

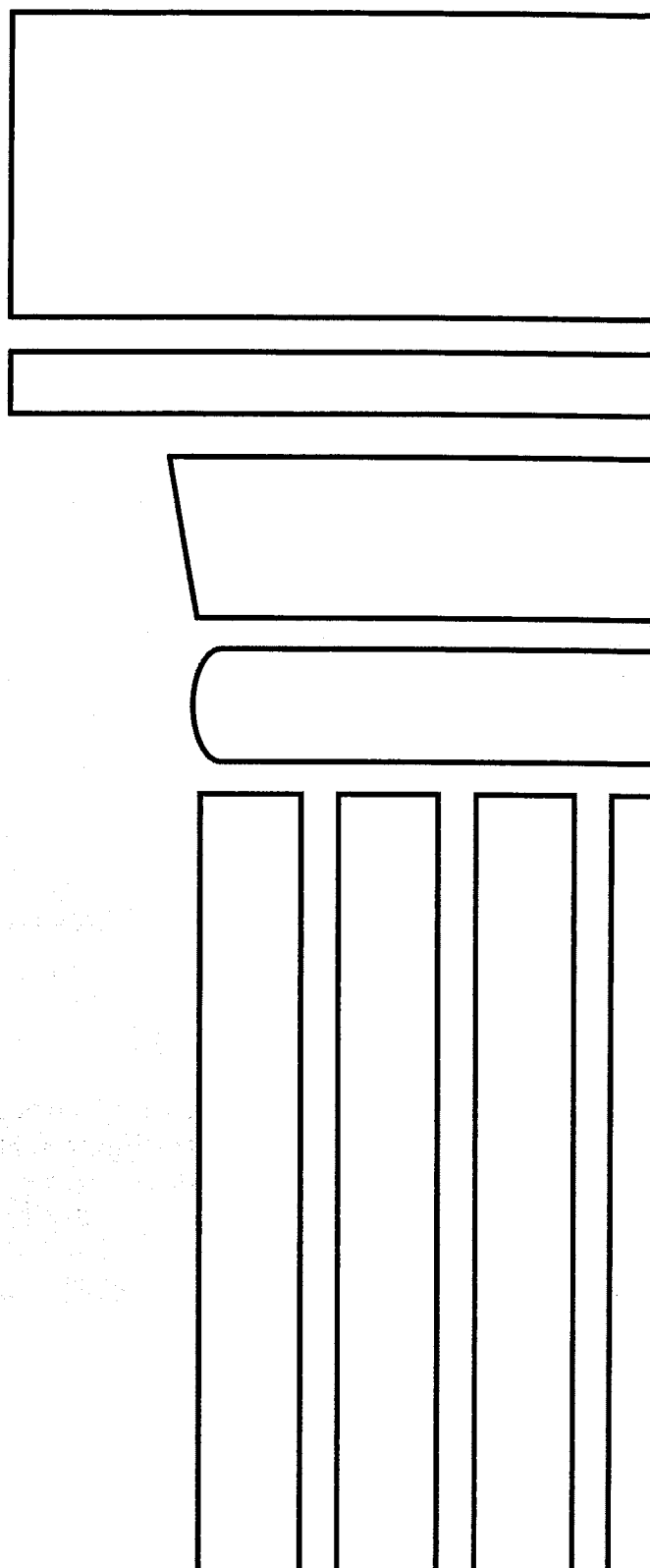
**PROTECTING
INDIVIDUAL
RIGHTS:**

**The Role of State
Constitutionalism**

**Report of the 1992
Forum for State Judges**

**Cosponsored by
The Roscoe Pound Foundation &
Yale Law School**

Edited by Barbara Wolfson



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FOREWORD

At a time when many in our profession perceive a widening gulf between what is studied in the law schools and the work of practicing lawyers and judges, it is heartening that state judges and academic lawyers are coming together, as they did in this forum, to share theoretical knowledge and practical experience in order to enhance the role of state courts in protecting individual rights.

In 1977, Justice William Brennan offered what can serve as the premise and charge for the forum reported in the following pages. “Federalism,” he wrote, “need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”

It is in this positive spirit that I welcome the publication and dissemination of the ideas raised and vigorously debated by the forum participants including my colleagues at the Yale Law School, more than 100 appellate judges from forty-three states and the District of Columbia, and Fellows of The Roscoe Pound Foundation who served as moderators for the small discussion groups. Everyone involved in the forum learned from the perspectives represented by these diverse members of the American legal community.

This forum marked the inauguration of a collaborative effort on the part of the Yale Law School and The Roscoe Pound Foundation to continue the dialogue that we hope will illuminate and strengthen the important emerging area of state court jurisprudence.

Guido Calabresi
Dean
Yale Law School

PREFACE

The renewed attention to state courts and state constitutions that this forum inaugurates recalls the earliest days of the Republic when individuals looked, not to the federal courts, but to state constitutions and state courts for protection in their relations with state and local governments.

Indeed, the period of ascendancy of federal constitutional guarantees was relatively short, beginning slowly in 1925 and culminating in the 1960s and 1970s. After only half a century, the trend of recent U.S. Supreme Court decisions is, in the eyes of many, forcing attention back to state courts in matters of civil liberties.

In this diversity may be strength. As Justice Louis Brandeis wrote in 1932:

It is one of the happy accidents of the federal system that a single, courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

It was evident from the deliberations at the forum that many judges, freshly aware of the choices before them, are examining state constitutionalism more seriously than ever before and that their understanding of its potential is evolving rapidly. This report is a collage of ideas in progress, offering snapshots of the thoughts of numerous judges from a variety of states and many points of view on the main points raised in the provocative papers and lively discussions of the forum.

Robert L. Habush
President
The Roscoe Pound Foundation
1990–1992



REPORT

OF THE

CONFERENCE



INTRODUCTION

Background

In 1977, in a speech and in a landmark article in the *Harvard Law Review*, Justice William Brennan called for a rebirth of state constitutionalism. The drafters of the Bill of Rights, he pointed out, drew upon corresponding provisions in the various state constitutions. Before the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more of the state constitutions or colonial charters. Guarantees of rights thus preceded, and even inspired, the constitutional protections embodied in the Bill of Rights.

Justice Brennan said that the Supreme Court had forgotten that one of the strengths of our federal system is its provision of a double source of protection for the rights of our citizens. At the heart of his call for a reassertion of state constitutionalism was the point that state courts may construe state constitutions as providing even greater, or new, or clarifying protection of rights, more than the federal Constitution does. State constitutions, he said, are also a source of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.

Brennan urged state courts to step into the breach left by what he saw as the high court's lack of commitment to the protection of individual rights. "More and more state courts," he said,

are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.

His article was most influential and has been hailed in some quarters as the Magna Charta of state constitutionalism. Together with a number of state jurists, Justice Brennan generated widespread interest in state constitutional law. The movement advocating independent state constitutionalism received the name New Federalism, and attracted the support of a group of eminent state jurists and legal scholars.

The New Federalism

State court judges and academicians active in the movement called for nothing less than a “renaissance” of state constitutional law. By the mid-1980s, according to Professor A. E. Dick Howard:

*State constitutions have become the pivot of important decisions in a wide range of substantive areas—criminal justice, privacy, libel, church and state, school finance, gender discrimination, abortion funding, terminal illness, and expression on private property, among others.**

Recent state court decisions based on state constitutions have focused on jury composition, the right to counsel, freedom of speech, search and seizure, privacy and cruel and unusual punishment. These decisions often expanded rights beyond those in the federal Constitution as interpreted by the United States Supreme Court, thus fulfilling Justice Brennan’s urging that

state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

*(*Developments in State Constitutional Law*, Bradley D. McGraw, ed. 1985, “A Frequent Recurrence of Fundamental Principles,” p. xvi, West Publishing Company.)

As the concept of New Federalism evolved both in theory and practice, it has attracted increasing interest among judges and academicians. In the last few years, judges in states in every region of the country have demonstrated a growing reluctance to rely solely on federal judicial rulings that may restrict individual rights and have founded their decisions on their state constitutions.

Michigan v. Long

The move to enhance state constitutionalism was given impetus by the 1983 decision in the case of *Michigan v. Long* [463 U.S. 1032 (1983)] in which the United States Supreme Court declared that state courts' interpretation of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds. Although ostensibly a restriction on the exercise of state court decisionmaking (a court must indicate "clearly and expressly that it is alternatively based on bona fide, separate, adequate and independent grounds"), *Michigan v. Long* has made state court judges confident that they can use their own constitutions while ensuring that their opinions are protected from federal review.

State Court Responsibility in American History

Some observers, taking the long view, view the contemporary movement toward state constitutionalism as part of a dynamic that has traditionally marked the history of American jurisprudence. Its resurgence can be seen as a shift from the recent hegemony of the federal courts in which the pendulum swings again to the kind of state court involvement that characterized American jurisprudence in the early days of the Republic. During that era, individuals looked to state constitutions and state courts, not the federal courts, for protection of their constitutional rights when these were invaded by state and local government.

The period of ascendancy of federal constitutional guarantees came late in our history, and was relatively short. As Justice Brennan has noted, "Before the Fourteenth Amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action." Even then, "It was 1925 before it was suggested that perhaps the restraints of the First Amendment applied to state action." Decisions of the United States Supreme Court in the 1960s and 1970s were the high-water mark extending some provisions of the Bill to the states, a movement that Justice Brennan hailed as having changed the face of the law.

But the trend of recent U.S. Supreme Court decisions is, in the eyes of many jurists, lawyers and scholars, forcing attention back to state courts in matters of civil liberties and individual rights.



Today, the promise and potential of state constitutionalism offer an avenue for protecting and even expanding rights that many see as circumscribed by recent decisions of the federal courts. Yet there are constraints and limitations on state courts that tend to inhibit state judges from interpreting state constitutions in ways that counter interpretations of the federal Constitution made by the U.S. Supreme Court.

These dual themes were central to the dialogue among the participants at the Pound/Yale Forum for State Judges.

Examining the Issues

More than 100 judges representing state Supreme and Intermediate Appellate courts in forty-three states and the District of Columbia took part in the forum. Senator Howell Heflin (D-Ala.), former Chief Justice of the Alabama Supreme Court, gave the keynote address.

The discussions were organized around two papers written by Paul W. Kahn and Akhil Reed Amar, both professors at Yale Law School. The papers were distributed to participants in advance of

the forum, and each author presented his ideas to the audience in an informal talk. Each presentation was followed by a commentary by a state supreme court justice recognized nationally as a proponent of state constitutionalism.

Professor Kahn's paper, "Interpretation and Authority in State Constitutionalism," was discussed by Justice Denise R. Johnson of the Vermont Supreme Court; Justice Lloyd Doggett of the Texas Supreme Court, commented on "Using State Law to Protect Federal Constitutional Rights," presented by Professor Amar.

Following each presentation and commentary, the judges separated into six groups to exchange ideas on the issues raised in each paper. Each group discussion was led by a Fellow of The Roscoe Pound Foundation. At the end of the day, all the participants reassembled for a plenary session, where the moderators outlined the major issues discussed and summarized whatever consensus had been reached.

Under the ground rules of the forum, comments by judges are not for attribution in the published proceedings. The result was candid and free-wheeling discussion among the judges and the other forum participants and a willingness to consider all sides of an issue with no holds barred.

THEMES AND ISSUES

The judges at the forum represented a diversity of views about state constitutionalism and a wide range of practical approaches to interpreting their state constitutions. Some sit on courts that have long been active in basing decisions on state constitutional grounds and do not hesitate to disagree with rulings of the U.S. Supreme Court. Indeed, among the judges present were some of the bench's most prominent advocates of the New Federalism, including those who have written ground-breaking opinions drawing on state constitutional provisions.

Others came from state courts that, according to their account, see little need to question federal decisions and therefore have given little attention or weight to their own state constitutions.

Many judges stood on a middle ground: they were intrigued by the possibilities of state constitutionalism, but had little experience in constitutional interpretation and recognized the difficulties of charting new directions in states which had traditionally bowed to federal court decisionmaking. For many of them, the field represented a terra incognita—one posing dangers as well as opportunities.

It was clear that across the country, state constitutionalism is in a stage of ferment as judges seek to define methods of interpretation that are appropriate to the constitutional traditions of their states as well as to the political and cultural climates of opinion in which they render decisions. They spoke openly about the difficulties of redefining state constitutionalism under the pressure of heavy dockets or fiscal constraints, not to mention political considerations. (Most are elected or appointed for limited terms.)

Judges generally did not believe they had the luxury of building the kind of theoretical edifices that engage the legal scholars. Rather they must respond to specific, often very narrow issues that come before them. Nevertheless, most of them found the

interchange between academicians and practitioners stimulating and enlightening. The scholars, in turn, benefited from the challenge of having to respond to a series of pragmatic questions focusing on the nuts and bolts of deciding cases that were raised by the judges.

Within this framework, a cluster of themes emerged from the discussions. They include the following.

The Need For a Renewal of State Constitutionalism

There was near universal approval for such a movement. Only a few state courts were apparently comfortable marching lock step with the United States Supreme Court. A number of judges expressed dissatisfaction with what they saw as mixed messages contained in recent federal decisions and mentioned this as impelling them to explore their state constitutions.

Most judges were eager to advance state constitutionalism and more than willing to turn to their state constitutions if these would support granting more individual rights than did the U.S. Supreme Court in its interpretations of the federal Constitution.

Representative Views

In the sixties, the federal courts were the sole repository for protection of individual rights. That's where all of us went. You made the law there. Now, most of us recognize that that is not the repository [we need], so we're looking for a new place, and that's got to be the state courts. We're looking for a new forum.

■ ■ ■

I have served on my state supreme court for twelve years. It's kind of been two different courts. For the first ten years an all-white male court, and I would say we were

somewhat moderate. We never used the state constitution. During the last two years, there have been three new members and we have been using the state constitution a great deal.

■ ■ ■

I think it's wrong to assume that the majority of state appellate justices are opposed to the shift in the doctrine [interpreting individual rights] articulated by the Rehnquist court.

■ ■ ■

Give us a break. Come back to the state courts. We know how to read federal cases. We know what rights are. And we know how to read our own constitutions. And I think we should be doing more of that.

■ ■ ■

In criminal law, I don't think there are many of us in my state that are wanting to get ahead of the United States Supreme Court and be any more liberal than they are in the area.

■ ■ ■

In my state, which has thoroughly turned to the state constitution, one phenomenon is that the Supreme Court of the United States practically has been irrelevant. There's no uniformity. In the areas that we're really concerned about, the Supreme Court doesn't say, 'Three say this, two say this, two say this, one says this and one says something else.' We don't pay any attention to it. We go our own way. We may have exactly the same fight, but we fight it out among ourselves.

■ ■ ■

The notion out our way [the midwest] is that the recent turns in the United States Supreme Court have been good. There isn't much enthusiasm, at least among the majority of our court, to change it. I have an idea this is more prevalent in rural areas. We don't see the gross deprivations of human rights that other jurisdictions possibly see. There are a few exceptions, but we've tracked quite well with the federal Constitution

■ ■ ■

We feel that the decisions, at least within the last decade or so, of the United States Supreme Court are difficult to contain. We have to write a little diagram as to just where the Supreme Court is on a particular issue. We don't want to make our task more complicated, and it's very easy for us to resolve them in the state constitution.

■ ■ ■

There is at least a strong possibility that the protection of individual rights is going to become in the nineties and thereafter the domain of the state supreme courts, just as in the sixties it was the domain of the federal courts. There has been almost a sea change in philosophy and focus as far as individual rights are concerned. I think [state constitutionalism] is an idea whose time has come.

■ ■ ■

The Concept of Floor and Ceiling

This metaphor, first suggested by Justice Brennan in 1977, was used again and again by the judges to express the notion that while U.S. Supreme Court rulings establish a mandatory floor below which rights cannot fall, state courts are free to interpret their own constitutions as granting more rights.

Representative Views

In terms of individual rights, the federal system should be viewed as providing a floor, and the state constitution can provide rights in excess of that floor. Some would argue that the floor has been raised to a level that approaches the ceiling. And others would argue the opposite.

■ ■ ■

The federal Supreme Court has given us a ground, a floor, a limit below which we cannot go. But I don't think there's anything wrong in individual states going above those limits.

■ ■ ■

In PruneYard Shopping Ctr. v. Robins, [447 U.S. 74 (1980)] the United States Supreme Court held, nine-^{zip}, that if a state wants to disagree with their concept in that conflict, the state has a right to do so. What that amounts to, I think, is that the United States Supreme Court sets the floor for individual rights, but any state may set the ceiling wherever it sees fit, and the Supreme Court will uphold that, if challenged. And that opinion, saying the states could disagree with them and give their citizens more rights than the United States Supreme Court requires, was written by Justice Rehnquist.

■ ■ ■

Our courts have recently held the federal Bill of Rights as a floor beneath which we cannot fall, and our state's bill of rights as a ceiling. In our criminal jurisprudence and our civil law they are actively turning to the state constitution.

■ ■ ■

The Role of Unique State Sources in Interpreting State Constitutions

The issue that stimulated the most intense discussion was the central role of unique state sources—including text, history and judicial precedent—in state constitutional decisionmaking. Although Professor Kahn argued for a new form of American constitutionalism that would transcend what he saw as parochial state grounds, the judges were almost unanimous in their view that local traditions embodied in unique state sources had to form the basis of state constitutional jurisprudence. Justice Johnson advanced the latter viewpoint in her comments on Professor Kahn's paper, and her views were echoed resoundingly in the small discussion groups. Most of the judges believed there was something special about their state's history, even in an era in which, according to Professor Kahn, regional and local differences are rapidly eroding and even in states whose constitutional history was obscure.

Representative Views

Our constitution was adopted relatively late, in 1889. You might think we'd have a lot more information about what our founders were thinking. We really don't. What we know comes from newspaper accounts of the time. Nevertheless, I feel very uncomfortable about jettisoning the doctrine of unique state sources. I have a gut feeling that there is something unique about the constitution of the state of Washington. I'm sure each of you feels the same way about your state's history.

■ ■ ■

I think it's a mistake to ignore unique state sources. Particularly in relatively new states like New Mexico, where our constitution that was adopted in 1912 is not a mirror image of the federal Constitution. An example is the right to bear arms. Unlike the federal Constitution that talks about militias, the constitution of the state of

New Mexico says in effect that every person has a right to bear arms for his or her defense, for hunting, for recreation and for any other lawful purpose. The only thing it prevents is carrying a concealed weapon.

■ ■ ■

I like [Professor Kahn's] concept of American constitutionalism. But as a practical and a political matter, the movement toward this concept is not going to be done by completely avoiding unique state sources.

■ ■ ■

I lean strongly toward unique state sources as the first place that our state would look. We have a rich heritage. Indiana's bill of rights in our 1851 constitution has thirty-seven provisions. Many of them are quite a bit different from the federal rights. We have five specific provisions about religious freedom. We have an entire section on education, so these encourage us to look more to unique state sources. We will not really get to the American constitutionalism that Professor Kahn talks about until we exhaust and deplete the historical basis for the unique state sources.

■ ■ ■

I don't see unique state sources as a limitation. You want to reach the result. You think that the constitutional rights which have to be protected are not properly protected by the Supreme Court of the United States as it interprets the federal Constitution. Your analysis leads you to find something in your state constitution which you can hang your hat on to protect those rights.

■ ■ ■

I have a problem in that I tried to find some state sources in our constitution. It had to do with a right-to-counsel issue. I found that while there are volumes of journals of the constitutional convention, their concerns

were banks and branch banking and Indian tribes and internal improvement. Virtually nothing was said about the provisions we've been talking about today. There's a real paucity of state sources.

■ ■ ■

We view Michigan v. Long as sort of requiring at least paying lip service to unique state sources. Michigan v. Long only protects you if you ground [your decision] in independent and adequate state ground.

■ ■ ■

The Reliance on Core Values in Judicial Decisionmaking

Many judges expressed their belief in the notion that a sense of justice, or core values, frequently provided a firm ground for decisionmaking. Core values, it was suggested, played a dual role: they motivated judges to use state constitution sources wherever possible to support outcomes they sought to reach, and they also allowed judges to go beyond state sources when they were silent on a particular question of protecting individual rights. A few judges, however, urged caution in using core values as a vehicle for making decisions that may actually be based on ideological grounds.

Representative Views

The notion that there is a generalized pool of core values out there and that state court judges have as much legitimacy speaking with authoritative voices to articulate these values is very consistent with my notion of what my job is all about.

■ ■ ■

I'm not suggesting that I'm as bright as anybody on the United States Supreme Court, but rather that our interpretation of what is the core of American constitutional values is as valid as the interpretation of the United States Supreme Court.

■ ■ ■

The notion of this whole debate—that one should be more acutely concerned with the concepts expressed than with the words—is simply an unvarnished call to judicial activism. Whether judges are elected or serve for life terms or are appointed by governors with retention elections, we take an oath to uphold our state constitution. And we should do that. On the other hand, I don't think it is an empty vessel into which we can pour our own idiosyncratic ideas about what the just society is.

■ ■ ■

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I believe that we are, as a court, free to make some kind of independent interpretation of core values. I don't think we can be limited to what the Founding Fathers or Framers of the Constitution meant. They were just talking about general values for the most part. I have little doubt that the people writing the Fourteenth Amendment would have been shocked if you told them that it protected miscegenation. Nevertheless, it is recognized that it does. I think that recognizes that equal protection is a core value and has to be reconsidered in modern terms.

■ ■ ■

I find absolutely nothing wrong with pursuing whatever means are available to reach the conclusion. You have a sort of gut reaction to where you want to go, and you find justification wherever you find it.

■ ■ ■

Which Constitution, Federal or State, Should be Reviewed First by State Court Judges?

In attempting to answer this question, the judges considered an array of historical and procedural issues. There was great divergence of opinion on the matter, ranging from the belief that state court judges are free to rely solely on state constitutions to the conviction that state courts have some obligation to look first to federal court decisions for answers before proceeding to an examination of state constitutions.

Representative Views

I think there is a little danger in interpreting state constitutions differently just for its own sake. Although the state and the federal Constitution language may be different, the intent is probably pretty similar. I think there is something to be said for uniformity. The state constitution should be interpreted differently only if there is a very compelling reason.

■ ■ ■

I feel that my role as a supreme court justice is to interpret our own state constitution. Our state is very active. Any time a case is challenged, or we take a criminal case, we decide it first on a sub-constitutional basis. Then, if it's necessary to go beyond that, to the state constitution, and then to the federal Constitution.

■ ■ ■

Justice Hans Linde of the Oregon Supreme Court, a very vocal advocate of the use of state constitutions, said every case ought to be decided in three stages. First, you look at the statute involved. If you can decide it under the statute, do that. If not, go up to the state constitution next. If you can decide it under the state constitution, do that. And only as a last resort do you look to the U.S. Constitution. I think that's a sound principle.

■ ■ ■

Some of us tend sometimes to forget the fact that the oath a judge takes is to support the federal Constitution, as well as [the state's] constitution. And I have just as much responsibility to uphold the United States Constitution as any justice on the U.S. Supreme Court, I hope. And I take it seriously. In matters where state constitutions are identical, I don't think I'm at liberty to go against the U.S. Supreme Court. They are the highest authority in this land, under the federal Constitution.

■ ■ ■

How Should State Constitutionalism Operate When the Language of the Federal and State Constitutions are Identical?

When state constitutions provide greater rights than do parallel clauses in the federal Constitution, state court judges can, it was agreed, legitimately base their decisions on such provisions. But when the language of the state constitution is identical to that of the federal Constitution, how can judges claim to interpret it as providing more rights than the United States Supreme Court does?

This difficult question engendered a great deal of lively discussion. Some judges thought identical language should not be interpreted independently. Many felt that divergent interpretation was permissible and even desirable in a range of cases, with the caveat that state courts should move cautiously in drawing different conclusions from identical language. A number of judges, however, took the view that the very existence of a state constitution was a sufficient foundation for reaching almost any conclusion whether or not the language is the same.

Representative Views

If you have identical language, it seems to me you have some fairly big hurdles to get over before you come to a conclusion that is the opposite result.

■ ■ ■

We have the power to do it. The question is: Do we want to exercise it? Do we want to interpret our constitution differently from the United States Supreme Court's interpretation of identical words in the U.S. Constitution? I think we have the power. The question, is: Do we have the duty?

■ ■ ■

When the language in the state constitution is identical to the federal Constitution, it can be interpreted differently. Obviously, that ought to be done with great caution, but uniformity between federal and state on occasion may have to give way as justice requires. And whatever justice requires, the end result is going to be based on what kind of reason is provided and what kind of core values exist.

■ ■ ■

We are interpreting constitutions not just for professors and supreme court justices, but for policemen and ordinary citizens. So we've got the same provision in the federal and state constitution. If the two are identical, we ought to be awfully careful about giving them different interpretations, not only because you're giving the same language a different meaning, but also because you lose some credibility with ordinary citizens who say: "You use the same language. Why do two courts take exactly the opposite approach?" Notwithstanding all that, there may be some situations where you would do it.

■ ■ ■

One may look at federal precedent as being persuasive, but it is not mandatory, and if the state wants to assign an entirely different meaning or construction to that identical language, that's why the state is a recognized independent sovereign.

■ ■ ■

Inasmuch as I come from a state that has adopted different constructions of identical language in state and federal constitutions, I thought it was a foregone conclusion that a state had the power to adopt a different construction as long as it did not restrict fundamental liberties as they exist under federal law.

■ ■ ■

It should clearly appear that this is not just an exercise in power, an exercise in sovereignty, but a good faith disagreement in principle, disagreement with a previous decision—the same type of analysis which would be rendered when overruling the prior precedent of one's own court or failing to follow the precedent of the court of a sister state.

■ ■ ■

The Role of Attorneys, Scholars and Law Schools in Contributing to State Constitutionalism

The judges uniformly noted that they depend on lawyers to raise pertinent state constitutional issues on the appellate level. Very few believed they could take the responsibility of introducing these questions. They were concerned that lawyers do not know their state constitutions and that state constitutional law is not addressed in the law school curriculum. There was a consensus that lack of knowledge and interest on the part of the bar was a major impediment to the development of state constitutional jurisprudence.

Representative Views

I think the problem for us is that the bar has to be strictly educated to preserve these claims and to present them to us and brief them and argue them well. If the bar does its job, I think the court will do its job.

■ ■ ■

Our problem to date is getting the practicing bar to preserve the issue under the Montana Constitution, so we can fully use our nice, shiny, progressive 1972 fully-transcribed constitution. When I speak to bar associations, I try to gin up the idea.

■ ■ ■

We have a specific right to privacy, a specific right of the public to know about everything that goes on in government, a right to a clean and healthy environment, and so forth. Some of us are rarin' to go to interpret some of these things.

■ ■ ■

- *I think we're behind. You'll find that the academics have been talking about this ever since Brennan's speech.*
- *Though they do not have courses on state constitutional law. They aren't teaching it in law schools.*
- *Especially your national law schools.*

■ ■ ■

We've had cases on our books for a generation now varying from the federal Constitution in search and seizure. We have the problem of lawyers not raising these issues. When they start doing it, they find all kinds of stuff in the state constitution that's not even covered in the federal Constitution.

■ ■ ■

As of about two years ago, in our state bar exams we require applicants to answer a question on [our state's] constitutional law. In our dissents and footnotes and invited questions for oral argument, we will specifically ask counsel to address [state] constitutional issues. Our chief justice has done a lot of speaking about state constitutional issues. Two of our state law schools are going to be offering courses in state constitutional law. I'm going to be teaching one for the first time next fall—and scared to death to face the student body. It's going to be a learning experience.

■ ■ ■

Professor Kahn was open in his remarks that most constitutional scholars know more about East European or West African constitutions than they do about the Mississippi or the Texas constitution. There has been a tendency not to focus on state constitutionalism so that our lawyers come before us and make only passing reference to the state constitution. They never brief it; they don't know how to research it; they don't know how to argue it.

■ ■ ■

If lawyers will look at our state constitution, they will find a lot of individual rights that are not protected as much by the U.S. Supreme Court under the federal Constitution. But these are generally never alleged in the complaints, and, as a result, as a trial judge I don't get to deal with some of the issues that I think the lawyers ought to bring out.

■ ■ ■



PROCEEDINGS

OF THE

CONFERENCE



INTERPRETATION AND AUTHORITY IN STATE CONSTITUTIONALISM*

■ ■ ■

Professor Paul W. Kahn
Yale Law School

Professor Kahn challenged the acceptance of the belief that state constitutionalism must be based on the doctrine of unique state sources. He asserted that in an increasingly homogenous American polity, state communities no longer retained the individuality necessary to support the legitimacy of distinct state constitutional law doctrines.

In making the case for abandoning the doctrine of unique state sources, he proposed a far broader concept of American constitutionalism in which state courts can interpret their constitutional texts by appealing to state, national and international sources. The end of state constitutionalism, he suggested, is to realize within the local community a common, American ideal of the rule of law within a system of majority rule.

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Much of the recent interest in state constitutionalism arises out of frustration with the changing direction of federal constitutional law. Justice Brennan initiated much of this recent work and never disguised his own feelings about the Supreme Court's turn away from the protection of individual rights. As the Court has become increasingly conservative, the hope has arisen that state courts interpreting state constitutions would take up the cause of individual rights.

Paradoxically, even those who have been most forceful in arguing that the state courts should continue with the liberal agenda have allowed the increasingly conservative federal courts to set the parameters within which state constitutionalism is pursued. They accept the idea that state courts must rely on state text, state history and the particular values of the unique state community. I call this the doctrine of unique state sources.

*Professor Kahn's remarks were based on a paper prepared for the Forum. His paper appears in the *Harvard Law Review*, Volume 106, (1993).

“ State courts should abandon the doctrine of unique state sources, a doctrine that divides them from each other, as well as from the national community. They should aim to give voice not to a narrow state constitutionalism, but to the broadest vision of American constitutionalism. ”

The result has been a substantial frustration and a continual sense that state constitutionalism is not living up to expectations. This is only to be expected. By allowing the constitutionalism of the federal bench to set the terms of the inquiry, state constitutionalism accepts a set of assumptions that severely constrain its possibilities.

There is no necessity that state courts accept the niggardly view of constitutional rights offered by the federal judiciary. Similarly, there is no compelling reason to accept the federal courts' narrow view of constitutionalism. State courts should abandon the doctrine of unique state sources, a doctrine that divides them from each other, as well as from the national community. They should aim to give voice not to a narrow state constitutionalism but to the broadest vision of American constitutionalism. Only then will the state courts be able to draw upon the richest sources of American constitutional law: the ongoing national debate over the meaning of equality, liberty, due process and limited government. Only then will state constitutionalism become a vibrant part of the single enterprise of American constitutionalism.

Pitfalls of relying on unique state sources

The doctrine of unique state sources assumes a vitality of state communities that is no longer consistent with the real state of our federalism. Today, public life has been largely captured by the central state. Local public life is frequently identified with prejudice, discrimination, censorship and ideological rigidity. The individual citizen turns to the national authority for protection from these constraints on his or her freedom.

Modern state constitutionalism has been characterized by the simultaneous and reciprocal development of national political authority and individual liberty. The central state has grown at the expense of local forms of public association. The individual has been largely freed from church, family, town, militia and, more recently, unions, schools and political parties. The decline of a vibrant place for the state is only one aspect of this general disappearance of a rich public life at a level below that of the national community.

Increasingly, the state is seen as only an aggregate of private citizens, not an ongoing historical community. Individuals in the United States are extremely mobile. Information, ideas, art and literature are not constrained by geographical boundaries. A national culture supports national political life.

If the states are no longer the locus of a vibrant community experience, then a state constitutionalism that looks to the unique state community for its sources of decisionmaking promises to remain a marginal factor in American public life. No doubt, a good part of the effort to reinvigorate state constitutionalism represents a longing for a resurgence of a rich local community. But the move towards national political identity and the emptying of the intermediate associations of public life are not simply consequences of a passing phase of a liberal judiciary. These are trends that characterize modernity everywhere.

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Interpretation transcends state sources

It makes little sense to rely on the doctrine of unique state sources. It is simply implausible to believe that each state has worked out unique answers to major constitutional issues such as requirements of equality, liberty and due process. The doctrine assumes that the answers to problems of constitutional interpretation can be found within the existing materials of the community's experience, whether text, history or public values. But constitutionalism is a process of interpretation, and it is wrong to think the answers can be found outside of that process. The judge cannot escape the responsibility of interpretation. There is no source that will simply present an answer.

Consider, for example, the constitutional value of equality. It is not possible for a judge, or anyone else, to consider the meaning of equality without drawing on a wealth of experience, arguments and values that range across local, national and even international communities. Each judge tries to construct the best interpretation of equality of which he or she is capable. The inquiry might turn to any number of texts, precedents and historical events, as well as to moral intuitions and principled arguments.

“ State judges offer the variety that has been driven out of the federal courts. To the degree that [state judges’] voices are added to the debate, we should expect a reinvigoration of a democratic order committed to the rule of law. ”

We distort this process if we conceive of it as an effort to put into place a local community’s unique concept of equality instead of that constitutional goal of equality that is a common aspiration of American life. The same can be said of liberty, due process and the other large values of our constitutionalism.

To the degree that the interpretative debate within the federal bench has diminished, a new locus must be found for that discourse. In part, that locus is the academy. In part, it is Congress. Another important part, however, is the state courts. State judges offer the variety that has been driven out of the federal courts. To the degree that their voices are added to the debate, we should expect a reinvigoration of a democratic order committed to the rule of law.

Interpretation as a unifying force in American constitutionalism

State constitutionalism should not, therefore, become another vehicle for removing diverse voices from the national debate. It should not splinter the debate over the rule of law into the babble of fifty different communities. At its best, state constitutional discourse can be directed at the same principles of the rule of law that underlie federal constitutionalism. American constitutionalism is not simply an aggregate of distinct bodies of state and federal doctrine. Rather, American constitutionalism is the interpretive enterprise that seeks to understand the appropriate role for the rule of law in a democratic order.

I have made two arguments that need to be brought together. First: State constitutionalism should free itself from the constitutionalism of the contemporary federal courts, in particular from the doctrine of unique state sources. Second: Constitutionalism is itself an interpretive enterprise; it is not bound to a single truth. These arguments intersect at the point at which state constitutionalism is placed within the larger enterprise of American constitutionalism.

Now the word “constitution” is ambiguous. It can mean the written document, or it can mean the basic values and institutional structures that constitute a particular polity. Not everything in the constitutional context is of constitutional dimension, and not everything of constitutional dimension finds its way into the text. Nevertheless, these two meanings tend to come together once the constitution is understood as the object of interpretation. Interpretation brings to the text an understanding of the larger constitution of the polity.

Of course different courts will reach different conclusions. But there is not one equality in Connecticut and another in Rhode Island. There may be differences in interpretation between the courts of the two states. These are differences, however, that each state needs to engage and discuss, and not simply dismiss as arising from unique state sources.

Interpretive diversity is the ordinary way in which we experience constitutional meanings. Only occasionally does a court speak authoritatively to a constitutional controversy. Even when a court does speak, its pronouncements rapidly become only another text that is in turn subject to interpretation. Nevertheless, every community must have the capacity to stop talking and to act. It must locate within itself an authority to decide.

The authority of state courts to resolve a dispute comes from two distinct sources: state and federal. This is a distinction that matters when we ask not about the interpretation of law but about the authority of an interpretation. A state court that rests its authority on federal power is subject to the power of the federal institutions to coerce compliance with an interpretation with which the state court may disagree. Conversely, a decision that rests on state power is subject to revision by the institutions of the state, including the power of constitutional amendment.

State constitutionalism begins when federal authority ends, not when the use of federal sources ends.

In my view, each state constitution represents, in large measure, an effort to realize within the bounds of a particular jurisdiction a common idea of American constitutionalism. While some states were founded to secure a place for difference from existing political communities, most states were founded not to be different but to realize for their own communities the ideas that are our common heritage. Each state sought to be, and continues to seek to be, the ideal American community.

A state court interpreting American constitutionalism is therefore a powerful counter-force to federal court interpretation of the federal Constitution. The responsibility that arises from their authority gives the state courts a special role in articulating their differences with the federal bench. The explanation of American citizenship is too important a task to leave to the federal courts alone.

If the state courts are freed from the narrow parochialism of traditional federalism, then the meaning of American citizenship is enriched. It is enriched whenever new voices are added to the debate. It is especially enriched because fifty different courts are now talking to each other, as well as to the federal courts, about the meaning of common enterprise. In this way, constitutional federalism will help to bind each of the states to the others.

This federalism can make us a better national community. It need not divide us from each other.

Response

by Justice Denise R. Johnson, Vermont Supreme Court

In her response, Justice Johnson strongly defended the usefulness and vitality of unique state sources in state constitutional jurisprudence. She argued that both in theory and practice, the concept of unique state sources is central to the legitimacy of state court interpretation.

She urged judges not to abandon unique state sources, and outlined a process of judicial decisionmaking that takes into account core values and historical background as well as constitutional text.

Academics develop doctrines and judges decide cases.

That statement is not meant either to trivialize the work of academics or to exalt the work of judges, but to point to the very real difference in perspective that we each bring to this problem of state constitutional adjudication.

The part of Professor Kahn's paper that I agree with most is his point that the state courts are independent interpretive bodies entitled to take issue, under their own authority and within their own jurisdictions, with any constitutional decision of the United States Supreme Court, regardless of whether their own state constitutions provide the same or a different text.

After *Michigan v. Long*, those decisions should be insulated from review. There is nothing result-oriented or unprincipled about agreeing with a dissenting view of the Supreme Court or in taking a wholly different view from any expressed in an opinion of that court. In other words, the Court is handing down those decisions on mere paper, not stone tablets. Neither the Warren nor the Burger-Rehnquist courts have had a lock on the truth.

To the extent that Professor Kahn attempts to empower us by emphasizing that American constitutionalism is a continuing debate over the meaning of the rule of law in a majoritarian political system and that we, as state appellate judges, are just as entitled to engage in that debate as any member of the federal appellate bench, I fully support his views.

I thought this point was self evident. But after I started reviewing the literature, I learned that there is no small disagreement among us about whether and how to approach state constitutional issues. Some courts have asserted that state constitutional issues should be addressed first; and if a violation is found, no further inquiry is necessary. Others believe that state constitutions should be

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consulted only when the state court disagrees with the interpretations of a parallel state provision in the United States Constitution, or only if the parallel state provision has a different wording. Vermont even has a decision that says we should always consult both.

The central role of state constitutions

My view is that we ought to face up to state constitutional issues when they are raised by the parties, regardless of whether we disagree with the United States Supreme Court or not. To see state constitutions as merely supplemental or interstitial is, in my view, an outright rejection of the state's sovereign authority and an abdication of judicial responsibility.

I realize my perspective is short. I came to the bench out of practice, in which I used the state constitution to advance the claims of my clients. And when I started to sit, the state constitutional movement was well under way in Vermont. Nothing about the notion of a state interpreting its own constitution seemed foreign to me.

Others of you, who have a longer perspective and who sat or practiced for years in an era when state constitutional claims were rarely raised by the parties and were considered too insignificant a subject for commentary, may have had a more difficult time ascending to this new seat of power. It may have seemed that reaching for the state constitution was like grasping at straws.

Perhaps this is why the unique state sources doctrine seemed so attractive. Judges may have reasoned that if there was a real, solid textual or historical ground on which to base their disagreement with the new conservative direction being taken by the Supreme Court, then it was okay to do so. It was a rationale that was more legitimate than mere disagreement.

In my own state, the late Justice Thomas L. Hayes issued a virtual call to arms in the *State v. Jewett* case in 1985. In that opinion, Justice Hayes called upon litigants and judges to develop an

independent state constitutional jurisprudence based on text, historical materials, economic and sociological materials, and the decisional law of states with similar constitutional clauses. He, too, was concerned with creating an approach to state constitutional adjudication that commanded respect and that had legitimacy.

State sources are legitimate

Although a wealth of decisions on state constitutional issues is now reported, one still finds articles being written that go to the very legitimacy of a state court's right to interpret its own law—like Professor Kahn's article.

We are still at a place where the legitimacy of the state constitutional movement is being debated.

This brings me to my disagreement with Professor Kahn. I disagree that state judges should be anxious to reject unique state sources. I do not think they will do so. I disagree that only by rejection will we engage in the kind of national constitutional debate that will save state courts from the dustbin of legal history. Rather, I think we will reach the same result Professor Kahn desires whether we reject or rely on unique state sources simply by engaging in the enterprise of state constitutional adjudication.

Let me return to my point that academics develop doctrines and judges decide cases. In my experience, judging is a very intuitive process. Judges do not use a doctrinal approach to deciding cases, especially involving significant constitutional rights guaranteed by the Bill of Rights. Their approach to a case begins with the facts, with answering the question of whether something happened in this case that offends their sense of justice or their sense of the core values embodied in our constitutions as we understand them.

In other words, judges ask themselves: "Where is the balance here between individual and government in this case? Has it unfairly tipped in one direction or another?"

Our answers, as I think all of us know, are influenced by a lifetime of personal experiences, our view of the role of government in society and whether we place ourselves in the majority or the minority camp. In other words, by our world view, if you will. And once we reach the decision that our core values are either offended or not, the last thing we are likely to do is rule out a unique state source that might support the ruling we feel is correct. Judges will and should use whatever is legitimately useful to support their rulings. And what could have more legitimacy for a state court than a unique state source? I cannot think that it is philosophically wrong to take that approach.

“ I think it is unlikely that judges who run for office will want to be seen as divorcing themselves from unique state sources. They will not be campaigning on the ground that one state is just like another. ”

Moreover, there will be occasions, despite our core values, when a unique state source, whether text or other materials, really provides the answer. In those cases—and they may be rare—we are compelled to ground our decision on the unique state source, and indeed may be directed by it.

I am thinking in particular about bail, which has been the subject of many constitutional amendments. In Vermont, an amendment process was initiated last year. If it passes, judges will be allowed to put the accused in jail if he is considered dangerous to the public. This will overrule several recent cases holding to the contrary.

Now, bail appeals will not be a situation in which we will be able to consider ourselves unlimited by text, regardless of whether our core values about the presumption of innocence are offended. I do not really think that Professor Kahn would disagree with the use of unique state sources when they are directive.

Certainly judges in those states with recently adopted or significantly amended constitutions for which there are modern source materials and legislative history will not embrace the notion that they should be unlimited by text or the intent of the framers.

Although I am not an elected judge, I think it is unlikely that judges who run for office will want to be seen as divorcing themselves from unique state sources. When their constitutional

opinions are scrutinized in a campaign, my guess is that they will want to represent themselves as linked, not separated, from their states and constituents, and they will want to portray themselves as specifically suited to and understanding of their state's unique cultural history and values. They will not be campaigning on the ground that one state is just like another.

State constitutionalism is not limited to state sources

Having said that unique state sources should not be rejected as the ground of decision, I want to acknowledge Professor Kahn's point that in states where the historical materials are nonexistent or unreliable, this approach is something of a problem.

In Vermont, with a constitution that dates from the late 1700s and with what some view as questionable historical materials, lawyers and judges are faced with a formidable task in attempting to divine the meaning of various provisions. We do not, in fact, get good briefing. But when the text and historical materials do not shed light on an issue, I do not think this is any reason for abandoning the enterprise.

This is a particular place in which Professor Kahn's approach may be used. I think in that situation, the court has to be intellectually honest about the fact that the answer is not provided by the intent of the framers and the words of the document, and then proceed to a discussion of what really drives the result.

Let me give an example. In *State of Vermont v. Robert Kirchoff*, [156 Vt. 1.] an open fields case decided by the state supreme court in Vermont on constitutional grounds, one can see three different interpretive approaches. The majority comes to the conclusion that Article XI, which provides that people have a right to hold themselves, their houses, papers and possessions free from search or seizure, is not meaningfully different in language from that of the Fourth Amendment, which uses the word "effects" instead of "possessions." The majority disagrees,

however, with the rationale of the U.S. Supreme Court's decision in *Oliver v. United States*, [104 S.Ct. 1735 (1984).] holding that open fields beyond the curtilage are not subject to the protection of the Fourth Amendment.

In rejecting the notion that different words compelled the result, Justice Morris writes:

We strive to honor not merely the words, but the underlying purposes of constitutional guarantees, and to give meaning to the text in light of contemporary experience. Our duty is to discover and protect the core values that gave life to Article XI.

The majority opinion is largely a discussion of the development of federal law preceding *Oliver* and why the majority chooses not to follow *Oliver*.

A concurring opinion accuses the majority of being unduly concerned with federal constitutional law and not enough concerned with the historical and philosophical background of the ideas expressed in the Vermont Constitution. The concurrence emphasized the text of Article XI as meaning something different from the Fourth Amendment, drawing support for its rationale on its historical setting.

At the time the Vermont Constitution was adopted, Vermont had several land disputes with the state of New York. One of the things Vermonters did not like was that New York used to send law officers to invade the lands of the people of Vermont. This concern was reflected in the preamble.

So the concurring justice relied more generally on the differences between the United States Constitution and the state constitution and found a special commitment to liberty in the Vermont Constitution because of such principles expressed as a prohibition against slavery, which of course did not appear in the U.S. Constitution.

The dissenting opinion, a real stinger, focuses again on the meaning of the Vermont Constitution, but comes to a different

interpretive result. It basically focuses on the language of effects and possessions and reaches the same results as Oliver.

There you have three grounds for decision: core values, text and historical background, and text and invective. All made use of unique state sources, but each interpreted them differently.

The majority opinion, I think, does exactly what Professor Kahn would like us to do when we encounter issues involving the grander concepts of Anglo-American jurisprudence, and that is to find that the concepts are more important than the words in which they are expressed. But I do not think the majority opinion rejected the unique state sources because they were too parochial, but because it did not find them compelling.

Constitutional adjudication is a dynamic process. It is not formulaic. It ought not to be subject to *per se* rules. Whether a unique state source will be the appropriate ground for decision should be subject to a case-by-case analysis. It is at least the starting point.

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I think the most important lesson we can draw from Professor Kahn, however, is that we do not need a unique state source to justify our differences with the interpretation of the federal Constitution. The concept of sovereignty gives state courts the right and the justification to disagree.

Developing a viable state constitutional jurisprudence

Resting a state constitutional holding on a unique state source will not, in my opinion, turn every state away from every other. We will be turned toward each other, partly as a natural consequence of some of the points that Professor Kahn makes—that is, inadequate or unreliable source materials in states with older constitutions. But also, we do not have fifty unique state constitutions. The old state constitutions are not that different from each other. Vermont's is based on Pennsylvania's, and there are a number of states that have similar provisions. But even when they are different, interpretation does become more important than words.

Even when holdings rest on unique state sources, they still make a contribution to what might be termed the common law of state constitutional adjudication, because state courts look to other state courts—and federal courts, for that matter—in cases that have faced similar issues and similar fact situations. The reasoning of these decisions provides guidance on core values, even when the language differs. Inevitably, there will be a blending, no matter how unique we consider our own states.

Right now we are acting without large bodies of state constitutional precedent, which is one of the reasons that text and historical data remain central to the inquiry. It may well be that as state courts develop a body of constitutional law, and judicial meaning is added or subtracted from text, then original sources will have less significance than accepted judicial interpretation of text.

Finally, on the grand concepts, I think our core values drive us to decision. And this is ultimately what will forge an American constitutional law.

We may sometimes use unique state sources to get there, but I think we are already on the mission that Professor Kahn wishes us to undertake.

USING STATE LAW TO PROTECT FEDERAL CONSTITUTIONAL RIGHTS*

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Professor Akhil Reed Amar
Yale Law School

Professor Amar proposed the creation of “converse-1983” remedies to provide state law causes of action for citizens whose federal constitutional rights have been violated by federal officials. He suggested that such causes of action could be achieved through state constitutions, legislation or judge-made common law. He urged state judges to consider this method of state court action in the application of federal constitutional rights.

By re-examining “converse-1983” laws I hope to make you aware of a dramatic set of progressive actions that you as state judges may take in the service of constitutional rights. As shorthand, you might call the specific proposal “converse-1983.” The basic idea is that state law—whether state statute, state constitutional provision or state common law, state judge-made law—can provide a remedy, a cause of action for damages against federal officials when they violate the federal Constitution.

Whereas 42 U.S.C. Section 1983 provides a *federal* law cause of action for federal constitutional violations perpetrated by state officials, a converse-1983 law would provide a *state* law cause of action for federal constitutional violations perpetrated by *federal* officials. Such a converse-1983 law would invoke and invert the logic and language of Section 1983. No state has adopted such a converse-1983 law. But I believe states can and should adopt these laws.

**Professor Amar’s remarks were based on a paper prepared for the Forum. The paper was also delivered, in September 1992 as the 36th Annual Coen Lecture at the University of Colorado Law School, and published in the University of Colorado Law Review, Volume 64, Number 1 (1993).*

***Bivens* and beyond**

“ Two hundred years ago there was no case such as *Bivens v. Six Unknown Named Federal Agents*. If federal officials violated the Fourth Amendment, the victim sued those officials in tort, in trespass. But it was state law that got you into court. I suggest that this continues to be true today. ”

Two hundred years ago there was no case such as *Bivens v. Six Unknown Named Federal Agents* [403 U.S. 388 (1971).] If federal officials violated the Fourth Amendment, the victim sued those officials in tort, in trespass. They would plead federal empowerment in the Supremacy Clause, arguing that “the Supremacy Clause gives us a right to do this because federal law trumps state law.” But it was state law that got you into court. I suggest that this continues to be true today.

In a variety of contexts, state law can provide a cause of action, whether you are in federal court or state court, when federal officials have violated your federal constitutional rights.

The role of judge-made common law in the enforcement of federal constitutional rights is highlighted by the *Bivens* case. As *Bivens* reminds us, courts—state courts no less than federal courts—can, pursuant to their common law function, infer private causes of action for violations of legal rules laid down in statutes and constitutions.

In the early 1970s, the U.S. Supreme Court recognized a cause of action directly under the Constitution in *Bivens*. But *Bivens* could be eliminated tomorrow. The state courts would then be the ultimate bulwark. State law can help provide a remedy if *Bivens* goes by the board.

The point is that state law can provide a cause of action when federal officials violate the federal Constitution. That law could be in a state constitution. It could be in a state statute. You, as state judges, can do this too, pursuant to your common law function.

For 200 years, the most traditional thing judges have done is infer causes of action directly under legal norms, whether statutory or constitutional. That is what *Marbury v. Madison* actually does. State courts infer causes of actions directly under state statutes all the time. They infer causes of action directly under federal statutes, although there are some tricky preemption issues there. And they can also, as they have historically, infer causes of action directly under the federal Constitution. *Bivens* says so. But if *Bivens* fails, for one reason or another, state courts are going to be what we have left.

Reasserting the role of states in the federal system

Why do we have a federal system? Why do we have states? I think the justification that you think of most is the one associated with Justice Brennan. We have states because they provide a double source of protection. The federal Constitution protects us when states violate constitutional norms and the rights of their citizens. But in addition, state constitutions can protect us against those very same states. So there are two causes of action, two sets of laws you can invoke when a state government violates the Constitution.

This is important. That is the spirit in which most of the literature has proceeded and in which most of you have been thinking. Protecting your citizens against state government is important, but it misses the core justification for federalism at the founding, which is states protecting their citizens against the federal government when the federal government violates the Constitution. That is where the debate needs to proceed.

I want to redirect the focus. When you see the Tenth Amendment in the same Bill of Rights as the rest, you start to see that the Tenth and the other amendments show that states' rights and individual rights are both important in keeping check on the federal government.

The symmetry, the double protection of federalism, is not only, indeed not even centrally, Justice Brennan's argument that we have states and state constitutions to protect us against states. The symmetry is that states can help protect us when the federal government is acting egregiously.

I would not want us to lose sight of this original vision which retains its vitality, the vision of states protecting us against federal unconstitutionality.

“ The symmetry, the double protection of federalism, is not even centrally Justice Brennan's argument that we have states and state constitutions to protect us against states. The symmetry is that states can help protect us when the federal government is acting egregiously. I would not want us to lose sight of this original vision. ”

The case for state-created causes of action

The specific proposal is the idea of a converse-1983 law. Just as Congress can provide a cause of action for damages when states violate the federal Constitution, so states—either by statute or judge-made law, inferring causes of action directly under the Fourth Amendment—can provide causes of action when federal officials violate the federal Constitution.

Even if *Bivens* goes by the boards, there is going to be a way for the Fourth Amendment to be vindicated. That is for you to use state law, trespass law. But I want to go even further, because state trespass law might not go as far as the Fourth Amendment does. So a converse-1983 action is designed to fill that gap between ordinary state trespass law or tort law and what the federal Fourth Amendment prevents federal officials from doing.

Even if it stays on the books, *Bivens* is limited in ways that are not relevant if state law provides the cause of action. Just last term, for example, Justice Antonin Scalia noted that the Court had recognized many immunities in *Bivens* cases. The Court created this cause of action in *Bivens*, but limited it by immunities. Justice Scalia said, in effect: “We created it. What we can create, we can destroy.”

The Supreme Court limited the quantum of damages in *Bivens*. But that minimum, that floor, was not designed as a ceiling. It did not mean that states could not go beyond that.

There are going to be some limits on what states can do. I do not think states can provide a million dollars of presumed damages any time there is a Fourth Amendment violation.

State law can provide a cause of action against federal officials when they violate the federal Constitution: not when they violate a federal statute, because there are serious preemption problems there; not when they violate the state constitution, because unless they have also violated the federal Constitution, the Supremacy Clause protects them. The only way you can hold them liable is if they are *ultra vires* because they violated the federal Constitution.

That state law can be enforced in any court, federal or state. Federal courts are going to hear appeals from your courts, and a lot of these cases are going to be removed. Your role is to provide the cause of action itself that helps get someone into court. Without that cause of action, if *Bivens* goes by the boards, there is no way to get into any court.

State law can do this. Pursuant to your common law function, you have the power to recognize substantive legal norms. And in particular, you have a special obligation and duty, under the Marbury principle, to infer causes of action when statutory or constitutional norms have been violated.

Response

by Justice Lloyd Doggett, Texas Supreme Court

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Justice Doggett argued that insurmountable obstacles of immunity and preemption make the notion of converse-1983 causes of action impractical and unrealistic, maintaining that all such actions would be removed to federal court. He also reiterated the argument that states do have a unique community reflected in their constitutional history and jurisprudence, and suggested that state courts can play a significant role in protecting individual rights through interpretation of state constitutions.

I think my colleagues would be the first to say that you will not find anyone on the Texas Supreme Court who is likely to be more receptive than I to a new idea to vindicate individual rights, but I have some serious questions about this approach.

I agree in principle that there ought to be a way in state courts to vindicate the rights of state citizens who are injured by federal officials. But I think there are some very serious problems in how that is accomplished, and particularly with this converse-1983 approach.

I also believe that the general idea that really comes out with the enthusiasm that Professor Amar brings to this topic—that we have a shared responsibility as state courts to work continually to enhance the constitutional guarantees protecting the liberties of our citizens—is a very critical one. Both in his paper today and in his 1987 *Yale Law Journal* article, he has outlined most of the hurdles that the converse-1983-type action he advocates would encounter. He does not view getting over those hurdles as being Olympian feats. I view them as being insurmountable for even the most agile athlete.

One such hurdle is removal, since every converse-1983 action is going to involve a federal question. He indicates in his paper that, as a practical matter, a high percentage of these converse-1983 actions would be removed from our courts to federal courts.

If you substitute “all” for “high percentage,” I agree. Indeed, one need only look to the *Bivens* case that notes that the policy in the United States Department of Justice at the time was to remove every single 1983 action from state to federal court. I believe the policy still remains true in my home state. When a Texas official is the subject of a 1983 action, the Texas attorney general removes the case from state, to federal court because he believes the state will find an even more favorable forum in federal court than in the state court.

Professor Amar’s law review article says quite specifically that the role of the states is solely to provide victims of constitutional wrongs the chance to have their federal rights defined and fully protected in federal courts. If that is the objective—and I think it is a laudable objective—I am not sure that the states have a great role to play. It seems to me that the better course, rather than to do it indirectly by filing an action in the state and having it removed to the federal court, is to ask Congress to amend 1983 to include federal officials.

Perhaps the greatest obstacle, as acknowledged in his writings, is the improbability that the current federal judiciary will countenance state courts deciding the fate of federal officials. The purpose of any Section 1983-action—converse, reverse, the original—is to remedy a denial of constitutional rights. As I think

most people would concede, the litmus test for selecting judges for the federal bench during the last decade has been more a commitment to the New Right than to the Bill of Rights. With so many judges selected on that basis, I do not believe that today's Supreme Court would look with favor on the concept of the states holding federal officials to a higher standard than perhaps the federal courts would themselves do.

“ I do not believe that today's Supreme Court would look with favor on the concept of the states holding federal officials to a higher standard than perhaps the federal courts would themselves do. ”

Indeed, Professor Amar indicates that there is long-standing U.S. Supreme Court precedent that precludes states from entertaining converse-1983-type actions in a habeas context. Why, then, would a federal judiciary that has such a tepid commitment to civil liberties in the first place approve an identical action to allow people to recover monetary damages? He expresses faith that the Supreme Court would share his reading of *McCulloch v. Maryland* and comments that “the Supreme Court will find it hard to distinguish scores of cases from the eighteenth and nineteenth century enforcing state law without recognizing any immunity.”

That may be true. But scores of cases from recent decades of the twentieth century do not seem to pose much of a problem for this Supreme Court. One need only turn to the “Endangered Precedents” list in Justice Thurgood Marshall's final dissent to understand that with this court, well-reasoned precedents have often constituted little more than a speed bump on the fast track to achieve a desired result.

The place of *Bivens*

Justice Brennan's writing in the *Bivens* case in 1971, as Professor Amar has said, may be gone tomorrow. It may be little more than a speed bump, though certainly I share his hope that it represents much more.

Bivens upheld a civil remedy against federal officials. Though it has been somewhat criticized and narrowed, later interpretation has centered on giving a monetary damage remedy in federal court under *Bivens*. Each time that a *Bivens*-type action has been approved, there has been a kind of 1983 counterpart analysis.

Since 1983 actions can be heard—indeed, under a 1990 Supreme Court decision, *must* be heard— by state courts, I do not see an existing barrier to someone filing a *Bivens*-type action against a local FBI agent or the IRS or the Immigration Service in state court. However, I do not think they would get very far, because that case is going to be immediately removed. Still, they already have the option of doing it.

I think, of course, that what happens to *Bivens* is not really within our control as state jurists. What is within our control is what happens with reference to state constitutions and state officials. When you get right down to it, a strong case has not been made that our citizens are subject to greater infringement from federal officials or that there is a danger from which they require protection that is greater on the federal front than on the state and local front. Just the sheer size of the numbers of state and local officials and their daily interaction with our citizens suggests that, if anything, the need is probably greater at the state and local level, in terms of both the potential and the opportunity for abuse of citizens.

There are, of course, states that have still not come to grips with the very basic question that came up in *Bivens*: whether, if you have a violation of state constitutional rights, a court can do anything about it, or whether the judiciary must await enabling legislation before providing a remedy for deprivation of a fundamental state constitutional right.

I would commend the view of Justice Harlan, expressed in his concurrence in *Bivens*, that when a constitutional right is denied, a court is empowered to redress that violation.

Rather than attempting a federal legislative model, my concern is not so much converse-1983 but reverse-1983, and a reverse of many other liberty gains within the federal courts. I think we have to take advantage of the fact that we have not one Bill of Rights, but fifty-plus-one bills of rights.

“Don’t Mess with Texas”

I take exception to the comments Professor Kahn made this morning that there is not really any “state community of interest.” Maybe that is true in Connecticut, but I would ask him to come to Texas.

I live in a state where emblazoned on T-shirts, on bumper stickers, on billboards all over the state is the slogan “Don’t Mess with Texas.” It is a state where a great civil libertarian, my dear friend the late John Henry Faulk, described in his monologues the happy days when Lyndon Johnson was in the White House. Though there was that war in Vietnam and riots in the street, what a comfort it was to all of us in Texas each night as we went to sleep to have a president in the White House who did not speak in a foreign language.

I think there are some unique aspects not just of my state, but of many of your states, and there is some identity within states. But as we look at this question of state constitutionalism, this is not just the rebellion of the country bumpkins or the provinces against the center. Rather, it is fundamentally the notion that the states can be a source of new ideas.

What Justice Brandeis wrote of legislative experimentation in the states sixty years ago is now particularly applicable to state judicial action—the laboratory of democracy exists in the courthouses of our fifty states as well as in their legislatures. Successes in one state can be attempted and improved upon in other states.

Surely, as Professor Amar indicates, you can have controlled experiments from the center and do one thing in Michigan and one thing in Mississippi and one thing in Texas. But the true experimentation comes when each area has the opportunity and preserves for itself the power to make its own decisions, to do its own thinking. The big battle we just had in Texas over *Davenport v. Garcia*, which is similar to the battle that New York had in *People v. Scott*, [587 NYS 2d 844 (1992).] is one where very strong words were exchanged, where justices on state supreme courts were saying: “We can’t do this. We’ve got to do just what the federal courts do.” Fortunately, in both Texas and New York, this lock step approach was repudiated.

“ As we look at this question of state constitutionalism, this is not just the rebellion of the country bumpkins or the provinces against the center. Rather, it is fundamentally the notion that the states can be a source of new ideas. ”

“ We talk about a floor under the federal Bill of Rights and a ceiling provided by the states. With that federal floor in apparent free fall, the place where the exciting legal questions of our day will be resolved is in our state courts. I think we can take a great deal of pride as state judges that in our courthouses across the country we will have an opportunity to deal with the tough issues of the next century. ”

I think the concept of state constitutionalism is not yet sufficiently firm in many of our states, despite the leadership of jurists such as Hans Linde, Stanley Mosk and Christine Durham. We must start at home to address this issue before turning to the invention of new remedies for alleged misconduct of federal officials. In interpreting our state constitutions, we state judges should be neither unduly active nor deferential; rather, we should be independent and thoughtful in considering the unique values, customs, history and traditions of our citizens. Good state constitutionalism is neither purely liberal nor conservative; it is only responsible jurisprudence.

We talk about a floor under the federal Bill of Rights and a ceiling provided by the states. With that federal floor in apparent free fall, the place where the exciting legal questions of our day will be resolved is in our state courts. I think we can take a great deal of pride as state judges that in our courthouses across the country we will have an opportunity to deal with the tough issues of the next century. In the process, we can contribute to the national jurisprudence, and hopefully to a future reawakening to individual liberties here in our nation's capital.

THE VITALITY OF STATE CONSTITUTIONAL TRADITIONS: THE JUDGES REFLECT

The theme that elicited perhaps the most fervent response from the judges in the breakout discussions following the papers was the vibrancy and unique character of the constitutional traditions they found in their individual states. Whether the constitutions they described were old or new, whatever corner of the nation they were from, and whatever local interests they reflected, the judges made it clear that a deep-rooted sense of state identity shaped the nature of their constitutional jurisprudence. They were proud of their identity and history. The following excerpts from the small-group discussions illustrate the strength of this feeling, which was shared by judges from virtually every state represented at the forum.

In 1973–1974, Louisiana had a constitutional convention. We have records of the convention, what was said, what was argued and why the language is there. If the Supreme Court of the United States today says, “Miranda was a mistake. You policeman no longer have to give these warnings,” it wouldn’t change the law in Louisiana because it’s part of the Louisiana Constitution. We may be the only state that has the Miranda requirement in our state constitution. We also have the phrase “right of privacy.” We frequently try to use the Louisiana Constitution to avoid some of what we read out of Washington.

■ ■ ■

Our state, Kansas, came into its own right in 1861 as part of the focal point of the Civil War. So our state had a recognition of individual rights when it was formed, and we continue to follow that in our decisions. In fact, in many of our early decisions before the Thirteenth, Fourteenth and Fifteenth Amendments, the court traditionally said we grant greater rights than the United States Constitution. But we also recognized that it did not include women and Indians in state court.

We're also traditionally from the Bible Belt. One time, we had more churches per capita than any other state. So we tend to color our decisions with our local culture. We tend to view some of the sister state decisions as being just as weird as the U.S. Supreme Court decisions.

■ ■ ■

We have an 1859 case in my state that said that under the state constitution an indigent defendant in a criminal case is entitled to counsel at public expense. I would assume that if the United States Supreme Court would overrule Gideon v. Wainwright, [372 U.S. 335 (1963).] maybe it would be good somewhere, but it wouldn't be good in my state, where our supreme court has said that the state constitution requires it.

■ ■ ■

Maryland is one of the thirteen original states, and most of our rights antedate the federal rights by thirteen years. There has been a healthy jurisprudence in Maryland since 1776 about some of these rights. Some of them are in our constitution. Some of them—for example double jeopardy—are a matter of Maryland common law. That's another dimension you might want to think about.

The reliance on state law is not at all foreign to our state jurisprudence. Lawyers in Maryland have not been averse to raising state law. I think Brennan's article, at least in the criminal field, has made them more aware, but there's nothing new.

Our highest court has in some areas interpreted Maryland law differently and more expansively than the feds have, going back twenty, forty, fifty years, particularly in double jeopardy and in some instances in confessions. They've been generally reluctant to do that, however. It has been episodic.

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I'm from Texas. We have a unique state source in that we were the only state to join the Union coming in by treaty as a sovereign republic. We have a bill of rights that was written immediately after invasion and occupation by a foreign army. The granting of rights is an affirmative grant to the people, rather than a prohibition against the state. They are strong. There were times when we had been paying taxes to support the Catholic Church, even if we were Baptists. We thought about unreasonable search and seizure because we could have Mexican soldiers quartered in our houses.

These things in our Texas history and tradition give us a unique state source that is as strong as horseradish.

There is a saying: "I shook the hand that shook the hand of Sam Houston." As a boy, I could actually do that. So our frontier traditions and experiences are very raw.

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We're a bit different in Hawaii from other states, if only because we're so new. We achieved statehood in 1959. The constitution is not an old document. It's been revised through periodic constitutional conventions. And there are great gaps in case law.

Very early on, our court declared its independence from federal case law, particularly in criminal law and issues of criminal procedure, and indicated that so long as we interpreted our constitution to provide at least as much protection to the individual as the United States Supreme Court, we were unconstrained in according greater protection. That proposition was first articulated by our court in 1967. That preceded Justice Brennan.

As a result, the criminal jurisprudence of the United States Supreme Court in construing the federal Constitution has become largely irrelevant to us. In Hawaii, it's as if the Warren Court never left. We rely almost exclusively on provisions of the state constitution in reaching our results, particularly because they generally diverge from results reached by the United

States Supreme Court, especially in areas of search and seizure and rights to privacy.

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I may be parochial, but I think we have a rich and lively and intellectually stimulating community life in our [midwestern] state which is fully capable of supporting our state constitutional decisions.

I felt that maybe Professor Kahn was rejecting the notion of state sources because he somehow didn't think they were up to the task. In our state, at least, we think they're quite up to the task. Even though we have the same difficulties that many other states do in finding historical scholarship, we've tried to reach more broadly. I do agree with him in that regard: we should look to things that have not typically been constitutional sources.

■ ■ ■

Our original [California] constitution was written both in English and Spanish, so it had characteristics that other states did not have. There is a uniqueness about our constitutional provisions. Our state has a specific guaranteed right of privacy, for instance, that you won't find in the federal Constitution. As a result, our law developed differently. We have community property, which only a few states have. Water rights are particularly important because of the arid character of our state.

■ ■ ■

We're not a melting pot. I think we're a fruit salad bowl, and if you take lemon juice and put it over apples, it will keep the apples from turning black, but if you put that same lemon juice over bananas, it will turn them black immediately. That's the position we're still in today.

I don't see us as America yet. There are too many divergent forces in this country, each having its own history, and each wanting to express its individualism. And that individuality I think comes through the state system.

We recently had to decide a confrontation-clause case. Is it appropriate under the constitution to permit a six-, seven-, eight-year-old female child to go on closed-circuit television [to give testimony] out of the physical presence of the defendant? The United States Supreme Court says yes. We said no. Our constitution demands face-to-face confrontation. What's wrong with that? I don't think there's anything wrong with each state applying its own principles of rights consistent with the will of the populace.

■ ■ ■

THE FUTURE OF STATE CONSTITUTIONALISM: THE CLOSING PLENARY

At the plenary session that concluded the forum, the six Roscoe Pound Fellows who led the small-group discussions summarized the views of the judges on the central issues of state court constitutionalism, presenting consensus when it emerged and also noting divergences of opinion as they occurred. Most differences focused on the question of where to look first—federal or state constitutional law—when confronted with a state constitutional issue. The question of how a judge may arrive at a decision different from that of a federal court when the language interpreted is identical in both the federal and the state constitution also elicited some fragmented answers.

Aside from these areas, however, the discussions yielded notable consensus on the central themes of the forum. There were four major points of agreement among the judges:

- **State courts have the authority as well as the duty to develop their own state constitutional jurisprudence.** Although in the past, state courts have relied upon federal jurisprudence in the area of individual rights, they are not bound to march in lock step with the federal courts.
- **Federal constitutional law and jurisprudence provide a floor, as far as individual rights are concerned that state courts cannot go below.** State courts, however, can provide greater rights and those greater rights must prevail when they are based on state constitutional grounds.
- **States are a source of vibrant community experience.** Unique state sources are and should be the bedrock of state constitutional interpretation.
- **Lawyers have been slow to bring properly framed state constitutional issues to state courts for decision.** A great deal of work needs to be done to raise the consciousness of lawyers so they become better informed and better trained in articulating them. In addition, law schools

should be encouraged to make a serious effort to teach state constitutional law. As one judge said: "Perhaps one of the greatest benefits of this conference might be that we go back to our respective states and discuss this with the law schools, the local bar associations and our judges' conferences."

These views were so strongly held by the judges that it seemed certain that they would be critical long-term factors shaping the future course of state constitutionalism.

■ ■ ■

During their discussions, the judges also speculated on the role state courts might play in developing a new form of American constitutionalism, the concept propounded by Professor Kahn. Although the judges vigorously rejected his call to turn away from unique state sources, they envisioned a dynamic process in which states would maintain their identity while learning from one another.

New technology will make rapid and extensive communication among state courts a reality. A data bank was suggested as a way of keeping judges informed about ways in which other states interpret similar constitutional provisions. "I'd like to see what they've done with it," one judge said. "It may be that they decided it in a way with which we would not agree, but I would like to have the benefit of that wisdom and judgment."

State courts are becoming increasingly eclectic, it was suggested. "We're really looking for a rationale we can adopt to move to a certain point," commented a judge from a midwestern state, "and we look to all the states. I think the biggest thing encouraging the use of decisions of other states is the modern way [of] researching We can now find these decisions quickly."

But some judges predicted that getting together would not be easy. One described the multiplicity of state court interpretation as a battleground:

I think that as the movement progresses, we are headed for some difficult sailing. Because despite the fact that Professor Kahn sees the state courts talking to each other and perhaps eventually coming to some national consensus, I think that for a long period of time we're going to have fifty states battling each other. It's almost inevitable that as we wrestle with this new authority, and as it takes hold, there's going to be an awful lot of uneasiness.

Another judge, however, said:

I don't think it's a concern that the states turn against one another. I believe in federalism. I believe that state judges have an obligation to interpret their constitution. To the extent [the states] are unique, then their constitutional jurisprudence should reflect that uniqueness. If there are different solutions to common problems amongst the fifty states, that's what federalism is all about.

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As they did at every point, judges returned to the tenacity of individual state character. As one participant said:

On our court, we see our role as writing and interpreting for a different constituency from the United States Supreme Court. The Supreme Court writes for a very broad constituency and deals with problems that have probably the lowest common denominator. We think that in our small state we can perhaps have a little more play in the joints, give a smidgeon more freedom here and there, because we're not writing for the national scene.

"I think the states now are closer legally than we have ever been in the past," one judge commented. "Sure we're going to have differences. You're going to have regional differences. What's wrong with differences?"

■ ■ ■

As they reflected on the larger issues informing the future of state constitutionalism, a common goal enunciated by several judges was the prospect of transcending the political agendas and ideological labels that some observers see as having to some extent marked the movement in the past.

“I don’t see any way that one can properly say that state constitutionalism is either liberal or conservative,” one of the judges noted. “It does not necessarily ensure either liberal or conservative results to the extent that those terms have much meaning. I see the whole thrust of state constitutionalism as one that is good jurisprudence.”



APPENDIX



APPENDIX

Opinion of Justice Lloyd Doggett in *Davenport v. Garcia*, Texas Supreme Court, June 17, 1992

This opinion, which is excerpted below, exemplifies a recent trend in the assertion of state constitutional authority, one that was central to the discussions among the judges at the forum. In Justice Doggett's opinion, the decision, overturning a gag order issued in a civil case, is based solely on the state constitution, which is held to provide greater rights of free expression than the First Amendment of the U.S. Constitution.

The concurrence by three of Justice Doggett's colleagues, criticizing his method, also illustrates the fact that state court appellate panels throughout the country are frequently split in their notions of what approaches are appropriate to state constitutional jurisprudence.

The full text of the opinions, including citations omitted in the following excerpts, may be found at [834 S.W. 2d 4 (Tex. 1992)].

In this *mandamus* proceeding, we address the ability of a judge to suppress speech with a "gag order." A guardian *ad litem* was appointed to represent 213 children among numerous persons who brought suit concerning toxic chemical exposure at a dump site.

At a hearing, the presiding trial judge, on her own motion . . . instructed the *ad litem*, parties, and counsel to "cease and desist any discussion of this case outside the court hearing" and prohibited any "communications with any other lawyer or discussion at all about the matters that have transpired in this case."

The gag order was reiterated in a written protective order that prohibited any public comment or discussion of the litigation with anyone not involved in the "necessary course of business of this case." Counsel were also directed to inform their clients of the order's applicability to each of them. The sole reason for this sweeping injunction was the finding that conflicts between counsel and the parents of the minor children were resulting in miscommunications with the parents and with the media and general public.

We consider whether the court's gag orders violate the guarantee of free expression contained in Article I, Section 8 of the Texas Constitution, which provides: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege...."

From the outset of this state's history, freedom of expression has been a priority. Although the 1836 Texas Independence Constitution in general closely tracked the wording of the U.S. Constitution, different language was chosen to protect free speech. Rather than a restriction on governmental interference with speech as provided by the First Amendment, Texans chose from the beginning to assure the liberties for which they were struggling with a specific guarantee of an affirmative right to speak. This language became the model for all of Texas's subsequent state constitutions.

Consistent with this history, we have recognized that our free speech provision is broader than the First Amendment. Under our broader guarantee, it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs. This comports with Article I, Section 8, which both grants an affirmative right to "speak ... on any subject" and holds the speaker "responsible for the abuse of that privilege." The presumption in all cases under Section 8 is that prior restraints are unconstitutional.

Since the dimensions of our constitutionally-guaranteed liberties are continually evolving, we build on our prior decisions by affirming that a prior restraint on expression is presumptively unconstitutional. With this concept in mind, we adopt the following test: A gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.

Assisting our analysis are federal cases that have addressed prior restraints. The standard enunciated in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), does not, however, sufficiently protect the rights of free expression that we believe the fundamental law of our state secures. We adopt a test recognizing that Article I, Section 8 of the Texas Constitution provides greater rights of free expression than

its federal equivalent. We are fully aware that a prior restraint will withstand scrutiny under this test only under the most extraordinary circumstances.

The first requirement of our standard advances from the prior holdings of Texas courts that only an imminent, severe harm can justify prior restraint, and in the context of gag orders, that harm must be to the judicial process. The second part of the test is intended to ensure that no alternative exists to treat the specific threat to the judicial process that would be less restrictive of state speech rights. While this element is shared in common with the ruling in *Nebraska Press*, we view the federal test announced therein as too permissive toward prior restraints and decline to adopt it. The federal approach offers only limited guidelines concerning gag orders such as that involved here, which restrict access to information by prohibiting individuals from discussing a case. Such orders should be treated like any other prior restraint.

Applying this test to the facts of this case, there can be no doubt but that the gag orders violated the Texas Constitution. The orders fail to identify any miscommunication that the trial court may have perceived, do not indicate any specific imminent harm to litigation and offer no explanation of why such harm could not be sufficiently cured by remedial action. For instance, had any miscommunication stemmed from improper statements by the relator, as implied by the court, the proper response may have been to sanction her conduct.

By stopping not only the purported miscommunications but any communications, the broadly worded injunction certainly fails the second part of our test. While a gag order may be expeditious in producing a settlement, decisions to terminate litigation based on lack of information can facilitate injustice. We conclude today, as we did over seventy years ago in *Ex parte Tucker*, 220 SW 75 (Texas SupCt 1920), that the judicially imposed gag orders in question are void.

Having found that the trial court's gag orders violate the Texas Constitution, this court need not consider whether the U.S. Constitution has also been violated. We reaffirm our pronouncement that our constitution has independent vitality, and this court has the power and duty to protect the additional-state guaranteed rights of all Texans. We decline

to limit the liberties of Texans to those found in the federal Constitution when this court is responsible for the preservation of Texas's own fundamental charter.

When a state court interprets its state constitution merely as a restatement of the federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.

While reflecting local concerns and assuring local accountability, reliance on our own constitution allows Texas to have a meaningful voice in developing this nation's jurisprudence. This court has a growing responsibility as one of fifty laboratories of democracy to assist the federal courts in shaping the fundamental constitutional fabric of our country.

Our rich history demonstrates a long-standing commitment in Texas to freedom of expression as well as a determination that state constitutional guarantees be given full meaning to protect our citizens. But historical analysis is only a starting point. The constitution of our state is an organic document. In no way must our understanding of its guarantees be frozen in the past; rather, our concept of freedom of expression continues to evolve over time.... Forms of expression not widely approved in 1875 may well demand state constitutional protection today, just as new methods of infringing on speech may require new methods of protection tomorrow.¹

In interpreting our constitution, the state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs and traditions of our citizens. Texas should borrow from well-reasoned and persuasive federal precedents when this is deemed helpful, but should never feel compelled to parrot the federal judiciary. —Doggett, J.

Concurrence: Most of the court opinion is devoted to a defense of its new method of state constitutional analysis, which examines the state constitution first, and if a right is found to be protected, never reaches the federal constitutional question. The court derives this approach from developments in other jurisdictions and our own case law. Neither supports the court's new methodology. —Hecht, Cook and Cornyn, JJ.

¹Our analysis of the history of Texas and its constitution thus in no way detracts either from the dignity of the text itself or from the realities of the present. Rather, we use history to assist in an understanding of the generalities and ambiguities sometimes present in a constitution.

STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS¹

William J. Brennan, Jr.
Associate Justice, United States Supreme
Court (Retired)

During the 1960's, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.

REACHING the biblical summit of three score and ten seems to be the occasion — or the excuse — for looking back. Forty-eight years ago I entered law school and forty-four years ago was admitted to the New Jersey Bar. In those days of innocence, the preoccupation of the profession, bench and bar, was with questions usually answered by application of state common law principles or state statutes. Any necessity to consult federal law was at best episodic. But those were also the grim days of the Depression, and its cure was dramatically to change the face of American law. The year 1933 witnessed the birth of a plethora of new federal laws and new federal agencies developing and enforcing those laws; ones that were to affect profoundly the daily lives of every person in the nation.

In my days at law school, Felix Frankfurter had taught administrative law in terms of the operations of the Interstate Commerce Commission — because that was the only major federal regulatory agency then existing. But then came in rapid succession the National Labor Relations Board, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and a host of others. In addition, laws such as the Fair Labor Standards Act, administered by the Labor Department, also began to require practitioners to master new, and federal, fields of law in order to serve their clients. And, of course, those laws and agencies did not disappear with the end of the Depression — rather a procession of still more federal agencies and federal laws has followed. Only recently, for example, Congress created the Environmental Protection Agency and the Equal Employment Opportunity Commission — new major sources of concern for today's clients keeping lawyers everywhere very federal law-minded.

In the beginning of this legal revolution, however, federal law was not a major concern of state judges. Judicial involvement with decisions of the new federal agencies was the business of federal courts. I have tried to recall how often in my years on the New Jersey courts from 1949 to 1956 issues of federal law were relevant to cases tried before me as a trial judge in Paterson and Jersey City, or were addressed by me on the appellate division or in the supreme court. I can remember only three cases out of the hundreds with which I was involved over those years that turned on the resolution of a federal question, and in all three that question was statutory. Two were cases tried before me in Jersey City, one a railroad worker's suit under the Federal Employers Liability Act and the other a case that implicated the Immigration and Naturalization Act. Undoubtedly the reason they are still fresh in my memory is that I had frantically to dig up the federal statutes and federal cases that bore on their disposition because both presented federal questions of first impression in my experience. The third instance was a labor injunction case in which I first circulated an opinion to my brethren on the supreme court sustaining a chancery injunction against peaceful picketing, only to have to withdraw the opinion and set aside the injunction when the United States Supreme Court held that federal law preempted state regulation of such picketing.

In recent years, however, another variety of federal law — that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty — has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment — that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures,² Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of

¹Reprinted from *Harvard Law Review*, Vol. 90, No. 3, pp. 489-504 (1977).

²*Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

state court judges as well. This is both necessary and desirable under our federal system — state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.



The decisions of the Supreme Court enforcing the protections of the fourteenth amendment generally fall into one of three categories. The first concerns enforcement of the federal guarantee of equal protection of the laws. While the best known, of course, are *Brown v. Board of Education*³ and *Baker v. Carr*,⁴ perhaps even more the concern of state bench and bar in terms of state court litigation are decisions invalidating state legislative classifications that impermissibly impinge on the exercise of fundamental rights, such as the rights to vote,⁵ to travel interstate,⁶ or to bear or beget a child.⁷ Equally important are decisions that require exacting judicial scrutiny of classifications that operate to the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination — racial minorities⁸ and aliens⁹ are two examples.

The second category of decisions concerns the fourteenth amendment's guarantee against the deprivation of life, liberty or property where that deprivation is without due process of law. The root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant "liberty" or "property" interest. Our decisions enforcing the guarantee of the due process clause have elaborated the essence of that "liberty" and "property" in light of conditions existing in contemporary society. For example, "property" has come to embrace such crucial expectations as a driver's license¹⁰ and the statutory entitlement to minimal economic support, in the form of welfare, of

those who by accident, birth or circumstance find themselves without the means of subsistence.¹¹ The due process safeguard against arbitrary deprivation of these entitlements, as well as of more traditional forms of property, such as a workingman's wages¹² and his continued possession and use of goods purchased under conditional sales contracts,¹³ has been recognized as mandating prior notice and the opportunity to be heard. At the same time, conceptions of "liberty" have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity, so that prison regulations and parole procedures must provide some form of notice and hearing prior to confinement in solitary¹⁴ or the revocation of parole.¹⁵ Moreover, the concepts of liberty and property have combined in recognizing that under modern conditions tenured public employees may not have their reasonable expectation of continued employment,¹⁶ and school children their right to a public education,¹⁷ revoked without notice and opportunity to be heard.

I suppose, however, that it is mostly the third category of decisions by the United States Supreme Court during the last twenty years — those enforcing the specific guarantees of the Bill of Rights against encroachment by state action — that has required the special consideration of state judges, particularly as those decisions affect the administration of the criminal justice system. After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr*, because he believed that if each of us has an equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraints of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

Before the fourteenth amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action.¹⁸ In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action.¹⁹ The break-through came in 1897 when the prohibition against taking private property for public use without payment of just compensation was

³347 U.S. 483 (1954) (invalidating state laws requiring public schools to be racially segregated).

⁴369 U.S. 186 (1962) (invalidating state laws diluting individual voting rights by legislative malapportionments). See also *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁵*Harper v. Virginia State Bd.*, 383 U.S. 663 (1966).

⁶*Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁷*Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut* 381 U.S. 479 (1965).

⁸*Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁹*Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁰*Bell v. Burson*, 402 U.S. 535 (1971).

¹¹*Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹²*Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

¹³*Fuentes v. Shevin*, 407 U.S. 67 (1972).

¹⁴*Wolff v. McDonnell*, 418 U.S. 539 (1974).

¹⁵*Morrissey v. Brewer*, 408 U.S. 471 (1972).

¹⁶*Perry v. Sindermann*, 408 U.S. 593 (1972).

¹⁷*Goss v. Lopez*, 419 U.S. 556 (1975).

¹⁸*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

held embodied in the fourteenth amendment's proscription, "nor shall any state deprive any person of . . . property, without due process of law."²⁰ But extension of the rest of the specific restraints was slow in coming. It was 1925 before it was suggested that perhaps the restraints of the first amendment applied to state action.²¹ Then in 1949 the fourth amendment's prohibition of unreasonable searches and seizures was extended,²² but the extension was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available. It was not until 1961 that the Court applied the exclusionary rule to state proceedings.²³

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law. The eighth amendment's prohibition of cruel and unusual punishment was applied to state action in 1962,²⁴ and is the guarantee under which the death penalty as then administered was struck down in 1972.²⁵ The provision of the sixth amendment that in all prosecutions the accused shall have the assistance of counsel was applied in 1963, and in consequence counsel must be provided in every courtroom of every state of this land to secure the rights of those accused of crime.²⁶ In 1964, the fifth amendment privilege against compulsory self-incrimination was extended.²⁷ And after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police to give warnings to a suspect before custodial interrogation.²⁸

The year 1965 saw the extension of the sixth amendment right of an accused to be confronted by the witnesses against him;²⁹ in 1967 three more guarantees of the sixth amendment — the right to a speedy and public trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses — were extended.³⁰ In 1969 the double jeopardy clause of the fifth amendment was applied.³¹ Moreover, the decisions barring state-required prayers in public schools,³² limiting the availability of state

libel laws to public officials and public figures,³³ and confirming that a right of association is implicitly protected,³⁴ are significant restraints upon state action that resulted from the extension of the specifics of the first amendment.

These decisions over the past two decades gave full effect to the principle of *Boyd v. United States*,³⁵ the case Mr. Justice Brandeis hailed as "a case that will be remembered so long as civil liberty lives in the United States."³⁶ That principle, stated by Mr. Justice Bradley, was "...constitutional provisions for the security of person and property should be liberally construed....It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."³⁷

The thread of this series of Bill of Rights holdings reflects a conclusion — arrived at only after a long series of decisions grappling with the pros and cons of the question — that there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

■ ■ ■

Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that

¹⁹See *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892); *McElvaine v. Brush*, 142 U.S. 155, 158–159 (1891); *In re Kemmler*, 136 U.S. 436, 446 (1890); *Presser v. Illinois*, 116 U.S. 252, 263–68 (1886); *Hurtado v. California*, 110 U.S. 516 (1884); *United States v. Cruikshank*, 92 U.S. 542, 552–56 (1875); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

²⁰*Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

²¹*Compare Gilow v. New York*, 268 U.S. 652, 666 (1925), *with Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922).

²²*Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

²³*Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁴*Robinson v. California*, 370 U.S. 660 (1962).

²⁵*Furman v. Georgia*, 408 U.S. 238 (1972). *But see Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976).

²⁶*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

²⁷*Malloy v. Hogan*, 378 U.S. 1 (1964).

²⁸*Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁹*Pointer v. Texas*, 380 U.S. 400 (1965).

³⁰*Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966); *Washington v. Texas*, 388 U.S. 14 (1967).

³¹*Benton v. Maryland*, 395 U.S. 784 (1969).

³²*School Dist. v. Schempp*, 374 U.S. 203 (1963).

³³*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁴*NAACP v. Alabama*, 377 U.S. 288 (1964).

³⁵116 U.S. 616 (1886).

³⁶*Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion).

³⁷116 U.S. at 635.

when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy,³⁸ as well as laws that impose special burdens on those of our citizens who are of illegitimate birth.³⁹ The Court has also found un compelling the claims of those barred from judicial forums due to their inability to pay access fees,⁴⁰ and has further handicapped the indigent by limiting their right to free trial transcripts when challenging the legality of their imprisonment.⁴¹

Under the due process clause, the Supreme Court has found no liberty interest in the reputation of an individual — never tried and never convicted — who is publicly branded as a criminal by the police without benefit of notice, let alone a hearing.⁴² The Court has recently indicated that tenured public employees might not be entitled to any more process before deprivation of their employment than the government sees fit to give them.⁴³ It has approved the termination of payments to disabled individuals who are completely dependent upon those payments, prior to an oral hearing, a form of hearing statistically shown to result in a huge rate of reversals of preliminary administrative determinations.⁴⁴ And it has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored.⁴⁵

The same trend is repeated in the category of the specific guarantees of the Bill of Rights. The Court has found the first amendment insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers;⁴⁶ and at the same time has found the amendment's prohibitions insufficient to invalidate a system of restrictions on motion picture theaters based upon the content of their presentations.⁴⁷ It has found that the warrant requirement plainly appearing on the face of the fourth amendment does not require the police to obtain a warrant before arrest, however easy it might have been to get an arrest warrant.⁴⁸ It has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction.⁴⁹ The Court has held permissible police searches grounded upon consent regardless of whether the consent was a knowing and intelligent one,⁵⁰ and has found that none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our knowledge or consent.⁵¹ Even when the Court has found searches to violate fourth amendment rights, it has — on occasion — declared exceptions to the exclusionary rule and allowed the use of such evidence.⁵²

Moreover, the Court has held, contrary to *Boyd v. United States*, that we may not interpose the privilege against self-incrimination to bar government attempts to obtain our personal papers, no matter how private the nature of their contents.⁵³ And the privilege, said the Court, is not violated when statements unconstitutionally obtained from an individual are used for purposes of impeaching his testimony,⁵⁴ or securing his indictment by a grand jury.⁵⁵

The sixth amendment guarantee has fared no better. The guarantee of assistance of counsel has been held unavailable to an accused in custody when shuffled through preindictment identification procedures, no matter how essential counsel might be to the avoidance of prejudice to his rights

³⁸Geduldig v. Aiello, 417 U.S. 484 (1974); cf. General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (decided under Title VII).

³⁹Compare Mathews v. Lucas, 96 S. Ct. 2755 (1976), with Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("...imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."). Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in employment and education. See Washington v. Davis, 96 S. Ct. 2040 (1976); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

⁴⁰Compare Ortwein v. Schwab, 410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973), with Boddie v. Connecticut, 401 U.S. 371 (1971).

⁴¹United States v. MacCollom, 96 S. Ct. 2086 (1976).

⁴²Paul v. Davis, 424 U.S. 693 (1976).

⁴³Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 96 S. Ct. 2074 (1976).

⁴⁴Mathews v. Eldridge, 424 U.S. 319 (1976).

⁴⁵Compare Meachum v. Fano, 96 S. Ct. 2532 (1976) (finding no liberty interest implicated in the transfer of a prisoner to a maximum security facility), with Wolff v. McDonnell, 418 U.S. 539 (1974).

⁴⁶Hudgens v. NLRB, 424 U.S. 507 (1976), overruling Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

⁴⁷Compare Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976), with Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975).

⁴⁸United States v. Watson, 423 U.S. 411 (1976). See also United States v. Santana, 96 S. Ct. 2406 (1976) (holding that in a Watson-like situation, police may pursue a suspect into his or her home).

⁴⁹United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Court has also declined to read the amendment to prohibit warrantless searches of the glove compartments of automobiles impounded for mere parking violations. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

⁵⁰United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

⁵¹United States v. Miller, 96 S. Ct. 1619 (1976).

⁵²E.g., United States v. Janis, 96 S. Ct. 3021 (1976).

⁵³Andresen v. Maryland, 96 S. Ct. 2737 (1976); Fisher v. United States, 96 S. Ct. 1569 (1976).⁵⁴Harris v. New York, 401 U.S. 222 (1971).

⁵⁵United States v. Calandra, 414 U.S. 338 (1974).

at later stages of the criminal process.⁵⁶ In addition, the Court has countenanced a state's placing significant burdens — in the form of a “two-tier” trial system — on the constitutional right to trial by jury in criminal cases.⁵⁷ And in the face of our requirement of proof of guilt beyond a reasonable doubt, the Court has upheld the permissibility of less than unanimous jury verdicts of guilty.⁵⁸

Also, a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make.⁵⁹ At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment.⁶⁰ And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.⁶¹

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights — the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.



Some state decisions have indeed suggested a connection between these recent decisions of the United States Supreme Court and the state court's reliance on the state's bill of rights. For example, the California Supreme Court, in holding that statements taken from suspects before first giving them *Miranda* warnings are inadmissible in California courts to impeach an accused who testifies in his own defense, stated: “We...declare that [the decision to the con-

trary of the United States Supreme Court⁶²] is not persuasive authority in any state prosecution in California...We pause ...to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.”⁶³

Enlightenment comes also from the New Jersey Supreme Court. In 1973 the United States Supreme Court held that where the subject of a search was not in custody and the prosecution attempts to justify the search by showing the subject's consent, the prosecution need not prove that the subject knew he had a right to refuse to consent to the search.⁶⁴ The Court expressly rejected the contention that the validity of consent to a noncustodial search should be tested by a waiver standard requiring the state to demonstrate that the individual consented to the search knowing he did not have to, and that he intentionally relinquished or abandoned that right. In *State v. Johnson*,⁶⁵ Mr. Justice Sullivan, writing for New Jersey's high court, first acknowledged that the United States Supreme Court decision was controlling on state courts in construing the fourth amendment and was therefore dispositive of the defendant's federal constitutional argument.⁶⁶ But Mr. Justice Sullivan went on to consider whether the identically phrased provision of the New Jersey Constitution, Art. I, para. 7, “should be interpreted to give the individual greater protection than is provided by” the federal provision.⁶⁷ Counsel had not made this argument either to the trial court or on appeal, but the supreme court, *sua sponte*, posed the issue and afforded counsel the opportunity for argument on the question. Mr. Justice Sullivan held for the court that, while Art. I, para. 7 was *in haec verba* with the fourth amendment and until then had not been held to impose higher or different standards than the fourth amendment, “we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning.”⁶⁸ That meaning, he went on to hold, was “that under Art. I, para. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.”⁶⁹

⁵⁶Compare *Kirby v. Illinois*, 406 U.S. 682 (1972), with *United States v. Wade*, 388 U.S. 218 (1967).

⁵⁷*Ludwig v. Massachusetts*, 96 S. Ct. 2781 (1976) (approving trial de novo system).

⁵⁸*Apodaca v. Oregon*, 406 U.S. 404 (1972).

⁵⁹*Rizzo v. Goode*, 423 U.S. 362 (1976); *Simon v. Eastern Ky. Welfare Rights Org.*, 96 S. Ct. 1917 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

⁶⁰*Hicks v. Miranda*, 422 U.S. 332 (1975).

⁶¹*Stone v. Powell*, 96 S. Ct. 3037 (1976); *Francis v. Henderson*, 96 S. Ct. 1708 (1976).

⁶²*Harris v. New York*, 401 U.S. 222 (1971).

⁶³*People v. Disbrow*, 16 Cal. 3d 101, 113, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). The Hawaii and Pennsylvania Supreme Courts have taken similar positions. See *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971); *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975).

⁶⁴*Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

⁶⁵68 N.J. 349, 346 A.2d 66 (1975).

⁶⁶See *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

⁶⁷68 N.J. at 353, 346 A.2d at 67-68.

⁶⁸*Id.* at 353 n.2, 346 A.2d at 68 n.2.

⁶⁹*Id.* at 353-54, 346 A.2d at 68.

Among other instances of state courts similarly rejecting United States Supreme Court decisions as unpersuasive, the Hawaii⁷⁰ and California⁷¹ Supreme Courts have held that searches incident to lawful arrest are to be tested by a standard of reasonableness rather than automatically validated as incident to arrest;⁷² the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure;⁷³ and the South Dakota⁷⁴ and Maine⁷⁵ Supreme Courts have held that there is a right to trial by jury even for petty offenses.⁷⁶

Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.⁷⁷ As the Supreme Court of Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law...."⁷⁸ Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are therefore resting decisions solely on state law grounds.

For example, the California Supreme Court held, as a matter of state constitutional law, that bank depositors have a sufficient expectation of privacy in their bank records to invalidate the voluntary disclosure of such records by a bank to the police without the knowledge or consent of the depositor;⁷⁹ thereafter the United States Supreme Court ruled that federal law was to the contrary.⁸⁰

And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.⁸¹ This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision,⁸² which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise: indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.⁸³ And prior to the adoption of these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed

⁷⁰*State v. Kaluna*, 55 Hawaii 361, 520 P.2d 51 (1974).

⁷¹*People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

⁷²*Compare* cases cited notes 69 & 70 *supra*, with *United States v. Robinson*, 414 U.S. 218 (1973).

⁷³*Compare* *People v. Jackson*, 391 Mich. 323, 217 N.W.2d 22 (1974), with *United States v. Ash*, 413 U.S. 300 (1973).

⁷⁴*Parham v. Municipal Court*, 199 N.W. 2d 501 (S.D. 1972).

⁷⁵*State v. Sklar*, 317 A.2d 160 (Me. 1974). *See also* *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

⁷⁶*Compare* cases cited notes 73 and 74 *supra* with *Baldwin v. New York*, 399 U.S. 66 (1970), and *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁷⁷For a listing of such examples, see the cases collected in the following articles: Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437-43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, HARV. C.R.-C.L. L. REV. 271 (1973).

⁷⁸*State v. Kaluna*, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

⁷⁹*Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

⁸⁰*United States v. Miller*, 96 S. Ct. 1619 (1976).

⁸¹The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). One reason for the refusal to review such decisions, even where the state court also decides a federal question erroneously, was explained by Mr. Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

⁸²*Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (invalidating town's exclusive zoning ordinance), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

⁸³*See generally* Brennan, *The Bill of Rights and the States*, in *THE GREAT RIGHTS* (E. Cahn ed. 1963).

by counterpart provisions of state law.⁸⁴ Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.



Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered.⁸⁵ Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated⁸⁶ and systematic⁸⁷ violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual rights,⁸⁸ the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law,⁸⁹ state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved. We tend to forget that Madison proposed not ten, but, in the form the House sent them to the Senate, seventeen amendments. The House approved all seventeen including Number XIV — a number prophetic of things to come with the adoption of Amendment XIV seventy-nine years later — for Number XIV would have imposed specific restraints on the states. Number XIV provided: "No State shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press."⁹⁰ Madison, in a speech to the House in 1789, argued that these restrictions on the state power were "of equal, if not greater, importance than those already made"⁹¹ in the body of the Constitution. There was, he said, more danger of those powers being abused by state governments than by the government of the United States. Indeed, he said, he "conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments."⁹²

But Number XIV was rejected by the Senate, and Madison's aim was not accomplished until adoption of Amendment XIV seventy-nine years later. The reason that Madison placed such store in the effectiveness of the Bill of Rights was his belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."⁹³ His reference was, of course, to his proposed Bill including Number XIV, but we may be confident that he would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice "will be naturally led to resist every encroachment upon rights expressly stipulated for...."⁹⁴

⁸⁴The Court has made this point clear on a number of occasions. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("...a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); *Cooper v. California*, 386 U.S. 58, 62 (1967).

⁸⁵See *Stone v. Powell*, 96 S. Ct. 3037 (1976); *Francis v. Henderson*, 96 S. Ct. 1708 (1976); *Hicks v. Miranda*, 422 U.S. 332 (1975).

⁸⁶See *Paul v. Davis*, 424 U.S. 693 (1976); cases cited note 84 *supra*.

⁸⁷See *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

⁸⁸See *Stone v. Powell*, 96 S. Ct. 3037, 3051 n.35 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975).

⁸⁹See p. 496 & notes 41-42 *supra*.

⁹⁰See E. DUMBAULD, *THE BILL OF RIGHTS* 215 (1957); Brennan, *supra* note 82, at 69-70.

⁹¹1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).

⁹²*Id.* at 755. See Brennan, *supra* note 82, at 69-70.

⁹³1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789). See *United States v. Calandra*, 414 U.S. 330, 356-57 (1974) (Brennan, J., dissenting).

⁹⁴1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).

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Honorable Lloyd Doggett was elected to the Texas Supreme Court in November 1988, after serving in the Texas State Senate for eleven years and practicing law in Austin for seventeen years. Since serving on the Supreme Court, Justice Doggett has been honored by both The Freedom of Information Foundation of Texas and the National Society of Professional Journalists for his commitment to open government.

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