

## INTRODUCTION: THE THIRD STAGE OF THE NEW JUDICIAL FEDERALISM

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### I. INTRODUCTION

*State constitutions are coming out of the archives into the legal literature and into the classroom. They are coming out of the literature and the classroom into the courtroom. State constitutions will go from the courtroom back into the legal literature and into the classroom, and maybe back to the courtroom, through the lawyers trained in the 1980s.*<sup>1</sup>

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The New Judicial Federalism<sup>2</sup> dates from the early 1970s and, of course, cannot be described as “new” anymore.<sup>3</sup> Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution. In addition, scholarly publications by state judges have helped develop the doctrines included within the New Judicial Federalism.<sup>4</sup>

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1. Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 971 (1982).

2. See G. Alan Tarr, *Understanding State Constitutions* 161–70 (1998).

3. See Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the “New Federalism,”* 8 U. Puget Sound L. Rev. vi (1985).

4. See, e.g., Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341 (1985); Robert I. Berdon, *Freedom of the Press and the Connecticut Constitution*, 26 CONN. L. REV. 659 (1994); Robert I. Berdon, *Individual Rights and the Challenge of the 1990s: Developing Connecticut State Constitutional Jurisprudence*, 22 CONN. L. REV. 499 (1990); Dennis J. Braithwaite, *An Analysis of the “Divergence Factors”: A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1 (2001); Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601 (2001); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996); Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727 (1992);

That will also be true of the articles in this issue of the *NYU Annual Survey of American Law*.

These developments have made it very clear that, with respect to federal constitutional rights, decisions of the United States Supreme Court may be divided into two categories: (1) those that find *in favor* of rights claimants and therefore must be enforced throughout the country under the Supremacy Clause, and (2) those that find *against* rights claimants, determining that there are no enforceable federal constitutional rights, and effectively leaving the matter to the states.<sup>5</sup>

Next, we have come to recognize that state constitutional rights claims may be made either under provisions that are the same as, or similar to, federal constitutional rights guarantees or, rather, under state constitutional rights provisions that are quite different from federal constitutional rights guarantees (i.e., there is no “cognate” federal provision or federal “analog”). Often, in this latter situation, claims that may have been asserted under more familiar federal provisions may be repackaged under the less familiar state constitutional provisions.<sup>6</sup> Particularly under the first circumstance, where the state right is the same as, or similar to, the federal guarantee, legitimacy questions have been raised about state courts reaching results that are more liberal or protective of rights than those rendered under the Federal Constitution.<sup>7</sup>

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Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992) [hereinafter Linde, *Common Law?*]; Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) [hereinafter Linde, *E Pluribus*]; Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259 (1989); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992).

5. See Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 166 (1987).

6. See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 190–91 (1983).

7. Professor Tarr notes:

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

## II. THE FIRST TWO STAGES OF THE NEW JUDICIAL FEDERALISM

### A. *The First Stage: The Thrill of Discovery*

There were a number of factors contributing to the rise of the New Judicial Federalism. Probably the most important early case was *People v. Anderson*<sup>8</sup> in 1972, where the California Supreme Court declared the death penalty unconstitutional under its state constitutional prohibition against cruel or unusual punishment.<sup>9</sup> This decision stimulated a substantial academic response,<sup>10</sup> as well as the initial recognition that state courts could evade decisions of the United States Supreme Court by relying on their own state constitutions.<sup>11</sup> In 1973 the wave of litigation on equality and adequacy in school finance was launched in New Jersey,<sup>12</sup> and it is still going on today.<sup>13</sup> In 1980 the United States Supreme Court decided *PruneYard Shopping Ctr. v. Robins* upholding, against federal constitutional challenge, the California Supreme Court's recognition of free speech rights under the California Constitution in privately owned shopping malls.<sup>14</sup> In this way the United States Supreme Court placed its "seal of approval" on the New Judicial Federalism. Individual justices of the United States Supreme Court also gave their imprimatur to the New Judicial Federalism in individual opinions. For example, Justice John Paul Stevens wrote a number of

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G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 853 (1991). See also TARR, *supra* note 2, at 175.

8. 493 P.2d 880 (Cal. 1972).

9. *Id.* at 899. *Anderson* was overruled by Article I, § 27 of the California Constitution, ratified only a few months later.

10. See, e.g., Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262 (1972); Edward L. Barrett, Jr., *Comment, Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972).

11. Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure Revisited*, 64 Ky. L.J. 729 (1976); Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 Ky. L.J. 873 (1975); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

12. See Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 892-930 (1998).

13. See *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002) (issuing an additional order in New Jersey's ongoing school finance litigation governing the 2002-2003 school year); Tractenberg, *supra* note 12, at 930-36 (discussing recent history of New Jersey's school finance litigation).

14. 447 U.S. 74 (1980).

opinions encouraging independent interpretation of state constitutions.<sup>15</sup>

Justice William J. Brennan, Jr., is also credited with stimulating the reemergence of *state* constitutional law.<sup>16</sup> His 1977 *Harvard Law Review* article, *State Constitutions and the Protection of Individual Rights*,<sup>17</sup> has already taken its place among “the most frequently cited law review articles of modern times.”<sup>18</sup>

In that article, Justice Brennan noted the rise of federal constitutional rights protections, and the influence of that development on the work of state courts. He also criticized the trend toward lesser protections reflected in the United States Supreme Court’s pronouncements and pointed out that state courts had been “step[ping] into the breach” by interpreting their state constitutions to provide more rights protections than required under the Federal Constitution.<sup>19</sup> In now oft-quoted words, he stated:

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.<sup>20</sup>

“Fittingly, since he had begun his judicial career as a New Jersey judge, it is important to note that the 1977 article was the text of a speech Justice Brennan delivered to the New Jersey State

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15. See *Pennsylvania v. Finley*, 481 U.S. 551, 570–72 (1987) (Stevens, J., dissenting); *Delaware v. Van Arsdall*, 475 U.S. 673, 689–708 (1986) (Stevens, J., dissenting); *Michigan v. Long*, 463 U.S. 1032, 1065–66 (1983) (Stevens, J., dissenting); *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982). See generally Ronald K.L. Collins, *Justice Stevens Becomes Advocate of States’ Role in the High Court*, NAT’L L.J., Aug. 27, 1984, at 20.

16. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 (1992). For accounts and assessments of the original New Judicial Federalism, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism’s First Generation*, 30 VAL. U. L. REV. at xiii (1996).

17. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

18. Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State’s Rights*, 20 J. MARSHALL L. REV. 1, 2 n.3 (1986) (citing Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550 (1985), “which found [in 1985] Brennan’s article to be the nineteenth most-frequently-cited law review article of those published in the last forty years”).

19. See Brennan, *supra* note 17, at 502–03.

20. *Id.* at 491.

Bar Association on May 22, 1976.”<sup>21</sup> Justice Stewart G. Pollock of New Jersey referred to Brennan’s article as “the Magna Carta of state constitutional law.”<sup>22</sup>

Finally, during this first stage in 1983, questions of United States Supreme Court jurisdiction in mixed federal and state constitutional cases were ironed out with the Court’s adoption of the “plain statement” requirement for invoking the adequate and independent state ground doctrine in *Michigan v. Long*.<sup>23</sup>

### B. *The Second Stage: Backlash*

Beginning in the 1980s, but finding its roots in the reaction to the 1972 California decision in *People v. Anderson*,<sup>24</sup> a backlash against the New Judicial Federalism arose. Academics, government officials, and judges spoke out in various forums opposing state decisions “going beyond” the national minimum standards. Prosecutors were particularly critical of state constitutional criminal procedure decisions providing more protections than those required by the United States Supreme Court.<sup>25</sup> They argued that state court judges’ disagreement with the outcome of similar rights claims in the United States Supreme Court did not justify such

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21. Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 765 (1998).

22. Pollock, *supra* note 4, at 716. In a brief foreword to Justice Pollock’s article, Justice Brennan stated:

Justice Pollock’s own court has been a leader in reaffirming the independent nature of the New Jersey Constitution and his court’s responsibility separately to define and protect the rights of New Jersey citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution. Justice Pollock forcefully demonstrates why, when federal scrutiny is diminished, state courts must respond by increasing their own.

*Id.* at 707.

23. 463 U.S. 1032 (1983). *See generally* Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041 (1988). Richard W. Westling, Comment, *Advisory Opinions and the “Constitutionally Required” Adequate and Independent State Grounds Doctrine*, 63 TULANE L. REV. 379 (1988).

24. 493 P.2d 880 (Cal. 1972). *See also supra* note 8 and accompanying text.

25. *See generally* John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 721 (1998) (noting that as a result of a New Jersey Supreme Court decision finding broader protection for defendants who confessed in police custody than had the United States Supreme Court, “a brutal murderer ended up only serving eight years and then was released. If the prosecutor had been running for office that year, he or she would undoubtedly have attacked the court’s decision.”).

judges' substitution of their judgment for those federal outcomes at the state level.<sup>26</sup>

In some states, amendments to state constitutions were proposed to the electorate that would overturn state court interpretations that were more protective than federal constitutional rights. The development of the New Judicial Federalism therefore has shown that the exercise of popular sovereignty, or voting by the electorate, can not only be used to add new rights, but also to literally overturn or "overrule" judicial interpretations of state constitutional rights guarantees (or, for that matter, other state constitutional provisions). Such overruling can be accomplished either through legislatively-proposed amendments, constitutional convention proposals, or, in those states that permit it, popularly-initiated constitutional amendments. There are two different approaches. First, state constitutional decisions can be overruled simply by amending the constitution to say that the judicial interpretation no longer applies. For example, several states have overturned state judicial decisions declaring the death penalty unconstitutional by inserting language in the relevant constitutional clauses to indicate that capital punishment will not be deemed to violate the clause.<sup>27</sup> Illustrating a different approach, after some expansive state judicial interpretations, Florida's search and seizure clause was amended in 1982 to require the state courts to interpret the provision the same way as the United States Supreme Court interprets the federal clause.<sup>28</sup> This also happened in California to

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26. I took the position that reasoned disagreement was justified in Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389-404 (1984). The Arkansas Supreme Court recently recognized this point in *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002). But see *People v. Haley*, 41 P.3d 666, 679-80 (Colo. 2001) (Kourlis, J., dissenting).

27. On November 2, 1982, the Massachusetts voters approved a constitutional amendment that added a second and third sentence to Article 26:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

MASS. CONST. amend. art. CXVI. See also CAL. CONST. art. I, § 27; OR. CONST. art. I, § 40.

28. The Florida clause reads as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated . . . . *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles*

eliminate a line of state constitutional interpretations that went beyond the federal requirements in the area of school busing.<sup>29</sup> This Florida and California “lockstep” or “forced linkage” amendment approach can be seen as undesirable because it constitutes a blanket adoption, *in futuro*, of all interpretations of the United States Supreme Court, thereby abdicating a part of a state’s sovereignty and judicial autonomy. In a few states, notably California<sup>30</sup> and Oregon,<sup>31</sup> campaigns were mounted against judges associated with independent interpretation of the state constitution.

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*or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

FLA. CONST. art. I, § 12 (emphasis added). See generally Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653 (1987).

29. The amendment reads:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

CAL. CONST. art. I, § 7(a) (emphasis added).

30. Among the most well-known judicial elections was the 1986 California Supreme Court election in which three sitting judges, including Chief Justice Rose Bird, were voted out of office. This election is analyzed by Joseph R. Grodin, himself one of the defeated justices. See JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* 162–86 (1989); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988); Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365 (1987). See also Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

31. See, e.g., Fred Leeson, *Oregon Court Seat Fight Gets Bitter*, NAT’L L.J., May 14, 1984, at 3; Wallace Turner, *Law-and-Order Groups Oppose an Oregon Justice*, N.Y. TIMES, Apr. 2, 1984, at A17.

Another feature of this middle stage of the New Judicial Federalism was the attempt, in a number of states, to develop criteria to guide and limit state courts in their decision about whether to interpret their state constitutions to provide more rights than were guaranteed at the federal level. I have described the “criteria approach” as follows:

Under this methodology, the state supreme court . . . sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution. These criteria, then, are used by advocates to present, and judges to decide, claims made under the state constitution in cases where there is also a federal claim that is unlikely to prevail. On the one hand, the criteria approach is laudable because it teaches and calls attention to the nature of state constitutional arguments. On the other hand, however, I have been critical of this approach for a number of reasons that I believe have demonstrated themselves in the past fifteen years.<sup>32</sup>

This approach is still attracting adherents today.<sup>33</sup> For example, the Wyoming Supreme Court justices engaged in debate through the 1990s on the proper methodology to apply in cases where litigants argued for greater protection under the state constitution. The debate began in 1993 in *Saldana v. State*, which produced four opinions based on methodology.<sup>34</sup> In 1999 the court appeared to settle on the criteria approach,<sup>35</sup> which it now applies.<sup>36</sup>

The Delaware Supreme Court has also recently expressed reliance on the criteria approach.<sup>37</sup> The California Supreme Court continues to assert the requirement that “there must be cogent reasons for a departure from a construction placed on a similar constitutional provision by the United States Supreme Court.”<sup>38</sup> Ohio

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32. See Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1021–22 (1997).

33. See *id.* at 1022–26.

34. 846 P.2d 604 (Wyo. 1993).

35. *Vasquez v. State*, 990 P.2d 476, 486 (Wyo. 1999).

36. See *Mogard v. City of Laramie*, 32 P.3d 313 (Wyo. 2001). See also *Cordova v. State*, 33 P.3d 142, 146–47 (Wyo. 2001).

37. See *Jones v. State*, 745 A.2d 856, 864–65 (Del. 1999).

38. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1139 (Cal. 2000). See also *People v. Monge*, 941 P.2d 1121, 1133 (Cal. 1997) (internal quotations omitted).



seems to apply a similar approach,<sup>39</sup> as do Illinois,<sup>40</sup> Hawaii,<sup>41</sup> and Tennessee.<sup>42</sup> Pennsylvania has eased up on the rigidity with which it had been applying the criteria approach.<sup>43</sup> I have argued that the criteria approach gives improper deference to the United States Supreme Court, which is interpreting a different constitution under different, national, circumstances.<sup>44</sup>

### III.

#### THE THIRD STAGE: THE LONG HARD TASK

*[T]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis.*

*Justice Hans A. Linde*<sup>45</sup>

The most vitriolic reactions to the New Judicial Federalism now seem to have died down. More and more members of the public, lawyers, judges, academics and members of the media have learned that state constitutions may, in fact, be interpreted to provide more rights than the national minimum. This fact is no longer such a surprise to people as the maturation process of the New Judicial Federalism has continued.<sup>46</sup> Still, independent state constitutional interpretation can, as Justice Linde noted, be difficult work. The following comments reflect on some of the issues currently arising in state constitutional rights cases.<sup>47</sup>

Several state courts have recently abandoned their interpretations of the state constitution after the United States Supreme

39. *State v. Robinette*, 685 N.E.2d 762, 766 (Ohio 1997).

40. *See, e.g., Relsolelo v. Fisk*, 760 N.E.2d 963, 967–70 (Ill. 2001).

41. *See, e.g., State v. Entrekin*, 47 P.3d 336, 347 (Haw. 2002); *State v. Tau'a*, 49 P.3d 1227, 1239 (Haw. 2002).

42. *See, e.g., State v. Randolph*, 74 S.W.3d 330, 334–35 (Tenn. 2002).

43. *See, e.g., Commonwealth v. Franciscus*, 710 A.2d 1112, 1121 (Pa. 1998). *Cf. generally* Robert F. Williams, *Foreword: Continuing Developments in State Constitutional Law*, 74 TEMP. L. REV. 573, 576–77 (2001).

44. Williams, *supra* note 32, at 1046–55. *See also supra* note 26 and accompanying text.

45. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

46. *See generally* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996). I noted in 1997 that “[T]he initial thrill of discovery of the existence of state constitutional rights may have given way to the responsibility of determining how to enforce them.” Williams, *supra* note 32, at 1018.

47. There are, of course, many important state constitutional interpretation issues that do not arise in *rights* cases. *See* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002).

Court revised its interpretation of a similar or identical federal constitutional provision. For example, after the Pennsylvania Supreme Court ruled that both the state and federal constitutional search and seizure provisions were violated,<sup>48</sup> the United States Supreme Court vacated the Pennsylvania Court's judgment on the federal ground<sup>49</sup> and remanded in light of its earlier decision.<sup>50</sup> On remand, the Pennsylvania court reversed its original state constitutional interpretation.<sup>51</sup> Judge Zappala dissented:

I find the majority writer's present change of position regarding our disposition of this matter pursuant to Article I, Section 8 perplexing. In our original opinion addressing this matter, we relied upon *both* the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in holding that the police officer here did not possess the requisite cause to stop appellant based upon flight alone . . . . While the United States Supreme Court's decision in *Wardlow* impacts upon our analysis as it relates to the Fourth Amendment, the Court's decision is not dispositive of our state constitutional analysis. Moreover, regardless of the majority writer's *current* disagreement with his prior disposition of the case pursuant to Article I, Section 8, principles of *stare decisis* mandate that such disposition, a majority opinion of this Court, remains the law of this case and of the Commonwealth.<sup>52</sup>

A similar state constitutional turnaround took place in Washington in 1997.<sup>53</sup> Analyzing the same phenomenon in Montana in the 1980s, a commentator referred to this type of changed opinion as the "Montana Disaster."<sup>54</sup>

Despite the development of the New Judicial Federalism nearly two generations ago, lawyers still fail to properly argue the state constitutional grounds where available. In many states the courts refuse to reach the state constitutional argument under such circumstances.<sup>55</sup> In this context, the colorful imagery of the Supreme

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48. *In re D.M.*, 743 A.2d 422 (Pa. 1999).

49. *Pennsylvania v. D.M.*, 529 U.S. 1126 (2000).

50. *See Illinois v. Wardlow*, 528 U.S. 119 (2000).

51. *In re D.M.*, 781 A.2d 1161 (Pa. 2001).

52. *Id.* at 1165 (Zappala, J., dissenting).

53. *See State v. Catlett*, 945 P.2d 700 (Wash. 1997).

54. Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985). Collins referred to the "Problem of the Vanishing Constitution." *Id.* at 1111.

55. *See, e.g.*, *State v. Thornton*, 929 P.2d 676, 682 n.3 (Ariz. 1996); *Jones v. State*, 64 S.W.3d 728, 733 (Ark. 2002); *State v. Robertson*, 760 A.2d 82, 89 n.5

Court of Appeals of West Virginia is relevant: “[w]e have said many times that a skeletal argument, really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs.”<sup>56</sup>

In *State v. Sullivan*, the Arkansas Supreme Court acknowledged what the United States Supreme Court had already confirmed—a state supreme court may not interpret the *federal* constitution to provide *more* rights than recognized by the United States Supreme Court.<sup>57</sup> In the original adjudication of *Sullivan* in the Arkansas state court system, the Arkansas Supreme Court had required suppression of the fruits of a pretextual arrest, concluding that even if the United States Supreme Court had rejected that result, it could still base its decision on its view of the Federal Constitution.<sup>58</sup>

The United States Supreme Court reversed.<sup>59</sup> On remand, the Arkansas Supreme Court, by contrast to those courts discussed earlier that abandoned their views of their state constitutions after the Supreme Court reversed on the federal ground,<sup>60</sup> affirmed its earlier decision “on adequate and independent state grounds.”<sup>61</sup> The court further noted that it could make this determination, even after stating in earlier opinions that it would follow the United States Supreme Court’s interpretation of the Fourth Amendment, explaining, “[c]urrent interpretation of the United States Constitution in the federal courts no longer mirrors our interpretation of our own constitution.”<sup>62</sup>

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(Conn. 2000); *Worsham v. Greifenberger*, 698 A.2d 867, 869 n.5 (Conn. 1997); *State v. Ross*, 924 P.2d 1224, 1225 (Idaho 1996); *People v. Emerson*, 727 N.E.2d 302, 321 (Ill. 2000); *Henderson v. State*, 769 N.E.2d 172, 175 n.6 (Ind. 2002); *Warren v. State*, 760 N.E.2d 608, 610 n.3 (Ind. 2002); *Lockett v. State*, 747 N.E. 2d 539, 541 (Ind. 2001); *Osterberg v. Peca*, 12 S.W.3d 31, 40–41 (Tex. 2000); *State v. Hayes*, 752 A.2d 16, 18 (Vt. 2000); *State v. Fire*, 34 P.3d 1218, 1224 (Wash. 2001); *Martindale v. State*, 24 P.3d 1138, 1141 n.2 (Wyo. 2001); *Doles v. State*, 994 P.2d 315, 319–20 (Wyo. 1999).

56. *State v. Ladd*, 557 S.E.2d 820, 831 n.1 (W.Va. 2001) (internal quotations omitted).

57. *State v. Sullivan*, 74 S.W.3d 215, 216–17 (Ark. 2002).

58. *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000) (concluding “there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights”).

59. *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

60. See *supra* notes 48–56 and accompanying text.

61. *Sullivan*, 74 S.W.3d at 221.

62. *Id.*, at 222 (internal quotations omitted).

The State of Florida has what has been referred to as the most amendable state constitution in the country.<sup>63</sup> A proposed state constitutional amendment to be placed on the ballot by a citizens' initiative, mandating humane treatment for pregnant pigs, was evaluated by the Florida Supreme Court for its validity prior to the referendum.<sup>64</sup> The court approved the proposed amendment, letting it go to the ballot; Justice Barbara Pariente concurred, noting:

[T]he issue of whether pregnant pigs should be singled out for special protection is simply not a subject appropriate for inclusion in our State constitution; rather it is a subject more properly reserved for legislative enactment. I thus find that former Justice McDonald's observations made when this Court reviewed the net fishing amendment continue to ring true today:

The merit of the proposed amendment is to be decided by the voters of Florida and this Court's opinion regarding the wisdom of any proposed amendment is irrelevant to its legal validity. I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.<sup>65</sup>

Many state constitutions contain a wide variety of equality clauses, yet it is very common for state courts to interpret the disparate provisions as identical to the Equal Protection Clause of the Fourteenth Amendment.<sup>66</sup> Still, other states that initially equated their equality clauses with federal doctrines have begun to move in the direction of independence. States like Indiana,<sup>67</sup> Vermont,<sup>68</sup> Minnesota,<sup>69</sup> Alaska,<sup>70</sup> and Idaho<sup>71</sup> have been moving to decouple

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63. See TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 146 (1991) ("The Constitution of Florida has more processes for amendment and revision than any other state constitution.").

64. See Advisory Opinion to the Attorney General Re: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597 (Fla. 2002).

65. *Id.* at 600-01 (quoting Advisory Opinion to the Attorney General Re: Limited Marine Net Fishing, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring)).

66. See, e.g., *In re Commitment of Dennis H.*, 647 N.W.2d 851, 854-55 n.3 (Wis. 2002); *Mass. Fed'n of Teachers v. Bd. of Ed.*, 767 N.E.2d 549, 562 (Mass. 2002). See generally Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

67. See, e.g., *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

68. See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999). See also Robert F. Williams, *Old Constitutions and New Issues: National Lessons From Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).

69. See, e.g., Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?* 20 WM. MITCHELL L. REV. 338, 348-81

their state constitutional equality doctrines from the formerly dominant federal equal protection analysis.

#### IV. A FOURTH STAGE? STATE AND FEDERAL CONSTITUTIONAL DIALOGUE

A number of scholars and judges have called for a true dialogue among state and federal judges and constitutional scholars. Professor Paul Kahn has argued that state constitutional rights cases should not necessarily “rely on unique state sources of law. Those sources include the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community.”<sup>72</sup> Kahn described constitutionalism, including state constitutional law, as “not a single set of truths,” but rather as an ongoing national discourse about “ideas of liberty, equality, and due process.”<sup>73</sup> Professor Kahn argued that state courts and federal courts should work together, using both state constitutions and the Federal Constitution to pursue the “common enterprise” of providing interpretive answers to great constitutional questions.<sup>74</sup>

Professor Lawrence Friedman has elaborated the elements and benefits of a true constitutional dialogue between state courts and the United States Supreme Court on shared constitutional issues.<sup>75</sup> Professor Friedman has argued that

insofar as the new judicial federalism reflects attempts by state courts independently to interpret the meaning of cognate textual provisions, its legitimacy is buoyed by the federal constitu-

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(1994) (discussing deviations between the Minnesota Supreme Court’s interpretation of the state and federal Equal Protection Clauses).

70. See, e.g., *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 402 (Alaska 1997); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?* 15 ALASKA L. REV. 209 (1998); Ronald L. Nelson, *Welcome to the “Last Frontier,” Professor Gardner: Alaska’s Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 11–17 (1995); Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986).

71. See, e.g., *Concerned Taxpayers of Kootenai Co. v. Kootenai Co.*, 50 P.3d 991, 994 (Idaho 2002). But see *Rudeen v. Cenarrusa*, 38 P.3d 598, 606–07 (Idaho 2001).

72. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993).

73. *Id.* at 1147–48.

74. *Id.* at 1168.

75. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 112–23 (2000).

tional value of dialogue—that is, the value that attaches to discourse about law and governance that occurs between and among the different organs of the federal and state governments.<sup>76</sup>

Still, it must be remembered that each state constitution has its own text. The textual focus is an important way to distinguish the interpretation of a state constitution from the United States Supreme Court's interpretations of the Federal Constitution. This point was emphasized by Justice Hans Linde of Oregon, one of the most influential scholars and judges in the rise of New Judicial Federalism, when he cautioned that state constitutions are not common law.<sup>77</sup> He has noted that:

[S]tate courts find themselves pulled between fidelity to the state's own charter and the sense that constitutional law is a shared enterprise. Fidelity to a constitution need not mean narrow literalism. Most state bills of rights leave adequate room for modern applications, as well as for comparing similar guarantees elsewhere. But fidelity to a constitution means at least to identify what clause is said to invalidate the challenged law, to read what one interprets, and to explain it in terms that will apply beyond the case at issue, not to substitute phrases that have no analogue in the state's charter . . . . A demand that each state's court reach whatever desired result courts in other states have reached, in the common law manner of generic judge-made formulas, denies significance to the lawmaking act of choosing and adopting the constitutional provisions on which claims of unconstitutionality rest.<sup>78</sup>

The move to overrule state constitutional rights decisions seems to have slowed down. This is a positive development. A constitutional ruling about people's rights is really something quite special. We invented it here in the United States and it is now the envy of the world. Rights decisions should be seen as different from constitutional rulings about separation of powers, state-local relations

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76. *Id.* at 97.

77. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993); Linde, *Common Law?*, *supra* note 4, at 226–29.

78. Linde, *Common Law?*, *supra* note 4, at 228–29. *See also* Linde, *E Pluribus*, *supra* note 4, at 195; Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393–94 (1998) (arguing that state identity for the purpose of constitutional interpretation is “constituted not by the beliefs of the population of the state, but rather by the ideals defined by the constitutional itself”).

or other matters of state constitutional interpretation. Such matters are extremely important but are qualitatively different from rights rulings.

Rulings about rights often protect unpopular people or groups who cannot gain a legislative or electoral majority. If a decision about constitutional rights becomes nothing more than the springboard for a proposed constitutional amendment to overrule it, we can damage our fundamental system of state constitutional rights. That system depends on independent courts for its operation.

Constitutional interpretation, especially in controversial rights cases based on older, generally worded clauses, is not an exact science. This is true despite the assertions of strict constructionists or originalists. Decisions based on similar clauses, which rule against the asserted rights, are not necessarily correct either. Either way, we should leave those decisions in the hands of independent judges.

Those who disagree with a controversial rights decision often argue that there is no constitutional underpinning for the decision and that the court was just implementing its policy preferences. These people often feel a particular decision cries out for a constitutional amendment to overrule it even though they may not feel that way about other controversial rights decisions in such areas as free speech, criminal procedure rights, and religious freedom. Those who feel strongly about the other decisions, however, may propose amendments to overrule them. This reaction can have a snowball effect.

When such people are legislators, rather than ordinary citizens, the slippery slope problem becomes obvious. The legislator who believes passionately about a particular amendment, and believes just as passionately that the decision to be overruled was rendered without legal basis, will need to enlist the support of other legislators, forming a majority or even a supermajority.

If some of these other legislators have amendments about which they are passionate, the stage is set for a logrolling process on constitutional rights. Support for one amendment may depend on, or even stimulate, support for others. This is not a climate that is conducive to independent interpretation of state constitutional rights provisions.

## V.

## THE CONTRIBUTIONS IN THIS ISSUE

As I have noted elsewhere, with some reservations, many of the statutory interpretation approaches developed by the courts are also applicable to interpreting state constitutions.<sup>79</sup> In this sense, the articles by Justice Moyer<sup>80</sup> of Ohio and Chief Justice Corrigan and J. Michael Thomas<sup>81</sup> of Michigan make important contributions to the interpretative enterprise.

As noted earlier, capital punishment litigation in California helped to kick off the New Judicial Federalism in 1972.<sup>82</sup> The article by Justice Walsh of Delaware thoughtfully considers the continuing issues surrounding the death penalty in state constitutional law.<sup>83</sup>

Justice Richard Sanders and Dr. Barbara Mahoney of Washington, building on Justice Sanders's earlier work,<sup>84</sup> challenge the well-accepted canon that state government, particularly the legislative branch, possesses plenary or residual governmental power.<sup>85</sup> This is an important and provocative challenge to the prevailing view,<sup>86</sup> and should be taken seriously in both theoretical and practical terms. Long ago Walter Dodd asked whether there was really a great distinction between the approach of most state constitutions, delegating "all legislative power" to the legislature and the view that legislative power was inherent or plenary.<sup>87</sup> Justice Sanders and Dr. Mahoney contend, by contrast, that the distinction is both great and important.

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79. Williams, *supra* note 47, at 209.

80. Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003).

81. Maura D. Corrigan & J. Michael Thomas, "Dice Loading" Rules of Statutory Interpretation, 59 N.Y.U. ANN. SURV. AM. L. 231 (2003).

82. See *supra* notes 8–10, 24, and accompanying text.

83. Joseph T. Walsh, *The Evolving Role of State Constitutional Law in Death Penalty Adjudication*, 59 N.Y.U. ANN. SURV. AM. L. 341 (2003).

84. Richard B. Sanders, *Battles for the State Constitution: A Dissenter's View*, 37 GONZ. L. REV. 1 (2001/02).

85. Richard B. Sanders & Barbara Mahoney, *Restoration of Limited State Constitutional Government: A Dissenter's View*, 59 N.Y.U. ANN. SURV. AM. L. 269 (2003).

86. See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44 (R.I. 1995); Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57 (1995); *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Power*, 4 ROGER WILLIAMS U. L. REV. 159 (1998).

87. Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205 (1915).



Separation of powers under state constitutions has been the subject of heightened interest recently.<sup>88</sup> Dr. Alan Tarr's article provides an excellent survey of the issues, and elucidates the contrast between state and federal separation of powers doctrine.<sup>89</sup>

The question of establishing non-constitutional legal requirements to make constitutional norms effective, in the "real world," has risen to high visibility with the United States Supreme Court's recent decision in *United States v. Dickerson*.<sup>90</sup> There the Court concluded that "Miranda warnings,"<sup>91</sup> understood by every viewer of television in the past several generations, were in fact constitutionally required rather than a non-constitutional "prophylactic rule."<sup>92</sup> The article by Justice Thomas G. Saylor of Pennsylvania provides a timely and thoughtful analysis of this very important topic, which has rarely if ever been assessed in the context of state constitutional law.<sup>93</sup> His conclusions that "state courts may legitimately consider employment of acknowledged, prophylactic rules affording greater protections to individual rights than are available under the United States Constitution, particularly where they are charged with broad supervisory duties under the state constitution,"<sup>94</sup> and that "there is stronger justification for the employment of prophylactic rules to safeguard individual liberties from government intrusion by state as opposed to federal courts,"<sup>95</sup> are illuminating contributions to the New Judicial Federalism. Like the doctrines of harmless error,<sup>96</sup> and the retroactivity of constitutional rulings,<sup>97</sup> prophylactic rules do form an important component of non-constitutional judicial application of state constitutional rules.

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88. See, e.g., *Symposium: Separation of Powers in State Constitutional Law*, 4 ROGER WILLIAMS U. L. REV. 1 (1998).

89. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

90. 530 U.S. 428 (2000).

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

92. 530 U.S. 428 (2000).

93. Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003).

94. *Id.* at 284.

95. *Id.* at 308.

96. *Cooper v. California*, 386 U.S. 58, 62 (1967); Note, *The California Constitution and the California Supreme Court in Conflict Over the Harmless Error Rule*, 32 HAST. L.J. 687 (1981); *State v. Harris*, 544 N.W. 2d 545, 561 (Wis. 1996) (Abrahamson, J., concurring).

97. Mary C. Hutton, *Retroactivity in the State: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1993).

Justice Saylor's interesting treatment of prophylactic rules in state constitutional law is reminiscent of elements of Professor Larry Sager's "strategic concerns thesis."<sup>98</sup> Sager contended:

State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. . . .

In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the difference in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.<sup>99</sup>

Finally, the article by Justice Donald Wintersheimer of Kentucky, an established state constitutional law scholar,<sup>100</sup> makes an important analysis of the extent to which state courts follow the United States Supreme Court's *de novo* appellate review rule for federal punitive damages awards.<sup>101</sup> This is a very interesting issue in this era of state tort reform.

## VI. CONCLUSION

The New Judicial Federalism has been, and continues to be, an evolving phenomenon. It is here to stay, as a central feature of American federalism and promises to continue, with our help, through a number of additional stages in the future. Scholars of law, political science and history, as well as judges and lawyers, will define those stages.

This special issue of the *Judges' Forum* represents an important contribution by the *NYU Annual Survey of American Law* by publish-

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98. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

99. *Id.* at 975-76, quoted in Williams, *supra* note 32, at 1052. See also Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 Land and Water L. Rev. 527 (1986).

100. See, e.g., Donald C. Wintersheimer, *State Constitutional Law*, 20 N. KY. L. REV. 591 (1992-93); Donald C. Wintersheimer, *State Constitutional Law Survey*, 21 N. KY. L. REV. 257 (1993-94).

101. Donald C. Wintersheimer, *Does Cooper Industries v. Leatherman Tool Group, Inc. Require De Novo Review by State Appellate Courts?*, 59 N.Y.U. ANN. SURV. AM. L. 357 (2003).

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ing important scholarly and practical articles written by busy sitting members of the judiciary that increase our understanding of the judges' craft. By speaking directly to judges and lawyers, this special issue provides a major step forward in the necessary dialogue on state constitutional law.

