

**PROPHYLAXIS IN MODERN STATE
CONSTITUTIONALISM: NEW
JUDICIAL FEDERALISM AND
THE ACKNOWLEDGED,
PROPHYLACTIC RULE**

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The question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.¹

The task of crafting a new rule or test—or even a serious proposal for one—is hard work, requiring resources that may not always lie at hand. And a failed effort can be costly. Sometimes in constitutional law, as in medicine, the governing principle should be: “First, do no harm.”²

INTRODUCTION

In his timely treatise on state constitutional law, Professor G. Alan Tarr notes a gap in the literature connecting the subject of state constitutionalism with modern constitutional theory; the book’s final chapter bridges that gap, thus serving as a foundation for further, directed inroads.³ This Article is intended as a modest effort at one such venture.

The object, then, is to consider the relevance of doctrinal theory that has been intensely debated at the national level to state

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1. 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, 1018 (1997) [hereinafter Williams, *In the Glare of the Supreme Court*].

2. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 113–14 (1997) [hereinafter Fallon, *Implementing the Constitution*].

3. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 173 (1998) [hereinafter TARR, UNDERSTANDING STATE CONSTITUTIONS].

constitutional interpretation and implementation. The chosen focal point is rule-based legal requirements or directives that are intended to guard constitutional values but are not expressly implemented as direct manifestations of constitutional prescription, namely, prophylactic rules. Although different connotations of this concept are considered, the present treatment narrows to concentrate on rules that are candidly prophylactic in character—the acknowledged, prophylactic rule.

From a broader vantage point, the Article looks for insight into the uneven experience of state courts in interpreting and implementing vital state constitutional provisions having some federal analogue. Because divergence from the federal approach and judicial rulemaking implicate independent and overlapping concerns touching on the lawfulness of judicial review, this Article argues that precaution is a legitimate and substantial factor in state courts' assessments concerning whether and when to diverge from the federal example—prophylaxis, if you will, in modern state constitutionalism. Nevertheless, the thesis is developed that, given a necessary and substantial foundation, 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. State courts should be reluctant, however, to couch such rules as absolute commands of a state constitution, unless a restrained and thorough application of established interpretive principles renders such a course an imperative.

Parts I and II of the Article cover essential background, with the former being devoted to state constitutionalism, its resurgence (or emergence) as a source for defining and advancing individual rights, and various methodologies by which state constitutional precepts are discerned and evaluated. Part II discusses doctrinal forms in terms in which they are assessed in federal constitutional theory, with particular emphasis on the character of rules and standards; prophylactic rules; and the controversy over the “constitutionalization,” in *Dickerson v. United States*,⁴ of the once-prophylactic rule of *Miranda v. Arizona*.⁵ In Part III, the individual strands of Parts I and II are addressed in tandem, and consideration is given to the development of acknowledged, prophylactic rules in the state forums. Further, if much of the commentary represents an effort of

4. 530 U.S. 428 (2000).

5. 384 U.S. 436 (1966).

scholars to glean perspective into judicial opinions, Part III of this Article reflects a judge's effort to draw insight from the critical commentary. Part IV contains a few concluding remarks emphasizing, in particular, the appropriate and perhaps essential role for the rich dialogue of federal constitutional interpretation and theory in state constitutionalism, where due care is taken not to do violence to the distinctive character of state charters and the corresponding role of unique state sources in the interpretive venture.

I.
OPENING WITH STATE CHARTERS IN FOCUS—
MODERN STATE CONSTITUTIONALISM

Consideration of the modern role of state constitutions generally begins with the national Constitution, since the federal government was conceived as one of limited powers, with powers not delegated to it, or prohibited to the states by the Federal Constitution, reserved to the states or to the people.⁶ This system of dual sovereignty, or federalism, seeks to impose structural limitations on government by allocating powers between the federal and state systems.⁷ The residual quality of state power, and the associated concept of local control, have yielded the metaphor of states as laboratories, free to experiment with novel social and political ideas and thereby create diversity.⁸ In this system, state constitutions may, within their structural limits, embody such diversity.⁹

6. See U.S. CONST. amend. X; see also *United States v. Sprague*, 282 U.S. 716, 733 (1931); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

7. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

8. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting); see also *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983) (positing that “[d]iversity is the price of a decentralized legal system, or its justification”); Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO L. REV. 523, 526–27 & n.5 (2000) (emphasizing as critical that state constitutions are documents that limit otherwise unfettered power, whereas the United States Constitution embodies a grant of enumerated powers, and noting, “[t]he essential notion of the state police power expresses the core idea of the state legislative and executive power under principles of state constitutionalism, which is that state political entities may exercise all powers necessary to carry out state goals, except as limited by the national constitution”).

9. See Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents*, 27 OKLA. CITY U.L. REV. 189, 191, 194–95 (2002) [hereinafter Williams, *Interpreting State Constitutions As Unique Legal Documents*] (“State constitutions are sui generis, differing from the Federal Constitution in their origin, function, and form.”).

In a recent article, Justice Stephen Breyer elaborated on the vitality of this core concept of federalism, as follows:

By guaranteeing state and local governments broad decision-making authority, federalist principles facilitate “novel social and economic experiments,” secure decisions that rest on knowledge of local circumstances, and help to develop a sense of shared purpose among local citizens. Through increased transparency, they make it easier for citizens to hold government officials accountable. And by bringing government closer to home, they help maintain a sense of local community. In all these ways they facilitate and encourage citizen participation in governmental decisionmaking.¹⁰

The phrase “new federalism” is used broadly to describe a trend towards enlargement of the role of the states in the national, political scheme.¹¹ “New judicial federalism” generally refers, more narrowly, to the increased tendency of state courts to interpret state charters as sources of rights independent of the Federal Constitution and interpretations of the United States Supreme Court,¹² with the term “lockstep” employed essentially as its antonym.¹³ With the clarification of the doctrine of “adequate and independent state

10. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 257–58 (2002). Others have contended that the states-as-laboratories metaphor is at best a dated conception. See, e.g., *infra* notes 19–23 and accompanying text.

11. See Jeffrey A. Modisett, *Discovering the Impact of the “New Federalism” on State Policy Makers: A State Attorney General’s Perspective*, 32 IND. L. REV. 141, 141 (1998) (“The phrase ‘new federalism’ connotes an asserted reinvigoration of states’ rights by the U.S. Supreme Court and other institutions.”). The phrase itself has been attributed to Professor Donald E. Wilkes, Jr. See Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421, 421 (1974). Recent decisions in this vein include *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating certain provisions of the federal Violence Against Women Act as exceeding the limits of Congress’ commerce power), *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating portions of the Brady Bill deemed to “commandeer” state officials into federal service as in conflict with the “constitutional system of dual sovereignty”), *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the federal courts lack jurisdiction to adjudicate certain claims against non-consenting states), and *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the federal Gun-Free School Zones Act).

12. See generally G. Alan Tarr, *The New Judicial Federalism In Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–98 (1997).

13. See, e.g., Jessica L. Schneider, *Breaking Stride: The Texas Court of Criminal Appeals’ Rejection of the Lockstep Approach 1988-1998*, 62 ALB. L. REV. 1593, 1593–94 (1999); TARR, UNDERSTANDING STATE CONSTITUTIONS, *supra* note 3, at 180.

grounds” in *Michigan v. Long*,¹⁴ the United States Supreme Court reaffirmed the justification for and continuing validity of such divergence from the design reflected in federal constitutional jurisprudence.¹⁵

Many view the invigoration of state constitutionalism as a reaction to the changing composition of the United States Supreme Court.¹⁶ Since Justice William J. Brennan, Jr.’s publicized heralding of a “new federalism” in the 1970s,¹⁷ a substantial body of litera-

14. 463 U.S. 1032, 1041 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we . . . will not undertake to review the decision.”).

15. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1167 (1993) (“*Michigan v. Long* put into place the doctrinal scheme within which the state-court pursuit of American constitutionalism can proceed.”). See generally James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 234–35 (1996) (“New Federalism arose from the principle that the guarantees of the United States Constitution provide only minimum standards and the states are at liberty to accord their citizens greater rights under their respective state constitutions.”).

16. See, e.g., TARR, UNDERSTANDING STATE CONSTITUTIONS, *supra* note 3, at 180; David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 368–69 (2001) (characterizing new judicial federalism as an effort “to keep alive the Warren Court’s legacy of expanded constitutional protections for the criminally accused by utilizing state constitutional provisions”); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 794 (2000) (“The very impetus for resort to state constitutional interpretation was the perception that the federal courts—in particular, the United States Supreme Court—during the Burger era were engaged in a systematic effort to dismantle the civil rights jurisprudence of the Warren Court.”); Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1460 (1997) (“No doubt, the increased interest by lawyers and litigants in state constitutional rights was fueled by the retrenchment of the Supreme Court in many rights disputes during the same period.”).

17. Justice Brennan wrote:

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. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); see also *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (calling upon state court judges to “impose higher standards governing police practices under state law than is required by the Federal Constitution”). For a critique of Justice Brennan’s motivations, see Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421–23 (1996). Chief Justice Shepard, of the Indiana Supreme Court, also emphasized that scholars and judges pursued the potential for divergence before

ture has been generated on the subject, and various Justices of the United States Supreme Court have suggested that state courts might discern or fashion clear rules departing from applicable federal constitutional jurisprudence pursuant to their respective state constitutions, or have at least alluded to the possibility of divergence.¹⁸

Any overview of modern state constitutionalism would be incomplete without reference to the ongoing debate concerning its relevance and the legitimacy of heightened interest in the subject. The nature and timing of Justice Brennan's involvement has contributed to arguments that federalism is employed often and/or largely for political or ideological reasons.¹⁹ Further, in 1992, Professor James A. Gardner described a trend toward a national cultural identity, which, he contended, undercuts the prospects for meaningful state constitutionalism based on unique state sources.²⁰ Professor Gardner's view has been challenged by numerous other scholars, who maintain not only that a principled and robust judicial federalism is possible, but that it is desirable, achievable, and, indeed, essential.²¹ A fairly strong countercurrent, however, points

Justice Brennan devoted close focus to the matter. *See id.* at 423–24; *accord* 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, 44–45 (2001) ("The view that state constitutions are the basic instruments that protect individual liberties did not evaporate when state courts stopped looking to them to protect fundamental liberties because those liberties were federalized during the 1960's."). Attribution is frequently given to Justice Hans Linde of the Oregon Supreme Court for his substantial contribution. *See, e.g.*, Shepard, *supra*, at 422 & n.5 (citing Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980)).

18. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 43–44 (1996) (Ginsburg, J., concurring). In the individual rights arena, of course, divergence cannot result in standards or rules less favorable to individual rights, since the Federal Constitution establishes the minimum protections that must be afforded individual liberties.

19. *See, e.g.*, Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1308 (1999).

20. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 837 (1992). Gardner describes state constitutional law as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements." *Id.* at 763.

21. *See, e.g.*, Shepard, *supra* note 17, at 433 (observing that "it is often said that vigorous state constitutionalism is imperative because it perpetuates the scheme of dispersal of powers envisioned by the framers"); 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, 105 (2001) [hereinafter Williams, *Old Constitutions and New Issues*]. *See generally* George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1370–71 (1990) [hereinafter Dix, *Defining Criminal Defendants' Texas Constitutional*

to the “perplexing melange of disparate constitutional principles” that can result from divergence,²² and the attendant undesirability of divergence in a nation of interdependent states.²³

Accepting that state court judges, who are sworn to uphold not only the national Constitution but also their state constitutions, have an obligation to make some independent assessment of state constitutional provisions, a question arises concerning how the task is to be undertaken.²⁴ Under a “primacy” approach, courts evaluate their constitutional provisions firstly and primarily, looking to analogous federal provisions only for potential guidance; courts applying an “interstitial” method begin with federal constitutional

Rights] (“Those urging that state courts readily engage in more expansive construction of state provisions argue that our federal system requires state courts, within federal constitutional parameters, to develop state constitutional doctrines in a manner reflecting each state’s own particular tradition and heritage.”).

22. Diehm, *supra* note 15, at 244.

23. See, e.g., *id.* at 263–64; Stephen J. Bogacz, *Bright Lines and Opaque Containers: Searching for Reasonable Rules in Automobile Cases*, 10 *TOURO L. REV.* 679, 704 (1994); Matthew M. Weissman, *People v. Torres and the Limits of State Constitutionalism: Has the Court of Appeals Forgotten the Cop?*, 24 *COLUM. J. L. & SOC. PROBS.* 299, 348–49 (1991). In this regard, Professor George E. Dix has summarized this line of critical commentary as follows:

Those opposing broad assertion of new-federalism powers assert that principled state judicial independence is an illusory goal. They argue that holdings expanding individual rights beyond those in the federal constitution are necessarily based upon little more than state judges’ personal views, because neither constitutional text nor state history yields a sufficiently objective basis for principled independent construction of state constitutional provisions. The result-oriented case law that follows must then inevitably usurp the policy-making powers of the legislature. Opponents of state court activism, therefore, often urge a “lockstep” approach, under which state courts generally construe a state constitutional provision as having a content identical to the content that the Supreme Court has given to the federal constitutional analogue.

Dix, *Defining Criminal Defendants’ Texas Constitutional Rights*, *supra* note 21, at 1371.

24. Justice Garibaldi of the New Jersey Supreme Court described this inquiry as follows:

The vexing problem that remains in the area of “new judicial federalism” is how a state court should determine when its state constitutional provision provides greater protection of individual rights than a similar or identical federal constitutional provision. Justice Souter, while serving as a Justice on the Supreme Court of New Hampshire, aptly described the dilemma facing the state courts in stating: “If we place too much reliance on federal precedent we will render the State rules a *mere row of shadows*; if we place too little, we will render State practice *incoherent*.”

Marie L. Garibaldi, *Foreword: The Vexing Problem of State Constitutional Law*, 72 *TEMP. L. REV.* 555, 556 (1999) (quoting *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially) (emphasis added)).

interpretations and evaluate whether there are grounds for divergence.²⁵ Under either approach, there is much diversity regarding the manner in which state constitutional provisions are evaluated.²⁶ Initially, there is some degree of consensus that the overarching task is to determine the intent of voters who ratified the constitution.²⁷ In furtherance of this aim, courts reference, *inter alia*, text;²⁸ history (including “constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision”);²⁹ structure; underlying values;³⁰ and interpretations of other states.³¹ In making the case for fair and meaningful consideration of the potential for divergence, Professor Tarr points to the “different institutional positions of federal and state supreme

25. See Gardner, *supra* note 20, at 774–75. Some commentators have deemphasized the significance of the choice between these methods. See, e.g., Williams, *In the Glare of the Supreme Court*, *supra* note 1, at 1019 (“[I]t is not the *sequence* that matters, but rather the focus on truly *independent* state constitutional interpretation, in whatever sequence it occurs. It is substance, not form, that counts most.”).

26. See generally Lynn M. Boughey, *A Judge’s Guide to Constitutional Interpretation*, 66 TEMP. L. REV. 1269, 1269 (1993) (“Perhaps one of the most difficult functions of a judge, and especially a new judge, is to determine an appropriate analytical framework to employ when interpreting a state constitution.”).

27. See, e.g., *People v. Tisler*, 469 N.E.2d 147, 161 (Ill. 1984) (“With similarity to the principle governing statutory construction, a court, in interpreting a constitution, is to ascertain and give effect to the intent of the framers of it and the citizens who have adopted it.”); *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979) (“Where, as here, we must decide between two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.”); accord Williams, *Interpreting State Constitutions As Unique Legal Documents*, *supra* note 9, at 194–95 (positing that “[w]hen construing a constitution, the Court’s task is to divine the common understanding of the provision, that meaning which reasonable minds, the great mass of the people themselves, would give it.”) (citations omitted).

28. See, e.g., *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). See also generally Boughey, *supra* note 26, at 1269.

29. See Williams, *Interpreting State Constitutions As Unique Legal Documents*, *supra* note 9, at 194–95.

30. See *infra* notes 39–40 and accompanying text.

31. Reference to constitutional jurisprudence of other states has been termed “horizontal federalism.” See Brendan W. Williams, *Horizontal Federalism Inches Along: New Jersey’s Experiment in State Constitutionalism and Consent Searches Finally Finds Company*, 5 TEX. F. ON C.L. & C.R. 1, 2 (2000); Williams, *Old Constitutions and New Issues*, *supra* note 21, at 98–99.

courts and the constraints imposed by federalism on the development of federal constitutional doctrine.”³²

Just as in matters of statutory construction, the selection of the individual factors, and the weight attributed to each factor, varies among courts and between controversies. Thus, Professor Robert F. Williams has explained that no one theory is available that would rationalize the progress of state constitutionalism:

Outcomes will depend on the clarity as well as the distinctness of the state constitutional text (both in contrast to the federal and other state texts), its character as an open-textured or “great ordinance,” the presence of either general or specific state constitutional history, precedents and judicial doctrines that have been developed within the states (particularly those from which the provision was copied) with similar or identical provisions, judges’ assessments of “strategic concerns,” as well as, of course, judges’ attitudes and “reasoned judgment.”³³

According to Professor Williams, this dynamic quality of the state constitutionalism provides “at least a partial answer for those scholars who search for a single constitutional theory to explain the New Judicial Federalism, or who call on courts to follow a single methodology.”³⁴

The Vermont Supreme Court described its methodology in state constitutional interpretation, in general terms, as follows:

[T]he responsibility of the Court . . . is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them. . . . Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.³⁵

Among other things, this passage alludes to the interpretive role of fundamental values underlying certain state charter provisions. The New Jersey Supreme Court has elaborated on this dynamic,

32. See G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 849 (1991) [hereinafter Tarr, *State Constitutional Interpretation*].

33. Williams, *Old Constitutions and New Issues*, *supra* note 21, at 121–22 (footnotes omitted).

34. *Id.*

35. *Baker v. State*, 744 A.2d 864, 874 (Vt. 1999).

while distinguishing constitutional provisions of narrower significance, as follows:

Not all constitutional provisions are of equal majesty. Justice Holmes once referred to the "great ordinances of the Constitution." Within this category would be included the due process clause, the equal protection clause, the free speech clause, all or most of the other sections of the Bill of Rights, as well as certain other provisions. The task of interpreting most if not all of these "great ordinances" is an evolving and on-going process. . . .

. . . .
. . . [T]he underlying spirit, intent and purpose of the Article must be sought and applied as it may have relevance to the problems of the day³⁶

Professor James Gray Pope has contended that "vital provisions" are "of sufficient constitutional weight to alter the field of state constitutional interpretation."³⁷

The manner in, and degree to which such values may be relied upon in determining the results of judicial decisions, of course, implicates the debate between originalism and non-originalism (or interpretivism and non-interpretivism)³⁸ persisting at the federal level. It is frequently argued that state courts are free both to enter this debate, and to depart from federal jurisprudential devices on state constitutional issues. Indeed, even some commentators who have expressed the view that there are inherent limitations in attempts to identify unique state sources on which to ground independent constitutional theory find substantial use for a vital provisions concept. For example, in making the case for a legitimate "common enterprise" in which both the Federal Constitution and state constitutions are assessed to provide interpretive answers to great constitutional questions, Professor Paul W. Kahn begins by distinguishing interpretation from truth, as follows:

[C]onstitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order. At both the state and national levels, this de-

36. *Vreeland v. Byrne*, 370 A.2d 825, 831-32 (N.J. 1977) (footnote omitted); see also James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 1007 (1993); Williams, *Old Constitutions and New Issues*, *supra* note 21, at 117-18.

37. Pope, *supra* note 36, at 1007.

38. See generally Daniel A. Farber, *The Originalism Debate: A Guide For The Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (describing arguments for and against originalism).

bate focuses upon the ideas of liberty, equality, and due process, as well as upon the structures of representative government necessary to realize these values The diversity of state courts is best understood as a diversity of interpretive bodies, not as a multiplicity of representatives of distinct sovereigns. The common object of state interpretive efforts is American constitutionalism. Each state court has the authority to put into place, within its community, its unique interpretation of that common object.³⁹

Professor Kahn therefore takes issue with the suggestion that a lockstep approach should be required of state courts:

[T]he mere fact that a doctrine emerges from the authoritative voice of the Supreme Court does not make it correct. The same institutional authority, after all, announced both the new and the old doctrines. Supporters of each doctrine will claim to speak for the law and will accuse their opponents of confusing law and politics. In this debate over the meaning and requirements of law, the Court's voice is never final. Conflicts among interpretations are not resolved by assertions of judicial authority. When there is only a single view of the possibilities of law, the meaning of the constitutional order is impoverished.⁴⁰

39. Kahn, *supra* note 15, at 1147–48. Professor Kahn's view has been criticized for failing sufficiently to take into account real and significant differences in federal and state constitutional content and context. See, e.g., TARR, UNDERSTANDING STATE CONSTITUTIONS, *supra* note 3, at 188 (arguing that "Kahn's argument glosses over crucial differences between state and federal constitutions, substituting generic constitutional analysis for the interpretation of identifiable state constitutional provisions"); Williams, *Old Constitutions and New Issues*, *supra* note 21, at 107–08; see also Kahn, *supra*, at 1156 (contending that "constitutionalism is an interpretive enterprise, not a set of timeless truths"). See generally Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1084 (1997) ("It is enough to discern and apply the values that document apparently meant to perpetuate. It is not necessary, in order to support pursuit of independent or diverse state doctrines, to assert that every state constitutional decision reflects a unique political climate or set of values.").

40. Kahn, *supra* note 15, at 1155; see also Baker, 744 A.2d at 886 ("[I]n the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefits, protection, and security that Vermont law provides opposite-sex couples."); Friesen, *supra* note 39, at 1083–84; Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 657 (1994) (describing the exercise of interpretive responsibility by the state judiciary); Shepard, *supra* note 17, at 426 (considering the suggestion that "even where the language of the two constitutions was similar, a state court should independently evaluate the meaning of a provision

Building on the role of vital provisions and autonomy in state constitutional interpretation,⁴¹ Chief Justice Shepard has commented that “we are moving rather surely towards becoming a nation where the most important constitutional issues are joined and resolved in a variety of fora after robust debate and analysis. This should make for a better America.”⁴²

In summary, while there is little question that state courts possess the authority to diverge from federal constitutional precepts in interpreting state constitutions, there is a wide array of views concerning the scope of state courts’ interpretive responsibilities. The complexity of the inquiry increases when considering the vehicles by which constitutional values are identified and implemented in judicial decisions, namely, doctrinal forms.

in order to choose the better rule, not to merely follow a majority of the U.S. Supreme Court”); Tarr, *State Constitutional Interpretation*, *supra* note 32, at 849 (positing that “when state judges forthrightly assert their own perspectives, it is argued, the result is a healthier and more vibrant federalism”); Williams, *Old Constitutions and New Issues*, *supra* note 21, at 106–07, 114 (elaborating on the ongoing discourse idea and indicating that it is “the ideals defined by the constitution itself that form the underpinning for a vibrant, independent state constitutional discourse”).

41. Again, Professor Tarr takes issue with the significance of the vital provisions observation in state constitutional law. *See, e.g.*, TARR, UNDERSTANDING STATE CONSTITUTIONS, *supra* note 3, at 188–89. In this regard, however, he does not appear to discount that such vital provisions may exist in state constitutional law and therefore that corresponding interpretive approaches may be relevant; rather, his focus appears to be on tempering such perspective by emphasizing the role of unique state content and context. *See id.*

42. Shepard, *supra* note 17, at 457. Justice Robert Utter of the Washington Supreme Court has expressed similar sentiments as follows:

The reliance on state constitutions as the source of many of our individual rights is part of the historic fabric of the United States. . . . It remains to be seen how the personalities of the various state courts and state populations will combine in the diversity of state constitutional interpretation. This diversity is inevitable, given the varying language and histories of the state constitutions, the willingness of some state courts to go farther than others in independent jurisprudence, and the differences between states in democratic contributions. Yet this diversity is also desirable. It widens the range of constitutional analysis and allows the results of each state’s experimentation to benefit all other courts, federal as well as state.

Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 49 (1989).

II.
SHIFTING TO A DIALOGUE AMONG NATIONAL
CONSTITUTIONAL THEORISTS—
DOCTRINAL FORMS

Since vital constitutional provisions are not self-executing, courts rely on legal constructs to discern their relevance and effect in the context of controversies arising before them. In the words of Dean Kathleen M. Sullivan, “[l]aw translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts.”⁴³ In turn, courts’ doctrinal choices impact strongly on the character and range of the consequences resulting from vindication of constitutional values that are found to be at stake.⁴⁴ For these and other reasons, doctrine assumes a primary role in the decision making process in matters of constitutional adjudication; this is true at both the federal and state levels.⁴⁵

As there are innumerable forms of doctrine (which, assuming an absence of substantive constraints, would be limited only by the inventiveness of the decision maker), intermediate forms are not frequently described in the literature in terms of categories,⁴⁶ but rather, according to a “continuum” of decision making latitude or discretion afforded by the relevant form.⁴⁷ The two polar, archetypical forms of doctrine are bright-line rules, affording the least

43. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) [hereinafter Sullivan, *Justices of Rules and Standards*]; see also Fallon, *Implementing the Constitution*, *supra* note 2, at 57 (“A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”).

44. A powerful example can be found in the application of the exclusionary rule in criminal cases. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

45. Cf. Fallon, *Implementing the Constitution*, *supra* note 2, at 56–57 (“The need for doctrine arises partly from uncertainty about which values the Constitution encompasses and how protected values should be specified” and, because constitutional norms “are too vague to serve as rules of law,” to achieve effective implementation.)

46. Professors Richard H. Fallon, Jr. and James G. Wilson have made two notable efforts at assembling loose categorizations of forms. See Fallon, *Implementing the Constitution*, *supra* note 2, at 67–75; James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 778–834 (1995).

47. See, e.g., Sullivan, *Justices of Rules and Standards*, *supra* note 43, at 57; Wilson, *supra* note 46, at 776.

flexibility to the decision maker, and standards taking into account a totality of the circumstances, allowing the greatest latitude.⁴⁸

Rule-like forms limit flexibility and discretion by requiring courts to proceed in a pre-established manner when confronted with certain categories of circumstances.⁴⁹ Therefore, they are said to ease the reviewing court's task and conserve judicial resources because they provide a clear analytical framework for judges;⁵⁰ foster predictability;⁵¹ ameliorate unevenness of judging;⁵² dispel uncertainty among government actors including law enforcement by establishing a uniform practice;⁵³ and provide plain incentives to

48. See Wilson, *supra* note 46, at 777. Professor Wilson also suggests further categories of even more malleable standards, such as conclusory ones, that, if used, effectively could permit unlimited discretion. See *id.* at 818–22.

49. Kathleen M. Sullivan has elaborated on the point in the following manner:

Rules, generally speaking, bind a legal decision-maker in a fairly determinate manner by capturing underlying principles or policies in ways that then operate independently. What gives a rule its force is that judges will follow it in a fairly rote fashion even where a particularized application of the background principle might arguably yield a different result.

Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 750 (1998) [hereinafter Sullivan, *Jurisprudence of the Rehnquist Court*].

50. See George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 229 [hereinafter Dix, *Wayne LaFave's Bright Line Rule Analysis*].

51. See Sullivan, *Jurisprudence of the Rehnquist Court*, *supra* note 49, at 751 (“Rules constrain the discretion of the decision-maker who applies them and typically require the determination of only very limited issues of fact. . . . [T]he advantages of rules include certainty, predictability, formal fairness, clear notice to those they govern, and economy in the process of decision-making.”) (footnotes omitted).

52. See Breyer, *supra* note 10, at 270; Sullivan, *Justices of Rules and Standards*, *supra* note 43, at 62 (“The argument that rules are fairer than standards is that rules require decisionmakers to act consistently, treating like cases alike. On this view, rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties’ particular attractive or unattractive qualities into the decisionmaking calculus.”).

53. In advocating judicial application of bright-line rules in the Fourth Amendment arena of criminal procedure, Professor Wayne R. LaFave has taken the position that:

Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field.

conform to such practice.⁵⁴

A legal directive is considered to be in the nature of a standard when it affords flexibility to the decision maker to consider a broader range of considerations before directing a result, including context, as well as principles or policies giving rise to the directive.⁵⁵ The affordance of such flexibility or discretion is said to decrease under- and over-inclusiveness in the vindication of constitutional norms or values at stake in particular controversies,⁵⁶ which would be inherent in the application of a more rigid directive.⁵⁷

When couched in terms of flexibility and discretion, the relationship between constitutional interpretation and forms of doctrine becomes evident. In Dean Sullivan's terms:

The real question is not whether the Court should exercise discretion in constitutional interpretation, but rather how much and by what means the Court should try to keep its discretion in check. Once it is seen as a debate about the boundaries of judicial discretion, the constitutional interpretation debate converges with pervasive jurisprudential debates over the rela-

Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 [hereinafter LaFave, *The Robinson Dilemma*] (internal citation and footnotes omitted); see also Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 3 (1999) ("The development of bright-line rules in search and seizure cases helps . . . [police] officials [to] more easily instruct officers in broad, clear-cut terms as to the legal procedures for conducting searches and seizures."); Paul Marcus, *A Return to the "Bright Line Rule" of Miranda*, 35 WM. & MARY L. REV. 93, 111–12 (1993) (noting the great value of *Miranda* in providing a clear and understandable governing rule).

54. See LaFave, *The Robinson Dilemma*, *supra* note 53, at 141 & n.58. Professor Dix has summarized this point as follows:

[T]hese rules arguably maximize the effectiveness of exclusion as a means of enforcing the legal requirements. Law enforcement officers are told that they cannot ignore legal requirements such as those regarding pre-interrogation warnings in reliance upon the likelihood that the courts will later find that a subsequent confession was obtained without compromising the underlying interest, *i.e.*, that the confession was voluntary.

Dix, *Wayne LaFave's Bright Line Rule Analysis*, *supra* note 50, at 230.

55. See Sullivan, *Justices of Rules and Standards*, *supra* note 43, at 58–59.

56. Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 596 (2001) [hereinafter Klein, *Miranda's Exceptions Post-Dickerson*] ("When it is impossible to precisely track the constitutional clause at issue, the Court is forced to either over or underprotect.")

57. See Fallon, *Implementing the Constitution*, *supra* note 2, at 117–18 ("Doctrinal tests typically function as rules for decision. As measured by reference to their underlying rationales, doctrinal tests, like all rules, are prone to both overinclusiveness and underinclusiveness.") (footnotes omitted).

tive merits of the choice of legal form, because in these debates the amount of judicial discretion has been thought to depend on the form in which legal directives are addressed to judges.⁵⁸

Falling at one end of the rules/standards continuum, prophylactic rules crystallize most aspects of the rules/standards debate and thus have been a focal point for controversy.⁵⁹ Such legal requirements have been defined in many ways, but here the focus is on the particular type of judicial, bright-line directive intended to guard an underlying constitutional value and designed to apply categorically to ensure its effectiveness. Therefore such requirements will necessarily apply in some instances in which the constitutional value is not actually compromised or impinged.⁶⁰ The justification for imposing such a rule generally is tied to the degree of difficulty attached to identification of an actual violation of the relevant constitutional value.⁶¹ There is disagreement as to how pervasive prophylactic rules actually are in the jurisprudence.⁶²

58. See Sullivan, *Justices of Rules and Standards*, *supra* note 43, at 57.

59. Compare, e.g., Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987), and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) [hereinafter Strauss, *Ubiquity of Prophylactic Rules*], with Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).

60. See Dix, *Wayne LaFave's Bright Line Rule Analysis*, *supra* note 50, at 229–30 (citing Wayne R. LaFave, *Constitutional Rules for Police: A Matter of Style*, 41 SYRACUSE L. REV. 849, 856 (1990)); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985) [hereinafter Grano, *Prophylactic Rules in Criminal Procedure*] (“A prophylactic constitutional rule . . . is a rule that functions as a preventive safeguard to insure that constitutional violations will not occur. What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution.”); Klein, *Miranda's Exceptions Post-Dickerson*, *supra* note 56, at 595–96.

61. Strauss, *Ubiquity of Prophylactic Rules*, *supra* note 59, at 195–97.

62. Professor David A. Strauss and others argue that, at least functionally, many legal directives are closely analogous to prophylactic rules. See David A. Strauss, *Miranda, The Constitution, and Congress*, 99 MICH. L. REV. 958, 959 (2001) [hereinafter Strauss, *Miranda, The Constitution, and Congress*] (positing that “in principle, *Miranda* is no different from any number of well-established rules of constitutional law that also, in a sense, sweep more broadly than the Constitution itself”) (citation omitted); Strauss, *Ubiquity of Prophylactic Rules*, *supra* note 59, at 198 (“[T]he most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”); see also Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 2 (2001) (stating that “there is no difference in kind, or meaningful difference in degree, between *Miranda*’s so-called prophylactic rule and the run-of-the-mill judicial doctrines routinely constructed by the Court that we unquestioningly accept as perfectly legitimate exercises of judicial power”);

Several scholars have framed prerequisites for the imposition of such a rule. For example, Professor LaFave listed the following factors:

(1) Does [the proposed rule] have clear and certain boundaries, so that it in fact makes unnecessary case-by-case evaluation and adjudication? (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were possible? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse?⁶³

Professor Susan R. Klein has described necessary conditions as follows: “first, [it must be demonstrated] that simply providing relief upon a showing that the explicit right was violated is ineffective; second, [there should be a showing] that use of this rule will be

Klein, *Miranda's Exceptions Post-Dickerson*, *supra* note 56, at 569 (“Pivotal decisions outlining procedures required to uphold Fourth, Fifth, Sixth, and Fourteenth Amendment guarantees can be properly and accurately characterized only as prophylactic rules rather than ‘true’ constitutional edicts.”); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedures*, 99 MICH. L. REV. 1030, 1037 (2001) [hereinafter Klein, *Identifying and (Re)Formulating Prophylactic Rules*] (“Constitutional criminal procedure is rife with prophylactic rules, which most often take the form of rebuttable or conclusive evidentiary presumptions or bright-line rules for law enforcement to follow.”). Henry P. Monaghan has similarly observed that:

[A] surprising amount of what passes as authoritative constitutional “interpretation” is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975). For another comparison, see Richard H. Fallon, Jr., who states that:

Against the background of myriad doctrines and practices that accept a gap between constitutional “meaning” and judicial “implementation,” the notion of a “prophylactic” rule loses much of its capacity to shock and alarm. Prophylactic rules stand among a cluster of well-established doctrines and practices justified by the requirements of reasonably successful constitutional implementation.

Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119, 131 (2000) [hereinafter Fallon, *Judicial Legitimacy and the Unwritten Constitution*].

63. WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1(c) (3d ed. 1996).

more effective and involve only acceptable costs.”⁶⁴ Further, she cautioned that “[i]t should be clear that, thus defined, a constitutional prophylactic rule is purely instrumental; it strives to achieve the rule and/or value inherent in that constitutional clause, and has no utility outside of that function.”⁶⁵ As succinctly stated by Professor George E. Dix, “[a] bright line rule is entitled to serious consideration only if it is likely to do the job for which it is offered.”⁶⁶

At the federal level, the *Miranda* rule, arising in the confession law context, was the paradigmatic example. *Miranda* created a bright-line rule to the effect that, absent specific warnings, confessions obtained by police in custodial interrogations would not be admissible into evidence at a criminal trial.⁶⁷ Prior to *Dickerson*, the United States Supreme Court with some frequency referred to the requirement of a *Miranda* warning as prophylactic in character,⁶⁸ imposed to ensure that the constitutional guarantee against self-incrimination was implemented effectively.⁶⁹ Professor Klein has described the Court’s experience as follows:

The Court tried for thirty years to ensure that coerced confessions were not admitted in criminal trials by examining each

64. Klein, *Identifying and (Re)Formulating Prophylactic Rule*, *supra* note 62, at 1033. Professor Wilson denominates such overarching cost/benefit assessments “meta-balancing.” Wilson, *supra* note 46, at 805.

65. Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1033.

66. Dix, *Wayne LaFave’s Bright Line Rule Analysis*, *supra* note 50, at 234.

67. In *Miranda*, the United States Supreme Court interpreted the Fifth Amendment privilege against self-incrimination as guaranteeing a subject of custodial interrogation “the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’” *Miranda v. Arizona*, 384 U.S. 428, 460 (1966) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). Further, discerning coercive pressures associated with such interrogation, the Court saw a need for “concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Id.* at 441–42. Accordingly, it imposed a rule, absent “other fully effective means,” *id.* at 444, requiring a pre-interrogation warning concerning the subject’s right to remain silent, the consequences of failing to do so, and the subject’s right to an attorney, with the exclusionary rule available as a remedy for violation. *See id.* at 479. *Miranda* supplemented the practice, on appropriate challenge, of assessing the voluntariness of confessions under a totality-of-the-circumstances approach. *See Withrow v. Williams*, 507 U.S. 680, 689 (1993) (discussing the totality-of-the-circumstances approach); *accord Dickerson v. United States*, 530 U.S. 428, 442 (2000) (“In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession . . . , a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt.”).

68. *See, e.g., Withrow*, 507 U.S. at 690 (citing cases).

69. *Dickerson*, 530 U.S. at 450–51 (Scalia, J., dissenting).

confession which came before it. The use of the “totality of the circumstances” test, requiring the Court to thoroughly examine every detail about the individual defendant and the particular interrogation at bar, taught the Court two things. One, it was incapable of correctly identifying which custodial interrogations resulted in compulsion and which did not. The Court never offered a workable definition of “voluntary”; there were too many factors which went into the indeterminate “voluntariness” equation; it was too difficult to reconstruct an often lengthy interrogation session after the fact; and it could not review a sufficient number of cases. Second, the Court discovered that law enforcement was receiving no guidance on which interrogation techniques were acceptable and which were not, which in turn led to further constitutional violations.⁷⁰

With this background, Professor Klein has observed, the *Miranda* Court was simply unable to precisely implement the Fifth Amendment’s guarantees; “rather, it was forced either to under- or overprotect the constitutional right. Without the *Miranda* warnings, the Court will inadvertently admit some confessions that are compelled. With the *Miranda* warnings, the Court will exclude some confessions that were not compelled.”⁷¹

While *Miranda* thus imposed a form of prophylactic rule, the Court nevertheless invited the federal and state legislatures to devise alternative methods to safeguard constitutional rights in custodial interrogations.⁷² Two years later, Congress enacted § 3501 of the Crimes and Criminal Procedure Code,⁷³ providing that in assessing the admissibility of statements obtained via custodial interrogations, federal courts should consider only the voluntariness of the statements,⁷⁴ in effect, directing a reversion to pre-*Miranda* practice. Although *Miranda* prevailed for thirty-five years,⁷⁵ in *United States v. Dickerson*,⁷⁶ the Fourth Circuit determined that it did

70. Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1035–36.

71. *Id.*

72. *See Miranda*, 384 U.S. at 490.

73. 18 U.S.C. § 3501 (2000).

74. *See id.*

75. The Justice Department apparently concluded that § 3501 was unconstitutional and therefore refrained from invoking it. *See Davis v. United States*, 512 U.S. 450, 464 (1994) (Scalia, J., concurring) (noting that “with limited exceptions the provision has been studiously avoided by every Administration, not only in this court but in the lower courts”).

76. 166 F.3d 667 (4th Cir. 1999).

not embody a constitutional rule, and, accordingly, § 3501 had effectively supplanted it.⁷⁷

The United States Supreme Court, however, disagreed, denominating *Miranda* as a “constitutional decision,”⁷⁸ in what has been described as a minimalist opinion.⁷⁹ The Court cited as evidence of *Miranda*’s constitutional rooting: its previous application in Supreme Court decisional law to state court proceedings, which would exceed the Court’s authority unless reflecting a constitutional command;⁸⁰ the *Miranda* Court’s suggestion that its decision established a threshold level of protection to be met by any alternative legislative solutions;⁸¹ and language from *Miranda* tethering its requirements in the Fifth Amendment privilege against self-incrimination.⁸² The Court also indicated that “whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”⁸³ In this regard, the Court acknowledged that *Miranda* had “[b]ecome embedded in routine police practice to the point where the warnings have become part of our national culture.”⁸⁴ Thus, it concluded that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.”⁸⁵

A dissent authored by Justice Scalia and joined by Justice Thomas characterized the majority opinion as unsupported, and as an example of “judicial overreaching.”⁸⁶ After roundly criticizing the *Miranda* decision itself, and highlighting that the Court had previously eschewed the idea that a failure to comply with *Mi-*

77. See *Dickerson*, 166 F.3d at 672 (“Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution.”). For an interesting point/counterpoint concerning the genesis of *Dickerson*, compare Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287 (2000), with Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251 (2000).

78. *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

79. See, e.g., Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 3–4 (2001).

80. See *Dickerson*, 530 U.S. at 438.

81. See *id.* at 440.

82. See *id.* at 439–40.

83. See *id.* at 443.

84. See *id.*

85. *Id.* at 444.

86. See *id.* at 444–45, 465 (Scalia, J., dissenting).

randa's requirements was itself a constitutional violation,⁸⁷ the dissent turned specifically to the power of the Court to enforce a prophylactic rule over and against the expressed will of Congress. First, it catalogued various qualifications of and exceptions to *Miranda* reflected in the Court's subsequent decisions, contending that such permutations of a constitutional rule would not be possible.⁸⁸

Further, the dissent considered the arguments of the petitioner and of the United States, partly consistent with the views of a number of the commentators discussed above, that there was nothing either exceptional or unconstitutional about the Court's adoption of a prophylactic rule buttressing a constitutional entitlement,⁸⁹ or enforcement of such a rule over and against Congress and the states.⁹⁰ While conceding that the Court had, in fact, used prophylactic rules, the dissent took issue with the assertion that they are prevalent in federal constitutional jurisprudence.⁹¹ Additionally, it criticized the use of any form of prophylaxis in constitutionalism, expressing the view that doctrine should be congruent with constitutional values, and therefore the Court lacks the authority to overprotect. The dissent stated:

Since there is in fact no . . . principle [other than judicial empowerment] that can reconcile today's judgment with the post-*Miranda* cases that the Court refuses to abandon, what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."⁹²

The dissent also cited principles of federalism in support of its claim that *Miranda* represents an illegitimate exercise of the Court's authority to review state court judgments.⁹³

Dickerson has drawn critical commentary from many quarters. Of particular significance here, those of the view that acknowledged, prophylactic rules have a legitimate place in constitutional implementation have expressed disappointment that their position

87. *See id.* at 447–50.

88. *See id.* at 451–53.

89. *See supra* note 62; *infra* notes 93–103 and accompanying text.

90. This latter portion of Justice Scalia's characterization of the arguments is not consistent with the views of the commentators presently surveyed.

91. As noted, many commentators take a contrary view. *See supra* note 62.

92. *Dickerson*, 530 U.S. at 461 (Scalia, J., dissenting).

93. *See id.* at 464–65.

did not receive more explicit treatment.⁹⁴ For example, Professor Klein, noting various shortcomings of *Dickerson's* reasoning,⁹⁵ has proposed an alternate approach to resolution of the controversy surrounding *Miranda*. According to Professor Klein, the Court could have expressly labeled *Miranda's* requirements a constitutional prophylactic rule (as it would have appeared to have done previously),⁹⁶ provided an explicit definition of the rule,⁹⁷ and detailed why such a directive was required to safeguard the privilege against self-incrimination.⁹⁸ Professor Klein has forcefully argued that the conditions for imposition of a prophylactic rule (ineffectiveness of relief on showing of an explicit violation and predominance of benefits over costs)⁹⁹ were met at the time the *Miranda* decision was issued.¹⁰⁰

Professor Klein acknowledges a primary critique of prophylactic rules at the national level, which argues that they may impinge on principles of federalism and violate separation of powers.¹⁰¹ Her response, however, does not depend on national uniformity in criminal procedures or on dominance of the judicial power in the vindication of constitutional rights. Rather, she argues that prophylactic rules may serve a legitimate function to fill a void resulting from the insufficiency of constraints implemented by the legislative and/or executive branches.¹⁰² In Professor Klein's terms:

94. See, e.g., Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1032.

95. *Id.* at 1071–77. In particular, Professor Klein believed that the Court should have addressed the following:

If the rule is in fact broader than the Fifth Amendment, [the Court] ought to justify reversing a state criminal conviction based upon the state court admitting a statement that did not violate the privilege against Self-Incrimination.

If the rule is a constitutional one, [the Court] ought to explain the exceptions admitting evidence taken in violation of the constitution.

Id. at 1073.

96. See *supra* note 68 and accompanying text.

97. Professor Klein defines a “constitutional prophylactic rule” as:

[A] judicially-created doctrinal or legal requirement determined by the Court as appropriate for deciding whether an explicit or “true” federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but provides approximately the same result as a showing that the explicit rule was violated.

Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1032.

98. See, e.g., *id.* at 1033.

99. See *supra* notes 63–66 and accompanying text.

100. See *supra* note 70 and accompanying text.

101. Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1052 (footnotes omitted).

102. *Id.*

The more persuasive answer is that nature abhors a vacuum. When the Court promulgates such rules and rights it is not attempting to fashion uniform national rules, nor is it jealously guarding its judicial prerogative to remedy constitutional wrongs. Rather, it has stepped in by necessity—when states refuse to act to protect the constitutional criminal procedural guarantees in state criminal trials, and when Congress and the Attorney General fail to protect the constitutional criminal procedural guarantees of federal defendants.¹⁰³

Further, Professor Klein views open and clear rulemaking of this sort as susceptible to revision by Congress, federal executive action, and state legislative, executive or judicial action, so long as the alternative paradigm is sufficiently protective of the constitutional values at stake:

If one views the purposes behind federalism as the preservation of local control in fields traditionally left to state government and the reform and evolution of criminal procedures attained by experimentation, these values should not be lost, and in fact would be advanced. While the Court will, of course, have the final say as to whether alternative prophylactic rules and rights provided by legislators, law enforcement agencies, and state judges sufficiently protect the Bill of Rights in a manner the Court can effectively oversee, the use of prophylactic rules . . . rather than pure constitutional interpretation gives the states exactly that opportunity for diversity and experimentation. Further, it allows the other two branches of the federal government increased opportunities for participation.¹⁰⁴

103. *Id.*

104. *Id.* at 1054; Professor Klein also contends that the deferential approach to prophylactic rules

allows the Court to overturn a rule without spending the institutional capital of a constitutional reversal, fosters free and open discussion between the Court and state and federal legislators, stimulates social science and empirical research, and encourages the Court and state and federal legislators to experiment with different and competing rules and remedies.

Id. at 1078.

Professor David A. Strauss, whom Professor Klein credits as having contributed to the foundation for her work, also has considered a similar point:

[I]f *Miranda* is a fully legitimate principle of constitutional law, why *shouldn't* Congress be able to replace it with some other regime, if Congress's statutory alternative really does as good a job as the *Miranda* rules themselves? Once we recognize that constitutional rules often rest on a judgment about institutional capacities and propensities—the reliability *vel non* of judicial factfinding procedures, the risks of giving bad incentives to government officials, and so on—there is no good reason to preclude Congress and the states from

Professor Klein has expressed the belief that this view accounts for many similar doctrinal devices throughout constitutional criminal procedure.¹⁰⁵

Professor Richard H. Fallon, Jr., although also finding substantial deficiencies in *Dickerson*, offered insights into the Supreme Court's approach, with particular focus on institutional constraints.¹⁰⁶ Surveying the range of considerations before the Court, he observed that "the Court must not only take into account the practical adequacy of one or another test to protect underlying values, but must also weigh the costs, in practical and constitutional terms, of adding or subtracting increments of judicial protection."¹⁰⁷ More particularly, Professor Fallon has noted that

the Court must assess the competence of courts to conduct particular kinds of inquiries; the costs that particular tests are likely to engender—including judicial errors of both over- and under-protection and the burdens of litigation under narrower and broader, or more and less determinate, doctrinal formulations; and the political fairness of having courts resolve different kinds of questions on more or less deferential bases in the face of reasonable disagreements among the citizenry, between judges and more politically accountable actors, and, in some cases, among the Justices themselves.¹⁰⁸

Narrowing his focus to the internal workings of the Court, Professor Fallon has commented further on the role of judicial compromise in shaping doctrine and its supporting rationale:

Judicial compromise is sometimes necessary to produce "opinions of the Court" and, thus, workable constitutional doctrine. But if each of the Justices' sole and overriding obligation were to afford what she took to be a perfectly accurate specification of constitutional meaning, compromise would be impossible. To the extent that compromise about how to frame a constitu-

trying to solve the same problem that the courts are addressing—that is, from trying to implement the Constitution with the best balance of costs and benefits.

Strauss, *Miranda, The Constitution, and Congress*, *supra* note 62, at 969.

105. Klein, *Miranda's Exceptions Post-Dickerson*, *supra* note 56, at 596. Professor Klein's works also discuss potential alternatives to *Miranda* warnings that would be available for consideration and dialogue in such a paradigm. *See, e.g.*, Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1057–58.

106. Fallon, *Implementing the Constitution*, *supra* note 2, at 60 (arguing that "the fidelity owed by the Justices must be defined partly in institutional terms, not simply by an abstract ideal of constitutional truth").

107. *Id.* at 66 (footnote omitted).

108. *Id.*

tional standard is permissible, the justification must reside in the Court's responsibility to implement the Constitution effectively. Successful constitutional implementation requires relatively clear opinions of the Court, not a disjointed series of essays by individual Justices on the correct specification of constitutional meaning.¹⁰⁹

Thus, Professor Fallon has suggested that there may not have been a majority of Justices willing to support the vision of constitutional prophylactic rules described by Professor Klein. This dynamic, he also suggests, may have substantial bearing on the substance of judicial opinions generally, and the legitimacy with which they are perceived:

It would be a mistake . . . to believe that legitimacy questions always have yes-or-no answers. Legitimacy is often a matter of degree, involving intertwined elements of adherence to accepted legal norms and overall substantive and procedural justice. Moreover, the Court is composed of practical lawyers, not philosophers. As practical lawyers, the Justices know the best rhetorical strategy for maintaining at least a shallow acceptance of their role among the public—one of the component variables in the calculus of legitimacy—is sometimes to be less than wholly forthcoming. An effort at full, deep justification might stir opposition, not acceptance, and might ignite political controversy in which the Court is ill-equipped to defend itself. This is among the tensions in the role of a less than Herculean Supreme Court that must struggle to maintain its legitimacy.¹¹⁰

With reference to these thoughts, Professor Fallon offers the following observation concerning *Dickerson's* reasoning and holding:

Under the circumstances, *Dickerson* was not a simple abdication of judicial responsibility. As an institution of practical government, the Court could not function effectively if obliged to bare and debate the deepest foundations of its reasoning whenever a challenge is raised. As a practical matter, a relatively cryptic invocation of widely accepted norms—such as *stare decisis* and the precept that the Supreme Court has no

109. Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 129.

110. *Id.* at 139–40.

“supervisory power” over state courts—must sometimes suffice.¹¹¹

These perspectives regarding *Dickerson* amply illustrate the complexities and uncertainties associated with doctrinal forms jurisprudence at the federal level.

III. SYNTHESIS—NEW JUDICIAL FEDERALISM AND THE ACKNOWLEDGED, PROPHYLACTIC RULE

The controversy surrounding *Dickerson* sounds a familiar note to students of state constitutional law. Just as in the jurisprudence of rules and standards, questions concerning methodology and legitimacy are pervasive in state constitutionalism.¹¹² Indeed, the interstitial approach to state constitutional law, which imposes the inertial force of federal constitutional jurisprudence as a central hurdle,¹¹³ may itself be viewed as a form of prophylactic rule, insulating the state courts, at least to some degree, from controversy attendant to constitutional law decisions by normalizing the practice of acquiescence. But putting lockstep aside for the moment to consider theory, the disfavored status of acknowledged, prophylactic rules at the federal level should set the stage for their critical evaluation in state constitutionalism.

For several reasons, there is stronger justification for the employment of prophylactic rules to safeguard individual liberties from government intrusion by state as opposed to federal courts.¹¹⁴ First, as concerns doctrinal forms jurisprudence, one of the primary barriers to the United States Supreme Court’s implementation of prophylactic rules—federalism—militates in favor of their consideration in state court. Simply put, the problem of over-inclusive Supreme Court rulemaking intruding into matters of state criminal

111. *Id.*

112. *See supra* notes 26–35 and accompanying text; *see also infra* notes 160–81 and accompanying text.

113. *See supra* note 12 and accompanying text.

114. As further discussed below, the legitimate and substantial interest of state government in detecting crime and prosecuting criminals is a consideration that pervades federal and state constitutional analysis; however, such interest must be held in perspective in the assessment of fundamental, individual liberties. *See James v. Illinois*, 493 U.S. 307, 311 (1990) (“‘There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.’ . . . But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation’s history.”) (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)).

law does not operate at the state level;¹¹⁵ indeed, as a matter of federalism, rulemaking in the states is consistent with the states-as-laboratories conception.¹¹⁶ Thus, while adherence to a lockstep approach may be seen as prophylactic, when measured against tenets of federalism, this practice can also be viewed as perverse. Further, whereas the United States Supreme Court is expressly precluded from employing its supervisory powers to govern state criminal procedure,¹¹⁷ many state supreme courts have acknowledged inherent, or possess constitutionally prescribed, supervisory powers that enhance authority to this end.¹¹⁸

Although the general rule, therefore, is that state courts have the power to diverge on state constitutional grounds from federal constitutional rulings of the United States Supreme Court,¹¹⁹ a distinction is made in state constitutional law between courts' authority and their interpretive responsibilities.¹²⁰ As concerns doctrinal forms, methodologies by which interpretive duties are fulfilled are diverse and complex. Indeed, courts are sometimes criticized for the "lack of adherence to any consistent interpretive approach."¹²¹

A. *Rules Methodology in State Court*

Methodologically, it seems to be a shared ideal that courts should at the outset identify the constitutional value or norm at issue;¹²² and this should be accomplished via principles of state constitutional interpretation.¹²³ Thus, the initial task resides in the domain of state constitutional law, encompassing the attendant debate concerning the fertility of unique state sources, content, and

115. See, e.g., Grano, *Prophylactic Rules in Criminal Procedure*, *supra* note 60, at 101 & n.4.

116. This does not mean that there are not horizontal separation-of-powers concerns in the state setting; these are discussed at *infra* notes 169–75 and accompanying text.

117. See *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

118. See, e.g., PA. CONST. art. V, § 10.

119. See Dix, *Defining Criminal Defendants' Texas Constitutional Rights*, *supra* note 21, at 1369 ("Commentators and courts agree that state courts have the technical power to construe state provisions more broadly than the Supreme Court has construed even identically worded federal provisions.").

120. See, e.g., Williams, *Old Constitutions and New Issues*, *supra* note 21, at 113–14.

121. See, e.g., Landau, *supra* note 16, at 808.

122. See, e.g., Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1031–32.

123. Following a lockstep approach, the federal constitutional value would be identified first, then the state value compared by reference to reasons advanced for divergence. See *supra* note 13 and accompanying text.

context as bases for independent interpretation.¹²⁴ For present purposes, it is enough to say that genuine, unique aspects should be fully considered at this stage.¹²⁵ Experience teaches that determining the character and scope of vital state constitutional provisions is in itself a difficult task, one that has at times been omitted,¹²⁶ perhaps by inadvertence, for convenience, or by necessity for lack of consensus. But there is little foundation for proceeding further absent concrete grounding in some identified, fundamental value. As a threshold matter, a determination should also be made whether the salient, constitutional value is, in some way, under-protected by the application of the prevailing rule or standard (or the absence of implementing doctrine), since, if impingement is lacking, constitutional rulemaking for the sake of implementation would be unjustified.¹²⁷

Once the underlying value is identified and under-protection discerned, the doctrinal analysis shifts to implementation. While recognizing the pure, originalist position,¹²⁸ here, the position is taken that restrained and reasoned doctrinal choices designed to redress known under-protection of fundamental, constitutional values—judicial, implementation rulemaking—is theoretically possible. This conclusion follows from acceptance of Professor Fallon's description of responsibilities of the United States Supreme Court, and extrapolation to state supreme courts:

124. See *supra* notes 19–23 and accompanying text.

125. The Vermont Supreme Court's recent decision in *Baker v. State*, 744 A.2d 864 (Vt. 1999), in which it determined that denying same-sex couples benefits and protections accorded to opposite-sex married couples violated the Vermont state constitution, is a good example of state constitutional interpretation of vital provisions. Indeed, in a recent article, Professor Williams features *Baker* as a centerpiece in describing modern state constitutionalism. See Williams, *Old Constitutions and New Issues*, *supra* note 21.

126. See Tarr, *State Constitutional Interpretation*, *supra* note 32, at 844–46.

127. As explained by Professor Dix:

Direct case-by-case application of a legal principle is inherently preferable to bright line prophylactic rules and should be abandoned in favor of such rules only if weighty reasons exist for doing so. Therefore, as Professor LaFave emphasizes, consideration of a proposed bright line rule must address whether the situation involves a genuine and important need to forego case-by-case application of the underlying principle.

Dix, *Wayne LaFave's Bright Line Rule Analysis*, *supra* note 50, at 248–49. See also generally Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1068. The United States Supreme Court's experience with confession law prior to *Miranda* presents a vivid example of discerned under-protection giving rise to consideration of judicial rulemaking for the sake of implementation. See *supra* note 70 and accompanying text.

128. See Farber, *supra* note 38.

[T]he Supreme Court has at least two entrenched functions. One is to interpret the Constitution and specify its meaning. The other is to implement the Constitution through crafting and application of rules, tests, and doctrines that reflect, but do not always perfectly embody, the Constitution's meaning.¹²⁹

Notably, Professor Fallon also cautioned that the "Court's authority is not to displace the [constitutional] norm [at stake], but to exercise practical judgment and necessary or appropriate creativity in ensuring that the constitutional norm is successfully implemented in practice."¹³⁰ This establishes the foundation for the acknowledged, prophylactic rule.

Implementation of a state constitutional value by rule thus necessarily entails a searching, evaluative inquiry—as noted, Professor Wilson has referred to this process as "meta-balancing."¹³¹ The core of the inquiry is a cost/benefit assessment, entailing a predictive comparison of possible outcomes from the application of vari-

129. Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 128. Professor Fallon gives foundational credit to several other scholars in connection with this reasoning. *See id.* at 136 (citing WILLIAM BENNETT MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* 1–23 (1930); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 43–45 (1890); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 710–14 (1975)).

130. Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 136; *see also* Caminker, *supra* note 62, at 28–29 (stating that "there is commonly some slippage between rights and the doctrinal rules that enforce those rights, slippage designed in part to manage the probabilistic nature of most constitutional violations"). Professor Strauss has noted that in the context of confessions given after arrest

Miranda rules are prophylactic rules that go beyond the Constitution itself in the sense that the *Miranda* rules do not simply reflect the values protected by the Fifth Amendment. The *Miranda* rules also reflect judgments about how those values can best be secured, given the capacities and propensities of the various institutions involved—in the case of *Miranda*, the police and the lower courts.

Strauss, *Miranda, The Constitution, and Congress*, *supra* note 62, at 959 (citations omitted); *accord* *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (noting that *Miranda* "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation").

131. *See supra* note 64. Although alternatives to balancing are discussed in the literature, these would also appear, at least at an abstract level, to entail aspects of a critical weighing of a range of potentially conflicting factors. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 1002–04 (1987) (discussing potential alternatives to balancing, including focused examination of items such as "text, structure, precedent, consequences, history, intent, and notions of fundamental values").

ous candidate doctrinal forms.¹³² Since standard-like inquiries such as this implicate discretion,¹³³ this process is obviously vulnerable to criticism on grounds of subjectivity, and raises the same specter of vindication of ideological preferences by pretext as arises in balancing in individual cases.¹³⁴ Indeed, such vulnerability is greater in relation to “meta-balancing,” as the assessment occurs at the doctrinal level.¹³⁵ Nevertheless, the choice is between tolerating discerned under-protection of constitutional entitlements and eliminating the risks attendant to judicial, implementation rulemaking.¹³⁶

Once the risks of at least proceeding with the assessment are accepted, the range of relevant considerations is broad.¹³⁷ Particularly as the present focus is on state constitutionalism, a few, salient factors merit special emphasis.

1. Unique, state-based characteristics of the value in issue

Just as (at least under a primacy approach) state constitutional analysis should begin and end with the state constitution, unique state content, context, and sources should be deemed relevant in

132. See Dix, *Wayne LaFave's Bright Line Rule Analysis*, *supra* note 50, at 236; Fallon, *Implementing the Constitution*, *supra* note 2, at 77; Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1032–33; Wilson, *supra* note 46, at 805–06.

133. See *supra* notes 55–57 and accompanying text.

134. See *supra* notes 49–52. In addition, since prophylactic rules are candidly over-protective of constitutional values, see *supra* notes 59–62 and accompanying text, their application is in tension with pure originalism theory.

135. See *supra* note 64 and accompanying text.

136. This decision itself calls for an evaluative process, further discussed *infra*.

137. For example, Professor Wilson has provided the following generalized, non-exclusive list of factors:

Choosing the proper form is part of a simultaneous equation, which arguably includes at least the following other factors: the plaintiff's interests, defendant's interests, ease of formulating a remedy, nature of the claim (constitutional versus statutory or common law), foreseeable costs and benefits of favoring either party, degree of concern about future abuses by similar parties, nature of those abuses, prior record of similar parties, any relevant statutory or constitutional text, purpose of that text, legislative history, subsequent history, mischief that the text was attempting to cure, structure of the system the text created, judicial competence, role of the judiciary, precedent, judge's personal views and experiences, public opinion, judge's sense of self-confidence, concerns about future discretion, evidentiary problems, and competing legitimate ends, both substantive and judicial process, that judges must try to achieve. The very length of this list demonstrates that the question of form is only part of the adjudicative equation.

Wilson, *supra* note 46, at 842.

any balancing equation.¹³⁸ Further, if the state constitutional provision at issue itself has been deemed to afford greater protection than the federal analogue,¹³⁹ at least as a logical matter the attraction of the federal model should not be as great, since implementation of differing constitutional ideals may require different means. Conversely, if a discrete state constitutional value is not found, greater relevance may attach both to the federal example and related factors.

2. Competing interests and values

As concerns prophylactic rules governing criminal procedure, some scholars argue that the primary and weighty competing interest at stake is that of effective law enforcement and the attendant need to avoid over-regulation of police.¹⁴⁰ At the state level, divergence has numerous collateral effects arising out of differential treatment in the federal and state courts. In a recent article, Professor James W. Diehm chronicles negative consequences of fragmentation of criminal procedure jurisprudence, including avoiding more stringent state procedural requirements via federal prosecution, a version of the “silver platter” doctrine;¹⁴¹ confounding of law enforcement cooperation and joint investigations;¹⁴² generating complex choice-of-law issues;¹⁴³ fomenting litigation;¹⁴⁴ and spawning federal constitutional ramifications, primarily as concerns the supremacy of the Federal Constitution.¹⁴⁵ While there is reasonable disagreement as to the weight that should be ascribed to such considerations in relation to vital constitutional provisions directed to protection of individual liberties,¹⁴⁶ there should be little question that they merit consideration as part of a full and fair evaluation in judicial, implementation rulemaking. Moreover, the

138. *See supra* notes 28–31.

139. For example, the Pennsylvania Supreme Court has determined that Article I, Section 8 of the Pennsylvania Constitution affords greater privacy protection than the federal analogue, the Fourth Amendment. *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

140. *See generally*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

141. Diehm, *supra* note 15, at 246 (discussing asserted “severe problems [arising out of new judicial federalism] involving silver platters, joint investigations, and choice of laws”).

142. *Id.* at 248–50.

143. *See id.* at 250–53.

144. *See id.* at 253–54.

145. *See id.* at 255–57.

146. *See, e.g.*, Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1052.

deliberation concerning law enforcement interests brings to mind more generalized factors also meriting careful consideration, such as the benefits from clear and simple directives governing police work in the field.¹⁴⁷

3. Exceptions and Weak Rules

While it is certainly not a unique state problem, state courts have ample experience with the consequence of rules that lack clear content and parameters.¹⁴⁸ Difficulties in this regard arise by virtue of the inherent character of rules, which are designedly rigid and over-inclusive.¹⁴⁹ As explained by Professor Dix:

[T]he apparent simplicity of the prophylactic nature of the rules may be misleading. In order to avoid absurd results, the rules may have to incorporate some “case-specific” considerations. Once this is done, the rules lose some of their advantages, and there is an increased risk that the incorporated qualifications will multiply until so-called prophylactic rules become indistinguishable from others.¹⁵⁰

Questions that will arise from future applications of the rule can be addressed by anticipating future contexts and outcomes. If, in this predictive assessment, the rule appears vulnerable to corruption to a degree that it resembles a standard in any event, that weighs against expenditure of the judicial capital inherent in implementation rulemaking.¹⁵¹ Professor Wilson’s admonition—“unin-

147. See Ronald Susswein, *The Practical Effect of the “New Federalism” On Police Conduct in New Jersey*, 7 SETON HALL CONST. L.J. 859, 862 (1997) (explaining that “there are many . . . prosecutors . . . who believe that efforts to interpret the state constitution more expansively will serve unwittingly to put police officers at greater risk of harm and to undermine the protections against criminal attack for law abiding citizens”).

148. See, e.g., *Commonwealth v. Bridges*, 757 A.2d 859, 883 (Pa. 2000) (Saylor, J., concurring). The author of this Article explains in his concurring opinion:

I find the federal model vastly superior to continuation of a rule so readily capable of avoidance as to function as no rule at all; indeed, I believe that its maintenance on such terms carries with it the potential for diminishing respect for the courts’ authority in the eyes of those subject to their lawful mandates.

Id. at 883 (Saylor, J., concurring).

149. See *supra* notes 49–54 and accompanying text.

150. Dix, *Wayne LaFave’s Bright Line Rule Analysis*, *supra* note 50, at 231 (footnote omitted).

151. See Sullivan, *Justices of Rules and Standards*, *supra* note 43, at 63 (explaining that “decisionmaking economies from the application of rules . . . will be offset if decisionmakers spend time inventing end-runs around them because they just

tended consequences often frustrate judicial ambitions”¹⁵²—captures this thought succinctly. As a corollary, Professor Wilson also observes that rules can enhance the jurisprudence only to the extent that future judges will apply them;¹⁵³ therefore, a primary consideration in implementation of a rule is how likely it is to command the abiding respect of the judiciary.¹⁵⁴ For example, with reference to *Dickerson*, many have expressed the view that, to the extent that the decision was a victory for civil liberties advocates, it was nonetheless a hollow one in light of pervasive exceptions to the *Miranda* requirements already in place.¹⁵⁵

A related phenomenon is the perversion of rules so that they no longer serve their original and intended function. For example, in the state forum, several jurisdictions maintain a vestige of a bright-line rule that at one time afforded automatic standing to a criminal defendant charged with a possessory offense in a suppress-

cannot stand their over- or under-inclusiveness”); see also Fallon, *Implementing the Constitution*, *supra* note 2, at 118.

152. Wilson, *supra* note 46, at 783.

153. See *id.* at 786; see also Fallon, *Implementing the Constitution*, *supra* note 2, at 121–22 (positing that Justices “must consider the importance of sustainable equilibria in domains of reasonable disagreement”).

154. As Professor Fallon has commented:

[I]t is crucial to recognize that constitutional doctrine, once established, becomes part of the fabric of constitutional law. For the Constitution to be implemented successfully, this fabric must be reasonably stable and coherent; . . . doctrine therefore has a claim to adherence, even by Justices who believe it to be less than optimal.

Fallon, *Implementing the Constitution*, *supra* note 2, at 65–66.

It is also significant that subordinate judges may have considerable discretion in assessing whether predicate circumstances are present implicating the rule under consideration. For example, there are many forms of questioning short of custodial interrogation, which is a prerequisite to the requirement for *Miranda* warnings. See Melissa E. Rosenbaum, *Reflecting the Need for Recognition of “Cat-Out-Of-The-Bag” Confessions: State v. Champion*, 553 N.W.2d 40 (Minn. 1995), 19 HAMLINE L. REV. 313, 329–30 (1995).

155. Professor Klein, for instance, has observed that:

Miranda has been effectively transformed over the years from a case that all but mandated defense attorney participation in custodial interrogations to dispel inherent compulsion, to a case about providing the minimal amount of notice to a defendant about his privilege against self-incrimination such that a court can uphold his confession as voluntary.

Klein, *Miranda’s Exceptions Post-Dickerson*, *supra* note 56, at 570; see also, e.g., Marcus, *supra* note 53, at 94 (opining that “the problem [with *Miranda*] is not the holding . . . [but] that the holding is riddled with exceptions and strapped with limitations”).

sion context.¹⁵⁶ Historically, this meant that the defendant was not required to establish a legitimate expectation of privacy in the situs of the search as a prerequisite to challenging the lawfulness of police conduct pursuant to the Fourth Amendment and state constitutional analogue.¹⁵⁷ While still maintaining the rubric of automatic standing, however, these jurisdictions have adopted a threshold requirement to demonstrate a legitimate privacy expectation, thus altering the doctrine to afford the defendant no greater advantage than do criminal procedural rules merely authorizing the filing of a suppression motion.¹⁵⁸ Arguably, had an accurate predictive assessment been made at the time automatic standing rules were designed, the institutional costs associated with derogation of the rule, and/or maintenance of a superfluous directive, would have outweighed the advantages of allowing it its limited tenure.

Some additional relevant considerations are developed in the discussion below, but the above should give the flavor of the balancing inquiry and be sufficient to highlight two points. First, unique and genuine state-specific factors should be assessed as a threshold to and in the course of judicial, implementation rulemaking in the state judiciary. Second, an analysis that requires balancing these and other diverse factors and making predictive judgments to fashion prevailing rules raises questions concerning judicial competency to accomplish the task. Thus, as the state courts move beyond the comparative insulation of lockstep, they should be prepared to encounter the panoply of considerations that are relevant to selection of doctrinal forms at the federal level, including legitimacy.¹⁵⁹

B. *Rules Legitimacy in State Court*

With regard to judicial balancing, Professor Fallon has acknowledged that the factors considered are frequently incommensurable, and therefore, "it makes no more sense to ask whether a right is outweighed by a governmental interest than to inquire whether a rock is heavier than a line is long."¹⁶⁰ Nevertheless, he answers this criticism as follows:

156. See, e.g., *Commonwealth v. Carter*, 676 N.E.2d 841, 842–43 (Mass. 1997); *Commonwealth v. Sell*, 470 A.2d 457, 468–69 (Pa. 1983).

157. See, e.g., *Jones v. United States*, 362 U.S. 257, 264 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83, 84–85 (1980).

158. See generally Roger L. Michel, Jr., "Automatic Standing-Down for the Court": *An Analysis of Commonwealth v. Carter*, 42 BOSTON B.J. 10, 24–25 (1998).

159. See *supra* notes 86–93 and accompanying text.

160. Fallon, *Implementing the Constitution*, *supra* note 2, at 80.

This strong criticism is quite mistaken if “balancing” is conceived, as it should be, as a metaphor for (rather than a literal description of) decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors. Understood in this way, the term “balancing” does not signify that decisionmaking necessarily proceeds by reducing all relevant considerations to a single metric, assigning them quantitative values, and then weighing them against one another with the precision of a scale.¹⁶¹

This explanation may have an ameliorative effect; at the same time, however, it highlights that these evaluations are simply unbounded by any conventional standard of measurement.

Professor Kahn has offered a perspective suggesting that the judicial responsibility is to enunciate the best-reasoned interpretation possible:

Neither judge nor commentator can escape the responsibility of interpretation. No source or set of sources will simply present an answer. The object of interpretation might, for example, be the meaning of the constitutional value of equality. Equality does not have a single, definite meaning in any community prior to the process of interpretation. It is not a thing waiting to be discovered by a judge. It only has an identifiable shape after the judge articulates the conclusion of an interpretive inquiry. Even that conclusion is only a momentary stopping point in an ongoing debate. In this debate, it is not possible for a judge—or anyone else—to consider the meaning of equality without drawing on a wealth of experiences, arguments, and values that range across local, national, and even international communities. . . . 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 the constitutional goal of equality that is a common aspiration of American life. The same can be said of liberty, due process, and the other broad values of our constitutionalism.¹⁶²

While this passage represents a portion of Professor Kahn’s theory challenged by other scholars as under-valuing unique state sources,¹⁶³ it also makes the narrower point that there are inher-

161. *Id.* at 80 (footnotes omitted).

162. Kahn, *supra* note 15, at 1161.

163. *Id.* (“Conflict over the meaning of common values, however, does not imply that each community has hold of a unique or separate constitutional truth. . . . Differences reflect the rich possibilities of interpretation.”). *But see supra* note 39 (elaborating on contrary views concerning unique state sources).

ently amorphous aspects of judicial decision making, such as meta-balancing, that fall within the institutional role of jurists, and should simply be accepted as part of the job of judging.

Although this may afford some comfort to courts considering judicial, implementation rulemaking, at most it clarifies that the balancing is an institutional tool that may sometimes be available to courts, but does not aid in determining which individual instances of balancing at the doctrinal level will be deemed legitimate.¹⁶⁴ Arguments that courts are ill equipped to consider the range of factors, which may include social and psychological considerations,¹⁶⁵ and to make the sorts of predictive judgments that are at the heart of balancing, retain resonance in the face of such explanations. It is difficult to defend the claim that judicial rulemaking does not have a quasi-legislative aspect¹⁶⁶—indeed, federal and state courts have described judgments entailing analogous considerations as more appropriately committed to the legislative branches.¹⁶⁷ Further, rightly or wrongly, legitimacy concerns are heightened by divergence from federal constitutional rulings on analogous provisions.¹⁶⁸

164. See, e.g., *supra* notes 86–93, 107; Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 121 (taking the position that “[j]udicial legitimacy . . . depends on a potentially unstable conjunction of public acceptance, substantive justice, and articulate justification”).

165. This occurs particularly in confession law and consent search cases. See *infra* notes 184–93 and accompanying text.

166. See Strauss, *Ubiquity of Prophylactic Rules*, *supra* note 59, at 190 (“The Supreme Court’s opinion in *Miranda v. Arizona* does not even look like an ordinary opinion. As many critics have commented, it reads more like a legislative committee report with an accompanying statute.”).

167. See, e.g., *Pegram v. Herdrich*, 530 U.S. 211, 221–22 (2000) (stating that “complicated factfinding and [invoking] debatable social judgment are not wisely required of courts”); *Conner v. Quality Coach, Inc.*, 750 A.2d 823, 829, 834 (Pa. 2000) (advocating deference to the “expertise of the Congress”).

168. See *People v. Vilaridi*, 555 N.E.2d 915, 926 (N.Y. 1990) (Simons, J., concurring). Judge Simons explains:

The majority merely finds arguments rejected by [the United States Supreme Court] more persuasive than those adopted by the court. That is within its power but a disagreement with the highest court in the land based solely on a preference for another rule when the provisions of the two Constitutions read the same raises doubt about our processes and creates instability and uncertainty in our law.

Id. at 926 (Simons, J., concurring); Tarr, *State Constitutional Interpretation*, *supra* note 32, at 853 (noting that state “[c]onstitutional scholars have often found it necessary to devote as much attention to legitimacy questions . . . as to substantive ones”).

One approach offered in the doctrinal forms commentary, however, although implicitly rejected by the United States Supreme Court in *Dickerson*, responds to the competency concern more directly and is available for consideration in state constitutionalism. As noted, Professor Klein's concept of prophylactic rules includes a power-sharing dynamic—"prophylactic rules [should be] fully open to revision by Congress, federal executive action, and state legislative, executive or judicial action."¹⁶⁹ Her explanation is that the courts are occupying an intolerable void when imposing prophylactic rules protecting constitutional values.¹⁷⁰ So long as the court invites (or at least does not foreclose) legislative or executive attempts to meet constitutional requirements by other means that the courts can oversee, the groundwork is put in place for a dialogue concerning optimal means of implementation of constitutional values.¹⁷¹ Professor Klein also emphasizes court supervision, and, in the envisioned paradigm, the court retains the authority to reject inadequate attempts to supplant its prophylactic rule.¹⁷² The theory is that emphasis on inter-governmental cooperation and dialogue fosters democratic legitimacy,¹⁷³ counterbalancing the inherent limitations of prophylactic rules.

Given its potential usefulness in state constitutional implementation, Professor Klein's framework of "Caution, Deference, and Truth-in-Labeling"¹⁷⁴ merits development. She posits that United States Supreme Court decision making in the consideration of pro-

169. Klein, *Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1054.

170. *See id.* at 1052; *see also supra* notes 101–03 and accompanying text.

171. *See Klein, Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1058 ("In revisiting past and developing future prophylactic rules . . . the dialogue I envision between the Court, Congress, state legislators, federal and state law enforcement agencies, and state judges should be possible if all parties act in good faith and treat each other with respect.").

172. *See id.* at 1068 ("Appropriate deference suggests that the Court accept alternative rules and rights proposed by other federal and state actors if they can plausibly be characterized as effective."); *id.* at 1059 ("If other government actors introduce implausible alternative procedures that will defeat constitutional rights, the Court can simply ignore such mischievous legislative behavior or declare the alternatives inadequate."); *see also* Fallon, *Implementing the Constitution*, *supra* note 2, at 141–42 ("[I]mplementing the Constitution . . . is a project that necessarily involves many people (not just courts) and often calls for accommodation and deference.").

173. *See Klein, Identifying and (Re)Formulating Prophylactic Rules*, *supra* note 62, at 1052.

174. *See id.* at 1068–70.

phylactic rules (and, by extrapolation, that of state supreme courts) should manifest each of these traits:

Caution requires the Court to refrain from creating prophylactic or safe harbor rules and incidental rights except where it clearly identifies the mandate of the constitutional clause at issue and/or the values underlying the clause, and then explains why a rule or right is necessary to protect or adjudicate that clause. Deference requires the Court to warn the other branches of the federal government and all branches of the state governments that some action is necessary, and to act itself only if the other actors fail to offer alternative procedures that are within an acceptable range of functionality. Truth-in-labeling requires the Court to identify each doctrinal rule it creates as being either an explicit constitutional rule or remedy, or a prophylactic or safe harbor rule or incidental right, so that there is a clear signal that modification may be permissible.¹⁷⁵

Professor Klein thereby lays the most suitable foundation for the acknowledged, prophylactic rule.

Her comments on disclosure draw attention to another characteristic highlighted in both doctrinal forms jurisprudence and state constitutionalism as enhancing legitimacy—expressed, reasoned decision making.¹⁷⁶ While there may be a role for minimalism in

175. *Id.* at 1031–32; *see also id.* at 1068 (“Caution requires that the Court generate prophylactic rules and incidental rights only when absolutely necessary. Moreover, before acting the Court should clearly warn the other branches of the federal and state governments in the appropriate cases that they must act to prevent a Court-imposed rule or right. This warning should be coupled with patience, such that action is taken only after long-term failure by the coequal branches.”).

176. *See* Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 119–20 (“[T]he Court . . . should act only on grounds of principle, not policy, and it should recognize stringent obligations of articulate reason-giving.”) (footnote omitted); *see also* State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (explaining that “[i]t would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented”); New Jersey v. Hunt, 450 A.2d 952, 963 (N.J. 1982) (Handler, J., concurring) (stating that “[t]here is a danger . . . in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere”); *id.* at 967 (recognizing that independent grounds should result from “a process that is reasonable and reasoned”); Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 866 (2002) (stating that “new federalism will not be widely accepted unless it is detached and grounded in a principled manner”); Landau, *supra* note 16, at 798 (“preserving the authoritativeness of the constitutions and legitimacy of the courts requires that constitutional meaning in some sense be

opinion writing,¹⁷⁷ it is difficult to make the case that announcement by the state judiciary of an acknowledged, prophylactic rule represents an appropriate context.¹⁷⁸

Two other aspects of legitimizing judicial behavior also reside at the crossroads between rules and standards theory and state constitutional law: process and restraint. With regard to process, it has already been developed that there is an emphasis in both disciplines on structure and consistency as stabilizing forces.¹⁷⁹ Both sets of commentators regard judicial restraint as appropriate and necessary. Of greatest relevance here, Professor Klein's model for the acknowledged, prophylactic rule is constructed on such qualities,¹⁸⁰ and state constitutional law decisions and scholarship reflect a growing consensus concerning their essential role.¹⁸¹

justifiable in terms other than the personal preferences of judges who determine that meaning"); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983) (noting that "it will become increasingly important for state courts to develop a rationale to explain when they will rely on their own constitutions" and explaining that "[s]tate courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled"); Williams, *Old Constitutions and New Issues*, *supra* note 21, at 113 ("the logic of interpretive responsibility commits judges to offering the best justification they can devise for the rights at issue").

177. See generally Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–10 (1996).

178. As summarized by Matthew M. Weissman:

While state courts are duty-bound to interpret their state constitutions and, if necessary, to diverge from the Supreme Court's interpretation of formally identical provisions of the federal Constitution, such state-based constitutional adjudication should be undertaken with great caution. All too often, state courts embark on independent state constitutional analyses without due regard for the dangers inherent in this approach. In return for the power to make constitutional law free from Supreme Court review, the state high courts carry a high degree of responsibility to explain and justify their decisions.

Weissman, *supra* note 23, at 300; cf. Fallon, *Judicial Legitimacy and the Unwritten Constitution*, *supra* note 62, at 139 ("The best defense of judicial review resides largely in the idea that the discipline of focused deliberation and public reason-giving will produce better answers to practical and constitutional problems than would less disciplined, less articulately reasoned decisions of other branches of government.").

179. Compare *supra* notes 28–32 and accompanying text, with *supra* notes 64–66 and accompanying text.

180. See *supra* note 175 and accompanying text.

181. See, e.g., Williams, *In the Glare of the Supreme Court*, *supra* note 1, at 1020 ("It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented.") (quoting *State v. Jewett*, 500 A.2d 233, 235 (1985)); accord Braithwaite, *supra* note 17, at 3 ("[T]here is danger in

C. Making a Federal Case in State Court

The emphasis of this Article is on the state constitutional setting, but theories and methods applicable to the federal setting have been discussed in order to consider their relevance in state forums. It has argued, in part, that, although state constitutionalism must confront questions arising from divergence from the federal model given the hierarchical relationship that are widely discussed in the literature, it also should address the horizontal, separation-of-powers and legitimacy concerns analogous to those faced by federal judiciary in the application of doctrinal forms jurisprudence. As a component of the state constitutional law cases seeking judicial, implementation rulemaking (or imposition of an acknowledged, prophylactic rule), advocates should consider squarely addressing such concerns in their presentations to the courts.

Litigants and their attorneys bear substantial responsibility in the judicial process. While courts are cognizant of resources limitations, the participants should be aware of the institutional limitations on the courts, and the corresponding burden to properly equip the judiciary imposed on those asking for the expenditure of judicial capital.¹⁸² One has only to revisit *Miranda* to view the role of context in balancing and predictive judgment—in attaching the requirement of a prophylactic warning in confession law, the Supreme Court extensively reviewed historical law enforcement practices, detailed police procedural manuals, and discussed sociological and psychological factors pertinent to coercion in a custodial setting in anecdotal and empirical fashion.¹⁸³

In a recent criminal case, *Commonwealth v. Strickler*,¹⁸⁴ the Pennsylvania Supreme Court was asked to consider imposing a prophylactic rule pursuant to the Fourth Amendment to the United States Constitution and its Pennsylvania analogue requiring that, in a police-citizen encounter following a traffic stop, the police officer must admonish the citizen that he is free to leave before requesting

state courts turning uncritically to their state constitutions for convenient solutions to problems. This supports the belief that such an uncritical use of the New Jersey Constitution would be both unprincipled and result oriented.”) (citation omitted).

182. See Dix, *Defining Criminal Defendants’ Texas Constitutional Rights*, *supra* note 21, at 1407 (indicating that “parties to criminal litigation need to improve the quality of their submissions to the court on these issues”).

183. See *Miranda v. Arizona*, 384 U.S. 436, 445–58 (1966); see also *supra* notes 70–71 and accompanying text.

184. 757 A.2d 884 (Pa. 2000).

consent to search the vehicle.¹⁸⁵ In *Ohio v. Robinette*,¹⁸⁶ the United States Supreme Court had refused to require such a prophylactic warning as a matter of federal constitutional doctrine, indicating that it had “eschewed bright-line rules” in the Fourth Amendment context in favor of a totality-of-the-circumstances assessment.¹⁸⁷ The Pennsylvania Supreme Court recognized that there was a coercive dynamic in the police-citizen encounter,¹⁸⁸ but, as a matter of Fourth Amendment jurisprudence, the United States Supreme Court’s decision was dispositive.¹⁸⁹ The Court gave limited attention to the arguments under the Pennsylvania Constitution, since the appellant had neither framed the issue according to the preferred methodology¹⁹⁰ nor presented a record providing empirical information. In the latter regard, the Court contrasted a New Jersey decision establishing a prophylactic rule precluding pretextual vehicle stops pursuant to the New Jersey Constitution based in part on unrebutted statistical evidence of racially-motivated selective enforcement,¹⁹¹ despite the United States Supreme Court’s decision that there is no federal constitutional impediment to such stops.¹⁹² The tenor of the Pennsylvania Supreme Court’s decision concerning the United States Supreme Court’s apparent decision that a reasonable person subject to a completed traffic stop would feel free to leave (and thus was not seized) was reserved; however, the court ventured only that it would consider a free-to-leave admonition as a strong factor in the totality-of-the circumstances assessment.¹⁹³

185. *See id.* at 890–91.

186. 519 U.S. 33 (1996).

187. *See id.* at 39.

188. *See Strickler*, 757 A.2d at 898, 900.

189. *See id.* at 899.

190. *See id.* at 902.

191. *See id.* at 902 n.28.

192. *See Whren v. United States*, 517 U.S. 806 (1996).

193. The Pennsylvania court stated:

As the United States Supreme Court has emphasized, rules fashioned by courts to implement constitutional precepts that regulate police activities should be expressed in terms that are readily understandable and applicable in daily encounters. Reciprocally, law enforcement officers can tailor their conduct in ways that will assist trial and appellate courts in the performance of their essential functions, with the corollary benefit of enhancing consistency and predictability of results in judicial proceedings. Toward both ends, we reiterate that, in evaluating a consensual encounter that follows a traffic or similar stop, a central consideration will be whether the objective circumstances would demonstrate to a reasonable citizen that he is no longer subject to domination by police. The presence of an express admonition to the effect

Thus, in *Strickler*, the attorneys offered the court little basis, beyond potential subjective beliefs held by individual judges, from which to depart from the United States Supreme Court's apparent assessment of sociological and psychological dynamics of a consensual encounter. Such circumstances present a poor foundation for any divergence that could be viewed as legitimate.¹⁹⁴

Attorneys should also consider addressing fundamental concerns—containment of over-inclusiveness of prophylactic rules, the role of the court, methodology, and legitimacy—whether or not they anticipate that each of these concerns will ultimately be fully developed in a judicial opinion. As advocates of a bright-line or prophylactic rule are asking the courts to conduct balancing for future litigants in a wide category of cases in a single instance based on predictive judgments, the imperative for broad perspective should be apparent.¹⁹⁵ The states-as-laboratories model may create latitude for experimentation, but that is informed experimentation. The directive of Justice Hayes of the Vermont Supreme Court—“Look to your Vermont constitution and, when you do, brief it adequately”¹⁹⁶—is an eloquent understatement. If the lawyers cannot make the case, then in all likelihood, prophylactic inertia inherent in the judicial system will prevail; this follows as a natural and legitimate consequence of Professor Fallon's borrowed admonition from medicine—“First do no harm.”¹⁹⁷

D. Judges, People, Time, and Perspective

Professor Fallon has described the phenomenon of reasonable disagreement as a potent, complicating force in constitutional law decision making:

As the Court attempts to implement the Constitution, its task is much complicated by the phenomenon of reasonable disagree-

that the citizen-subject is free to depart is a potent, objective factor that favors such conclusion.

Strickler, 757 A.2d at 899.

194. See Williams, *Old Constitutions and New Issues*, *supra* note 21, at 122 (noting that state constitutionalism “takes homework—in texts, in history, in alternative approaches to analysis”); Shepard, *supra* note 17, at 444 (alluding to the “hard work of free expression”).

195. “Judges are much more likely to grant relief in difficult cases when lawyers present them with a remedy, including viable doctrine in terms of form, that apparently improves the legal system not just for the winning litigant but also for society.” Wilson, *supra* note 46, at 829.

196. Thomas L. Hayes, *Clio in the Courtroom*, 56 VT. HIST. 147, 149 (1988), *cited in* Williams, *Old Constitutions and New Issues*, *supra* note 21, at 77–78.

197. Fallon, *Implementing the Constitution*, *supra* note 2, at 114.

ment in constitutional law. Many constitutional questions lack answers that can be proved correct by straightforward chains of rationally irresistible arguments. As a result, reasonable citizens, lawyers, and judges differ widely about what methodology should be used to interpret the Constitution, about which substantive principles the Constitution embodies, and about how, in more practical terms, constitutional norms should be protected by doctrine.¹⁹⁸

The constraint tends to support the position of critics of judicial, implementation rulemaking who contend that courts are incapable of accomplishing the task of legitimately implementing and maintaining an acknowledged, prophylactic rule.¹⁹⁹ Others recognize the substantial obstacles,²⁰⁰ but believe that they are surmountable.²⁰¹

The part of an evolutionary, democratic process entailing a role for ordinary citizens in the development of constitutional law should also not be discounted. Justice Breyer expressed this ideal in addressing federalism:

The complex nature of these problems calls for resolution through a form of participatory democracy. Ideally, that participatory process does not involve legislators, administrators, or judges imposing the law from above. Rather, it involves law revisions that bubbles up from below. Serious complex changes in law are often made in the context of a national conversation involving, among others, scientists, engineers, businessmen and -women, and the media, along with legislators, judges, and many ordinary citizens whose lives the new technology will affect. . . . This “conversation” is the participatory democratic process itself.²⁰²

Time also plays a role in judicial, implementation rulemaking. For example, the United States Supreme Court considered many instances of police abuses occurring over the course of decades

198. *Id.* at 57–58 (footnotes omitted).

199. *See, e.g.*, Dripps, *supra* note 79, at 41–42.

200. *See, e.g.* Friesen, *supra* note 39, at 1085 (“There are real obstacles to innovation: the defaults of lawyers, the philosophical disagreements among justices, the costs to clients of devising new theories, the pressure to reduce the backlog, and other institutional pressures.”).

201. *See id.*

202. Breyer, *supra* note 10, at 263; *see also* Harris, *supra* note 16, at 370 (acknowledging that “efforts other than litigation, such as state legislative proposals, have shown that state institutions other than courts can also serve as effective guarantors of civil liberties in ways perhaps not considered by the new federalism’s proponents”).

before implementing the prophylactic *Miranda* requirements.²⁰³ “The Justices would be unfaithful to their roles if, trying to do too much too fast with inadequate resources, they prematurely spoke the truth as they personally saw it and crafted bad doctrine that frustrated reasoned debate and democratic experiment.”²⁰⁴ There can be some satisfaction in incremental progress, and there is a need to be patient with setbacks.

Finally, there is the role of perspective. This Article, crafted around theory, was not designed to address all possible considerations relevant to judicial, implementation rulemaking. For example, in state constitutionalism, it should go without saying that, whether applying an interstitial or primacy approach, the federal model on an analogous provision deserves some degree of consideration on its merits at some stage of the analysis. Nor does existing doctrine establish fixed limitations. For example, application of the exclusionary rule, although a potent incentive for governmental compliance, is not required, as a matter of course, to be implemented as a corollary to a prophylactic rule. The construction of new doctrine does not necessarily incorporate old doctrinal tenets—the judges and litigants may begin at the foundations and proceed with creativity, within the confines of only constitutional, institutional, and prudential limitations.

IV. CONCLUSION

Jurisprudentially, there is a certain intrinsic appeal to clear rules. Announced by a supreme court, state or federal, as the law of the jurisdiction, they aspire to promote clarity and foster consistency for and among the participants in the legal and judicial process, including busy trial and intermediate appellate courts. This desire for plainness becomes most acute on studying constitutional law, which undergirds the nation’s democratic system of government, and through which core, individual rights are described and vindicated.

This Article has considered the theories underlying judicial rulemaking in the setting of state constitutional law. Pursuant to the suggestion in Professor Tarr’s treatise, academic arguments and proposals from scholarly works focusing on the national Constitution have been juxtaposed with those of state constitutional law

203. See *Miranda v. Arizona*, 384 U.S. 436, 446–47 (1966).

204. Fallon, *Implementing the Constitution*, *supra* note 2, at 148.

scholars. The narrower focus has been the acknowledged, prophylactic rule.

The state constitutional law literature brings unique content, context, and sources to the forefront. Nevertheless, it is also clear that the forces of federal rules and standards jurisprudence will in many instances operate as constraints. The two intersecting disciplines share a concern for legitimacy having to do with the character of the judicial decision-making venture. The course of the acknowledged, prophylactic rule in state courts is not certain, but its best claim to legitimacy lies in first apprehending its location at the crossroads of doctrinal forms jurisprudence and state constitutionalism.

