective.[118] A high court decision declaring, for example, that the people of its state have a long and proud history of hunting in the woods, a cultural tradition that finds expression in the state constitution's protection of the right to bear arms, sounds innocent enough. Sure, it seems to remind everyone that vegetarians—Hindus, hippies, and the like—stand outside the state's "proud tradition," and so are not in the core of people the state court considers itself bound to protect. Much worse is the other side of the legal history associated with the hunting tradition, the side state elites are unlikely to recall: the legal exclusion of African-Americans from the gun-toting culture during the time when right to bear arms clauses encouraged whites to own guns as a means of maintaining racial superiority.[119] The court's privileging of gun-owning culture silently (and accidentally) perpetuates the racial subordination that accompanied that culture.[120] Of course, in every case decided by a court, one side loses. The difference with a case decided on the basis of Romantic Subnationalism, however, is that the losing side is deemed not just legally wrong, but culturally wrong; the loser is held to lack the fundamental values underlying the constitutional decision that make state citizens full members of the state culture.[121]

In a myriad of other areas, the same risk presents itself. The high court judges might tend to see, in their constitution, only those strands of state culture that support the social and political status quo, rather than giving voice to the constituents of state culture that include alternative paths and visions of the good society. That dialectic, between the status quo and an alternate imagined community, is a central component of democracy.[122] It is

---

116. *See* John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 47, 52, 54 (1997) (noting that most state high court judges are white male Protestants).

117. Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 844 (1993) (referring to the U.S. Supreme Court as a "marble palace (or tomb inhabited by the living dead)").

118. *Cf.* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (complaining that elite judges impose their own view of national culture on the divergent views of the public).

119. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 326 (1991) (describing the history of gun law as intimately connected with the maintenance of white power at the expense of African-Americans).

120. *See id.* at 335-38; *see also* David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 405 (1999).

121. *Cf.* Schapiro, *supra* note 5, at 394 (arguing that an important function of constitutions is "to counter, rather than to embody, preexisting identities").

122. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 4-5 (1996) (arguing that unquestioning acceptance of existing structural institutions and power arrangements

the nature of every constitutional case, every political controversy, every battle in Justice Scalia's "kulturkampf."[123] When a state institution like a supreme court expressly favors only the dominant branch of that conversation, cultural minorities are made even more "discrete and insular"[124] and lacking in the power to offer the community a new political direction. Civic life stagnates.

Furthermore, there is little reason to suspect that citizens of a state feel any consistent sense of belonging to a state constitutional community, or even that they are aware states have constitutions.[125] "Most Americans don't give a damn about federalism," one political scientist has modestly explained.[126] Even those state courts that reach a decision based on the polity's "fundamental values" may be reluctant to carry that cultural observation to its logical conclusion in other cases. For example, if "the people" of West Virginia value their privacy more than most, such that a police search of a car is unreasonable, does that imply that the West Virginia character would also rebel at a registry of sex offenders? If the result in the first case is based on the amorphous nature of a stereotype, little principled rationale is left to guide, and restrain, a court acting in the next case.

In short, Romantic Subnationalism is objectively faulty to the extent it relies on a unique state character because state populations are too internally divergent, and too alike across borders, to exhibit such character traits.[127] Cultures might vary across regions more than across states, as Patrick Baude has suggested,[128] but resting a *state* constitutional conclusion on a *regional* culture seems somewhat inconsistent with the concept of state constitutions

---

"suppress[es] a crucial internal dialectic in the material of desires and intuitions: the conflict between those of our tendencies that take the established order of social life for granted and those that, as longing, fantasy, or resistance, rebel against that order").

123. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

124. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

125. *See* Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 42 (2002) (confirming the widespread apathy and ignorance about state constitutions among Americans).

126. *See* R. Shep Melnick, *The Federal Safeguards of Politics*, 41 WILLAMETTE L. REV. 847, 847 (2005) (arguing that most voters care about reaching the optimal policy result, not which level of government should best deal with the issue).

127. *See* Schapiro, *supra* note 5, at 393 (describing the community model theory as giving "rise to pointless, indeed often silly, debates about state character"); Linde, *supra* note 62, at 194 ("Federalism divides our laws along state lines, but those lines do not match divisions in American society. They do not correspond to this nation's ethnic and religious diversity nor to our bitter disputes over changing customs.").

128. *See* Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 836-37 (1997) (arguing that constitutional "epics" do transcend state borders, but can be located well below the national level, in regions and related states).

as enshrining the unique values of the authoring jurisdiction.[129] The theory is normatively lacking for elevating the version of the state's culture perceived and celebrated by legal elites over the less rosy or less "mainstream" components of the state community.[130]

The second robust state constitutionalism argument, advocacy for expanded protection of individual liberties, establishes a liberal ratchet: the more state constitutions are given independent meaning, the more restrictions on state action will ensue.[131] While appealing to supporters of increasing individual liberty and expanding state obligations,[132] this approach carries the somewhat obvious flaw that conservative judges will not accept such a theory. One student commentator's study of the Texas Court of Criminal Appeals reveals how a state jurist opposed to greater rights for criminal defendants bitterly opposed his colleagues' arguments for a robust state constitutionalism.[133] Proponents of state constitutionalism tend to acknowledge, but underestimate, the force of the liberal ratchet.[134] While some leading commentators from Justice Brennan onward solve the liberal ratchet problem more or less by embracing its liberty-enhancing teleology,[135] others have resisted such a legal realism approach to judicial

---

129. *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 235 (1996) ("[S]tate constitutional discourse will always be 'impoverished' and inadequate because states are not unique communities with their own fundamental character and values.").

130. *See* Shauna Van Praagh, *The Education of Religious Children: Families, Communities and Constitutions*, 47 BUFF. L. REV. 1343, 1386 (1999) ("Frameworks that operate at political, constitutional and state law levels need to be informed by small everyday stories of real people, rather than the other way around.").

131. *See* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 88 (1985) (explaining that "state constitutional interpretation is skewed" to provide only the same or greater liberty than that required by the Federal Constitution).

132. *See, e.g.*, Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 *passim* (2006) (celebrating the New Jersey Supreme Court's reliance on independent state constitutionalism to expand social and economic rights as well as traditional civil liberties).

133. *See* Jessica L. Schneider, High Court Study, *Breaking Stride: The Texas Court of Criminal Appeals' Rejection of the Lockstep Approach 1988-1998*, 62 ALB. L. REV. 1593, 1599-1620 (1999) (demonstrating empirically how the court's tendency to imbue the state constitution with independent meaning ebbed and flowed with the political ideology of the judges).

134. *See* Linzer, *supra* note 21, at 1576-79 (arguing that because state constitutions could protect conservative speech such as that of abortion protesters blocking clinics, or strike down liberal economic regulations, or ban abortion as a matter of state due process if federal constitutional protection for abortion were removed, the constitutions are not "liberal ratchets"); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 193 (1981) (acknowledging that the Supreme Court search and seizure limits in the Warren Court era went further than many state courts preferred, but that subsequent federal retreat from privacy protection led state courts to turn to their own constitutions to restrain the police).

135. *See, e.g.*, GARDNER, *supra* note 2, at 125 (positing the purpose of state authority as being to check national encroachments on individual liberty).

decision-making.[136] From the perspective of a judge, however, there is no avoiding the basic fact that a case disposed of on state constitutional grounds will almost always be politically liberal. Often, these decisions will not just be liberal, but also counter-majoritarian because the constitution would be reached only if the legislature has declined to provide the right in question.[137] While a state constitution can, theoretically, be interpreted as providing less protection than the Federal Constitution, so long as the lesser protection is not given effect, such a conclusion is necessarily dictum.[138] The practical difficulty of serious state constitutional interpretation associated with inadequate legislative records, and the lack of meaningful precedent, means that a conservative judge who wants to express her pique with a rights-protective federal decision by interpreting the state constitution below the federal floor must do an extraordinary amount of work to develop that dictum.[139] Few state high court judges have the luxury of enough time to undertake such a pointless project. More frequently, conservative courts that wish to avoid providing greater liberty than the Federal Constitution requires may simply adopt the federal standards as their own under the state constitution.[140] The approach permits as conservative a result as federal law permits, while still letting the court appear to endorse the new judicial federalism favored by scholars.[141]

The major exception to the liberal ratchet problem is intrastate structural law. Here, the difference between individual rights cases and structural cases does matter.[142] Conservative judges who dislike legislative spending

136. *See* Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399, 1404-05 (1998) (arguing that state constitutionalism need not result in more leftist policies).

137. *See, e.g.*, Goodridge v. Dep't of Pub. Health,798 N.E.2d 941, 953 (Mass. 2003) (reaching state constitutional question only after deterimining that statutory analysis would not provide plaintiffs with the relief sought). Note that some constitutional decisions may yet be majoritarian, because by coincidence the result might be consistent with what a majority of the population wants (despite the substance of the challenged statutes).

138. *See supra* notes 93-94 and accompanying text

139. *Cf.* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1307-08 (1999) (arguing that federalism arguments have often been used as cover for more ends-oriented jurisprudence, and observing that "[j]udges can be expected to decide ideologically before adhering to a neutral principle of federalism").

140. *See* Latzer, *supra* note 91, at 190-91 (revealing that most state high court decisions founded on "independent" state constitutional law actually track federal precedents and results).

141. *See id.* at 197 (noting that "conservative" state constitutionalism pleases the state courts' constituents: the U.S. Supreme Court likes being followed; the law-and-order political forces get the result they want; and the court itself gets to feel part of the "judicial mainstream" of autonomous constitutionalism).

142. *Cf.* GARDNER, *supra*, note 2 (arguing that in most circumstances, the difference between individual rights cases and structural cases is negligible).

are free to interpret their state constitutional line-item veto clauses generously in favor of a parsimonious governor, for example.[143] Similarly, a conservative court favoring the vigorous exercise of executive authority might be unusually deferential to state agencies on state constitutional separation of powers grounds. On the other hand, if the legislature were more conservative perhaps the agencies would receive less deference. Collectively, structural decisions tending to favor the state institutions more favorable to conservative ideology might make a bigger difference in the lives of ordinary state citizens than the rights-protective liberal decisions do. This structural exception to the liberal ratchet problem suggests that state courts should feel less restrained in giving independent constructions to state constitutions in this area, without undue deference to federal opinions.[144] Nevertheless, even in structural cases, where no federal parallel is apparent in the constitutional text, state courts have sometimes declined to perform truly independent analysis.[145]

The third argument for independent state constitutionalism, the "laboratories of democracy" position, has the main weakness of treating the state constitution as instrumentalist, that is, for the benefit of *other* states. As Professor Gardner has pointed out, a state court conducting constitutional interpretation has no incentive to make itself different from its neighbors just for the sake of experimentation.[146] Instead, its sole incentive is to discover the best meaning of the constitutional clause leading to the best policy for the state's own citizens.[147] Innovation for the sake of learning whether the state's policy or a competing one works best turns the state constitution into a gamble, a result unlikely to appeal to cautious state judges. Furthermore, as Professor Gardner also explains, states are not fungible.[148] A constitutional interpretation about the balance between privacy rights and law enforcement that satisfies the people of one state tells us nothing about how to set the balance in another state.[149] The greater the difference in

143. *See* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1174 (1993) (describing state constitutional structure as permitting a wide range of power balancing between the legislative and executive branches).

144. State judges are less open to accusations of illegitimate judicial activism if their decisions are not subject to a one-sided political ratchet. Because structural decisions can turn left or right with equal ease, there is no taint of state constitutionalism being a mask for only one political ideology in these cases.

145. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 167-68 (Ga. 1981) (following United States Supreme Court precedent to confirm the existing structural arrangement between the state and local authorities in the face of a challenge based on the state education clause).

146. *See* Gardner, *supra* note 95, at 481-82 (doubting the transferability of sound policy from one state to another due to differences among the states).

147. *Id.*

148. *See id.*

149. *Id.*

social and legal practices across state lines, the less useful such comparison will be.[150]

The federal constitutional avoidance argument, while theoretically sound and superficially appealing because of its association with judicial restraint, also fails. Commentators adopting this approach seem to treat the judicial decision-making process as congruent with the rationale expressed in the opinion. If a written decision first discusses the state constitution and then the federal claim, the reader is led to think the judges actually followed the same order in their deliberations. In fact, judges, like any writers, have all of the potential arguments to resolve before they present their public explanation. A state court following the constitutional-avoidance canon of construction is unlikely to engage in a lengthy and difficult process of state constitutional interpretation if it realizes all along that the Federal Constitution disposes of the case (and would therefore make impotent dicta of the state constitutional work).

Another critique, the "functionalist" approach elaborated by James Gardner, attacks the leading argument for strong state constitutionalism today.[151] Under this approach, state courts should engage in "dialogue" with federal courts about the meaning of an intertextual American constitutionalism.[152] Paul Kahn,[153] Robert Schapiro,[154] Robert Williams,[155] and Lawrence Friedman[156] each have different views from Professor Gardner's, but all agree that a lack of autonomous cultural communities underlying state constitutions should not prevent state courts from using their constitutions to justify diverging from Federal Supreme Court precedents. The difficulty with this approach is, in part, the appearance of illegitimacy. The public, not knowing (or caring) much about state constitutions or state high courts,[157] sees only a state court refusing to follow

150. *See id.*

151. *See* GARDNER *supra* note 2, at 20.

152. *See* GARDNER, *supra* note 2, at 20 (arguing for purposeful interpretation to advance federalism and "American constitutional discourse").

153. *See* Kahn, *supra* note 103, at 1147-48 (arguing for a state-by-state dialogue on the meaning of the national constitutional values).

154. *See* Schapiro, *supra* note 5, at 393 (arguing that state constitutional interpretation may legitimately rest on an "ideal" constitutional community rather than values of the actual people living in the state).

155. *See* Williams, *supra* note 11, at 223-25 (pointing out that regardless of any underlying community, state constitutional texts call for independent interpretation).

156. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 112-23 (2000) (arguing for primacy as the best interpretive approach to state constitutions, regardless of whether states constitute independent cultural communities).

157. A 1977 national poll sponsored by the National Center for State Courts revealed that 72% of

precedent from "the highest court in the land," and by that refusal, protecting a disfavored group's rights over the wishes of the electoral majority. This objection, I believe, could be overcome simply by expanding the frequency of such decisions. Eventually, the public would come to understand that state supreme courts have their own responsibility to fulfill and their own sphere in which to do it.

The remaining arguments for a sustained and consistent state constitutionalism are the judicial efficiency position and the "oath" approach which I explain in the following text. The efficiency of avoiding Federal Supreme Court review, which is increasingly rare in any event, may be overcome by the savings on judicial resources derived from conducting a federal analysis alone. State constitutionalism is hard work; not only are the relevant secondary sources frequently difficult to come by or to interpret, but there is commonly little instructive precedent to guide the court. In contrast, federal constitutional precedent is at least plentiful, even if a bit askew from the legal concerns that should face state courts.[158] Judges might believe that if they can resolve the matter without extra research (research that may end up futile if the state constitution permits the state action but federal law prohibits it), so much the better—at least for efficiency purposes.

The oath argument—interpret the state constitution simply "because it's there and the judge has taken an oath to uphold it"—has strong rhetorical value, but little persuasive force. If a judge already believes that a state constitution deserves serious and consistent analysis, then "following her oath" to give it meaning comes naturally. If the state judge doubts the legitimacy of state constitutions, or believes a particular case is better resolved by another source of law, the oath is far too vague a restraint on judicial power to change the judge's mind. This argument is valuable for emphasizing the state text—a document that gets short shrift in some of the pan-constitutionalist theories and jurisprudence. Still, the judicial oath of office is about good faith belief in the law, not substantive rules of construction.[159]

Americans believe the following statement to be correct: "Every decision made by a state court can be reviewed and reversed by the U.S. (United States) Supreme Court." Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 739 n.50 (2001).

158. Federal courts, for example, are inordinately concerned with separation of powers and holding themselves as a check against the other branches, a concern less directly applicable to the states. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657-59 (2000) (pointing out different institutional concerns between the state and federal courts in interpreting separation of powers questions).

159. *See, e.g.*, N.J.S.A. 41:1-1 (2006) ("I, . . . , do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people. So help me God."); OR. CONST. art. XV § 3 ("Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of

Finally, there is another objection. Academic advocates, like Professor Kahn, of the "dialogue" approach to state constitutions, whereby state constitutions are valuable only to the extent they provide a venue for commenting upon the deeper values common across the nation, sometimes appear to argue for a generic "American" constitutionalism.[160] This theory, as currently in favor, carries a flavor of the pre-*Erie* days when courts believed in a single, discoverable, verifiable Common Law.[161] By dissociating state constitutions from the real communities in which they operate, regardless of whether those communities are culturally distinct or not, supporters of generic constitutionalism reject the idea of law as inexorably attached to the people upon whom it operates. The new "new federalism" offers a dehumanized, abstract "constitutionalism" without context or connection to a state's real-life judges, lawyers, and citizens.[162] Certainly, the country can benefit from a diversity of voices on the content of whatever fundamental values we share as Americans; indeed, we do benefit now from such a diversity, because state courts consider federal questions, raised under the Federal Constitution, routinely and well. When a Federal Constitutional issue has percolated up from the state and federal courts together, the United States Supreme Court steps in, weighs the merits of the existing decisions from all relevant jurisdictions, and then proceeds to judgment. State constitutions are entirely superfluous to this type of state-federal judicial dialogue. While state courts might be persuaded to engage in the radically deracinated approach currently in academic favor, just as they were once persuaded to be eager participants in the epic and fruitless search for the one true common law, the project is ultimately hollow. There is no there there.[163] There can be no constitutionalism without a constitution, and no consensus on "American constitutionalism" will ever be

---

this State, and also an oath of office.").

160. Professor Gardner refers to this phenomenon, with disapproval, as "constitutional universalism." *See* GARDNER, *supra* note 2, at 30-32. However, Gardner's own "functional" theory may not go far enough to make clear that state constitutions are worthy subjects of explication in their own right, for the states' sake.

161. *See* Kahn, *supra* note 103, at 1163 (approving the view of a nineteenth century judge who saw state constitutionalism as just like other common law subjects, subject to interpretation "independent of any particular state's formal text, history, and precedents").

162. *See* Schapiro, *supra* note 5, at 434 (critiquing Professor Kahn's approach for treating state constitutional interpretation as divorced from unique state sources of law). *But cf.* Rodriguez, *supra* note 5, at 300-01 (arguing for a generic "trans-state constitutionalism" in the area of individual rights).

163. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937). *See* Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993) (rejecting an amorphous state constitutionalism disconnected from specific texts and local context).

found, no matter how well-reasoned the state courts are in their rebuke of contemporary Federal Supreme Court decisions. The failure of a universal common law as a governing principle in American courts teaches us that much.

C. *American Exceptionalism as an Alternate Cause for Inconsistent State Constitutionalism*

While the preceding discussion of various arguments for state constitutionalism and their counterpoints has been centered on the theoretical, there is another explanation for why state courts may find a sustained and consistent state constitutionalism unpalatable. Lately, the Supreme Court and its watchers have been engaged in an odd debate about the citation of foreign law in federal decisions.[164] Opponents of citing foreign law appear to come from a perspective of "American Exceptionalism," a broad concept covering the empirical ways in which America differs from other countries, as well as prescriptive claims that America has the right to avoid conformance with international norms and a view of America as "the exceptional nation," a place with "a special and unique destiny to lead the rest of the world to freedom and democracy."[165] While some scholars have pointed out positive elements to America's view of itself as a place uniquely unbound by transnational norms and conventions,[166] other approaches to American Exceptionalism can carry connotations of xenophobia[167] or downright lawlessness.[168] Underlying all American Exceptionalism, both good and bad, is the basic view that the United States Constitution and system of government are the best in the world, and that adherence to alternative sources of law risks debasing our

164. *See* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129 (2005) (describing the debate over the citation of foreign law in the United States Supreme Court); *see also* Paul von Nessen, *Is There Anything to Fear in Transnationalist Development of Law? The Australian Experience*, 33 PEPP. L. REV. 883, 883-885 (2006) (discussing the debate over using foreign law to decide federal cases in the United States Supreme Court).

165. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1582-83 (2006).

166. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) (positing that this country has practiced a "distinctive rights culture" by which certain human rights are protected more extensively here than anywhere else); Marshall, *supra* note 75, at 1639-41 (describing the American constitutional democracy as unique and a model for the rest of the world, with newer and older democracies alike moving closer to the American system).

167. For an example of the view that America should not be influenced by foreign norms, see Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) ("I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment.").

168. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793-98 (2006) (holding that the American government's self-created exception to the Geneva Conventions for detainees suspected of terrorism was not authorized by any law).

national liberty.[169] Critics of this worldview complain that the opposite conclusion is more historically accurate: liberty-enhancing movements have often been transnational, while American "sovereignty" has been used in law and culture to oppose liberty-enhancing movements.[170] Nevertheless, for believers in American Exceptionalism, American nationhood depends on a self-definition based on values and ideology, such that American patriotism is dissociated from ethnicity or history and tied instead to a near-religious devotion to the American "creed."[171]

Previous scholars of state constitutionalism generally have not studied the connection between the debate at the federal level on citation of foreign sources and state constitutional courts' frequent reluctance to deviate from federal precedent.[172] Nevertheless, the link has strong intuitive force as a potential explanation for state court resistance to the vigorous state constitutionalism advocated by scholars. After all, state judges take an oath to support *two* constitutions, federal and state.[173] To the extent these judges feel that the United States legal tradition is unique and valuable, they may privilege it over competing sources of legal authority—even from their own states. An assertion that foreign law or state law should govern a particular situation may feel, to judges imbued with a sense of American Exceptionalism, like an implicit criticism of national law and an unpatriotic gesture.[174]

Even the descriptive and common reference to the "federal floor"

---

169. *Cf.* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN xiii (1992) (arguing that the world is on a march of progress from baser forms of government to the highest form of political arrangement, liberal democracy).

170. *See* Resnik, *supra* note 165, at 1577 ("Time and again, human rights movements are met with an insistence on America's sovereignty, claimed to entail an entitlement to originality or 'exceptionalism.'").

171. *See* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1996); Todd E. Pettys, *Our Anticompetitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1360 (2006) (describing parallels between American patriotism and Christianity, including some patriots' belief in a "divinely ordained" mission for the United States, emphasis on "the importance of soldiers' blood sacrifices for their country," belief in a fundamental moral text, and faith in the national government's power to solve seemingly intractable problems). American nationalism has become such a central ideology in some quarters that one evangelical minister felt obliged to remind the congregation of his mega-church that "America is not the light of the world and the hope of the world. The light of the world and the hope of the world is Jesus Christ." Laurie Goodstein, *Disowning Conservative Politics, Evangelical Pastor Rattles Flock*, N.Y. TIMES, July 30, 2006, § 1, at 1.

172. *But see* Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 374 (2006) (noting an analogy between federal citation of foreign jurisprudence and state high courts' citation of sister-state decisions).

173. *See supra* note 159.

174. *See* Pettys, *supra* note 171, at 1357-58 (describing the strong emotional bonds Americans feel toward the national community, in contrast to the weak bonds connecting them to their states).

suggests, perhaps unwittingly, that the Federal Constitution revered by state judges is inadequate to protect Americans' liberty by itself.[175] If New Judicial Federalism is taken seriously, this inadequacy is not amenable to correction by judicial reinterpretation of federal principles, but is rather an inadequacy built deep into the structure of the national legal system. Resorting to state constitutions as a routine and consistent solution to the under-protection of individual rights under the Federal Constitution forces state judges to treat the federal document as permanently and structurally insufficient. This challenge to the ideals embodied in the national structure may provoke resistance among nationalist/"patriotic" judges on state courts, just as the suggestion that foreign law could improve American legal rights has provoked judicial and academic resistance.[176]

It is inherent in the judicial temperament to be conservative, in the sense of following tradition (*stare decisis*) and mainstream social norms. Law moves slowly.[177] True innovation in state constitutional interpretation potentially yields results that seem weird enough to be frightening. In this way, Professor Unger's description of the positive social sciences is also an apt description of judicial practice: "The [ ] social sciences dispense with the idea of structural change altogether, treating basic arrangements and preconceptions as the cumulative residue of countless past episodes of problem solving or compromise, or as the outcome of trial-and-error convergence toward the best available practices."[178] This intellectual tendency constrains political and legal debate to questions of method and efficiency, rather than permitting deep transformations of the social institutions we otherwise take for granted.[179] Some state practices may already seem extraordinary to those steeped in the federal legal culture: chief executives who cannot fire their states' own lawyers;[180] state prosecutors

175. It is a bedrock principle of Federal Constitutional law that the Federal Constitution was specifically designed to permit only a limited national government. To the extent the Constitution permits and provides states the capacity to fill the gaps in liberty protection, federal law was *intended* to be incomplete. Still, whether the national protections for specific liberties, like the First Amendment's protection of free speech or the Fifth Amendment's protection against double jeopardy, were intended to be incomplete or not remains hotly contested. Indeed, the state courts that interpret state constitutions in lockstep with federal precedent in these areas are effectively asserting that the national document is *not* limited in these respects, but instead provides all the coverage any American could need. This view may seem more "patriotic" than the alternative state constitution-centered interpretation, which suggests that the First Amendment is not the strongest, wisest, or most effective protection of free speech in the world.

176. *See supra* note 164.

177. *See, e.g.*, WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1 (giving "the law's delay" as an impetus toward suicide).

178. UNGER, *supra* note 122, at 3.

179. *See id.*

180. *See, e.g.*, Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 365-67 (2005) (describing the political and legal autonomy of independently elected state attorneys general).

appointed, in part, by judges;[181] or enforceable obligations to provide welfare to aliens.[182] Other institutional reforms implicit in state constitutions are legally plausible but perhaps are too far afield from "American" national practices to be politically feasible.[183] State judges' patriotic devotion to American national law, coupled with the common juristic unease with structural reform,[184] suggest that state constitutionalism may appear as an insidious threat to the "normal," i.e. federal, way of doing things. If the "American" (legal) way of life is the best in the world, a state judge might wonder how can that way be improved by application of independent state constitutionalism?

A host of federal tropes become challenged by true and consistent state constitutionalism. For example, Americans value the three branches of government as part of the system of "checks and balances," but Florida values the State Game and Freshwater Fish Commission as a fully independent, constitutionally autonomous "branch."[185] According to federal judges, the existence of a "case or controversy" is essential to the orderly and appropriate administration of justice,[186] but several state courts will occasionally adjudicate a dispute even where the plaintiff has no concrete, particular injury.[187] States might diverge even more from the federal model

181. *See* CONN. CONST. art. XXIII (2004) (providing for the appointment of state prosecutors by a criminal justice commission to include two state trial-court judges); *see also* Lynne Tuohy, *Filling a Job Born in Politics: Top Prosecutor to Be Chosen Soon*, HARTFORD COURANT (Conn.), July 10, 2006, at B1 (describing the history of the Connecticut Chief State's Attorney's office).

182. *See, e.g.*, Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1088 (N.Y. 2001) (holding that the state constitution required equal Medicaid benefits for citizens and legal aliens).

183. *See, e.g.*, Bradley R. Haywood, Note, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 177 (2002) (arguing for substantially elevated state constitutional protection for a "right to shelter"); Antony B. Klapper, Comment, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 747 (1993) (acknowledging the widespread political opposition to deinstitutionalization of the mentally ill and arguing that courts should step in to protect the patients' rights under the state constitutions).

184. *See* UNGER, *supra* note 122, at 189 (criticizing an "idolatrous" devotion to the status quo in legal and political institutional arrangements and arguing for greater "imagination" in conceiving and building new arrangements).

185. *See* Fla. Dep't of Natural Res. v. Fla. Game & Fresh Water Fish Comm'n, 342 So. 2d 495, 495-97 (Fla. 1977) (describing state constitutional independence of the Commission). *See generally* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 51-52 (1998) (discussing the different approach to separation of powers in the states, as contrasted with the federal system).

186. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (describing elements of federal standing in a separation of powers context); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002-08 (1924) (sharply attacking the idea of using advisory opinions in constitutional cases as antithetical to Anglo-American jurisprudence).

187. *See, e.g.*, *In re* Advisory Opinion to the Governor, 483 A.2d 1078, 1079 (R.I. 1984)

if their judges felt that they could do so without implicitly denigrating the part of their professional, and personal, identity bound to national loyalty. The principle of American Exceptionalism may operate as an inhibiting factor for these judges.

III. THE STATES BEHAVE ERRATICALLY

Critics of state constitutionalism need hardly be convinced that state courts' talk about constitutionalism is often at odds with their walk about constitutionalism.[188] The continued efforts by state constitutionalism proponents to convince state courts to engage in consistently independent state constitutionalism, however, calls for a renewed illustration of the futility of this project. In this Part, I will review the state constitutional decisions of four states over a one year period: Oregon, Washington, New Jersey, and New Hampshire. I picked these states because each has adopted a bold declaration of vigorous state constitutionalism,[189] and so are among the most likely to give strong independent meaning to their state constitutions. If these states decline to apply that autonomous spirit consistently, states with lesser commitments to their state constitutions are even more likely to follow federal precedent or a generic "constitution-in-the-air."

To conduct my review, I examined state high court decisions from August 1, 2005 to July 31, 2006. I looked at all cases where the court itself mentioned a state constitutional claim by using the phrase "state constitution" or "[the state's name] constitution."[190] My review leaves out

---

(delineating circumstances under which the state supreme court must give state officials an advisory opinion and when doing so is merely permissible); *see also* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that state courts need not apply federal standing requirements, even when considering federal questions); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 264-65 (1990) (noting the lack of traditional standing requirements in state court and arguing that federal standards should apply when state courts are considering federal questions).

188. For a thorough empirical demonstration of state court fickleness in approaching constitutional claims, see Gardner, *supra* note 5, at 778-79, 804.

189. *See* Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) (establishing the primacy doctrine as Oregon law); State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (establishing, in line with the dualism doctrine, "neutral criteria" to guide courts and litigants in deciding when to construe the state constitution differently from analogous federal clauses); State v. Hunt, 450 A.2d 952, 955-56 (N.J. 1982) (following interstitial/supplemental doctrine to reach a result founded on the state constitution as more protective than the Federal Constitution); State v. Ball, 471 A.2d 347, 351 (N.H. 1983) (establishing the primacy doctrine as New Hampshire law). *See generally* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983-86 (1985) (describing various state courts' approaches to independent state constitutionalism).

190. This search process leaves out state high court decisions that did not use those specific phrases, so it cannot fairly be called all-encompassing. Nevertheless, because I am looking for examples of where the state courts declined to provide an autonomous constitutional interpretation, the discovery of such cases even under my limited search strengthens my argument that state courts

cases where the state constitutional claim may have been briefed but not explicitly noted by the court in its decision. In surveying these decisions, I recognize that state high courts will sometimes conform their constitutions to the Federal Constitution in those states with approaches other than primacy. However, even the interstitial approach states should typically conduct an independent state constitutional analysis when the issue has been raised, even if merely to conclude that the two constitutions offer the same protection.[191] Even in the two states following the interstitial approach, whereby the state constitutions are construed only if the Federal Constitution does not protect the right asserted,[192] the choice to follow that model reflects a preference by those courts to give their constitutions independent meaning only intermittently.

To some extent, the small number of deviations from autonomous state constitutionalism revealed by my search may reflect individual judges' disinterest or distaste for state constitutionalism, rather than a shift in the court's general jurisprudence. This would still be consistent with the theory of intermittent state constitutionalism I have described, because it supports the contention that more conservative judges might be more reluctant to embrace state constitutionalism, or that certain judges might view some issues as better resolved at the national level. Even a small number of deviations in states like those studied here that have announced policies *not* to deviate from strong independent constitutionalism, lead to unpredictability for litigants and cast into doubt the idea that any state court will give its constitution unflagging interpretive attention.

A. Oregon

Oregon has one of the strongest traditions and practices of independent state constitutionalism in the United States, in large part due to the extraordinary efforts of former Justice Hans Linde.[193] The Oregon Supreme Court has held that the state will follow the primacy approach, meaning that it will always address a state constitutional issue before considering any

behave inconsistently.

191. *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, 1019 (1997) (arguing that so long as a state court conducts a genuine analysis of its constitution, the result and order of proceeding cannot diminish the state's constitutional autonomy).

192. *See infra* notes 221-77 and accompanying text.

193. *See* Wayne V. McIntosh & Cynthia L. Cates, *The Power of Judicial Ideas: A Tribute to Justice Hans Linde*, 64 ALB. L. REV. 1147, 1149 (2001) (explaining Justice Linde's enormous influence on Oregon's approach to state constitutionalism).

Federal Constitutional issue where both are raised.[194] I looked at forty-eight cases decided by the Oregon Supreme Court containing the phrases "state constitution" or "Oregon Constitution" from the relevant time frame.[195] Of those, forty-four presented genuine state constitutional questions (the other cases mentioned the state constitution as the source of the court's authority, but did not confront a constitutional controversy).[196] In the great majority of those cases, the Oregon Supreme Court performed a thorough and sophisticated analysis of its state constitution, adhering to the primacy model of adjudication.[197] In fact, primacy appears to have become so ingrained in Oregon practice that in two cases, criminal defendants pressed *only* their state constitutional claims, failing to raise the Federal Constitution well enough to preserve the claim for review.[198] Despite Oregon's devotion to strongly autonomous state constitutionalism and its clear precedent requiring

194. *See, e.g.*, State v. Randant, 136 P.3d 1113, 1117 (Or. 2006) (following the proper sequence in Oregon, which is to decide state constitutional questions before reaching federal questions).

195. Strunk v. Pub. Emples. Ret. Bd., 139 P.3d 956 (Or. 2006); Juarez v. Windsor Rock Prods., Inc., 341 Ore. 160 (2006); *In re* Conduct of Moultrie, 139 P.3d 955 (Or. 2006); State v. Randant, 136 P.3d 1113 (Or. 2006); Roberts v. SAIF Corp. (*In re* Roberts), 136 P.3d 1105 (Or. 2006); State v. Makuch, 136 P.3d 35 (Or. 2006); State v. Crandall, 136 P.3d 30 (Or. 2006); Lincoln Loan Co. v. City of Portland, 136 P.3d 1 (Or. 2006); State v. Roble-Baker, 136 P.3d 22 (Or. 2006); Martin v. Myers, 135 P.3d 315 (Or. 2006); State v. Tiner, 135 P.3d 305 (Or. 2006); State v. Cook, 135 P.3d 260 (Or. 2006); State v. Bowen, 135 P.3d 272 (Or. 2006); Jury Serv. Res. Ctr. v. De Muniz, 134 P.3d 948 (Or. 2006); Gonzalez v. State, 134 P.3d 955 (Or. 2006); Engweiler v. Bd. of Parole, 133 P.3d 910 (Or. 2006); Mabon v. Wilson, 133 P.3d 899 (Or. 2006); State v. Johnson, 131 P.3d 173 (Or. 2006); Lombardo v. Warner, 132 P.3d 22 (Or. 2006); Kerr v. Bradbury, 131 P.3d 737 (Or. 2006); Outdoor Media Dimensions, Inc. v. Dep't of Trans., 132 P.3d 5 (Or. 2006); Perry v. Myers, 131 P.3d 734 (Or. 2006); Carley v. Myers, 132 P.3d 651 (Or. 2006); Pacificorp Power Mktg., Inc. v. Dep't of Revenue, 131 P.3d 725 (Or. 2006); Perry v. Myers, 131 P.3d 721(Or. 2006); Allen v. County of Jackson County, 129 P.3d 694 (Or. 2006); Macpherson v. Dep't of Admin. Servs., 130 P.3d 308 (Or. 2006); Hunnicutt v. Myers, 127 P.3d 1189 (Or. 2006); Miller v. Lampert, 125 P.3d 1260 (Or. 2006); State v. Upton, 125 P.3d 713 (Or. 2005); Springfield Util. Bd. v. Emerald People's Util. Dist., 125 P.3d 740 (Or. 2005); State v. Sawatzky, 125 P.3d 722 (Or. 2005); State v. Heilman, 125 P.3d 728 (Or. 2005); Peiffer v. Hoyt, 125 P.3d 734 (Or. 2005); State v. Probst, 124 P.3d 1237 (Or. 2005); State v. Munro, 124 P.3d 1221 (Or. 2005); State v. Connally, 125 P.3d 1254 (Or. 2005); Christ v. Myers, 123 P.3d 271 (Or. 2005); State v. Smith, 123 P.3d 261 (Or. 2005); State v. James, 123 P.3d 251 (Or. 2005); *In re* Lemery, 120 P.3d 1221 (Or. 2005); State v. Ciancanelli, 121 P.3d 613 (Or. 2005); City of Nyssa v. Dufloth, 121 P.3d 639 (Or. 2005); Lawson v. Hoke, 119 P.3d 210 (Or. 2005); State v. Harris, 118 P.3d 236 (Or. 2005); Rico-Villalobos v. Guisto, 118 P.3d 246 (Or. 2005); Coast Range Conifers, LLC v. State, 117 P.3d 990 (Or. 2005); State v. Johnson, 116 P.3d 879 (Or. 2005).

196. Strunk v. Pub. Emples. Ret. Bd., 139 P.3d 956 (Or. 2006); Martin v. Myers, 135 P.3d 315 (Or. 2006); *In re* Conduct of Moultrie, 139 P.3d 955 (Or. 2006); *In re* Lemery, 120 P.3d 1221 (Or. 2005).

197. *See, e.g.*, State v. Roble-Baker, 136 P.3d 22 (Or. 2006) (applying Oregon Constitution to a self-incrimination claim).

198. *See* State v. Makuch, 136 P.3d 35, 42 (Or. 2006) (declining to reach any federal constitutional claim because of the defendant's failure to adequately raise it); State v. Crandall, 136 P.3d 30, 31 n.1 (Or. 2006) (holding that the defendant did not effectively raise a constitutional claim).

the primacy approach,[199] there were still four decisions that deviated from truly independent state analysis.[200]

In *State v. Johnson*,[201] a capital case, the court ruled that a search and seizure satisfied generic "constitutional" standards, without specifying which constitution it was considering.[202] The court cited to both state and federal precedents, further muddying the issue of which authority formed the basis for its decision.[203] Certainly, under the principles of *Michigan v. Long*,[204] *Johnson* does not provide a clear statement of the independent state grounds for its search and seizure holding necessary to preclude U.S. Supreme Court review. Notably, *Johnson* reached a "conservative" result: the affirmance of a death sentence.[205] By applying a generic constitutionalism ungrounded in any particular jurisdiction, the *Johnson* court seems to have followed Professor Kahn's approach of using state constitutional cases to comment on abstract constitutional values—the constitution-in-the-air.[206]

The court also left ambiguous which constitution it relied on to reach a conservative result in a case involving a right-to-counsel issue raised on collateral review.[207] The criminal defendant (petitioner) argued that her right to counsel had been abridged under both the state and Federal Constitutions when her trial lawyer failed to make an argument that certain evidence should have been suppressed.[208] Thus, the lawyer's performance hinged on

199. *See* Sterling v. Cupp, 625 P.2d, 123, 126 (Or. 1981) (adopting primacy as Oregon state constitutional law).

200. *See infra* notes 201-19 and accompanying text.

201. 131 P.3d 173 (Or. 2006). Justice Gillette has criticized his court's state constitutionalism elsewhere, albeit while engaging in a sophisticated state constitutional analysis of his own. *See* Lloyd Corp. v. Whiffen, 849 P.2d 446, 477 (Or. 1993) (Gillette, J., dissenting) (criticizing the majority for using the state constitution to reach its policy preference and arguing instead for a rule consistent with Federal Supreme Court precedent), *overruled by* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 243 (Or. 2000).

202. *Johnson*, 131 P.3d at 182.

203. *Id.* at 179, 189-90.

204. 463 U.S. 1032, 1040-41 (1983) ("[W]hen . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). Here, because the criminal defendant was denied the constitutional protection she sought under both constitutions, Federal Supreme Court review would remain available even if the Oregon court had expressed a clear distinction between the two constitutions.

205. *Johnson*, 131 P.3d at 194.

206. *See supra* note 103 and accompanying text.

207. Peiffer v. Hoyt, 125 P.3d 734, 735 (Or. 2005) (discussing both federal and state right-to-counsel standards).

208. *Id.* at 736.

the legitimacy of a police search and seizure.[209] After a lengthy discussion about preservation, the court decided that the trial counsel's performance was constitutionally adequate because the search was within the scope of the warrant, but made no indication about which constitution the court was applying.[210] The court did not even acknowledge the possibility of a difference between the Oregon right to counsel, or the right to privacy, and the corresponding federal right.[211]

Two other opinions from the 2005-2006 court year give more respect to the state constitution, but still cannot qualify as consistent with a primacy approach. In *State v. Upton*,[212] the criminal defendant contended, among other things, that statutory amendments to the state sentencing guidelines constituted ex post facto punishment, in violation of both the state and Federal Constitutions.[213] The court noted that both ex post facto clauses were similar, proceeded to conduct a single analysis for both claims without distinguishing the applicability of different precedents to different constitutions, and then concluded by holding that the statute did not violate either clause.[214] By conducting the analysis simultaneously and interweaving the rationale, the court left unclear whether its interpretation of the Oregon constitution depended on its view of federal law.[215]

In *State v. Sawatzky*,[216] another sentencing enhancement case, the criminal defendant raised an issue of double jeopardy under both the state and Federal Constitutions.[217] Although Sawatzky raised the state claim, according to the court, she did not make an argument for why the state constitutional protection should be interpreted differently from the federal clause.[218] Consequently, the court treated her argument as resting solely on federal law.[219] While this might sound like a perfectly reasonable approach, it tracks the "interstitial" or "supplemental" model of state constitutionalism, not primacy.

In each of these four cases, which together amount to almost ten percent of the Oregon Supreme Court's total state constitutional decisions in the 2005-2006 court year, the primacy doctrine was abandoned and the court declined to validate state constitutional rights claimed by criminal

209. *See id.*
210. *Id.* at 740.
211. *See id.*
212. 125 P.3d 713 (Or. 2005).
213. *Id.* at 719.
214. *See id.*
215. *See id.*
216. 125 P.3d 722 (Or. 2005).
217. *Id.* at 724-25.
218. *Id.* at 725.
219. *See id.* at 725 n.6.

defendants (on direct or collateral review).[220] These cases either mixed state and federal constitutional law into a generic consitutionalism, or else gave exclusive authority to federal law. While these four cases are not evidence of a wholesale retreat from state constitutionalism in Oregon, which otherwise exhibited a robust and complex state jurisprudence, they do suggest that even a state that prides itself on the independence of its constitutional law sometimes departs from theoretical purity. However, given the attention the Oregon Court devoted to its other cases, and the significance of the issues involved, these departures should not be viewed as lapses or scrivener's errors, although state constitutionalism proponents committed to the success of primacy might prefer to see these cases that way. Giving the court the benefit of the doubt, it seems more than plausible that the court simply chose to save itself some time and energy in reaching the conclusion it had already deemed appropriate. These decisions, each of which favored the police, illustrate a potential weariness among some members of the court over the liberal ratchet tendency in state constitutionalism.

B. Washington

The Washington Supreme Court decided forty cases in decisions including the phrases "state constitution" or "Washington Constitution" from August 1, 2005 to July 31, 2006.[221] Thirty-two of these decisions

220. *See* State v. Johnson, 131 P.3d 173 (Or. 2006); Peiffer v. Hoyt, 125 P.3d 734 (Or. 2005); State v. Upton, 125 P.3d 713 (Or. 2005); State v. Sawatzky, 125 P.3d 722 (Or. 2005).

221. State v. Brown, 117 P.3d 336 (Wash. 2005); State v. Kull, 118 P.3d 307 (Wash. 2005); State v. Gurske, 118 P.3d 333 (Wash. 2005); Coppernoll v. Reed, 119 P.3d 318 (Wash. 2005); Tiffany Family Trust Corp. v. City of Kent, 119 P.3d 325 (Wash. 2005); Brown v. State, 119 P.3d 341 (Wash. 2005); State v. O'Connor, 119 P.3d 806 (Wash. 2005); State v. Vincent, 120 P.3d 120 (Wash. 2005); State v. Louis, 120 P.3d 936 (Wash. 2005); HTK Mgmt. L.L.C. v. Seattle Popular Monorail Auth., 121 P.3d 1166 (Wash. 2005); *In re* Recall of W., 121 P.3d 1190 (Wash. 2005); State v. Brightman, 122 P.3d 150 (Wash. 2005); *In re* Parentage of L.B., 122 P.3d 161 (2005); State v. Elmore 123 P.3d 72 (Wash. 2005); Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 123 P.3d 88 (Wash. 2005); State v. Morse, 123 P.3d 832 (Wash. 2005); *In re* Recall of Reed, 124 P.3d 279 (Wash. 2005); Advanced Silicon Material L.L.C. v. Grant County, 124 P.3d 294 (Wash. 2005); State v. Ose 124 P.3d 635 (Wash. 2005); Kershaw Sunnyside Ranches, Inc. v. Yakima Inturban Lines Ass'n., 126 P.3d 16 (Wash. 2006); *In re* Recall of West, 126 P.3d 798 (Wash. 2006); State v. Johnston, 127 P.3d 707 (Wash. 2006); Cent. Puget Sound Regional Transit Auth. v. Miller, 128 P.3d 588 (Wash. 2006); State *ex rel* Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352 (Wash. 2006); *In re* Coday 130 P.3d 809 (Wash. 2006); State v. Perala, 130 P.3d 852 (Wash. 2006); Trummel v. Mitchell, 131 P.3d 305 (Wash. 2006); Larson v. Seattle Popular Monorail Auth., 131 P.3d 892 (Wash. 2006); State v. Linton, 132 P.3d 127 (Wash. 2006); State v. Jackman 132 P.3d 136 (Wash. 2006); State v. Levy, 132 P.3d 1076 (Wash. 2006); State v. Clarke, 134 P.3d 188 (Wash. 2006); State v. Luther, 134 P.3d 205 (Wash. 2006); State v. Borboa, 135 P.3d 469 (Wash. 2006); State v. Easterling, 137 P.3d 825 (Wash. 2006); State v. Zhao, 137 P.3d 835 (Wash.

involved questions of state constitutional interpretation.[222] Similarly to Oregon, state constitutionalism in Washington is often associated with one leading former Justice, here, Robert Utter. Utter has been a vocal advocate of state constitutionalism in both the law reviews[223] and the state reporter.[224] Unlike Oregon, Washington does not purport to follow the primacy approach, although it has made gestures in that direction.[225] Instead, its leading decision of *State v. Gunwall*[226] establishes "neutral" principles to differentiate state constitutional protections from their federal parallels.[227] Under this process, both constitutions should ordinarily be evaluated, but the court will afford federal law a presumption of validity and only give an independent analysis of the state constitution where "neutral" reasons are offered for divergence.[228] The *Gunwall* model has been described as consistent with the "supplemental" or "interstitial" theory for this reason.[229] An easy criticism of this approach is that it puts the state-federal relationship at the center of constitutional interpretation, rather than leading the court simply to eke out the best possible reading of the state constitution on its own terms.[230] Nevertheless, even a decision that rejects a divergent interpretation should still analyze the state constitution's text, history, etcetera, if only to determine that it matches the federal parallel (assuming there is one).[231] Instead, out of the thirty-two cases where a state constitutional question was in dispute, nine Washington cases decided in the time frame studied lack such an analysis.[232]

2006); State v. Walker 138 P.3d 113 (Wash. 2006); State v. Leyda, 138 P.3d 610 (Wash. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); T.S. v. Boy Scouts of America, 138 P.3d 1053 (Wash. 2006).

222. State *ex rel* Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352 (Wash. 2006); *In re* Recall of Carkeek, 128 P.3d 1231 (Wash. 2006); *In re* Recall of West, 121 P.3d 1190 (Wash. 2005); *In re* Coday 130 P.3d 809 (Wash. 2006); *In re* Recall of Reed, 124 P.3d 279 (Wash. 2005); Tiffany Family Trust Corp. v. City of Kent, 119 P.3d 325 (Wash. 2005); *In re* Recall of Robinson, 132 P.3d 124 (2006); Trummel v. Mitchell, 131 P.3d 305 (Wash. 2006); *In re* Parentage of L.B., 122 P.3d 161 (2005).

223. *See, e.g.*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

224. *See, e.g.*, City of Seattle v. McCready, 868 P.2d 134, 137-38 (Wash. 1994) (evaluating the warrant requirement under the state constitution as different and more protective than the federal warrant requirement, and conducting an extensive analysis of the state constitution to reach the disposition).

225. *See* State v. Coe, 679 P.2d 353, 359 (Wash. 1984) (following primacy approach and arguing for why that theory is optimal).

226. 720 P.2d 808 (Wash. 1986).

227. *Id.* at 811.

228. *Id.*

229. *See* TARR, *supra* note 52, at 183 n.36 (describing *Gunwall* as a "supplemental" case).

230. *See id.* at 183.

231. *See Gunwall*, 720 P.2d at 812-13.

232. State v. O'Connor, 119 P.3d 806 (Wash. 2005); State v. Louis, 120 P.3d 936 (Wash. 2005); State v. Brightman, 122 P.3d 150 (Wash. 2005); State v. Ose, 124 P.3d 635 (Wash. 2005); State v.

In several cases where a criminal defendant raised the issue of double jeopardy, the Washington court declined to do any state constitutional analysis because the court had already decided to follow the lockstep approach in this area, meaning that the state double jeopardy provision affords no greater protection to criminal defendants than the federal clause does.[233] While an interstitial state constitutionalism permits state courts to follow federal precedent sometimes, permanently lopping off the double jeopardy clause from the state constitution for all cases abandons the important jurisprudential idea that the state constitution has a steady and predictable meaning.[234] Permanent lockstepping for particular issues, as contrasted with treating state and federal protection as equivalent case-by-case, leaves the sole interpretive authority for the state constitution in Washington, D.C. instead of in Olympia, Washington. For example, the Washington court applied the *Gunwall* neutral factors and reached its conclusive decision that the two double jeopardy clauses had identical meaning in 1995.[235] Since then, the United States Supreme Court has decided many cases interpreting the federal double jeopardy prohibition.[236] Logically, there is no reason to infer that the state clause equated with the federal clause in 1995 still bears the same congruence. Likewise, there is no reason logically to infer that the changing double jeopardy landscape at the Supreme Court[237] has any bearing on how Washington's constitutional text has changed in the interim, or so the scholarly argument goes.[238]

Johnston, 127 P.2d 707 (Wash. 2006); State v. Linton, 132 P.3d 127 (Wash. 2006); State v. Luther, 134 P.3d 205 (Wash. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

233. *See, e.g.*, State v. Linton, 132 P.3d 127, 130 (Wash. 2006) (re-affirming that state and federal double jeopardy clauses are interpreted in lockstep, and applying federal analysis to defendant's claim); State v. Ose, 124 P.3d 635, 637 (Wash. 2005) (same); State v. Louis, 120 P.3d 936, 939 (Wash. 2005) (same).

234. Application of identical state and federal analysis to the protection against double jeopardy is especially odd, considering that current double jeopardy doctrine rests on the "dual sovereignty" notion. This concept permits states to try defendants who have already faced federal trials, on the theory that the states are independent sources of legal power. *See* Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1654 (2000) (describing the dual-sovereignty exception to the rule against double jeopardy).

235. *See* State v. Gocken, 896 P.2d 1267, 1274 (Wash. 1995).

236. *See, e.g.*, Smith v. Massachusetts, 542 U.S. 462 (2005); United States v. Lara, 541 U.S. 193 (2004); Price v. Vincent, 538 U.S. 634 (2003).

237. The U.S. Supreme Court itself has referred to its double jeopardy doctrine as confusing. *See* Albernaz v. United States, 450 U.S. 333, 343 (1981) (describing double jeopardy jurisprudence as an unnavigable "Sargasso Sea").

238. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 203-05 (1998) (describing the stifling effect of lockstep analysis on state constitutionalism and legal development).

In a courtroom closure case, implicating both the defendant's right to a public trial and the public's right to open courts, the Washington court also followed federal precedents.[239] Here, however, the court left unclear whether it was interpreting the state constitution as identical to the federal constitution, as similar to that document, or even whether it was interpreting the state constitution at all.[240] The court did not apply any factors to identify what degree of difference, if any, exists between the two constitutions, nor did it make a clear statement of whether its holding rested on the state constitution, the Federal Constitution, or both.[241]

The court left similar ambiguity in three free speech cases.[242] In two of these cases, the defendant explicitly raised the state constitution as a basis for protecting the conduct found criminal in each prosecution, but apparently not well enough: the court acknowledged that the state constitution had been raised, but also pointed out that the defendants failed to argue why the state free speech clause should be construed more expansively than the Federal First Amendment.[243] The result was that the court left open the question of whether its holding determined the meaning of the state constitution or not. In the third free speech case,[244] the court did not explicitly blame the litigants for failing to argue an independent interpretation of the state constitution, but went on to conduct a mixed state/federal analysis that treated the free speech clauses as if they were part of a generic "constitutional" right.[245] The court applied both federal and state precedents, and never indicated whether its conclusion rested independently on state grounds or whether it felt constrained by federal law.[246]

In a right-to-confrontation case,[247] the court acknowledged that the defendant raised both state and federal constitutional claims and observed that "[b]oth [constitutions] guarantee criminal defendants the right to confront and cross-examine adverse witnesses."[248] The court said nothing

239. *See* State v. Brightman, 122 P.3d 150, 154-61 (Wash. 2005) (holding that the state public trial provisions "mirror" the Federal Constitution's and ordering a new trial for a defendant where the trial court improperly closed the courtroom to the defendant and the public).

240. *See id.*

241. *Id.* at 152, 161.

242. *See* State v. Luther, 134 P.3d 205, 209-11 (Wash. 2006) (affirming a child pornography conviction after conducting an undifferentiated analysis of state and federal constitutional law); State v. Johnston, 127 P.3d 707, 709 (Wash. 2006) (conducting mixed analysis of state and federal law in determining whether a drunken threat to bomb an airport was protected speech); Trummel v. Mitchell, 131 P.3d 305, 312 (Wash. 2006) (affirming anti-harassment orders against a free-speech challenge).

243. *See Luther*, 134 P.3d at 209-11; *Johnston*, 127 P.3d at 709.

244. *Trummel*, 131 P.3d at 312.

245. *Id.* at 311-15.

246. *See id.* at 305.

247. State v. O'Connor, 119 P.3d 806, 813 (Wash. 2005) (affirming a conviction against the defendant's state and federal right-to-confrontation challenges).

248. *Id.*

more to clarify which constitution it relied upon, and again conducted a mixed analysis with reference to both state and federal precedents construing the two different constitutions.[249] Presumably, because the defendant lost, the court concluded that neither constitution protected the right as claimed by the defendant, but the court declined to segregate its analysis or review any factors for why the state constitution might be more protective.[250]

Finally, in a highly publicized case concerning the right to marriage, the court followed its precedents holding that the state "privileges and immunities" clause receives lockstep interpretation with the federal equal protection clause.[251] As a result, the court applied federal rational basis review to the challenged legislation, even though the plaintiffs brought suit strictly under the state constitution.[252]

C. New Jersey

New Jersey's 1947 constitution has been described as among the "best" in the country, and the state supreme court has received wide accolades for its relatively independent approach to state constitutionalism.[253] New Jersey, however, has not adopted the primacy approach to its constitution favored by scholars. Instead, the New Jersey Supreme Court, like Washington's, has adopted the interstitial approach to state constitutionalism, at least formally.[254] According to its own precedent, the court will interpret its state constitution differently from parallel clauses in the Federal Constitution only

249. *Id.* at 813-15.

250. *Id.*

251. *See* Andersen v. King County, 138 P.3d 963, 968 (Wash. 2006) (following federal precedent in lockstep).

252. *See id.* at 969.

253. *See* Robert F. Williams, *Afterword: The New Jersey State Constitution Comes from Ridicule to Respect*, 29 RUTGERS L.J. 1037, 1044 (1998) (extolling the virtues of the New Jersey constitution); *see also* Hershkoff, *supra* note 132, at 554 (describing the New Jersey court's strong protection of social welfare rights); Kevin M. Mulcahy, Comment, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 866-69 (2000) (urging California to become as constitutionally autonomous as New Jersey); Marie L. Garibaldi, *Conference on the Rehnquist Court: The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 74 (1998) (describing New Jersey as a strong supporter of New Judicial Federalism). *But see* Karen L. Folster, High Court Studies, *The New Jersey Supreme Court in the 1990s: Independence is Only Skin Deep*, 62 ALB. L. REV. 1501, 1540-41 (1999) (criticizing the New Jersey court for its sporadic implementation of independent state constitutionalism despite its own rhetorical enthusiasm for the New Judicial Federalism).

254. *See* State v. Hunt, 450 A.2d 952, 957 (N.J. 1982) (adopting the interstitial approach); Abrahamson, *supra* note 5, at 1172 ("New Jersey appears to use the interstitial method—at least sometimes.").

if the issue presents certain "neutral" factors suggesting divergence.[255] In the past, the court has inconsistently followed even this relaxed approach to the state constitution.[256] As the cases collected here show, that inconsistency has continued through the most recent court year.

From August 1, 2005 to July 31, 2006, the New Jersey Supreme Court decided twenty-two cases where interpretation of the state constitution was in dispute.[257] Of these, the court failed to follow its declared approach to interpretation, the interstitial theory, in seven cases—nearly one third of its state constitutional docket.[258] An example of the ambiguity in these cases appears in a major dispute over the right of property owners to have an adversarial administrative hearing before a state agency grants development permits.[259] The landowners raised both the state and federal constitutional protections of due process, which the court acknowledged.[260] Instead of carefully applying the *Hunt* divergence factors to determine whether there was any reason to treat the state claims differently from the Federal Due Process analysis, the court conducted no independent review of the state constitution at all.[261] Rather, it applied a mix of federal and state precedents to conclude that the generic "constitutional" right to due process did not

255. *See Hunt*, 450 A.2d at 952 (in three writings, laying out three different theories of state constitutionalism and applying an interstitial analysis). Professor Williams has called this case "the single best decision on state constitutional law in our history," although it does not adopt his preferred primacy approach. Robert F. Williams, *The "New Judicial Federalism" and New Jersey Constitutional Interpretation: Two Visions of State Constitutional Rights Protections*, 7 SETON HALL CONST. L.J. 833, 835 (1997).

256. *See* Dennis J. Braithwaite, *An Analysis of the "Divergence Factors:" A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 23 (2001) (cataloging areas of law where the New Jersey court has failed to follow its "divergence factors" purportedly justifying deviation from the Federal Constitution on state law grounds).

257. R.M. v. Supreme Court, 883 A.2d 369 (N.J. 2005); State v. Badessa, 885 A.2d 430 (N.J. 2005); Tonelli v. Bd. of Educ. of the Twp. of Wychoff, 888 A.2d 433 (N.J. 2005); *In re* Freshwater Wetlands Statewide Gen. Permits, 888 A.2d 441 (N.J. 2006); State v. Eckel, 888 A.2d 1266 (N.J. 2006); State v. Dunlap 888 A.2d 1278 (N.J. 2006); State v. Birkenmeier, 888 A.2d 1283 (N.J. 2006); Pasqua v. Council, 892 A.2d 663 (N.J. 2006); *In re* P.L. 2001 Chapter, 362, 895 A.2d 1128 (N.J. 2006); State v. Townsend, 897 A.2d 316 (N.J. 2006); *In re* Puglisi, 897 A.2d 1015 (N.J. 2006); Gac v. Gac, 897 A.2d 1018 (N.J. 2006); Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006); Mansoldo v. State, 898 A.2d 1018 (N.J. 2006); State v. Thomas, 900 A.2d 797 (N.J. 2006); State v. DiFrisco, 900 A.2d 820 (N.J. 2006); State v. Castagna, 901 A.2d 363 (N.J. 2006); State v. Crawley, 901 A.2d 924 (N.J. 2006); State v. Herrera, 902 A.2d 117 (N.J. 2006); New Jersey Div. of Youth & Family Servs v. S.S., 902 A.2d 215 (N.J. 2006); State v. Morrison, 902 A.2d 860 (N.J. 2006).

258. *In re* Freshwater Wetlands Statewide Gen. Permits, 888 A.2d 441 (N.J. 2006); State v. Birkenmeier, 888 A.2d 1283 (N.J. 2006); State v. Townsend, 897 A.2d 316 (N.J. 2006); Mansoldo v. State, 898 A.2d 1018 (N.J. 2006); State v. Thomas, 900 A.2d 797 (N.J. 2006); State v. DiFrisco, 900 A.2d 820 (N.J. 2006); State v. Castagna, 901 A.2d 363 (N.J. 2006).

259. *See In re Freshwater Wetlands*, 888 A.2d at 443.

260. *See id.* at 447.

261. *See id.* at 454.

protect the property owners, without specifying which source of law formed the basis of the decision.[262]

Similarly, in a criminal appeal involving the exclusionary rule and illegally obtained evidence, the New Jersey Supreme Court rejected the defendant's claims without ever distinguishing between the two constitutions.[263] The court simply treated the vehicle stop as subject to an unpredictable blend of constitutional law detached from any jurisdiction or identifiable constitutional community.[264]

The court also departed from the interstitial approach in a murder appeal, where the defendant challenged the prosecution's long pre-indictment delay.[265] Without any review of the "neutral" divergent factors, the court extended a prior decision tying the state constitutional speedy trial provision to the federal provision and declared that the state protection against pre-indictment delays is interpreted in lockstep with the Federal Constitution.[266] The court affirmed the defendant's conviction.[267]

In the civil context, the New Jersey high court evaluated a takings claim raised under both constitutions.[268] The court noted the plaintiffs' invocation of the state constitution, but explicitly limited the state constitutional takings clause to a level of protection identical to the Federal Fifth Amendment.[269] Thus, the court's lockstep analysis in this case would have been no different if there were no takings clause at all in the state constitution.

The court conducted another indistinct "constitutional" analysis, mixing the application of state and federal precedents with no mention of the *Hunt* factors, in a criminal appeal raising the state and federal constitutional issue of a defendant's right to have related or lesser offenses charged to the jury.[270] This ambiguous opinion left no way to determine whether an independent state ground for the holding existed or not.

Even in an appeal from a sentence of death, the court treated the defendant's state and federal constitutional claims of disproportionate sentencing as indistinguishable.[271] There, the court had conducted two

262. *See id.* at 450-54.

263. *See* State v. Birkenmeier, 888 A.2d 1283, 1285 (N.J. 2006) (holding a police investigatory stop was legally justified, without distinguishing between state and federal analysis).

264. *See id.* at 1289-90.

265. State v. Townsend, 897 A.2d 316, 325 (N.J. 2006).

266. *See id.*

267. *Id.* at 326.

268. *See* Mansoldo v. State, 898 A.2d 1018, 1023 (N.J. 2006).

269. *See id.*

270. *See* State v. Thomas, 900 A.2d 797, 803 (N.J. 2006).

271. *See* State v. DiFrisco, 900 A.2d 820, 826-27 (N.J. 2006).

phases of review: direct appeal and a secondary proportionality analysis.[272] Different justices voted differently in the two appeals, such that only by considering the two votes together could the defendant prevail.[273] The court rejected the death sentence without clarifying which constitutional text compelled its result.[274]

Most recently, in a right-to-confrontation clause case, the court again acknowledged that the defendant raised claims under both constitutions, but proceeded with a review that never made explicit which constitution supported the holding.[275] Here, the court found generic constitutional error, but determined the error was harmless and affirmed the defendant's conviction.[276] Intermingled state and federal precedents gave no indication whether the state protection of defendants' right to confront the witnesses against them is any greater than the Federal Constitution's, or if not, why.[277]

D. New Hampshire

Along with Oregon, Washington, and New Jersey, New Hampshire has shown an early and relatively steady interest in autonomous state constitutionalism,[278] and the state supreme court is well-regarded around the country.[279] Like Oregon, it has held that it will follow the primacy approach, giving independent meaning to its state constitution first and foremost.[280] Since its leading decision in *State v. Ball*,[281] the New Hampshire high court has customarily added boilerplate language to its constitutional decisions specifying that it reaches the state constitution first and cites federal precedent, if at all, merely for its persuasive power.[282] Even the routine use of this simple, clear statement showing an adequate and independent state ground has not worked to produce perfect consistency in the court's approach to state constitutionalism. Out of thirty-four cases the New Hampshire court decided between August 1, 2005 and July 31, 2006 with a

272. *See id.*

273. *See id.* at 822-23.

274. *Id.* at 832-33.

275. *See* State v. Castagna, 901 A.2d 363, 372 (N.J. 2006).

276. *See id.* at 374.

277. *Id.* at 372-74.

278. *See* Friedman, *supra* note 156, at 107 (recognizing New Hampshire's leadership for independent state constitutionalism).

279. *See generally* Seth Forrest Gilbertson, *High Court Study: New Hampshire: "Live Free or Die," But in the Meantime . . .*, 69 ALB. L. REV. 591 *passim* (2006) (describing the structure, make-up, and jurisprudence of the state supreme court).

280. *See* State v. Ball, 471 A.2d 347, 350 (N.H. 1983) ("When a defendant, as in this case, has invoked the protections of the New Hampshire Constitution, we will first address these claims.").

281. *Id.*

282. *See, e.g.*, State v. Murray, 2006 N.H. LEXIS 92, at *6 (N.H. June 27, 2006) ("We consider this argument under the State Constitution and cite federal opinions for guidance only."); *see also* State v. Ball, 471 A.2d 347, 352 (N.H. 1983).

state constitutional question in controversy, at least two failed to provide an independent state constitutional analysis.[283] Two more cases followed the form of primacy, but nakedly applied (and followed) federal reasoning from the United States Supreme Court with little inquiry into independent state law.[284]

In a challenge to a juvenile delinquency adjudication,[285] the New Hampshire Supreme Court noted that the juvenile raised double jeopardy claims under both the state and Federal Constitution.[286] Nevertheless, the court affirmed the delinquency judgment with a generic "constitutional" analysis, relying almost entirely on Federal Supreme Court cases.[287] The court omitted any *Ball* boilerplate language suggesting that it relied on the state constitution, leaving the state and federal analysis "interwoven" at best.[288]

Similarly, in a habeas petition presenting the issue of the prisoner's right to counsel at a parole revocation hearing, the court noted that the case presented both state and federal constitutional questions, but did not distinguish its analysis between the two texts.[289] The court decided that the claim lacked merit, but it did not specify which "due process" it was

283. *In re* State, 880 A.2d 397 (N.H. 2005); Winnisquam Reg'l Sch. Dist. v. Levin, 880 A.2d 369 (N.H. 2005); State v. Sanchez, 883 A.2d 292 (N.H. 2005); *In re* Berq, 886 A.2d 980 (N.H. 2005); Pennichuck Corp. v. City of Nashua, 886 A.2d 1014 (N.H. 2005); State v. Gubitosi, 886 A.2d 1024 (N.H. 2005); Caparco v. Town of Danville, 886 A.2d 1045 (N.H. 2005); State v. Pierce, 887 A.2d 132 (N.H. 2005); State v. Barkus, 888 A.2d 398 (N.H. 2005); Associated Press v. State, 888 A.2d 1236 (N.H. 2005); *In re* Juvenile 2004-822, 888 A.2d 1258 (N.H. 2005) (court failed to provide an independent state constitutional analysis); Dalton Hydro LLC v. Town of Dalton, 889 A.2d 24 (N.H. 2005); Bio Energy, LLC v. Town of Hopkinton, 891 A.2d 509 (N.H. 2005); State v. City of Dover, 891 A.2d 524 (N.H. 2006); *In re* R.A., 891 A.2d 564 (N.H. 2005); *In re* Jeffrey G., 892 A.2d 1234 (N.H. 2006); *In re* Petition of State, 893 A.2d 712 (N.H. 2006); State v. Horner, 893 A.2d 683 (N.H. 2006); State v. Arsenault, 897 A.2d 988 (N.H. 2006); State v. Burke, 897 A.2d 996 (N.H. 2006); DeBenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d 969 (N.H. 2006); Debonis v. Warden, 903 A.2d 993 (N.H. 2006) (failing to provide an independent state constitutional analysis); State v. Fichera, 903 A.2d 1030 (N.H. 2006); State v. Abram, 903 A.2d 1042 (N.H. 2006); *In re* Town of Nottingham, 904 A.2d 582 (N.H. 2006).

284. State v. Gubitosi, 886 A.2d 1029, 1034 (N.H. 2005) (re-affirming a precedent denying a state constitutional privacy interest in pen register data, primarily following federal precedent and reaching the same result as the U.S. Supreme Court); State v. Horner, 893 A.2d 683, 688-89 (N.H. 2006) (following federal precedent exclusively to reach the same result as the federal courts despite a *Ball* disclaimer that the federal precedents are merely persuasive).

285. *In re* Juvenile 2004-822, 888 A.2d 1258, 1259 (N.H. 2005).

286. *See id.* at 1259.

287. *See id.* at 1261-62.

288. Michigan v. Long, 463 U.S. 1032, 1040 (1983). The Federal Supreme Court would have had the power to review the judgment in any event, because the New Hampshire court denied the defendant's claims, leaving his federal rights open for further review.

289. Debonis v. Warden, 903 A.2d 993, 995-97 (N.H. 2006).

applying.[290] In this case, unlike the others described here, the court did cite both state and federal precedents, but mixed them into an indistinct "constitutional" reasoning.[291]

IV. THEORY AND PRACTICE MUST RECONCILE

Taken together, the recent constitutional history of Oregon, Washington, New Jersey, and New Hampshire shows that even states with the greatest rhetorical commitment to consistently autonomous state constitutionalism depart from their stated approach sometimes.[292] When states with such proven devotion to New Judicial Federalism occasionally reject its calling, the academic efforts to promote a natural and routine state constitutionalism appear quixotic. Some other, unspoken, cause for inconsistency must be at work beyond the earnest logical appeals of the professors. Perhaps the state courts' intermittent constitutionalism may be explained, in part, by the dual legal identities of all Americans. Because all of us, including state court judges, are members of both the state and national communities, we feel competing pulls of affection toward the different poles. Even state officials, who one might expect to most strongly identify with the legal community in which they live their day-to-day lives, naturally privilege the federal strand of their identities from time to time. In the judiciary, where the United States Supreme Court receives disproportionate attention and respect, state legal officials may feel that their own "legitimacy" depends on explaining any result divergent from the Court's precedents. More deeply, state judges are not "utility monsters" seeking endlessly to expand their own authority; as Americans, they may genuinely prefer some issues to be decided nationally, even if formal law permits a state-only resolution. By deciding important controversies on the basis of national law, the state high court makes two discrete choices: first, which source of law is appropriate to the dispute, and second, what result that law should yield. A pure primacy approach, while enthusiastically conceding that the state constitution can produce any answer to the second question, by-passes the first choice.[293] Conflict of laws scholars have expressed their annoyance at courts' failure to follow coherent principles in conflict of law disputes.[294] In both that context and state constitutional cases, even an ambiguous decision is still an implicit choice to follow one jurisdiction over the other.

---

290. *See id.*

291. *See id.* at 997.

292. *See supra* notes 193-291 and accompanying text.

293. *See supra* notes 45-46, 193-291 and accompanying text (for a discussion of the primacy approach).

294. *See* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1821 (2005) (chiding courts where the judges "failed even to conceive of the issues raised in conflict terms").

The distinction matters because each court decision subtly affects the cultural development of the state community. This may appear as repackaged Romantic Subnationalism, but I mean something quite different. The doctrine that state communities express their character in state constitutions, which can then be read like tarot cards by the state high courts, is wrong logically and empirically, as Gardner and other scholars cited in this Article have shown. Rather, I suggest that the opposite relation exists: state constitutions and constitutional decisions help to *create* a sense of cultural statehood, not express it.[295]

My position here is not at odds with Professor Schapiro's insight that state constitutions can (and should) be interpreted as expressing an "ideal" constitutional community, rather than the actual values of the people happening to reside instate while a court's decision is pending.[296] That approach elegantly solves many of the problems raised by Professor Gardner's attack on Romantic Subnationalism by dissociating constitutional interpretation from the messy and changing reality of state communities.[297] It also offers a coherent method of interpretation that lacks the legitimacy problems associated with Romantic Subnationalism.[298] Professor Schapiro, unlike Professors Gardner or Kahn, does argue that a state's constitutional norms should be autonomously developed, independently of concerns about the state's place in the national legal system.[299] Professor Gardner, in contrast, asserts that states should use their constitutions merely as a site of contestation, a springboard for debate over national values and national law.[300] This Article addresses a different problem from Professors Gardner and Schapiro: not how courts should interpret their constitutions, but how state constitutional decisions should be interpreted by the rest of society. Rather than make the data fit the theory, I seek to develop a theory to fit the data; I wish to learn from the judges.

Law is "articulated" with culture, like a lever or joint, in the sense that the legal system is a stabilizing institutional structure meant to impose order on society, but is itself subject to destabilizing change from cultural

---

295. *See* Marie A. Failinger, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. PA. J. CONST. L. 367, 370-71 (2006) (distinguishing between "symbol-making" and "rhetoric" as the difference between expressing existing values and urging values upon a community that may not yet be convinced).

296. *See* Schapiro, *supra* note 5, at 390-93 (arguing for state constitutional interpretation according to the values embedded in the document, not the court's perception of actual public values).

297. *See id.* at 393.

298. *See id.*

299. *See id.* at 394.

300. *See* GARDNER, *supra* note 2, at 180.

forces.[301] Law and popular culture tug on each other, but not linearly; rather, the two are sometimes reinforcing, sometimes undermining, and sometimes complementing each other.[302] More simply, law is a "bird[] stilted on [its] own legs;"[303] it both rests on and recreates the underlying culture of the people who imbue it with power.[304] State high courts carrying out constitutionalism are not free from this bonded interpretation common to all law. Acts of legal interpretation are articulated with social structures, regardless of the fame or esteem associated with the underlying legal document, like M.C. Escher's famous picture of a hand drawing itself.[305]

State constitutionalism is, concededly, a weak articulation of state culture; there are much stronger and more numerous cultural influences influencing a state population. Among these competing influences are the factors Professor Gardner described as precluding the possibility of an autonomous state constitutional culture: frequent migration, national media, and internal diversity.[306] While state culture may be too diffuse to justify autonomous state constitutionalism, autonomous state decisions are concentrated statism. The interaction is like a small oven in a big room: the heat of the room will not appreciably raise the temperature in the oven, but the oven (when turned on) can make the whole kitchen hot. Furthermore, even a weak contribution to a sense of state cultural identity can have unpredictably significant consequences.[307] These consequences could

---

301. *See* Jennifer Daryl Slack, *The Theory and Method of Articulation in Cultural Studies*, *in* STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 112-113, 123-25 (David Morley & Kuan-Hsing Chen, eds., 1996) (describing articulation theory in cultural studies and explaining how seemingly unitary forces, like certain social institutions, depend in reality on shifting contexts and power struggles); *see also* James Procter, STUART HALL 48 (2004) (explaining Hall's concept of articulation as a "structured, but supple, relation between two or more apparently unconnected parts (e.g. the economic and the ideological)").

302. *See* Slack, *supra* note 301; Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617-18 (1986) (describing the bonds between legal interpretation by a court and social organization as "reciprocal" in that the judge must conduct interpretation so it will create actual (violent) effect and simultaneously give meaning to that effect).

303. Seamus Heaney, *The Peninsula*, *in* NEW SELECTED POEMS: 1966-1987 11 (1990).

304. *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691 (1985) (describing law as "always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works"). For a concrete example of law's absorption and reconfiguring of social structure, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993) (describing the passage into law of customs of racism and the subsequent reinforcement of racist culture through recourse to law).

305. *See* Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (describing how constitutional law is both produced by, and produces, culture); Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35-36 (2001) (describing law and culture as influencing each other in an inseparable "complex entanglement").

306. *See* GARDNER, *supra* note 2, at 69-74.

307. *See* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 763, 806 (2003) (describing legal structures as "complex adaptive systems" that can have unpredictably large end-state changes after seemingly

include a stronger sense of state identity among the people subject to the new constitutional interpretation.

In this sense, it is especially important to avoid the binary conclusion that there exists, or does not exist, a fixed state identity or community.[308] The identity of each individual is perpetually shifting, as time, context, and experience vary, and consequently so shifts the cultural community to which the individuals belong.[309] A rugby team has a fairly strong identity, but once off the field, the athletes may conceive of other communities (like their church, or family, or the Marine Corps) as holding much stronger claims to their identities. There can be no "true" or "false," then, to the declaration that a state community exists. Individuals feel like part of a state community when they engage in values discourse centered on, and limited to, the state. The participants in this discourse may change as people move into or out of the state, and thus, into or out of the discussion. Still, legal behavior can affect the likelihood of any given individual within the state feeling a sense of state identity. In this way, state identity is a bit like a subatomic electron cloud: an individual electron is only approximately in any one place, but when pushed by energy, it will move in a more or less predictable way to another approximate location. State constitutionalism tends to push individuals toward feeling like part of a state community, at least some of the time, at least for some issues of public importance.

By giving a specifically state-based interpretation to a legal controversy, the court asserts the state as the proper community to resolve the dispute. Who decides the question is what matters for forming a sense of state community, not what the answer is.[310] Whether the court ends up with a result equivalent to federal law or a more expansive interpretation, by treating the dispute as one of state law, the court expresses a conviction that the matter should be decided internally, according to the state's own methods and traditions.[311] Fundamentally, the court is putting the state

---

minor alterations in starting conditions); Adam Liptak, *Case Won on Appeal (To Public)*, N.Y. TIMES, July 30, 2006, at wk-3 (describing the capacity of courts to elevate issues for public debate and the resulting surge in popular political awareness and activism).

308. *See* Solimine & Walker, *supra* note 29, at 1468 ("Whatever may have been true in the past, in this century it is unrealistic to contend that each state has a distinctive political or social culture, especially one that differs in important ways from national culture.").

309. *See* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1219 (1994) (describing individual identity, the "self," as an aggregation of multiple socially-constructed roles).

310. *See* Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 582 (1998) (describing culture as a site of contestation, where multiple forms of identity come into contact in supporting and opposing ways).

311. *See* Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997) (upholding a state action requirement under the state constitution comparable to the federal requirement, but conducting a

forward as a coherent and potent legal community—not a constitutionally significant authoring community, but an interpretive community.[312]

More than setting the state as the appropriate forum, the court declares, though the value-laden label "constitutional" applies, that the question is relevant to the state's identity.[313] Courts have multiple avenues open to avoid reaching a state constitutional question, not least of which is resort to the Federal Constitution, but also including a generic constitution-in-the-air,[314] statutory interpretation, common law, and even a court's "inherent" or supervisory powers.[315] When a court does reach the state constitution, the conventional understanding of the word "constitutional" itself suggests to the state public that the matter is one of fundamental importance.[316] For example, many of the cases decided by the four state supreme courts reviewed in this Article that *did* reflect independent state constitutional analysis were tax cases.[317] By giving these cases a truly autonomous interpretation, the courts were not expressing the "character" of the state polity nor its fundamental norms, but the courts were teaching the parties, the bar, and the public that cases of that type are part of what bind the people of the state together.

Notably, the particular resolution in any given case is not what does the culture-building work. In contrast to the bureaucratic model, law and its implementing structures are not policy machines, with inputs, a cost-benefit analysis, and then an efficient or inefficient output.[318] Rather, law is fluid, highly situated, and culture-forming.[319] In this sense, setting the question itself as one of importance to the state serves as a prod toward a stronger state identity. How one frames an issue can often be culturally more important than how the question is answered.[320] In the context of state

---

comprehensive autonomous state analysis in doing so).

312. *See* Schapiro, *supra* note 5, at 393 (suggesting that rather than "reflect a preexisting community of value, each state constitution "creates its own community" based on the norms embodied in the text).

313. *See infra* note 316 and accompanying text.

314. *Cf.* Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do.") (citation omitted).

315. *See* Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257, 258 (1985) (describing state courts use of their inherent or supervisory powers).

316. GARDNER, *supra* note 2, at 13 (acknowledging that the conventional view of constitutions is that they necessarily express the deep values underlying the authoring community).

317. *See, e.g.*, Larson v. Seattle Popular Monorail Auth., 131 P.3d 892, 893 (Wash. 2006) (holding that the monorail authority had been properly delegated taxing authority under the state constitution).

318. *See* White, *supra* note 304, at 686 (describing and rejecting the bureaucratic/economic view of law divorced from its linguistic and cultural context).

319. *See id.* at 684 (describing law as a form of rhetoric rather than a system of rules or policy-effectuating techniques).

320. *Compare* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (framing the issue as whether the Constitution contained a right to perform homosexual sodomy), *with* Lawrence v. Texas, 539 U.S. 558, 564-65 (2003) (framing the same issue as whether the Constitution contains a right to privacy in

constitutionalism, a decision founded independently on the state constitution reveals to the state polity that Washington, D.C. does not exercise plenary power over every matter of public importance. Lawyers learn that the issue is one to pursue through state courts, according to state precedents while the public learns that state politics is the appropriate locus of meaningful response. Gradually, a series of autonomous state constitutional decisions create a community of people (even if some of its members are transitory) that turns to itself to solve certain social dilemmas.[321] The continued practice of this shared experience and shared activism necessarily instills the feeling, among participants, of belonging to a unique, bounded, and integral polity.[322]

This view of state constitutionalism inspires the question of how the norms of state identity expressed in state court decisions are transmitted to the state's people. Lawyers are the primary interpretive community for court decisions, and they, in turn, influence the public's perception of judicial practice.[323] As Clark Cunningham explains, lawyers act as translators: they convert real-world stories into legal language/reasoning and then retranslate the legal conclusions into language comprehensible to their clients and the public.[324] James Boyd White emphasizes the completeness of the alternate language known as law, going so far as to credit legal language with "giv[ing] us the terms for constructing a social universe."[325]

The special role of lawyers in bridging real-world controversies and legal discourse is more pronounced in state constitutionalism. As Professor Gardner described state communities, the high mobility of workers served to elide or erase the autonomous features of state cultures.[326] Lawyers, on the other hand, are more likely to be geographically fixed than workers with

---

the bedroom).

321. *See* White, *supra* note 304, at 698 ("It is the true nature of law to constitute a 'we' and to establish a conversation by which that 'we' can determine what our 'wants' are and should be.").

322. *See* Schapiro, *supra* note 5, at 393 (describing autonomous state culture as the product, not the ingredient, of state constitutional interpretation and linking state constitutions not to actual state polities but to "the aspirational community constituted by the principles set forth in the constitution").

323. *See* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 393 (2004) (describing lawyers as a "particular interpretive community" that serves to reconcile the interests of individuals with those of the broader community).

324. *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299-1300 (1992) (describing the lawyer's power to alter a client's story through re-presentation into legal forms and the corresponding challenge of crafting a sensible narrative out of legal actions).

325. White, *supra* note 304, at 692.

326. *See* GARDNER, *supra* note 2, at 70 (describing Americans' migratory patterns and mobility as fixed patterns of contemporary life that undermine claims of unique state cultures).

portable skills because of the bar licensing requirements. Furthermore, the geography to which lawyers are attached exactly match state jurisdictions,[327] and because states make it an ethical violation to practice law without a license from the state (or without special permission), lawyers must limit their work to the states in which they hold bar membership.[328] Legal culture, then, is not subject to the migratory pressures our national culture imposes on the broader state community. As a consequence, legal culture is distinctive from state to state.

Voluntary associations, like local bar associations or law-related charities, are also near-universally divided by jurisdiction, i.e., along state lines. National and local associations also attract lawyers' attention, but these multiple pulls on communal identity recapitulate the multiple claims on identity that intermittent state constitutionalism exerts on the public. Despite the other levels of voluntary association, state bar groups serve to further bond a state's lawyers into a cohesive state-based community. One sees this, for a (trivial) example, in lawyers' notorious use of jargon that confirm insider status for the in-state lawyer and exclude laypersons and those unfamiliar with local legal practice.[329] More substantively, idiosyncracies in formal state legal structures that may go unnoticed by the general public become daily routine for practicing lawyers, and this too serves to make states the center of legal culture. For example, Connecticut lawyers know that the state attorney general has no powers of criminal law enforcement,[330] Texas lawyers know that civil and criminal cases are governed by two different high courts,[331] and New York lawyers know that civil cases can sometimes get three layers of state appellate review, while criminal cases will never get more than two.[332]

---

327. The vast majority of lawyers who work for firms work in only one state. *See* Am. Bar Found., 16 RESEARCHING LAW 1, 11 (2005), *available at* http://www.abfn.org/images/reslawwin05.pdf (reporting that in 2000, 88% of law firms had only one office and that among those moderate-sized firms that maintained more than one office, most kept all of their offices within one state).

328. *See* Diane Leigh Babb, Comment, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 535-37 (1999) (describing the regulatory practices restricting interstate law practice).

329. Some New York lawyers (and even courts) will un-selfconsciously refer to the state trial court as the "IAS court"—an arcane and bureaucratic reference to the "individual assignment system" whereby the state trial judges are assigned their dockets. *See, e.g.*, Emily Hunger Plotkin, Comment, *Arts Education: A Fundamental Element of Public School Education*, 26 COLUM. J.L. & ARTS 75, 85 (2002). The phrase adds no useful information to any legal discussion, but does succeed in establishing those who catch the reference as insiders while marking the uncomprehending as outside the state legal community.

330. CONN. GEN. STAT. § 3-125 (2006) (excepting from the powers of the Attorney General any issue over which state prosecutors have authority).

331. *See* Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 433 (2006) (describing the structure of Texas courts).

332. *See* Court Structure, http://www.courts.state.ny.us/courts/structure.shtml (last visited Oct. 7, 2006) (graphically displaying the structure of New York state courts).

Additionally, informal practices, such as the habits of local judges, the customs of oral argument, and the efficiency of court clerks, all serve to reward insiders and hinder lawyers from outside jurisdictions. Indeed, recognition of the peculiarities of practice from state to state justifies the ethical rules requiring out-of-state counsel to hire local counsel for litigation.[333] Even the signs and symbols of legal practice are heavily imbued with the concept of the state as a community of meaning: state flags appear in every courtroom and legislative chamber; state seals mark doorways, uniforms, and letterhead; and the architecture of state courthouses and office buildings form the visual environment of the lawyer.

In a sense, lawyers are not only translators of legal language, but they also translate state identity to and from the rest of a state's citizens, using that language. The bar can be thought of as a mediating institution: a social structure designed to stand between, and connect, a diffuse group with weak cultural links and a stronger cultural community. Through the process of translating legalese into common parlance, lawyers teach their clients traditional legal norms like due process, equal protection, and separation of powers, but the same conversations convey a second order of value: the notion of a particular community in which those norms are debated. When state constitutional decisions resolve a public conflict, the court establishes the state as that relevant community, and lawyers duly extend the lesson to the broader public. Lawyers are culture workers, building a sense of state identity within the hearts of the transient, distracted, and nationalist state citizens.

Because lawyers do stand between state constitutional decisions and their influence on public culture, the power of these decisions is diminished as it is transmitted, like the gradual loss of electrical current along a poorly insulated wire. To be effective at building a state identity, however, state constitutionalism need not hit the public at full blast. Just as state courts interpret their constitutions only intermittently, so a feeling of belonging to a state community will only arise in the hearts of the public intermittently. This modest sense of state identity is enough to achieve the important normative goals described in Part V.

The public also gets word of state constitutionalism through the popular media, when the issue is controversial enough to reach the headlines. The same-sex marriage cases around the country[334] probably constitute the most

333. Clint Eubanks, *Student Commentary: Can I Conduct This Case in Another State? A Survey of State Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145, 147 (2003) (describing the common requirement that out-of-state attorneys share representation with a local attorney).

334. *See, e.g.*, Andersen v. King County, 138 P.3d 963, 968 (Wash. 2006) (upholding the constitutionality of a state ban on same-sex marriage).

widely-known exercise of state constitutional authority in recent times. Whichever result the state courts reach on this issue, by framing the question as one of *state* constitutional law, the courts establish states as the right forum for regulating marriage. In particular, the people of each state are shown that they, together as a community, constitute the participants in the conversation. Their voices, not those of the national culture, count. Because communities are merely a network of relationships, who does the debating matters more than the content of the debate. The success of prominent state constitutionalism issues giving rise to a sense of state identity in people is apparent from the failure of federal officials to dominate the issue, despite vigorous attempts, including the "Defense of Marriage Act" signed by President Clinton.[335] For a different illustration of the significance of state constitutional decisions in crafting a state cultural identity, consider the "public use" provision of the Takings Clause.[336] The recent, and much-publicized, *Kelo v. City of New London* case[337] provides an example of a failed state constitutional moment, when national authorities were able to remove the cultural heft of an issue from the states by virtue of the state court's lockstep approach to the state constitution.[338]

The public's reaction to state constitutional decisions is one gauge of how these decisions tend to build and reinforce a sense of belonging in the state community. Letters to the editor and calls to radio shows show the high passion associated with state constitutional issues like environmental conservation, direct democracy provisions, and single-subject ballot procedures, apart from the nationally famous issues of same-sex marriage and takings.[339] These "small-time" cases establish a literal conversation about the state, its people, and its values. Of course, more formal and binding avenues for citizen comment on state constitutionalism also reveal

335. 28 U.S.C. § 1738C (1996); 1 U.S.C. § 7 (1996) (refusing to recognize same-sex marriages for federal purposes and purportedly authorizing states to refuse recognition to such marriages conducted in sister states). While the federal *government* has not succeeded in dominating this issue, I concede that national private groups have been disproportionately influential within the states on this topic.

336. U.S. CONST. amend. V.

337. 843 A.2d 500, 521 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

338. *But cf.* City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) (adopting the *Kelo* dissenters' position as a matter of Ohio state constitutional law). In addition to an example of a state supreme court using its own constitution to challenge the result reached by the U.S. Supreme Court on an identical issue, this case is also an example of independent state constitutionalism yielding a more economically conservative result than lockstep analysis would have.

339. *See, e.g.*, Mark Hautzinger, Letter to the Editor, *Don't Take It Lightly*, LINCOLN JOURNAL STAR (Neb.), July 5, 2006, at B5 (arguing that the direct democracy provisions of the state constitution are important); Allen Peacock, Letter to the Editor, *Right Wing Misperceptions*, DENVER POST, June 19, 2006, at B-07 (supporting the state supreme court's invalidation of a ballot measure for having more than one subject as an example of strict construction of the state constitution); Linda Henderson Gordon, Letter to the Editor, *Pollution Affects All*, DAILY PRESS (Newport News, Va.), June 17, 2006, at A12 (arguing that a proposed wastewater release permit would violate the state constitution's protection of public oyster beds).

the importance of state identity in providing the perspective through which state residents approach the problems of public life. Among these formal outlets are judicial recall elections,[340] state constitutional amendment,[341] and the practice of ordinary politics to elect new justices (or new justice-appointing politicians). The common thread among these different forms of reaction to state constitutional decisions is that they depend on the existence of a state community in which to conduct the debate.[342] The rhetoric of these expressions centers on contested meanings of the state identity and its fundamental norms.

Some of the issues subject to state constitutional analysis, like the tax cases discussed earlier,[343] education rights[344] or municipal law,[345] might be perceived as inherently local issues, without the possibility of a meaningful debate at the national level. While these issues are unlikely to generate widespread coverage in the national media, they may generate more discussion within the states because schools, taxes, and the authority of local governments to regulate neighborhoods have obvious impact on the daily lives of most Americans. Other state constitutional decisions do present questions being debated across the country, questions that could potentially be subject to a uniform national response: these include same-sex marriage,[346] school vouchers,[347] and free speech cases,[348] among others. In either case, a strongly independent state constitutional analysis stakes out the

340. *See* John T. Wold & John H. Colver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987) (describing the defeat of three state supreme court justices in judicial retention elections).

341. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 67, 73-74 (Haw. 1993) (applying, on state constitutional grounds, strict scrutiny to the legislative ban on same-sex marriage), *superseded by* HAW. CONST. art. I, § 23 (1998) (granting the legislature the power to ban same-sex marriage).

342. Both formal and informal popular reaction to state constitutional issues puts the residents of the state in a relationship with each other where they must convince each other of the preferred solution in order for it to prevail. This give-and-take, i.e., politics, is what makes the state community a relevant social and legal entity.

343. *See supra* note 317 and accompanying text.

344. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1280-81 (Conn. 1996) (deriving from the state constitution an obligation on the state to integrate the public schools).

345. *See, e.g.*, *In re* Advisory Opinion to the House of Representatives, 628 A.2d 537, 539-40 (R.I. 1993) (advising that the state constitution prohibits the legislature from removing a class of local elected officials by reorganizing local districts).

346. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (protecting the right to same-sex marriage under the state constitution).

347. *See, e.g.*, Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 942-44 (Colo. 2004) (striking the state's school voucher program as a state constitutional violation of local school board control over education).

348. *See, e.g.*, N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 761-62 (N.J. 1994) (holding that no state action requirement applies to the state constitutional free speech protections).

area as a matter for the state community.[349] The ensuing process of neighbor talking to neighbor about the issue as a state matter helps build moments of state character among the individual participants in the debate.[350] This activism builds in the state a habit of state-centered problem solving, and a view that political or legal success will depend on appealing to the other members of the state community.[351]

V. INTERMITTENT STATE CONSTITUTIONALISM IS INEVITABLE AND ENOUGH

So far, I have shown that even states with a keen devotion to autonomous state constitutionalism actually engage in that practice intermittently.[352] I have also argued that when states do confront their state constitutions and perform a genuinely independent analysis, the result fosters a sense of state identity among the people of the state.[353] Now, I argue that this intermittent state constitutionalism is unavoidable in our federal system. I further seek to show that this sense of state belonging may not be a dominant chord in an individual's cultural identity, but neither is it too minimal to matter; in fact, intermittent state constitutionalism is good for Americans.

Even if every case raising a state constitutional question were fully briefed from extensive state sources, and the constitutional record and text offered universes of rich interpretive possibility, judges would still bypass autonomous state constitutionalism in certain cases because state judges, like anyone else, are subject to the philosophical claims of multiple communities.[354] A nationalist, or "patriotic," facet of identity will sometimes overwhelm the state judges' philosophical loyalty to their states.[355] Further, state judges can fall subject to the ideology embodied by American Exceptionalism that places this nation as the paradigm of justice and law.[356] Cases revealing lockstep constitutional analysis are examples of state judges' privileging of national law as the best and most fitting for the issue at hand.[357] This cultural perspective, which is constantly reinforced in

349. *See supra* notes 310-12, 334-35 and accompanying text.

350. *See supra* notes 310-20 and accompanying text

351. *See supra* notes 310-12, 334-35 and accompanying text.

352. *See supra* notes 188-291 and accompanying text.

353. *See supra* notes 301-22 and accompanying text.

354. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993) (discussing the multiple social and ethical communities that make claims on an individual's identity).

355. *Cf.* Pettys, *supra* note 171, at 1359 (discussing the cultural power of "patriotism" to distract the public and officials from alternative institutional arrangements that might serve as "competitive forces" to protect the people from federal overreaching).

356. *See supra* notes 163-70 and accompanying text.

357. *See, e.g.*, Mefford v. White, 770 N.E.2d 1251, 1260 (Ill. App. Ct. 2002) ("Illinois court

popular and political discourse, provides a powerful counterbalance to the call of autonomous state constitutionalism. While they are professionally inclined toward the state, all state judges are also participants in the national social and legal cultures.

Even the state courts' Federal Constitutional obligation to hear federal questions may tend to emphasize to state judges their responsibility for national law.[358] Consequently, they may believe that some issues are best resolved at the national level. When a state claim about such an issue comes before the state court, the judges will seek to resolve it as if it were a federal question. Doing so conveys the opposite message from that described above with regard to the community-building aspect of state constitutionalist decisions.[359] A decision founded on federal precedent and reviewable by the United States Supreme Court stands as a declaration by the authoring state court that the issue is one of national scope and should be decided by the national community.

State judges are also subject to institutional pressures related to those described in the anti-commandeering jurisprudence of the Supreme Court.[360] While the anti-commandeering cases reflect a federal concern that state officials be held accountable only for decisions fairly within their control,[361] state officials may sometimes wish to evade such accountability. By deciding cases on the basis of federal law (and therefore consistently with the federal floor), state courts pass responsibility for the result onto at least one different institution—the United States Supreme Court.[362] If the state courts also affirm a legislative act by turning away from the state constitution, they direct the disappointed litigant's (and the sympathetic public's) attention to the legislative branch.[363] These structural pressures

typically apply the 'lockstep' doctrine, which dictates that provisions of the Illinois Constituion should be construed in the same manner as similar provisions of the United States Constitution.").

358. *See* U.S. CONST. art. VI (binding state judges to follow federal law); Howlett v. Rose, 496 U.S. 356, 367-70 (1990) (holding that state courts have a constitutional duty to hear and resolve federal questions over which the states have concurrent jurisdiction).

359. *See supra* notes 310-12, 334-45 and accompanying text.

360. *See* New York v. United States, 505 U.S. 144, 168-69 (1992) (describing the problems of political accountability associated with federal commandeering of state officials).

361. *See* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988-89 (1993) (describing the democratic accountability concerns behind U.S. Supreme Court federalism decisions, and noting that when state courts do not specify which source of law they rely upon, they might avoid political responsibility for their decision).

362. *See, e.g.*, State v. Marsh, 102 P.3d 445, 458 (Kan. 2004), *rev'd*, Kansas v. Marsh, 126 S. Ct. 2516 (2006) (applying solely federal constitutional criminal procedure to vacate a death sentence, although the claim was also raised under the state constitution).

363. *See, e.g.*, Hernandez v. Robles, 2006 N.Y. LEXIS 1836, at *1, *9-10 (N.Y. Ct. App. July 6, 2006) (relying primarily on federal precedent and deference to the legislature to leave intact a state

will exist for as long as federalism and separation of powers remain our political framework. Once in a while, state courts will succumb and pass the political responsibility for their decisions to the other institutions of government. Still, when the state courts do accept the yoke of interpreting their constitutions, they effectively advance a unique state culture and identity by teaching the public to look to state law to resolve local controversies.

The cases from the past court year examined in Part III show some signs of the tendency toward nationalism described here.[364] For example, three of the four Oregon cases examined in the text above dealt in part with the exclusionary rule,[365] a legal principle currently subject to sharp debate at the federal level.[366] By treating the issue as a matter of national law, the state court implicitly adopted the view that a single, national rule should apply and that law enforcement officials should not have to conduct themselves according to different exclusionary rules in state and federal court.[367] More explicitly, the Washington double jeopardy cases collected above plainly state that the state constitutional protection has no meaning beyond the Federal Constitution's prohibition of double jeopardy—a clear indication that the court believes questions of double jeopardy should be decided at the national level.[368] The New Jersey administrative due process and takings cases are interesting for blending state and federal constitutional law, without suggesting which source of law dictated the result.[369] This suggests, perhaps, the state court's reluctance to accept institutional responsibility for its results. While the decisions never come out and say the court is obliged to follow federal law, they smooth over the issue enough to leave the losing parties unsure who to blame. The two New Hampshire cases also blend state and federal law into a "constitutional" haze, leaving accountability for the results at least potentially outside the state courthouse.[370]

Given state judges' nationalist feelings founded in American Exceptionalism, their view that some issues are best decided at the federal level, and the institutional pressures to transfer accountability away, intermittent state constitutionalism is the best the academic advocates can expect. Nevertheless, state constitutionalism need not be perfectly consistent to be effective at raising state consciousness and fostering state

---

ban on same-sex marriage).

364. *See supra* notes 188-291.

365. State v. Johnson, 131 P.3d 173 (Or. 2006); Peiffer v. Hoyt, 125 P.3d 734, 735 (Or. 2005); State v. Sawatzky, 125 P.3d 722 (Or. 2005).

366. *See, e.g.*, Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (declining to apply the exclusionary rule to "knock-and-announce" violations of the Fourth Amendment).

367. *See supra* notes 201-18 and accompanying text.

368. *See supra* notes 233-35 and accompanying text.

369. *See supra* notes 259, 268 and accompanying text.

370. *See supra* notes 284-89 and accompanying text.

culture for those issues that the courts do decide on the basis of state law. State constitutionalism builds state identity case-by-case, issue-by-issue. A state court's decision to forego applying the state constitution no more undermines the development of a vibrant state culture than would a federal court decision on the same question.[371]

VI. BUILDING STATE COMMUNITIES IS A GOOD IDEA

Romantic Subnationalism, the theory by which state courts interpret their constitutions according to their perception of a unique state culture, has been discredited.[372] The possibility of using state constitutions to heighten a feeling of belonging for residents in a state community, however, remains viable. Assuming that state courts can encourage state residents to think of themselves as belonging to a state polity, and that such encouragement is effective even if intermittent, one question remains: is strengthening state identity desirable? In this Part, I propose that the answer is an emphatic yes. A comprehensive inquiry into each potential justification is beyond the scope of this Article. Nevertheless, the rationales for strong state communities offered here suffice to show that intermittent state constitutionalism is normatively worthwhile.[373]

There are risks attached to the development of states as cultural groups. The vicious "states' rights" proponents of Jim Crow segregation used their state identities to divide and exclude, in ways far worse than even the less attractive aspects of American Exceptionalism.[374] The intermittent state constitutionalism described here, however, minimizes the risk of such virulent statism; in this respect, its inconsistency is its saving virtue. Intermittent state constitutionalism will indeed foster a sense of state identity, but because the state courts will never treat all fundamental social questions as resolvable under state constitutions, the state identity occasional decisions develop will be relatively weak. This fleeting, issue-based sense of state community seems unlikely to grow into the malign, "us versus them" attitude of the Jim Crow years.

---

371. Indeed, piecemeal state constitutionalism is effective in part for the very reason it is needed: the public largely ignores state constitutions and state issues, so that if the state court does too, the public will not take the omission as anything beyond an assertion that the issue is federal. That view matches public assumptions, and offers the comfort of confirming a pre-conceived notion.

372. *See* GARDNER, *supra* note 2, at 21.

373. *See supra* notes 334-43 and accompanying text.

374. *See* Linda Greene, *Jim Crowism in the Twenty-First Century*, 27 CAP. U. L. REV. 43, 46 (1998) (explaining Jim Crow laws and how they focused on explicit racial classification as a means of separating the white experience from that of blacks, including excluding blacks from jury service).

Fostering the dual strands of state and national identity in Americans gives popular expression to the checks and balances of federalism as laid out in the "plan of the Convention."[375] The Constitution lends itself to permitting the people to trust one government or another with authority, treating the state and the federal governments as perpetual competitors seeking to please the true sovereign, the people.[376] That the practice appears consistent with historical expectations, however, would not be enough to justify strong state identities if other reasons were lacking. The key to justifying loyalty to states and unique state cultures lies in the value of pluralism.

When state cultures diverge from one another, even ephemerally, the problems of daily living become matters for resolution by the state community. This pulls political power toward more local authorities accessible to the people, where the average person's influence on politics and law is stronger.[377] The daunting task of repairing a broken federal policy may overwhelm even the most earnest citizens, while affecting state government is likely to appear more feasible.

As state cultures become distinct, at least about certain issues, the articulation between law and culture may take effect, leading to distinct structural institutions across state lines. Already, to some extent, state governmental structures vary, as described in Part V. Willingness to depart from the "normal" federal mold permits state polities to better suit their governments to their needs.[378] An autonomous state culture, bolstered by state constitutionalism, gives a state's citizens the strength to develop new, more radical structures to help achieve their social goals.[379]

Developing varied state cultures also fosters learning through other states, not in the rigid, laboratories-of-democracy way, but just as foreign travel broadens the mind. Divergence among states, coupled with the high mobility of Americans, would lead to a refreshingly routine self-examination by state governments. This is not to suggest that a state would adopt another state's exclusionary rule for itself by concluding that the other rule has "proven" more successful. Still, the states' willingness to import even the more muddled federal doctrines, like double jeopardy and three tiers of

375. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 310-11 n.4 (1990) (Brennan, J., concurring) (describing the phrase's origin and meaning in the sovereign immunity context).

376. *See* GARDNER, *supra* note 2, at 180-85 (describing the citizens as trusting states or the federal government with power depending on which better protects liberty).

377. *See* G. Alan Tarr & Robert F. Williams, *Foreward: Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1075 (2005) ("Formal constitutional change is easier at the state level than at the federal level.").

378. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634-35 (2000) (rejecting persistent adherence to the current federal separation of powers and arguing for a more internationally-inspired "constrained parliamentarianism").

379. *Cf.* UNGER, *supra* note 122, at 13 (discussing the necessity to form social communities that can re-imagine and radically reconstruct legal institutions).

equal protection review,[380] shows an eagerness to learn from comparative constitutionalism and a belief in the efficacy of viewing states' own practices in light of the questions posed in other jurisdictions.

Diversity among the states also permits mobile Americans to vote with their feet.[381] Every so often, discrete groups seek out a place of their own, a place where their subculture will be valued and find protection in law.[382] Liberals have threatened to move to Canada,[383] while conservatives may have considered South Carolina. Gay and lesbian enclaves, like San Francisco, California or Northampton, Massachusetts offer havens of support for people left feeling unwelcome in other communities. Racial minorities have also sometimes sought to establish their own geographic communities where their political power could be maximized.[384] The spread of diversity across states permits even more subtle differences to take effect; someone may just "feel more comfortable" in a state where the culture is only slightly more embracing of an unusual character trait than neighboring states. By extending cultural diversity from local areas to states, cultural minorities obtain greater access to more powerful democratic institutions. Treating constitutions, rather than only legislation, as within the reach of state communities makes available the full scope of debate over the values and issues considered fundamental to the transitory set of state inhabitants.

Finally, strengthening state communities fosters tolerance by rejecting the worst aspects of American Exceptionalism. There is certainly a place for patriotism on the state bench, and there are many issues that state judges may legitimately believe are best decided through national discourse as opposed to a state's foundational law. On the other hand, American Exceptionalism sometimes carries with it a knee-jerk jingoism, an unquestioning belief in America as the crowning achievement of global civilization. Such a belief system calcifies the mind and hardens the heart.

---

380. *Cf.* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) (criticizing state courts' adoption of federal rationality review in contexts lacking the separation of powers, federalism, and judicial capacity concerns that drive the federal standard).

381. *See* Baude, *supra* note 128, at 837-38 (arguing that the major interstate migrations in recent history were the result of the migrants choice to reject their old state's moral/legal regime in favor of other states more protective of human dignity).

382. *See, e.g.*, Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (describing a special school district created specifically for chasidic Jews).

383. *See* Gene Johnson, *A Northern Neighbor Offers a Liberal Haven: Frustrated U.S. Voters Look to Canada*, WASH. POST, Nov. 21, 2004, at A14 (describing interest among politically dissatisfied liberal Americans in emigrating to Canada).

384. Howard Witt, *New Orleans Forgives Much in Mayor Race*, CHI. TRIB., May 22, 2006, at 5 (describing the New Orleans mayor's advocacy for restoring African-Americans to majority status in the city).

By occasionally reminding Americans of the state component of their cultural identity, intermittent state constitutionalism enables us to hold two ideas simultaneously without cognitive dissonance: state loyalty and patriotism.[385] Emphasis on the state as a unique community permits citizens to deal with each other as different, without sacrificing the common aspects of national identity. True tolerance of diversity is not marked by the ability to recognize the commonalities shared with an interlocutor; rather, it requires the acknowledgment of difference and a willingness to move forward in cooperation and not assimilation.[386] The existence of state-oriented communities encourages Americans to develop such a tolerance.

VII. CONCLUSION

Scholars of state constitutionalism have been pleading for greater attention to state constitutions for over thirty years, since Hans Linde and Justice Brennan began the New Judicial Federalism movement in the 1970s. Formally, the lectures and articles have won the courts' grudging endorsement, but judicial practice has only spottily matched the academic vision of true autonomous state constitutionalism.[387] In this Article, I have attempted to expand this conversation. Rather than continue the cycle of critique and praise for state courts as the object of state constitutionalism, this Article has reconceived the courts as the subject of state constitutionalism in an effort to finally match theory to practice.

The evidence shows that even in the strongest courts for state constitutionalism, attention to New Judicial Federalism has remained inconsistent.[388] And we have seen why this condition is likely to remain true indefinitely.[389] Still, all is not lost for devotees of state autonomy. State constitutionalism builds and strengthens a sense of state identity for those affected by judicial decrees.[390] Even when practiced only intermittently, state constitutionalism can be effective at teasing out and bolstering the strands of culture that center on the state as a community. Lawyers have a special role as the ambassadors of state identity, a role that matches their traditional role as translators between the popular and legal cultures.

---

385. *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) (arguing that the goals of federalism are best achieved when state and federal governments are distinct but cooperative).

386. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 (2002) (discussing how assimilation tends to erase individual identity and weaken community); Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 B.Y.U. L. REV. 1005, 1021-22 (2004) (arguing that pluralistic democracy requires government to adopt a neutral attitude toward the divergent and competing moral and ideological commitments of its citizens).

387. *See supra* notes 188-291 and accompanying text.

388. *See supra* notes 193-292 and accompanying text.

389. *See supra* notes 354-64 and accompanying text.

390. *See supra* Part VI.

Enhancing Americans' sense of belonging to a state community is normatively desirable. State-to-state cultural diversity advances important goals common to profound national values. In particular, these goals include the protection of liberty by balancing one level of authority against another, expansion of participatory democracy, the ability to move to a more amenable culture within the United States, and development of a stronger, more tolerant pluralism. Intermittent state constitutionalism is here to stay, and for that we should all be grateful.