

FAILED OR UNEVEN DISCOURSE OF STATE CONSTITUTIONALISM?: GOVERNMENTAL STRUCTURE AND STATE CONSTITUTIONS

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In his recent article in the *Michigan Law Review*,¹ entitled "*The Failed Discourse of State Constitutionalism*," Professor James A. Gardner examines the responses to Justice Brennan's invitation to state high courts "to seize control of the protection of constitutional rights by looking to state constitutions as potentially more generous guarantors of individual rights than the U.S. Constitution."² He finds the responses in the "voluminous body of commentary" by "distinguished state jurists" and "prolific academics" to be "extraordinarily optimistic about the prospects for state constitutional law . . . not only to meet Justice Brennan's challenge, but to fulfill the promise of a genuinely federal system of government."³ After examining "the status of state constitutional law as it is practiced today," he finds "a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements."⁴ This wasteland is said to result from "the failure of state courts to develop a coherent discourse of state constitutional law."⁵ He does not find the wasteland surprising, as a coherent discourse is deemed impossible because state constitutions do not reflect the fundamental values, and ultimately the character, of the people of the states that adopt them.⁶ He finds that "the notion of state constitutionalism as defining distinctive and coherent ways of life does not accurately describe state constitutions."⁷ The description fails because "Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of sig-

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

2. *Id.* at 762.

3. *Id.* at 762-763.

4. *Id.* at 763.

5. *Id.* at 763-764.

6. *Id.* at 764.

7. *Id.* at 818.

nificant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.”⁸ The failure of a state’s constitution and its interpretation to reflect its people’s values and character, and the present actual lack of local values and character, do not trouble Professor Gardner. Such a reflection or local identity “could pose a serious threat to the nationwide stability and sense of community that national constitutionalism provides.”⁹ In many ways, Professor Gardner is thus happy to observe that Justice Brennan’s invited discourse on state constitutionalism has failed.

I leave to others, presumably excessively optimistic jurists and academics, the task of responding to Professor Gardner’s vision of the real and ideal role of state constitutions and state high courts in guaranteeing individual rights. I will briefly explore the real and ideal role of state constitutions and state high courts in defining state governments. There, in my view, state constitutionalism does more to fulfill significantly the promise of a genuinely federal system of government; there, states do, and should, acknowledge very different common identities,¹⁰ and such differences do not endanger nationhood.¹¹ By focusing almost exclusively on individual rights, Professor Gardner has not seriously considered the discourse of state constitutionalism on the powers of government, on what factors explain any inadequate discourse in this area, and on what can be done to correct any discourse deemed troubling. Hopefully, the following observations on governmental structure in state constitutions will serve to broaden the discussion of state constitutionalism spurred by Professor Gardner’s provocative article. I begin by examining American constitutional law on individual rights and governmental structure.

A. AMERICAN CONSTITUTIONS ON INDIVIDUAL RIGHTS AND GOVERNMENTAL STRUCTURE

American constitutions are chiefly concerned with two areas: individual rights and the structure of government. In the area of rights, an American government’s constitution may recognize such liberties as freedom of speech, the right to vote, the right of privacy, due process, freedom of religion, the right to a fair trial, and the right to equal

8. *Id.*

9. *Id.* Compare Hans A. Linde, *Are State Constitutions Common Law?* 34 ARIZ. L. REV. 215, 229 (1992) (“Recognition that a right may be guaranteed in one state but not in another is an uncomfortable idea . . . [Y]et of course the uncomfortable idea is true.”).

10. See Gardner, *supra* note 1, at 823.

11. *Id.* at 827.

protection of the law. In the area of governmental identity, an American government's constitution typically will 1) establish the branches of government; 2) describe some or most of the powers of these branches; 3) delegate to one governmental branch the responsibility for describing at least some of the power of another governmental branch; and 4) address the relationship of the government to other governments (both American and foreign). While both federal and state constitutional provisions focus on individual rights and on governmental structure, their approaches to each are quite different.

In recognizing certain liberties, the federal constitution speaks not only of rights secured against the national government, but also of rights secured against state governments. Thus, state constitutional provisions on individual rights are not written or interpreted on a clean slate. They must yield to the supremacy of rights guaranteed by federal constitutional, statutory and common law. As Professor Gardner recognizes, state constitutional rights are, at best, potentially only more generous than their federal counterparts.¹² Federal liberties predominate in the individual rights area because there are few liberties associated exclusively with state citizenship and because there are few liberties associated with both federal and state citizenship on which federal law has not spoken significantly.

By contrast, while the federal constitution defines the tripartite scheme of the national government, it speaks little about the definition of state government. Perhaps a tripartite scheme has been thought compelled for all American governments, since all states have executive, legislative, and judicial branches. There appears, however, to be no perceived federal mandate regarding the particular powers of these branches of state government.¹³ As a result, a rich divergence exists in state constitutional definitions of governmental authority. Many state governments differ widely from each other and from the federal constitutional approach to the tripartite scheme. This diversity may be exemplified by looking to contemporary state constitutional provisions on the judiciary, with attention focused on court structure, the jurisdictional authority of the courts, and judicial rulemaking. Additionally, individual states have defined governmental authority quite differently over time.

12. *Id.* at 762 (agreeing with Justice Brennan).

13. Professor Wolfram has observed: "Separation of powers doctrines of state and federal constitutional law, in general terms, do not directly affect each other. Thus no federal constitutional principle requires the states to follow, or restricts the states from adopting, any particular conception of separation of powers among the branches of state government." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.2.5 (1986).

Intrastate changes in governmental structure may be illustrated by looking to the various Illinois constitutional provisions on the judiciary. These federal/state, interstate, and intrastate diversities suggest that "the promise of a genuinely federal system of government"¹⁴ has been at least partially fulfilled.

B. THE DIVERSITIES IN STATE GOVERNMENTAL STRUCTURES

A comparison of contemporary American state judicial articles reveals diverse approaches to the allocation and use of judicial power. Provisions on court structure and jurisdiction vary widely in the extent of responsibility accorded legislatures to establish courts. For example, in Illinois, little legislative power exists because the Illinois Constitution vests the judicial power "in a Supreme Court, an Appellate Court and Circuit Court,"¹⁵ and outlines nearly all of these courts' jurisdictional authority.¹⁶ By contrast, other states grant the legislature broad responsibility over the judiciary. Rhode Island¹⁷ and Maine,¹⁸ for example, vest judicial power in a supreme court and in such inferior courts as the general assembly may establish. These provisions parallel Article III of the federal constitution.¹⁹ Most state constitutions fall between these extremes.

Many state constitutions create and empower some, but not all, courts, and typically permit greater legislative initiatives regarding trial courts of limited jurisdiction than with other courts. Michigan, for instance, allocates judicial power to "one supreme court, one court of appeals, one trial court of general jurisdiction . . . one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote . . ." ²⁰ Similarly, in Arizona the judicial power resides in "a Supreme Court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts."²¹

14. See Gardner, *supra* note 1, at 763.

15. ILL. CONST. art. VI, § 1.

16. *Id.* at §§ 4, 6, 9. The legislature may, however, provide for trial and intermediate appellate court review of administrative action, *Id.* at §§ 6, 9, and the high court may provide for certain appeals to it from the intermediate appellate court, *Id.* at § 4(c).

17. R.I. CONST. art. X, § 1.

18. ME. CONST. art. VI, § 1.

19. U.S. CONST. art. III, § 1.

20. MICH. CONST. art. VI, at § 1. Only the high court is free of significant legislative directives. *Id.* at §§ 4, 10, 13, 15.

21. ARIZ. CONST. art. VI, § 1. In Hawaii, the judicial power is "vested in one supreme court, one intermediate appellate court, circuit court, district courts and in such other courts as the legislature may . . . establish." HAW. CONST. art. VI, § 1. In Iowa, the judicial power is

Although state constitutional provisions on court authority vary, the resulting judicial systems are frequently characterized as "unified". For example, the self-proclaimed unified court system in Wisconsin encompasses the constitutionally-created supreme court, court of appeals and circuit court, as well as any legislatively-created municipal courts or other trial courts of general jurisdiction.²² In North Carolina, the unified system contains only the Appellate, Superior and District Court Divisions.²³ Unification in Idaho means a supreme court, district courts and any other legislatively-created inferior courts.²⁴ In Georgia it means magistrate, probate, juvenile, state and superior courts that operate at the trial level.²⁵

State constitutional provisions on judicial rulemaking in areas such as civil, criminal and appellate procedure, evidence, and attorney and judicial conduct are also quite diverse. These provisions differ regarding the composition of judicial rulemaking bodies, as well as the oversight role of the legislature.

State judicial rulemaking bodies typically encompass individuals or groups including at least one judge and possessing some decisionmaking responsibility for rules affecting the judicial system.²⁶ Many state high courts are recognized constitutionally as judicial rule-makers. State constitutions often delegate to courts of last resort duties regarding civil, criminal, appellate and professional conduct rules.²⁷

vested in a Supreme Court, District Courts, and other inferior courts established by the legislature. IOWA CONST. art. V, § 1. In New Mexico, the state's judicial power is "vested in the senate when sitting as a court of impeachment . . ." N.M. CONST. art. VI, § 1.

22. WIS. CONST. art. VII, § 2.

23. N.C. CONST. art. IV, § 2.

24. IDAHO CONST. art. V, § 2. Compare ALASKA CONST. art. IV, § 1 (vesting judicial power in a supreme court, superior court and courts established by the legislature).

25. GA. CONST. art. VI, §§ 1, 2.

26. A review of American judicial rulemaking bodies is found in Jeffrey A. Parness & Christopher C. Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121 (1980). Of course, not all constitutionally-based exercises of judicial rulemaking have express recognition in the relevant state constitution. See, e.g., Ronald C. Morton, Note, *Rules, Rulemaking and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler*, 12 MISS. C.L. REV. 293, 334 (1991) (concluding that the Mississippi high court has decreed an inherent power to self-rule).

27. See, e.g., ALASKA CONST. art. IV, § 15 (rules governing the administration of all courts, as well as rules governing practice and procedure in civil and criminal cases in all courts); ARIZ. CONST. art. VI, § 5 (rules relative to all procedural matters in any court); ARK. CONST. of 1874 amend. 28 (rules regulating the practice of law and the professional conduct of attorneys at law); KY CONST. § 116 (rules governing its appellate jurisdiction, the appointment of court personnel, practice and procedure in all courts, and the admission and discipline of lawyers); N.J. CONST. art. VI, § II (rules governing the administration of all courts and, subject to law, the practice and procedure in all such courts); N.D. CONST. art. VI, § 3 (rules of pro-

California, however, empowers a Judicial Council to adopt "rules for court administration, practice and procedure";²⁸ the Judicial Council contains judges from a variety of courts, as well as members of the state bar and a few legislators.²⁹ In New York, the high court's chief judge has extensive rulemaking responsibility for "standards and administrative policies for general application throughout the state."³⁰ By comparison, the federal constitution is silent on judicial rulemaking, and federal judges normally look to Congress for the recognition of their power to make rules.³¹

As with judicial rulemaking, American constitutions vary regarding the role of the legislature in overseeing as with acts of judicial rulemaking. Some states mandate that judicial rules not contravene any existing statutes,³² while others dictate that judicial rules not conflict with statutes addressing only certain topics.³³ Other states, however, seemingly permit judicial rules to supersede statutes.³⁴

cedure, including appellate procedure, for all courts, as well as rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law); OHIO CONST. art. IV, § 5(a)(1) (rules regarding general superintendence over all courts). Of course, distinguishing the appropriate realms for procedural rules from the realms of substantive law is often difficult, if not impossible. *See, e.g.,* Phyllis T. Baumann, et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 219 (1992) (substance and procedure are inseparable in the context of Title VII).

28. CAL. CONST. art. VI, § 6.

29. *Id.* On the operation of the California Judicial Council, see Rebecca Kuzins, 6 Cal. Lawyer 43 (Sept. 1986). By contrast, in Alaska, the constitutionally-established judicial council conducts studies and makes reports and recommendations to the supreme court and to the legislature. ALASKA CONST. art. IV, § 9.

30. N.Y. CONST. art. 6, § 28. In New Hampshire, the chief justice, with the concurrence of a majority of justices, makes many of the rules. N.H. CONST. art. 73-a.

31. *See, e.g.,* 28 U.S.C. §§ 2071(a) (1988) (art. III court rulemaking), 2072(a) (Supreme Court rulemaking in practice, procedure and evidence areas), and 2075 (Supreme Court rulemaking in bankruptcy area). In the area of attorney regulation, perhaps the most significant area in which state court inherent rulemaking power is asserted, Professor Wolfram has found:

Thus it seems safe to say that the Supreme Court would not invalidate an act of Congress regulating the legal profession on a separation-of-powers ground, except in the highly unlikely event that an act were passed that attempted to interfere directly with judicial functions, such as by severely restricting the right to counsel, an interference that would more likely be struck down on right-to-counsel or similar grounds relating to the rights of litigants.

See Wolfram, *supra* note 13. On the history of such inherent authority, *see, e.g.,* Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983). On the inherent power to compel funding, another major area almost exclusively addressed by state courts, *see* Ted Z. Robertson and Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863 (1989).

32. *See, e.g.,* LA. CONST. art. VI, § 5 and NEB. CONST. art. VI, § 25.

33. MO. CONST. art. V, § 5 (rules cannot alter laws on evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal).

34. OHIO CONST. art. IV, § 5(B) (laws in conflict with rules have no further force or ef-

American constitutions also vary on whether judicial rulemakers must submit their rules to legislative review. In Ohio, proposed practice and procedure rules cannot take effect unless the General Assembly has had the opportunity to adopt "a concurrent resolution of disapproval."³⁵ In South Carolina, however, similar proposals take effect unless three-fifths of the members of each house disapprove.³⁶ By contrast, some states constitutionally recognize legislative oversight of judicial rulemakers only after the rules take effect. For example, the Florida Supreme Court can adopt rules of practice without seeking the legislature's approval.³⁷ However, these rules "may be repealed by general law enacted by two-thirds vote of the membership of each house."³⁸ In Maryland, judicial rules have force "until rescinded, changed or modified . . . by law."³⁹ In Montana, practice and procedure, professional conduct, and appellate procedure rules are "subject to disapproval by the legislature in either of the two sessions following promulgation."⁴⁰

A brief review of Illinois judicial articles reveals that comparable diversities in approaches to governmental structure can be part of a single state's history. Under the 1818 Constitution, governmental powers in Illinois were divided among the legislative, executive and judicial departments; no department could exercise any powers of another unless "expressly directed or permitted."⁴¹ The legislative department was, however, granted significant duties regarding the judicial department. For example, one constitutional provision said: "The judicial power of this state shall be vested in one supreme court and such inferior courts as the general assembly shall . . . ordain and establish."⁴² Other provisions authorized the General Assembly to provide for justices of the peace⁴³ and to require high court justices to "hold circuit courts."⁴⁴

fect). Cf. N.C. CONST. art. IV, § 13(2) ("exclusive" high court authority to make rules for the Appellate Division).

35. OHIO CONST. art. IV, § 5(B).

36. S.C. CONST. art. V, § 4A.

37. FLA. CONST. art. V, § 2(a).

38. *Id.* Similar is ALASKA CONST. art. IV, § 15 (two-thirds vote to change a rule).

39. MD. CONST. art. IV, § 18(a) (practice and procedure rules). Comparable is MO. CONST. art. V, § 5 (practice rules may be annulled or amended by a law limited to the purpose).

40. MONT. CONST. art. VII, § 2.

41. ILL. CONST. of 1818, art. I, § 2.

42. ILL. CONST. of 1818, art. IV, § 1.

43. *Id.* at § 8.

44. *Id.* at § 4.

Under the 1848 Constitution, General Assembly duties regarding the judiciary were continued, but reduced. The General Assembly could authorize "courts of justice" to grant divorces and could direct "in what manner suits may be brought against the state."⁴⁵ It could no longer require high court justices to hold circuit courts. Most importantly, the Assembly's total control over lower courts was eliminated. A new provision declared:

The judicial power of this state shall be, and is hereby, vested in one supreme court, in circuit courts, in county courts, and in justices of the peace; *Provided*, that inferior local courts . . . may be established by the general assembly in the cities . . . but such courts shall have a uniform organization and jurisdiction . . .⁴⁶

All lower courts were no longer established by the General Assembly. The jurisdiction of the circuit courts was defined constitutionally.⁴⁷ Yet, the duties of county judges and justices of the peace continued to be prescribed chiefly by the legislature.⁴⁸

Under the 1870 Constitution, there was a further erosion of legislative authority. The General Assembly could not pass local or special laws in areas such as regulating the practice in courts of justice, the jurisdiction and duties of justices of the peace, police magistrates and constables, changes of venue, or any other area where a general law could be made applicable.⁴⁹ Furthermore, legislative control was diminished by new provisions prescribing much of the jurisdictional authority of county and probate courts.⁵⁰ The 1870 Constitution did recognize General Assembly power to create "inferior appellate courts"⁵¹ and to establish a "Probate Court in each county having a population of over fifty thousand."⁵²

General Assembly responsibility for the Illinois judiciary was dramatically reduced again by the 1962 constitutional amendments. One amendment said: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."⁵³ No longer were any lower courts established legislatively. Other amendments eliminated much

45. ILL. CONST. of 1848, art. III, § § 32, 34.

46. *Id.* at § 1.

47. *Id.* at art. V, § 8.

48. *Id.* at § 19.

49. ILL. CONST. of 1870, art. IV, § 22.

50. *Id.* at art. VI, §§ 18, 20.

51. *Id.* at § 11.

52. *Id.* at § 20.

53. ILL. CONST. of 1870, art. VI, § 1 (1962).

legislative authority over the jurisdiction of the lower courts⁵⁴ and declared that the Supreme Court was vested with "general administrative authority over all courts,"⁵⁵ with no express recognition of the opportunity for General Assembly review.

The movement toward increased judicial rulemaking in Illinois continued under the 1970 Constitution. Thus, while a 1962 amendment granted the Supreme Court the authority to provide by rule for direct appeals in certain cases, "subject to law hereafter enacted,"⁵⁶ the new constitution allowed the Supreme Court to provide for such appeals without mentioning legislative enactments.⁵⁷ The new constitution also required that matters assigned to associate judges be guided by Supreme Court rule⁵⁸ and that the "Supreme Court . . . adopt rules of conduct for Judges and Associate Judges,"⁵⁹ again with no mention of legislative review.

The trend in Illinois and elsewhere reflects diminishing legislative influence on the judiciary. The legislature's power to create courts and procedural law has diminished over time. Increasingly there have been constitutional mandates regarding the state courts, whose ambiguities are ultimately clarified by judges. Thus, judges are increasingly compelled to define the contours of their constitutional duties. In this setting an increased judicial responsibility for procedural law is more frequently recognized.

C. PROFESSOR GARDNER'S FAILED DISCOURSE ON DIVERSITIES IN GOVERNMENTAL STRUCTURE

Professor Gardner would not be surprised that state courts occasionally fail to appreciate the significance of such federal/state, interstate, and intrastate diversities in governmental structure.⁶⁰ I have myself demonstrated elsewhere such a failure by comparing two 1977 state high court rulings involving the constitutionality of statutes mandating

54. With respect to circuit courts, compare Article VI, section 12 of the 1870 Illinois Constitution with the 1962 version of Article VI, section 9. Regarding the Appellate Courts, compare Article VI, section II with the 1962 version of Article VI, section 7.

55. ILL. CONST. of 1870, art. VI, § 2 (1962).

56. *Id.* at § 5.

57. ILL. CONST. art. VI, § 4(b).

58. ILL. CONST. art. VI, § 8.

59. *Id.* at § 13(a).

60. See Gardner, *supra* note 1, at 808 ("state courts have adopted the federal analysis and terms of debate not merely when construing dependent provisions governed by Fourteenth Amendment incorporation, but also for many independent state constitutional provisions that federal law - as incorporated in the Fourteenth Amendment - is powerless to affect").

that judicial rulemaking hearings be noticed and open to the public.⁶¹ In deeming a Michigan law an unconstitutional "intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers,"⁶² the Michigan court quite reasonably relied upon state constitutional provisions expressly recognizing judicial rulemaking powers and superintending controls without providing for legislative oversight. By contrast, in declaring a similar Nevada law "an unconstitutional infringement on the inherent powers of the judiciary which violates the doctrine of separation of powers,"⁶³ the Nevada court was too conclusory, misleading in its discussion of the Nevada judicial article, and unconsciously disrespectful of the constitutional schemes in other American states.

Unlike state court failures to address constitutional law diversities dealing with individual rights, state court failures to address constitutional differences dealing with governmental structure greatly trouble Professor Gardner. Most state constitutional laws on individual rights are, according to Professor Gardner, "dependent;"⁶⁴ that is, they "have federal analogues capable of controlling the outcome of cases in which both provisions apply."⁶⁵ For example, "a state search and seizure provision is dependent because it has a federal analogue—the Fourth Amendment—capable of controlling the outcome of the case."⁶⁶ Only when a state's search and seizure provision provides greater protection than that provided in the Fourth Amendment will the state provision control. While Justice Brennan⁶⁷ and others⁶⁸ have recently urged state courts to read their state search and seizure provisions expansively, and while the differing language or history of certain state search and seizure provisions seemingly would accommodate such readings, Professor Gardner is unhappy when such readings occur. He does not believe such provisions can reflect differing views about reasonable searches and seizures since he finds the prospect of significant variations in state constitutional law "just too implausible to take seriously."⁶⁹ He says, "Americans are now a people who are so alike from

61. Jeffrey A. Parness, *Comparative American Judicial Systems*, 24 U. RICH. L. REV. 171, 181-86 (1990).

62. *In re Sunshine Law*, 255 N.W. 2d 635, 636 (Mich. 1977).

63. *Goldberg v. Eighth Jud. Dist. Ct.*, 572 P.2d 521, 522 (Nev. 1977).

64. See Gardner, *supra* note 1, at 807.

65. *Id.*

66. *Id.*

67. *Id.* at 762 n.1.

68. *Id.* at 762-63 nn.5-7.

69. *Id.* at 818. He later adds "it is simply implausible that these different constitutional

state to state⁷⁰ that "the elements of basic human dignity"⁷¹ can not truly be "something very different to the inhabitants of Ohio and Indiana."⁷² Further, even if the peoples of Ohio and Indiana did clearly differ on search and seizure limits and did express those differences in their constitutions, Professor Gardner would urge those states' courts to look the other way. Recognizing such differences, he says, would seem "vaguely antidemocratic,"⁷³ would appear to be "poor sportsmanship",⁷⁴ and would be taken as "some kind of political dirty trick."⁷⁵ In his view, such independent state constitutional interpretation is "potentially dangerous,"⁷⁶ as it constitutes a "threat to national stability"⁷⁷ because "differences at the expense of unity"⁷⁸ would be stressed.

By contrast, state court failures to address constitutional differences regarding governmental structure do trouble Professor Gardner. Most state constitutional provisions defining government are, according to the professor, "independent,"⁷⁹ in that, they "cannot be displaced"⁸⁰ or affected⁸¹ by federal law, "regardless of whether an analogous federal constitutional provision exists."⁸² For example, he finds that "a state constitutional provision governing executive power is independent because the state court's construction of that provision will define the extent of the governor's power regardless of how the Supreme Court interprets the powers of the President under the federal Constitution."⁸³ Comparably, the aforementioned state constitutional provisions dealing with the judiciary are independent. Professor Gardner laments that these independent provisions have not been subjected to appropriate state constitutional discourse; existing discourse has failed because state courts have employed "the federal analysis and terms of debate" even though "federal law . . . is powerless to affect" state

doctrines can be attributed to differences in the fundamental character and values of the people of the states." *Id.* at 826.

70. *Id.* at 818.

71. *Id.* at 825.

72. *Id.*

73. *Id.* at 829.

74. *Id.* at 830.

75. *Id.*

76. *Id.* at 833.

77. *Id.*

78. *Id.*

79. *Id.* at 807.

80. *Id.*

81. *Id.* at 808.

82. *Id.* at 807.

83. *Id.*

judicial construction of "independent state constitutional provisions."⁸⁴ Presumably the professor is troubled because the peoples of Ohio and Indiana do (and should) differ about the defining elements of a tripartite state government and because judicial recognition of such differences would not be antidemocratic, poor sportsmanship, some kind of political dirty trick, or a threat to national stability.

While I join Professor Gardner in lamenting the failures of discourse about state constitutionalism and governmental structure, I find that his premise about the extent of these failures is insufficiently supported and probably wrong. Additionally, his lack of suggestions about correcting such failures is itself regrettable.

In support of his premise that discourse about state constitutionalism and governmental structure is inadequate due to misplaced reliance on "the federal analysis and terms of debate,"⁸⁵ Professor Gardner refers chiefly to the political question doctrine, the legislative speech or debate protections, and the legislative veto.⁸⁶ He cites no state court case nor secondary source in the latter two areas.⁸⁷ Regarding political question, he finds the doctrine should be far less restrictive for state courts than for federal courts,⁸⁸ after noting that "some courts have more or less expressly incorporated the leading federal cases into the state's political question jurisprudence."⁸⁹ One of the state courts cited was the Ohio Supreme Court.⁹⁰ In the case, the court did look to a U.S. Supreme Court decision, but only for a general description of the political question doctrine.⁹¹ The Ohio court did say that while the federal courts employed the doctrine in cases involving foreign relations, war powers, the processes for ratifying constitutional amendments and enacting statutes, the status of Indian tribes, and the guarantee to every state of a republican form of government, Ohio courts applied the doctrine primarily in election cases.⁹² The court proceeded to cite to earlier Ohio cases on the doctrine.⁹³ After quoting two provisions of the Ohio Constitution on lawmaking,⁹⁴ the court found that the doc-

84. *Id.* at 808.

85. *Id.*

86. *Id.* at 808-09.

87. *Id.* at 809 nn.204, 205.

88. *Id.* at 808-09.

89. *Id.* at 808.

90. *Id.* at 808 n.200, citing *State ex rel. Meshel v. Keip*, 423 N.E.2d 60 (Ohio 1981).

91. *State ex rel. Meshel v. Keip*, 423 N.E.2d 60, 64 (Ohio 1981).

92. *Id.* at 64.

93. *Id.*

94. *Id.*

trine did not apply to a challenge to a controlling board's appropriations activities.⁹⁵

Another court cited by Professor Gardner was the Illinois Supreme Court.⁹⁶ In the case, a U.S. Supreme Court decision was again used to define generally the political question doctrine.⁹⁷ The Illinois court, however, also used earlier Illinois precedents and an Illinois statute to determine a challenge to a political party's authority over an appointment to fill a vacancy in the General Assembly, an issue not likely to trigger federal political question concerns.⁹⁸

While surely there is some failed discourse of state constitutionalism in cases involving state governmental power, I am not convinced that such failures predominate and that states frequently err in relying upon "the federal analysis and terms of debate."⁹⁹ The earlier review of state judicial articles suggests that there has been much successful discourse on state constitutionalism during considerations of at least some state constitutional laws on governmental identity. A similar review of state court decisions regarding who in government has responsibilities for procedural and substantive laws guiding the judicial system would also establish there has been much successful discourse on state constitutionalism. Frequently, these cases are resolved by exploring the inherent judicial power contemplated, but not expressed, in the current state constitution. Such resolution recognizes that the inherent judicial power may have changed as the state's judicial article changed and that such power is significantly different from inherent judicial power elsewhere.

D. PROMOTING BETTER DISCOURSE ABOUT AMERICAN GOVERNMENTAL STRUCTURE

What can be done to spur better discourse on state constitutionalism regarding governmental structure? Contemporary discourse seemingly is neither failed nor doomed to failure as discourse on individual rights should be if Professor Gardner is correct. Rather, present discourse on governmental structure seems uneven. While Professor Gardner agrees that more and better discourse on governmental structure is

95. *Id.*

96. See Gardner, *supra* note 1, at 808 n.200, citing *Kluk v. Lang*, 531 N.E.2d 790 (Ill. 1988).

97. *Kluk v. Lang*, 531 N.E.2d 790, 796-797 (Ill. 1988).

98. *Id.* at 796-97.

99. See Gardner, *supra* note 1, at 808.

needed, regrettably he offers no "serious proposal",¹⁰⁰ or even a "guidepost,"¹⁰¹ on the "set of conventions"¹⁰² which might "allow participants in the legal system to make intelligible claims"¹⁰³ about state constitutional law in this area. I shall conclude with a few observations intended to guide the development of such a set of conventions.

It must first be better recognized that the more recent drafters of American state constitutions had broader sources of materials on which to rely than did their earlier counterparts. They had not only the federal analysis and terms of debate, but also the seemingly more relevant materials from other states and interested professional organizations. Consider the twentieth century movement toward court unification, defined as a consolidated court system which is centrally funded and managed. This movement was primarily accomplished through state constitutional amendments, often including judicial rulemaking reforms¹⁰⁴ and producing today a rich diversity of approaches. In joining this movement, many state constitutional drafters looked to earlier actions of sister states or to the recommendations of such influential organizations as the American Bar Association, the American Judicature Society and the National Municipal League.¹⁰⁵ Likewise, since many states have adopted piecemeal certain constitutional principles, involving court unification, later constitutional writers had available a series of works by their in-state predecessors. The aforedescribed history of the Illinois judicial article demonstrates how a state has moved incrementally toward delegating broader, and increasingly more exclusive, powers to their judiciary.

While Professor Gardner correctly observes that there is too much misplaced reliance on the federal analysis and terms of debate during discourse on governmental structure, he fails to provide any guideposts about the proper place, if any, for federal constitutional discourse. Surely there is some place in state constitutional analysis and debate for consideration of federal constitutional thinking on checks and balances, separation of powers, and the meaning of executive, legislative, and judicial power. In addition, there are at least some express federal constitutional limits on the identity of state government. For example,

100. *Id.* at 835.

101. *Id.*

102. *Id.* at 767.

103. *Id.* at 768.

104. For an account of the court unification movement, see Allan Ashman and Jeffrey A. Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1 (1974).

105. *Id.* at 5-19 (reviewing these groups' recommendations).

each state must have a "Republican Form of Government";¹⁰⁶ no new state can be "formed or erected within the jurisdiction of any other state";¹⁰⁷ no new state can be "formed by the junction of two or more states, or parts of states, without the consent . . . of the Congress";¹⁰⁸ and each state must give "Full Faith and Credit . . . to the public acts, records and judicial proceedings of every other state."¹⁰⁹ Choices about the attributes of state government are further constrained by federal constitutional provisions on the procedural requirements for adjudication, particularly in criminal law,¹¹⁰ the taking of property,¹¹¹ and the deprivation of liberty and property.¹¹²

Given his dislike for independent state constitutional interpretation of individual rights and his desire that there be no state constitutional discourse in this area, Professor Gardner's chief concern about misplaced state court reliance on federal analysis and debate involves state constitutional discourse on the role of the three branches of each state government. Professor Gardner illustrates this concern by noting that the extent of a Governor's powers cannot be defined by the extent of a President's powers,¹¹³ though he cites no state cases in which such a definition actually occurred.¹¹⁴ Presumably, he would urge that inherent state judicial power typically not be defined by the cases on inherent federal judicial power, a proper request given the aforescribed differences between federal and state judicial articles. Further, he would presumably counsel, correctly, that General Assemblies should operate quite differently from Congress. But, given such differences, is federal constitutional discourse on national executive, legislative and judicial authority wholly irrelevant? I think not, and suggest an appropriate convention of state constitutionalism be developed; such a convention should address the role of federal constitutional thinking on separation of powers in state constitutional analysis and debate. In my view, even where there are no express or implied federal constitutional limits on state governmental structure, it is still appropriate for a state court to use a federal court's general descriptions of separation of powers concerns. Proper use, however, requires that the state court apply those

106. U.S. CONST. art. IV, § 4.

107. *Id.* at § 3.

108. *Id.*

109. *Id.* at § 1.

110. U.S. CONST. amend. IV, V, VI and VIII.

111. *Id.* at amend. V.

112. *Id.* at amend. XIV.

113. *See* Gardner, *supra* note 1, at 807.

114. *Id.*

generalities to the particulars of the state's own governmental scheme. Thus, unlike Professor Gardner, I am not troubled by an Ohio or an Illinois court's limited use of federal court precedent on the political question doctrine. In each setting, the state court applied the federal court's general discussion to the unique circumstances within its own borders. For me as well, the convention would permit considered, and perhaps allow even wholesale, state court adoption of specific federal court rulings on governmental powers. Adoption of federal rulings would be most appropriate where the relevant state and federal constitutional provisions are very similar and where there is no evidence suggesting that the relevant state provisions were seen by their drafters, or are seen today, as requiring rulings different from their federal counterparts. Exemplary may be the federal provisions defining: "high crimes and misdemeanors" for impeachment purposes;¹¹⁵ "good behavior" by judges;¹¹⁶ when an executive is unable "to discharge the powers and duties of . . . office";¹¹⁷ "disorderly behavior" permitting "punishment" of a legislator;¹¹⁸ the processes for reconsidering legislative actions not signed by the executive;¹¹⁹ and, appropriations made by law, so that money can be drawn from the Treasury.¹²⁰ A convention of state constitutionalism should also permit considered state court adoption of specific rulings on governmental powers rendered in a sister state. While Professor Gardner may be right that the political question doctrine should be far less restrictive for state than for federal courts,¹²¹ there may be good reason (and comparable constitutional language to support the proposition) that the doctrine be similarly applied in two American states.

Another convention guiding the "use and interpretation"¹²² of state constitutional law on governmental structure involves the need for greater consideration of the particular role each state constitution plays

115. U.S. CONST. art. II, § 4. Compare ARIZ. CONST. art. VIII, Pt. 2, § 2; FLA. CONST. art. III, § 17(a) ("misdemeanor in office"); KANSAS CONST. art. II, § 28.

116. U.S. CONST. art. III, § 1. Compare FLA. CONST. art. V, § 12(a) (removal of judges for "present unfitness to hold office").

117. U.S. CONST. amend. XXV, § 4. Compare ARIZ. CONST. art. V, § 6.

118. U.S. CONST. art. I, § 5. Compare ALA. CONST. art. IV, § 54; ARIZ. CONST. art. IV, Pt. 2, § 11; FLA. CONST. art. III, § 4(d) (punishment for "contempt or disorderly conduct"); IND. CONST. art. 4, § 14.

119. U.S. CONST. art. I, § 7. Compare ARK. CONST. art. VI, § 15; COLO. CONST. art. IV, § 12; IND. CONST. art. 5, § 14(b).

120. U.S. CONST. art. I, § 9. Compare ALASKA CONST. art. IV, § 72; COLO. CONST. art. V, § 33; LA. CONST. art. III, § 16 (need for "specific appropriation"); N.M. CONST. art. IV, § 30.

121. See Gardner, *supra* note 1, at 808-09.

122. *Id.* at 834.

in defining that state's government. Some state constitutions, like the federal constitution, are both bare-boned and stable, with no significant history of amendment and only an occasional need for judicial interpretation. Other state constitutions are more detailed and fluid. The history and provisions of the many Illinois judicial articles contrast sharply with the stability of Article III of the United States Constitution. Bare-boned and stable constitutional provisions, infrequently interpreted by the courts, should be used less frequently to resolve separation of powers and governmental structure disputes. If the discourse of state constitutionalism is to reflect the different roles which state constitutions play in defining state government, how should such reflections occur? In discussing individual constitutional rights, Professor Gardner offers words of guidance. He says that some state constitutions must "be viewed as something less than a 'real' constitution . . . but something more than a statute."¹²³ He goes on:

Perhaps state constitutional provisions might be viewed, like statutes, as outcomes of frankly pluralistic power struggles, but concerning subjects that the polity wants for some reason to remove from the political agenda for some period of time. Indeed, this seems to be the direction in which state supreme courts have moved; they are generally unwilling to invoke the grandest interpretative strategies of constitutionalism, but are nevertheless forced to treat constitutional positive law as somehow different from ordinary statutory law.¹²⁴

Recognition of the different roles state constitutions may play in defining governmental structure as a convention of state constitutionalism should not be "unsettling" and would help conform theory to reality.¹²⁵

E. CONCLUSION

To conclude, I suggest that Professor Gardner's fine article be used as the catalyst for further discussion of a set of conventions for state constitutional discourse about governmental structure. His article reveals there are good reasons why the conventions for such discourse should vary from the conventions for dialogue about individual rights. I hope that my suggested "guideposts" will prove useful to the future discourse on state governmental structure.

123. *Id.* at 833.

124. *Id.*

125. *Id.*