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Originally published in 77 Ohio St. L.J. 355 (2016)

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Justice Brennan and the Foundations of Human Rights Federalism

JAMES A. GARDNER

In a well-known and widely cited 1977 law review article, Justice William J. Brennan called on state courts to "step into the breach" and use their authority as independent interpreters of state constitutions to continue on the state level the expansion of individual liberties begun on the national level by the Warren Court. Justice Brennan was right about the importance of independent state constitutional law, but he was wrong about the reason. The benefits of independent state constitutional law have little to do with expanding human rights and everything to do with federalism. The confusion is understandable; both individual rights and federalism protect liberty, but they do so by very different mechanisms, and those mechanisms can at times operate at cross-purposes. Federalism protects liberty not by offering an opportunity for the continuous expansion of human rights protections, but by creating a system of dual agency in which the people appoint two agents, one state and one federal, to monitor and check the abuses and errors of the other. Nothing in that system inherently requires the expansion of rights on the state level, and it can just as easily support their contraction. The value of independent state constitutional law lies in its availability as a tool by which state agents can protect the people's interests by staking out and institutionalizing positions opposing those taken by the national government, whatever they may be. In the arena of rights, it is thus to be expected—and it is observed—that the state and national governments will sometimes agree and sometimes disagree about the appropriate scope of protection to be afforded various human rights, and that disagreement may manifest itself in a competitive struggle in which each level attempts to advance its own view at the expense of the other.

*Interim Dean and Bridget and Thomas Black SUNY Distinguished Professor, SUNY Buffalo Law School, The State University of New York. This Article is a much-expanded version of a presentation delivered at the Ohio State Law Journal's Symposium on State Constitutions in the United States Federal System, held at the Moritz College of Law on March 6, 2015. I thank the participants in the symposium for illuminating feedback and conversation. Thanks also to Michael Boucai, Hugh Spitzer, Rick Su, and participants in a workshop at SUNY Buffalo Law School for valuable comments. Portions of Part III of this Article first appeared in JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005). I thank the University of Chicago Press for permission to adapt this material for use here.
In May of 1976, in the unlikely venue of the Playboy Resort Hotel at Great Gorge, New Jersey, Associate Justice William J. Brennan delivered a speech at an event held by the New Jersey Bar Association in honor of Brennan’s seventieth birthday and twentieth year on the U.S. Supreme Court bench. The speech, published the following year in the *Harvard Law Review*, quickly became, according to his biographers, “the most famous and widely quoted of his entire career.” Brennan’s topic was the protection for individual rights contained in American state constitutions. The U.S. Bill of Rights, Brennan argued, is a powerful protector of individual liberty, but it is not the only source of protection. State constitutions, he observed, also protect liberty through their own bills of rights. Because the constitutional system of federalism makes states independent sovereigns, Brennan went on, state constitutional protections for human rights are independent of those provided by the U.S. Constitution. This means in turn that state constitutions may—and in Brennan’s opinion should—offer greater security for individual rights than does the U.S. Constitution, at least as construed by the Supreme Court in a

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3 STERN & WERMIEL, supra note 1, at 436.
4 Brennan, *supra* note 2, at 489.
5 Id. at 495.
6 Id. at 491, 502.
series of then-recent cases interpreting federal rights in ways that Brennan found unduly stingy.\textsuperscript{7} State courts, Brennan intimated, should thus look to their own bills of rights to continue the Warren Court’s expansion of individual liberty, of which Brennan had been a key architect.\textsuperscript{8}

Brennan’s plea did not fall on deaf ears. In the quarter-century preceding publication of the article, state courts around the nation had issued fewer than fifty rulings in which they construed state constitutions to be more protective of individual rights than the U.S. Constitution—about two per year.\textsuperscript{9} In the decade following Brennan’s article, the pace of such rulings increased at least tenfold.\textsuperscript{10} Within just eight years, Brennan’s article had shot up the list of most-cited law review articles to the top twenty of all time, taking its place alongside many articles that had been in circulation much longer.\textsuperscript{11}

Nevertheless, reaction to Brennan’s article was far from uniformly positive. On the bench, Brennan had long been associated with nationalistic, centralizing rulings in which federal law had been applied unsentimentally to override state policy decisions of all kinds—policies on racial segregation,\textsuperscript{12} electoral structures,\textsuperscript{13} the death penalty,\textsuperscript{14} obscenity,\textsuperscript{15} religious instruction in schools,\textsuperscript{16} and many others. Critics deemed Brennan’s newfound interest in federalism opportunistic, and characterized his interest in state constitutions as arising from a purely instrumental desire to harness them in an ideological war that he had begun to lose at the national level.\textsuperscript{17}

In this respect, Brennan’s article raised more questions than it answered. Brennan urged state courts to adjudicate cases under human rights provisions of state constitutions, but if his challenge was more than what his critics claimed—if it was really a principled appeal to constitutional rules of federalism rather than an opportunistic mobilization of ideological allies—then

\textsuperscript{7} Id. at 495–98.
\textsuperscript{8} Id. at 502–03.
\textsuperscript{9} Gardner, supra note *, at 40.
\textsuperscript{10} Id. at 40–41. One estimate places the increase at more like 35-fold. Sol Wachtler, Our Constitutions—Alive and Well, 61 St. John’s L. Rev. 381, 397 (1987).
\textsuperscript{12} Cooper v. Aaron, 358 U.S. 1, 4 (1958).
\textsuperscript{14} Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).
\textsuperscript{15} Miller v. California, 413 U.S. 15, 47–48 (1973) (Brennan, J., dissenting).
state courts would need a sound jurisprudential basis for heeding Brennan’s call. How should state constitutional rights provisions be interpreted? On what basis ought they to be interpreted to have a different—and more generous—meaning than the U.S. Constitution? Answering these questions turned out to be more difficult than Brennan seemed to anticipate, and in the end only a handful of state supreme courts showed an interest in unraveling the knotty jurisprudential issues.

Finally, although the article provoked a brief flurry of rights-protective state constitutional rulings, for the most part state courts showed a marked tendency even after the article’s publication to issue individual rights rulings by resting them solely on the U.S. Constitution without—contrary to Brennan’s urging—giving any consideration at all to state constitutional protections. In those cases in which state courts looked to the state constitution at all, as Brennan had recommended, they tended over time to construe their constitutions in conformity with the U.S. Constitution in the great majority of cases. In the end, although Brennan’s article did much to excite the appetite of rights liberals, it had little long-term impact on the practices of state courts.

This Symposium offers a welcome occasion to reflect on why this might be so. I argue here that Brennan’s pitch failed to gain much long-term traction among state judges not because it rested on an instrumental view of state constitutional rights provisions, but because it rested on an incomplete conception of federalism. Brennan was right that federalism makes state constitutions jurisprudentially independent from the U.S. Constitution, and that state courts may exercise this independence so as to read state constitutional rights more generously than their federal counterparts. In this respect he was indeed a shrewd analyst of the workings of the federal system. Brennan’s mistake, however, was that he failed to locate the federalism of constitutional rights within the much broader context of the federalism of intergovernmental relations, a system of long-term, often shifting power relationships created and structured by the U.S. Constitution. When properly contextualized, human rights federalism can be better understood as only one of many arenas in which state and national governments may contest for power, and the deployment of rights as only one of many tools that states may wield against the federal government to get their way in intergovernmental policy disputes. This, in my view, helps not only to resolve the puzzling questions of interpretation that Brennan’s notion of rights federalism raised, but also to explain why Brennan’s account has never provided an accurate description of the actual practices of state courts.

The balance of this Article is organized as follows. Part II establishes the context in which Brennan wrote his article, and briefly reviews its argument, culminating in his famous call to state courts to “step into the breach.” Part III discusses the jurisprudential problems that arose in the aftermath of the article, focusing on the widespread confusion that the article provoked concerning the proper methodology for interpreting state constitutional provisions. Part IV sets out an alternative view of subnational constitutional independence, grounding it in a Madisonian understanding of federalism as implementing a two-government system of dual agency, a system that is designed to produce permanent contestation between national and subnational governments. In that context, the deployment of independently interpreted constitutional rights can be better understood as merely one tool available to subnational governments in an ongoing practice of intergovernmental struggle over policy. That, in turn, explains why state courts are a priori no more likely to be inclined to prefer rights-expanding interpretations of state constitutional provisions than to prefer rights-contracting ones. When and if state courts choose to issue rights-expanding decisions thus depends largely on how well they believe the federal government is doing its job, a judgment that in today’s world is as much about power and partisanship as it is about constitutional jurisprudence.

II. BRENNAN’S ARTICLE AND ITS IMPACT

A. The Context

Brennan wrote *State Constitutions and the Protection of Individual Rights* in 1976, at a time that we now know, in retrospect, to have been a unique moment in American constitutional history. The national government was then riding the crest of an unprecedented, forty-year expansion of its role in American life. Its success in lifting the nation out of the Great Depression, prosecuting the Second World War, and enacting a good deal of the legislative agenda of the civil rights movement conferred on the use of national power perhaps the greatest legitimacy it has ever enjoyed. Though by 1976 the experiences of Vietnam and Watergate had complicated American feelings about national power, most in the 1970s continued to look to the national

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20 Brennan, *supra* note 2, at 503.

21 There is of course a practical complication imposed by the Supremacy Clause insofar as it constrains implementation of rights-contracting interpretations of state constitutions, but that is a smaller piece of the picture than it might at first seem. That issue is taken up below in Part IV.C.

government for solutions to significant domestic problems such as environmental protection, crime, public transportation, and pension benefits.\textsuperscript{23}

At the same time, federalism had been badly discredited by its association with the Southern regime of Jim Crow.\textsuperscript{24} Since the end of Reconstruction, and certainly since the era of Redemption in the late nineteenth century, Southern states had successfully invoked principles of federalism as a shield to protect a form of racial apartheid that, according to C. Vann Woodward's influential account, in some ways exceeded in harshness and comprehensiveness the lived caste system of slavery that it replaced.\textsuperscript{25} Southern members of Congress had long obstructed national intervention in aggressively asserted Southern "sovereignty"\textsuperscript{26} or "home rule"\textsuperscript{27} until the 1960s, when televised accounts of brutality toward peaceful civil rights marchers eventually made further complete obstruction politically impossible.\textsuperscript{28} The prevailing view among liberals was aptly summed up in 1964 by the political scientist William Riker, who in an influential book on federalism argued, more than a little reductively, that if "one disapproves of racism, one should disapprove of federalism."\textsuperscript{29}

Meanwhile, the Supreme Court had by the 1970s established individual rights as an immensely powerful tool for the deployment of national power against recalcitrant states. Because its prohibitions apply directly to the states rather than to the national government,\textsuperscript{30} the Fourteenth Amendment offered the Court a mechanism for penetrating the shield that the structural protections of federalism had long provided to deviant regional behavior. \textit{Brown v. Board of Education}, which deployed the Equal Protection Clause to dismantle segregation,\textsuperscript{31} was the first great shot in this war of intergovernmental power. It was soon followed by a series of decisions under the Due Process Clause that greatly expanded the scope of the incorporation doctrine, a reading of the

\begin{itemize}
  \item \textsuperscript{24} See, e.g., WILLIAM H. RIKER, FEDERALISM 152–53, 155 (1964).
  \item \textsuperscript{25} C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8, 14, 23–24, 91–92 (1955).
  \item \textsuperscript{26} ROBERT MICKEY, PATHS OUT OF DIXIE 5 (2015).
  \item \textsuperscript{27} WOODWARD, \textit{supra} note 25, at 13; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xix–xx (1988).
  \item \textsuperscript{29} RIKER, \textit{supra} note 24, at 155.
  \item \textsuperscript{30} "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).
\end{itemize}
Clause that understood it to include and to apply to the states most of the protections of the federal Bill of Rights. By the 1970s, the Court had applied expansive interpretations of individual rights to invalidate state laws in sensitive areas of criminal procedure, the death penalty and public displays of religion. As Lucas Powe has persuasively argued, an important mission of the Warren Court can be fairly understood as dragging the South kicking and screaming into the twentieth century.

Yet, by the early 1970s, Brennan was already worried that the Supreme Court had begun to abandon its commitment to an expansive reading of constitutional liberty. As Brennan’s biographers report, “[b]y the spring of 1971, Brennan did not feel much need to suppress the frustration and anger building inside his chambers. Every new opinion seemed to confirm the fears he and his clerks shared that the Warren Court’s gains had begun to slip away.”

B. Brennan’s Argument

Against this backdrop, why Brennan wrote his article as he did, and why his argument struck a chord with so many readers, becomes much easier to understand. In State Constitutions and the Protection of Individual Rights, Brennan argued that, notwithstanding the prominent role played by the U.S. Constitution in the protection of individual rights, in our federal system state constitutions play a similar role—they are, he observed, referring to state constitutional bills of rights, “a font of individual liberties.” The rights protections offered by state constitutions, he went on, implement “the independent protective force of state law,” and in virtue of this independence are neither subordinate to nor mere “mirror[s of] the federal Bill of Rights.” Instead, state constitutional rights provisions have independent force, the protections of which “often extend[] beyond those required by the Supreme Court’s interpretation of federal law.”

For this reason, Brennan argued, “state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution.” Instead, they must look to state constitutional rights, exercising independent

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35 Stern & Wermiel, supra note 1, at 350.
36 Brennan, supra note 2, at 491.
37 Id.
38 Id. at 501.
39 Id. at 491.
40 Id.
judgment concerning their meaning, to see if they provide additional protection for individual liberty. The need for state courts to adopt such a practice as a matter of routine, Brennan intimated, is urgent because the Supreme Court had by the mid-1970s begun to "pull back from" the aggressive enforcement of federal constitutional rights in which it had engaged throughout the 1960s. In sum, Brennan concluded, the Supreme Court's recent turn to the right "constitutes a clear call to state courts to step into the breach... With federal scrutiny diminished, state courts must respond by increasing their own."

C. The Article's Impact

Justice Brennan's challenge to state courts had an immediate effect. Some of the nation's leading state jurists enthusiastically took up Brennan's message, taking to the lecture circuit and the law reviews to repeat, emphasize, and refine it. But it was on the bench, in actual decisions, that these and similarly inclined judges had the greatest impact. There they produced, with what Justice Brennan later called "marvelous enthusiasm," a sudden burst of independent, rights-protective rulings. Between 1950 and 1959, according to one study, a grand total of three decisions were handed down in which a state court construed its own state's constitution to provide protection for individual rights greater than that accorded by the U.S. Constitution. During the 1960s there were seven such rulings, followed by thirty-six more between 1970 and 1974. From there, the pace picked up dramatically. Between 1975 and 1979, state courts issued eighty-eight rights-expanding rulings. They issued 125 such rulings between 1980 and 1984, and fifty-two more in just two years, 1985 and 1986. Between 1986 and 1994, state courts extended state constitutional protections another eighty-five times in the area of criminal

41 Id.
42 Brennan, supra note 2, at 495.
43 Id. at 503.
procedure alone. These rulings, and subsequent ones, touched on virtually every area of constitutional liberties.

Although this trend was greeted initially by legal scholars with enthusiasm, critical voices soon appeared. Chief among the early objections to the growing practice of independent state constitutional adjudication was the charge that such rulings were nothing more than unprincipled, result-oriented attempts to evade the force of decisions of the U.S. Supreme Court. As one early critic put it, Justice Brennan had invited state courts to treat their state constitution as "little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions."

Nor was the public always grateful for state courts' discovery of the rights-protective possibilities of state constitutions. During the 1980s, in a backlash against rulings of the California Supreme Court taking an expansive view of state constitutional procedural rights for those charged with crime, California voters amended the California Constitution to eliminate the state constitution's exclusionary rule, thereby making the California Constitution considerably more restrictive of rights than the federal Fourth Amendment. And in an incident that ushered in the modern era of bitterly contested judicial elections, California voters in 1986 turned out three sitting California Supreme Court Justices partly in reaction to their repeated invocation of the California Constitution as a basis for invalidating criminal punishments, including the death penalty. A similar popular backlash broke out in Florida, where voters by initiative amended the Florida Constitution to require Florida courts to construe the state constitutional right against unreasonable searches and seizures no more broadly than the U.S. Supreme Court interprets the federal Fourth Amendment.

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52 Maltz, Political Dynamic, supra note 17, at 233; Galie, supra note 17, at 763, 769.
53 Collins, supra note 17, at 2.
56 FLA. CONST. art. I, § 12.
Moreover, despite the brouhaha surrounding Justice Brennan's call to arms and the various judicial and scholarly responses, the ultimate impact of his article turned out to be limited, and fleeting. With the exception of a relatively small proportion of high profile cases, written mostly by a small number of vocal judges on a few state courts, the workaday reality of state constitutional adjudication remained much the same as it had been before publication of Brennan's article. State courts may well have issued 350 rights-expanding decisions during the decade following the article's appearance, but they also issued thousands of decisions in which they refused to construe state constitutions to provide protections for individual rights that exceeded federal minima.

Two empirical studies begin to suggest the extent of this trend. Barry Latzer's 1991 study of state constitutional criminal procedure decisions found that state courts construe their state constitutions in conformity with federal interpretations of the U.S. Constitution in about sixty-eight percent of all cases. These results were replicated in a 2000 study by James Cauthen, which found that between 1970 and 1994 state supreme courts followed the federal analysis in sixty-nine percent of a wide variety of cases raising issues of individual liberties. These two studies, however, very likely overstate the actual degree of independence to be found in state constitutional decision making. The Latzer study is limited to criminal procedure, the one field in which state courts have been most inclined to assert themselves, probably in part because of the high proportion of criminal cases appearing on state appellate dockets, along perhaps with a resultant sense of expertise and confidence among state judges. The Cauthen study examines a wider range of cases, but excludes those in which the state constitution is not clearly cited as the basis for a decision issued on adequate and independent state grounds. The study thus glosses over at the selection phase the widespread practice of state courts of failing to distinguish carefully between the state and federal constitutions, a practice that severely undermines the possibility of independent development of state constitutional law by blurring state and federal law at the outset.

57 Wachtler, supra note 10, at 397.
59 Cauthen, supra note 19, at 1196.
60 Latzer, supra note 19, at 191.
61 Cauthen, supra note 19, at 1193.
Finally, the methodology of empirical counting of results obscures the degree to which state courts not only follow the U.S. Supreme Court in its results, but tend to appropriate, lock, stock, and barrel, the analytic frameworks, doctrinal test, and reasoning patterns of federal decisions.\(^63\) The deference, that is to say, that state courts show to the U.S. Supreme Court in constitutional cases goes well beyond mere adoption of ultimate results. Even more than the empirical studies reveal, the practice of interpreting state constitutional provisions to have the same meaning as—"in lockstep with"\(^64\)—parallel provisions of the U.S. Constitution remains the norm.

To be sure, state supreme courts do occasionally invoke state constitutions to issue highly rights-protective rulings in controversial, high-profile cases, the best known of which is surely a recent series of rulings concerning gay marriage.\(^65\) To the extent that Brennan's article made such rulings more likely or more palatable, it continues to have an impact. Nevertheless, high-profile, rights-protective rulings remain the exception, and it would not be going too far to suggest that the field of state constitutional rights today can be characterized as a dual regime in which widespread, transgovernmental consensus on a great majority of settled issues exists side-by-side with a contrariety of views on a small number of newly emerging, socially salient issues.\(^66\)

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III. PROBLEMS IN THE AFTERMATH OF BRENNAN'S ARTICLE:
CONTRADICTIONS OF THEORY AND PRACTICE

A. The Methodology Wars

One undeniable impact of Justice Brennan's article was its instantaneous creation of a demand for a theory both to justify its prescriptions and to guide their application. To refute the critique of Brennan's call to action as opportunistic and ideological, supporters of state constitutional activism needed to explain the principles on which Brennan's argument rested. In particular, they needed to explain why, how, and in what circumstances state constitutions could legitimately be interpreted to provide more expansive protection for human rights than the U.S. Constitution. This proved considerably more difficult—and contentious—than expected.

Among judicial and academic commentators, one point of agreement quickly emerged: the practice of state constitutional interpretation most commonly used by state courts was illegitimate—namely, the more or less automatic interpretation of state constitutional provisions to mean the same thing as roughly corresponding provisions of the U.S. Constitution. This practice, soon pejoratively labeled "lockstep interpretation," was not only deemed improper, but indeed reviled as the very model of what a coherent practice of state constitutional interpretation must strive to avoid.

Courts practicing lockstep interpretation tended to justify it in terms of the desirability of uniformity in state and federal constitutional law. As the Oregon Supreme Court said in one well-known case:

There are good reasons why state courts should follow the decisions of the Supreme Court of the United States . . . .

The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges . . . .

. . . While [the exclusionary] rule is in effect, . . . it is important, for the guidance of law officers, that the rule be as clear and simple as may be reasonably possible, consistent with the constitutional rights of the individual.

. . . Not adopting the [federal] rule . . . would add further confusion in that there would then be an "Oregon rule" and a "federal rule." Federal and


68 One of the earliest uses of the term to describe this phenomenon appears to be Maltz, Lockstep, supra note 67, at 99.
state law officers frequently work together and in many instances do not
know whether their efforts will result in a federal or a state prosecution or
both. In these instances two different rules would cause confusion.69

Critics of lockstep interpretation argued, in contrast, that a judicial
yearning for simplicity and uniformity in constitutional law could not
legitimately serve as the basis for construing a state constitution.70 To follow
blindly decisions of the U.S. Supreme Court when interpreting provisions of
the state constitution was, critics argued, to accord federal rulings a
“presumption of correctness” to which they were not entitled.71

At the same time, critics of lockstep interpretation also agreed that its
opposite—the interpretation of state constitutions to mean something different
from the U.S. Constitution—is equally illegitimate when it rests on nothing
more than mere disagreement with the way in which federal courts construe
similar provisions of the U.S. Constitution.72 To reject federal constitutional
doctrine because it seems objectionable was said to be just as bad as adopting
it because it seems familiar or agreeable.73 Both approaches rest on the same
fundamental conceptual error: treating state constitutions as though they are
little more than forums for responding to, or expressing approval or
disapproval of, developments in federal constitutional doctrine. On this view,
lockstep and rejectionist approaches to state constitutional interpretation share
the common defect of failing to accord state constitutions the legal and
institutional autonomy with which principles of federalism and state
sovereignty invest them.74 In using these methods, state courts improperly
respond to federal constitutional doctrine when they should be engaging the
state constitution on its own terms, as an independent object of legal
interpretation.75

Beyond these points concerning how not to proceed, however, agreement
broke down. Jurists and scholars quickly divided into two vigorously
disagreeing camps. One group embraced what is now known as the “primacy”

69 State v. Florance, 527 P.2d 1202, 1209 (Or. 1974). While uniformity may be
especially desirable in areas such as criminal procedure, where state and local law
enforcement officers may need to exercise street-level discretion in ways that conform to
both state and national constitutional constraints, the impulse toward uniformity has not
been confined to such areas. As the Georgia Supreme Court said of its decision to follow
federal rulings when construing the dimensions of the right to an education under the
Georgia Constitution, “[c]onsistency in constitutional adjudication, though not demanded,

70 See, e.g., Williams, supra note 67, at 356.

71 Id.

72 See supra note 17 and accompanying text.

73 Collins, supra note 17, at 5–9.

74 Williams, supra note 67, at 356; Linde, E Pluribus, supra note 63, at 199; G. ALAN

75 Linde, First, supra note 44, at 379; Linde, E Pluribus, supra note 63, at 179; Williams, supra note 67, at 358.
According to this view, state courts should approach problems of state constitutional interpretation just as federal courts approach interpretational problems under the U.S. Constitution—that is, they should treat state constitutions as free-standing, wholly independent sources of positive constitutional law. This means that state courts should interpret state constitutions by bringing to bear all the traditional tools of constitutional analysis: text, structure, history, controlling state precedent, and the values of the state polity. This analysis should be performed, moreover, without resort to analogous rulings by federal or other state courts except for the limited purpose of providing persuasive guidance.

The other main position, often called the “interstitial” or “supplemental” approach, holds that federal constitutional questions should take pride of place, and that state courts should turn to the state constitution only after it becomes apparent that the United States Constitution provides inadequate protection for the civil liberties at issue. Upon making such a determination, the state court should then examine the state constitution to determine whether it provides the additional increment of protection. This approach is usually associated with a methodology of state constitutional interpretation, often labeled the “criteria” approach, which directs state courts to compare the state constitutional provision at issue to its cognate provision in the U.S. Constitution, and to construe it to have a different meaning from its federal counterpart only if some objective indicium supports the divergent interpretation. The indicia sufficient to support a divergent interpretation are typically said to include differences in the constitutional text, structure, or history; differences in controlling state precedent; and differences in the concerns or values of the local populace.

Both of these positions, however, suffer from significant theoretical flaws, which were quickly pointed out by their opponents. Proponents of the primacy approach criticized the interstitial approach for replicating the major flaw of lockstep interpretation: taking federal constitutional law as the presumptively correct baseline from which state constitutional interpretation must proceed. Advocates of the interstitial approach sometimes responded by justifying it as better taking into account the contemporary reality of constitutional protection.

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76 Tarra, supra note 74, at 183–85.
77 Id.
78 Id.; Linde, E Pluribus, supra note 63, at 180.
79 Tarra, supra note 74, at 182–83.
81 Williams, supra note 64, at 129–30, 146–69.
83 Williams, supra note 64, at 169–77.
of individual rights—namely, that the U.S. Constitution has assumed the primary role in protecting such rights, and that state constitutions consequently can bear only a limited, supplemental role without calling into question their legitimacy in the legal order. According to the primacy approach, however, this position is incoherent because state constitutions are not documents the legitimacy of which is or can be called into question; they are positive legal enactments with binding force that must be given effect.

The primacy approach, however, gives rise to equally difficult problems. This method demands that state courts engage the state constitution as an independent source of law by examining its text, its history, its structure, relevant state precedent, the character and values of the people of the state, and prudential considerations relating to the judicial role and the pragmatic consequences of judicial resolution of constitutional questions. Proponents clearly believed that state courts taking this approach would often reach results that differ from those reached by federal courts, and that these results would in consequence be legitimized by their responsiveness to a distinct body of positive law.

Yet how likely is it that careful and independent examination of these factors would really lead a state court construing the state constitution to reach a result significantly different from the result the U.S. Supreme Court might reach under the U.S. Constitution? Consider the constitutional text. In 1790, the text of state and national constitutions often differed significantly. Today, however, textual differences are both less common and less dramatic due to frequent state constitutional amendment and replacement, and the ubiquitous process of language-swapping. What about constitutional history? Even setting aside the obvious fact that constitutional text and constitutional history are hardly independent variables in constitutional interpretation, there are

84 Pollock, supra note 80, at 717–18; Developments, supra note 80, at 1357–58.
90 Clearly, textual similarities often reflect parallel similarities in constitutional history. Because constitutional text is drafted in a particular place, at a particular time, in response to particular historical experiences or exigencies, the appearance of the same or similar text in more than one document suggests strongly that the drafters of each document were reacting independently to the same or similar historical events.
good reasons to think that the historical experiences of individual American states differ from the collective historical experiences of the United States only in rare and, in all probability relatively minor ways. The major episodes of American life—the colonial experience, the Revolution, the frontier, the Civil War and Reconstruction, industrialization, two world wars, the Great Depression, the rise of the social welfare state, the civil rights movement, and so on—are, from the vantage point of the present, collective, shared experiences regardless of how they may have been experienced at the time of their occurrence in different places around the nation. This is not to say that constitutional history might not differ somewhat from state to state, but that the magnitude of any such differences must be greatly reduced through the process by which American historical experience is continually collectivized.91

Another problem, this time of a practical nature, also frequently confronted state courts attempting to follow the primacy approach: state courts searching for relevant state constitutional precedent often found none for the simple reason that the law of state constitutional rights was dramatically underdeveloped when Justice Brennan issued his call to pay it greater heed.92 State courts seeking to interpret their own bills of rights often found that the provisions had literally never been previously construed.93 In contrast, they often found a highly developed body of federal constitutional law construing textually and historically similar provisions of the U.S. Constitution.94

Even more damaging, however, is that the frequent congruity of guideposts to federal and state constitutional interpretation casts doubt on a fundamental premise of Brennan’s analysis: that state constitutional law is in fact, rather than merely in theory, jurisprudentially independent of federal constitutional law.95 If state constitutional law is not as a factual matter jurisprudentially independent of federal constitutional law—if it looks frequently to federal constitutional law not merely for inspiration but as a source of concrete legal doctrine—then the liberty-protecting justifications for treating it as independent disappear. State constitutional law would still retain its potential to serve as an independent and in some cases more generous source of individual liberty than national constitutional law, but this potential would remain unfulfilled due to the fact that constitutional drafters and ratifiers—the people of the states—would have chosen to adopt the federal approach, whatever it may be, for purposes of state constitutional doctrine.96

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92 See Brennan, supra note 2, at 502.
95 See Brennan, supra note 2, at 501.
96 Gardner, Autonomy, supra note 89, at 49–66.
B. The Upshot: Little Change in Judicial Practice

As the dust kicked up by this fierce theoretical debate began to settle during the 1990s, a remarkable fact emerged: relatively little had actually changed. With the exception of a comparatively small proportion of high profile cases, written mostly by a small number of vocal judges on a few state courts, the workaday reality of state constitutional adjudication remained much the same as it had been before Justice Brennan’s call to arms and the subsequent response.97

State courts did issue many rights-expanding decisions during the decade following Justice Brennan’s *Harvard Law Review* article,98 but they also issued many more in which they refused to construe state constitutions to provide protections for individual rights that exceed federal minima.99 For every state court that has expanded the scope of constitutional liberties under the state constitution by refusing to follow some rights-contracting ruling of the United States Supreme Court, two or three state courts have followed the federal lead by construing the state constitution to provide precisely the same reduced level of protection as the federal Constitution.100 For example, although five state courts have expressly rejected the United States Supreme Court’s interpretation of the First Amendment under which the public has no free speech rights in privately owned shopping malls,101 the courts of thirteen states have expressly followed the Supreme Court’s lead and construed their state constitutions precisely as the Supreme Court has construed the First Amendment.102 A 1991 study of state constitutional criminal procedure decisions found that state courts construe their state constitutions in conformity with federal interpretations of the U.S. Constitution in nearly seventy percent of all cases.103 The same study also categorized states as “rejectionist” if they rejected federal constitutional doctrine in seventy-five percent or more of their independent state constitutional rulings, and “adoptionist” if they adopted federal doctrine in seventy-five percent or more

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98 Wachtler, *supra* note 10, at 397.
100 For a more in depth discussion, see *id*.
103 Latzer, *supra* note 19, at 192 tbl.1.
of their independent state constitutional decisions.\textsuperscript{104} The study found that adoptionist states outnumbered rejectionist states by twenty-two to four.\textsuperscript{105} Many of these results were replicated in a 2000 study which found that between 1970 and 1994 state supreme courts followed the federal analysis in sixty-nine percent of all cases raising an issue of individual liberties.\textsuperscript{106}

State courts have also by and large continued their pre-1970s practice of avoiding state constitutional rulings altogether. One study examined state high court decisions handed down between 1981 and 1986 that dealt with the constitutional right against self-incrimination.\textsuperscript{107} It found that state courts ruled exclusively on federal constitutional grounds in seventy-eight percent of the cases.\textsuperscript{108} Only eight state supreme courts rested their decisions on state constitutional law in as many as half of all self-incrimination cases decided during the study period, whereas fourteen courts did not consult the state constitution in even a single self-incrimination case during the period, and another seventeen state high courts did so exactly once.\textsuperscript{109} Moreover, even when state courts do interpret state constitutions, their decisions frequently display many of the qualities that proponents of the primacy approach, and Justice Brennan before them, initially criticized.\textsuperscript{110} A study of over 1,200 state constitutional decisions issued by the highest courts of seven states during 1990 found that the great majority of these decisions were characterized by a grudging resort to the state constitution; obscurity as to whether the ruling was based on state or federal constitutional grounds; a tendency to fall into line, without offering any explanation or justification, with federal doctrine developed under the U.S. Constitution; and a complete absence of any discussion of state constitutional history or the intentions of the state constitution’s framers.\textsuperscript{111} These results were replicated in a more recent study of the decisions of four state courts issued during their 2005–2006 terms.\textsuperscript{112}

A few state courts have, not without some fanfare, self-consciously announced themselves adherents of either the primacy or interstitial approach. Yet close observation of the performance of even these courts reveals that they have rarely stuck to their methodological commitments, and have in fact often lapsed into the very kind of lockstep or reactive analysis they so deliberately committed themselves to eschew.\textsuperscript{113} In a 2000 article, a judge of Oregon’s

\textsuperscript{104} Id. at 193.
\textsuperscript{105} Id.
\textsuperscript{106} Cauthen, supra note 19, at 1195–96.
\textsuperscript{107} Esler, supra note 18, at 27.
\textsuperscript{108} Id. at 28.
\textsuperscript{109} Id. at 28–29.
\textsuperscript{110} Gardner, Introduction, supra note 87, at xxviii.
\textsuperscript{111} Gardner, Failed Discourse, supra note 62, at 781–94.
\textsuperscript{112} Long, supra note 66, at 72–86.
intermediate appellate court argued candidly that "although selected Oregon
decisions employ some interesting rhetoric about constitutional interpretation,"
a close examination of the decisions demonstrates that the Oregon Supreme
Court's self-conscious methodological commitment to the primacy approach
"appears to have made little difference other than to provide the courts an
opportunity to arrive at different results than the application of federal law
would otherwise require."114

Thus, by far the most serious mark against Brennan's analysis, and the
primacy approach to state constitutional interpretation it inspired, is that state
judges so rarely seem interested in following it.115 Indeed, they seem
uninterested in following it not only when the relevant interpretational
guideposts all point toward doctrinal convergence, but even when they do not—when the constitutional text differs from its federal counterpart; when the
state constitutional history contains episodes suggesting that it might differ
materially from the national historical experience; when prior, not to say
ancient, state decisions construing the state constitution may give reason to
think that prevailing federal doctrine may be irrelevant.116 Instead, whether by
lockstep adoption or by rejectionist disagreement, state judges behave
continually as though one of their principal functions when construing their
state constitution is to pass judgment on decisions of the U.S. Supreme
Court construing the national Constitution—to serve, that is, as supporters or
opponents of federal judicial rulings. This is a practice, of course, that only
reinforces the view, associated with Brennan's original critics, that
aggressively rights-protective interpretations of state constitutional provisions
are little more than the illicit expression by state judges of ideological
opposition to rulings of the U.S. Supreme Court.

Even taken individually, but certainly when taken together, these results
call into question the theoretical premises of Brennan and his followers.
Certainly the theory fails to provide a good description of what state courts
actually do. Prescriptively, Brennan urged state courts to do something—
interpret state constitutions to expand state protection for individual rights
beyond the level provided by the U.S. Constitution—that they are obviously
disinclined to do. At the same time, Brennan's account tells state courts that
the one thing they most consistently do when interpreting state constitutions—
construe them in lockstep with the U.S. Constitution—represents a
rudimentary error. Something clearly is wrong with this picture.

115 Long, supra note 66, at 42; Friedman, supra note 97, at 783.
116 Jeffrey S. Sutton, What Does—And Does Not—Ail State Constitutional Law, 59
IV. SUBNATIONAL CONSTITUTIONAL LAW AND RIGHTS FEDERALISM

In my view the principal flaw in Justice Brennan’s famous article, and in the judicial and academic theorizing that followed it, is that it ignores the shared setting in which state and federal constitutional law are deeply and mutually embedded. Both levels of constitutional law function as distinct, yet at the same time profoundly interconnected, parts of a federal system. Federalism does more than merely carve out separate spheres of self-sovereignty for state and national governments; it also binds them together in a shared system of mutual dependency and shared operational mission. As a result, state and federal constitutions are not and cannot be completely independent sources of positive law. Rather, they are interlocking parts of a larger system in which they operate partly in concert and partly in opposition, depending upon a great number of highly contingent factors. Justice Brennan’s call to arms was thus built around a significantly incomplete view of state constitutional law: he saw the independence, but overlooked the interdependence; he saw human rights protections, but missed the phenomenon of human rights federalism.

A. Basic Principles of Federalism

In the basic Madisonian model to which Americans are heirs, the purpose of federalism is clear: to protect liberty.117 “The accumulation of all powers . . . in the same hands,” wrote Madison, “may justly be pronounced the very definition of tyranny.”118 To protect liberty, power must therefore be divided.119 Federalism serves this principle of American constitutional design by parceling out government powers among different levels of government, and by giving each level of government, state and national, substantial powers sufficient to allow each to monitor and check the abuses of the other.120 In this scheme, Madison, wrote, “a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”121 In all but the smallest polities, self-governance can proceed only by the delegation of popular power to an agent—a government.122 One of the great innovations of the American federal system is that the people have secured their own self-interest by dividing power to create two distinct governmental agents.

119 See THE FEDERALIST No. 51, supra note 117, at 322.
121 THE FEDERALIST No. 51, supra note 117, at 323.
122 See Gardner, State Courts, supra note 120, at 1734–35.
Foundations of Human Rights Federalism

Principals frequently employ multiple agents for different purposes. Lord Grantham of the popular British television series Downton Abbey (PBS), for example, had his butler, his valet, his footman, his chambermaids, his cook, his chauffeur, and so forth, and each of these agents performed a very different and highly circumscribed task. American federalism, however, takes a different approach. The two agents in the system—the state and national governments—are charged not with pursuing distinct goals, but with pursuing largely the same set of goals, and each does so independently, under an independent delegation of authority. It is not only the national government that is charged to “promote the general welfare.” State governments have the same charge.

The “double security” of which Madison spoke, then, does not arise so much from some complicated scheme of complementary powers, as is often supposed, but from a conceptually much simpler arrangement in which the state and national governments independently police much of the same turf. Of course the overlap of mission is not complete; each level of government has exclusive or dominant authority in some spheres of public action. Still, most of the important powers held by each level of government are concurrent, allowing state and national authorities to occupy, and indeed to compete with one another in, the most important realms of public affairs.

This overlap of authority is essential to the success of the constitutional plan. As Madison explained, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” A successful and sustainable separation of powers through mutual checking, Madison argued, thus requires not complete separation of powers—an arrangement

124 U.S. CONST. pmbl.
125 See, e.g., OHIO CONST. pmbl. (“promote our common welfare”).
126 This view typically rests on an old, now largely discredited model of “dual federalism.” See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 35–36 (2009).
128 For example, the national government retains paramount power in military and foreign affairs. State power is dominant, though not exclusive, in traditional areas of law such as tort, contract, property, and family law.
129 The preeminent example is the power to regulate economic affairs, i.e., “commerce.” U.S. CONST. art. I, § 8, cl. 3.
130 For an overview of the theory of “competitive federalism,” see, for example, DYE, supra note 127, at 1–33.
Madison referred to disparagingly as "parchment barriers"—but significant overlap among them. It is only in virtue of the possession by each agent of some share of control over the same fields of action that each agent obtains the "constitutional means... to resist encroachments of the others." Dual policing of the same territory is thus the feature of constitutional design that enables each level of government not merely to monitor the behavior of the other, but to attempt, and sometimes to succeed, in checking and counteracting its abuses.

This structure is in many respects little different from a variety of commonplace arrangements in which a principal does not quite trust its agent, and so brings in a second agent to monitor the first one. A homeowner, for example, might hire a general contractor to undertake a large construction project, but might at the same time employ an inspector to check the contractor's work to make sure it is of the type and quality contracted for. A corporation or other organization might delegate or outsource some significant task, but also employ an auditor to make sure it is billed accurately and honestly. Congress charges government agencies with carrying out legislative instructions, but also creates in many agencies an inspector general's office to monitor agency performance. Federalism contemplates a similar arrangement for similar reasons: the delegation to government of the people's power to govern themselves is an action fraught with risk, and an arrangement of dual agency provides additional assurances that the work will be done to the principal's satisfaction.

B. State Constitutions in a Federal System

In its creation of the system of federalism, and its specification of the authority of the national government, the U.S. Constitution establishes a critically important piece of the constitutional architecture of dual, mutually checking governmental agents. It does not, however, establish the entirety of that architecture; state constitutions also play an indispensable role in constructing the federal system.

State constitutions do for state power what the U.S. Constitution does for national power: they structure and allocate it and establish the purposes for which it may—and may not—be used. In a federal system like ours, state

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133 The Federalist No. 47 (James Madison).
134 The Federalist No. 51, supra note 117, at 321–22.
135 See id. at 322.
constitutions thus perform three principal functions. First, they create a state government and invest it with the powers necessary to accomplish the goals for which the people of the state create a government—"to secure and perpetuate [the] blessings [of freedom];"\textsuperscript{137} "to provide for the health, safety and welfare of the people";\textsuperscript{138} to "insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty."\textsuperscript{139} State constitutions consequently grant state governments extensive authority to regulate public and private affairs and to raise and spend money to fund beneficial programs.\textsuperscript{140} Second, like the U.S. Constitution, state constitutions impose restraints on the exercise of granted governmental powers so that the state government, an agent charged with pursuing the goals of the state populace, does not turn on its own principal.\textsuperscript{141} Thus, state constitutions universally contain a host of well-established devices for limiting governmental power.\textsuperscript{142} Such devices typically include a formal horizontal separation of powers, procedural prerequisites for the use of state power, and substantive limits on the scope of state power. Substantive limits may inhere in internal limitations on the scope of granted powers,\textsuperscript{143} or they may be imposed through specific restrictions on the purposes for which state power may be deployed,\textsuperscript{144} or through the inclusion of a bill of rights, a feature found in every state constitution.

Third, because they are embedded in a federal system, state constitutions grant an additional form of power to state governments: the power to resist and check abuses of national power.\textsuperscript{145} In the Madisonian model, as we have seen, a functioning federal system is one in which "the different governments will control each other, at the same time that each will be controlled by itself." The U.S. Constitution serves this imperative by authorizing the national government to deploy its powers to monitor and check abuses of state authority.\textsuperscript{146} The national government has frequently deployed many of its powers in just this way. Federal courts, for example, have often used the power of judicial review to invalidate state laws that transgress federal

\textsuperscript{137} \textit{CAL. CONST. pmbl.}
\textsuperscript{138} \textit{ILL. CONST. pmbl.}
\textsuperscript{139} \textit{GA. CONST. pmbl.}
\textsuperscript{140} In fact, the standard presumption under state constitutions is that they grant state government plenary power except as limited—the opposite of the presumption that generally applies to the U.S. Constitution. \textit{Williams, supra} note 64, at 249–50.
\textsuperscript{142} See \textit{Gardner, supra} note *, at 87–100.
\textsuperscript{143} \textit{Williams, supra} note 64, at 253–57.
\textsuperscript{144} TARR, \textit{supra} note 74, at 118–21.
\textsuperscript{145} See \textit{id.} at 11–15.
\textsuperscript{146} \textit{Gardner, supra} note *, at 84–87.
constitutional boundaries.\textsuperscript{147} Congress has used its power to enforce the Fourteenth and Fifteenth Amendments to enact civil rights legislation that powerfully constrains the way states may treat their own citizens.\textsuperscript{148} And Congress has often used its power to spend money to encourage state behavior that it thinks beneficial to the American public.\textsuperscript{149}

A well-functioning federal system, however, demands that monitoring and checking occur from both directions, from below as well as from above. It follows, then, that states must possess a reciprocal authority to monitor and check abuses of national power. Since state constitutions are the foundational sources from which state governments derive their powers, state constitutions necessarily must authorize states to deploy their powers so as to resist what they believe to be national encroachments on public welfare.\textsuperscript{150}

I have elsewhere described in some detail the tools and methods that American states, consistent with the Madisonian model, have from time to time deployed to resist exercises of national power with which they disagree.\textsuperscript{151} These include techniques deployed in advance to influence the final content of national policy decisions, such as harnessing the state’s congressional delegation, lobbying, and mobilization of public opinion.\textsuperscript{152} States also have many tools at their disposal to undermine or blunt the impact of enacted national policies they view as inimical to the public welfare. These include the use of affirmatively granted state power to seize the initiative in policy making, refusal of spending incentives, uncooperative implementation of national policy, administrative negotiation, and litigation, as well as stronger (if not always fully legal) measures such as outright defiance of national authority.\textsuperscript{153}

\textsuperscript{147}For example, in the last Term the Court invalidated state laws in Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015) (state refusal to recognize gay marriage); and Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015) (anti-sign ordinance).


\textsuperscript{149}Most large-scale social welfare programs work this way, such as food stamps, unemployment insurance and, most recently, the Affordable Care Act.

\textsuperscript{150}GARDNER, supra note *, at 87–88.

\textsuperscript{151}Id. at 88–120. For a comparative analysis, see generally James A. Gardner & Antoni Abad I Ninet, Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain, 59 AM. J. COMP. L. 491 (2011).

\textsuperscript{152}For discussion of state mobilization of the congressional delegation and lobbying, see, e.g., DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974); ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995). For discussion of state mobilization of public opinion, see, for example, John Dinan, Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act, 41 PUBLIUS 395, 404 (2011); and JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 74 (2009).

\textsuperscript{153}For specific examples, see NUGENT, supra note 152, at 67 (seizing the initiative); Donn Tibbetts, Lift Seat-Belt Sanctions, Merrill Urges DOT Chief, N.H. UNION LEADER,
The point is this. The system of federalism established by the U.S. Constitution protects liberty and furthers the people's collective goals by institutionalizing a kind of permanent conflict between the national and subnational levels of government.\textsuperscript{154} Federalism creates a system of dual agency; charges both agents to pursue independently an identical, or at the very least significantly overlapping, set of goals; and then settles on each agent the additional burden of making sure the other agent stays on task.\textsuperscript{155} Because the state and national governments pursue largely the same set of popular goals, the range of this contestatory dynamic is not limited to any particular domain; on the contrary, it is capable of extending across the entire landscape of possible governmental action. State–national conflict might thus emerge in any arena of policy or public endeavor. We might, for example, observe a form of environmental federalism, in which the state and national levels engage in conflict over the goals or implementation of environmental policy. We might similarly observe conflict in the form of education federalism,\textsuperscript{156} immigration federalism,\textsuperscript{157} or foreign policy federalism.\textsuperscript{158}

C. Human Rights Federalism

The force of Justice Brennan's Harvard Law Review article was its startling insight—a correct one—that the field of human rights protection could itself be an arena in which the state and national governments might struggle over the content and scope of the American commitment to observe


\textsuperscript{155} See THE FEDERALIST NO. 46, supra note 123, at 294.


and respect the rights and dignity of individuals. The protection of human rights is not something that the architecture of federalism assigns exclusively to the national level; it is, on the contrary, a shared function, to be pursued simultaneously at both levels through the identification and active policing of such rights.\footnote{Originally, the only direct protection for human rights was provided by state constitutions; the U.S. Constitution as adopted did not initially have a bill of rights. When in 1791 the federal Bill of Rights was adopted, it applied solely to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 243 (1833). Adoption of the Fourteenth Amendment altered the landscape by intermingling rights protection at each level of government.} As Brennan observed, the federal Bill of Rights is hardly the only such document in our system. It is, to be sure, the nation’s most celebrated bill of rights, but every state has independently entered the field of rights protection by enacting and constitutionalizing its own bill of rights.

As a result, the proper scope of protection for human rights can be a subject of disagreement and contention among the orders of government. It should by no means be assumed that all fifty states and the national government agree completely on the scope of protection to be accorded to each and every human right receiving the dual protection of the state and national constitutions. In accordance with the federal dynamics of intergovernmental contestation, whenever any such disagreement appears, each order of government can be expected to use the resources at its disposal to advance its own view of the appropriate level of protection, and to resist what it views as misguided decisions about rights protection advanced by its competitor. It was this vision that so excited Brennan’s supporters.

What Justice Brennan failed to perceive, however, was that federalism’s assignment of responsibility for protecting individual rights to both orders of government says nothing about the likelihood of disagreement among them, much less that the disagreement might run in any particular direction. The federal system of dual agency requires each agent continually to examine and to judge the actions of the other. If such a system is to succeed in its goal of keeping both agents on track in implementing the wishes of their common principal, then each must exercise independent judgment about what fulfillment of those wishes requires in any particular instance. Thus, in the arena of human rights protection, each agent must decide for itself what balance between government empowerment and constraint best conduces to public welfare. There is no a priori outcome of this deliberative task. It is in principle just as possible—and just as permissible—for states to conclude that the national government has done a commendable job in striking the balance between individual rights and government power as it is for states to conclude that the national government has done a poor job, either by according too little protection to human rights or, indeed, too much.

This is where Justice Brennan missed the mark. He assumed that the lack of aggressively independent state judicial deployment of state constitutional rights, and the proliferation of lockstep state supreme court opinions, indicated
a lack of appreciation by state judges of the nature of state constitutional independence. But there is another explanation. Although federalism creates the conditions in which disagreement among the orders of government may appear and become an object of active conflict, there is nothing inevitable about the emergence of such disagreement. It is no more inevitable that states disagree with the national government over policies of free speech, freedom of religion, or warrantless searches than it is that they disagree over the details of policies concerning environmental protection, immigration, or economic development. And even when one state disagrees with national policy, there is no reason to assume that other states will share that disagreement, or that disaffection on the state level will spread like a contagion. After all, the very first attempt in American history to build a state-level movement against a controversial national human rights policy—public protests by Virginia and Kentucky of press censorship by the John Adams administration\textsuperscript{160}—died on the vine when a disposition to resist remain confined to those two states.

It follows that the predominance of lockstep interpretation by state supreme courts construing state constitutional rights provisions could just as well reflect a very different dynamic in which (1) states conscientiously monitor the performance of the national government in the field of human rights protection; (2) state supreme courts by and large approve of that performance; and (3) when state courts find it necessary to construe rights provisions of their state constitutions, they simply adopt approaches developed at the national level that they find satisfactory.\textsuperscript{161}

If anything, agreement at the state and national levels about the appropriate level of rights protection is likely to be far more common than disagreement, just as it is in other policy domains. The state and national governments are agents of a single national polity organized for various purposes into different subnational groupings. National policies toward human rights are in the long run likely to reflect nationwide trends in public opinion, trends from which individual state polities are hardly immune, and to which they in fact contribute. Public opinion at the state and national levels, that is to say, may frequently coincide—not always, and rarely uniformly across all the states, but often enough to make state adoption of national policies a commonplace occurrence.\textsuperscript{162}

\textsuperscript{160}THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99, at 5–6, 19–21 (Jonathan Elliot ed., 1832).

\textsuperscript{161}For further elaboration, see GARDNER, supra note *, at 196–97, 225–26, 243–44, 253–57.

\textsuperscript{162}As V.O. Key, Jr. wrote nearly sixty years ago, "[T]he American states operate not as independent and autonomous political entities, but as units of the nation." Consequently, "public attention cannot be focussed sharply on state affairs undistracted by extraneous factors; political divisions cannot occur freely on state questions alone: national issues, national campaigns, and national parties project themselves into the affairs of the states." V.O. KEY, JR., AMERICAN STATE POLITICS: AN INTRODUCTION 18 (1956). On the relationship between state and national politics, see generally James A. Gardner, The Myth
Indeed, congruity of state and national policy preferences is especially likely in the U.S. federal system for two related reasons. First, the major ideological cleavages in the United States tend not to be territorial, but partisan. Second, political parties in the United States typically display a strong degree of vertical integration, meaning that the policy commitments of Democrats and Republicans at the national party level tend to be similar to the commitments held their by their state-level affiliates.

Taken together, these two facts mean that differences of opinion, even very strong ones, may exist in the United States, but that the contestants are rarely divided by geographical boundaries. Instead, differences of opinion are far more likely to exist within every state, as on the national level, and to be organized by partisan affiliation. The major cleavages in public opinion therefore rarely pit some distinctive local opinion in Nebraska or Pennsylvania against a very different nationwide opinion; rather, they tend to pit Democrats and Republicans against each other at both the state and national levels.

When the party out of favor at the national level controls a state, the conditions are present for state-national conflict, but the frontier of conflict will likely be defined by the ideological commitments of the respective parties, not the territorially organized polities. By the same token, when the same political party controls the national government and the government of a state, there is likely to be a good deal of congruity of policy preference. In these circumstances, we can hardly be surprised to see a state supreme court marching in lockstep with the U.S. Supreme Court, even when the policies in question concern the scope of protection for human rights.

Of course, these are tendencies, not ironclad laws, and it is certainly possible for a state's constitutional jurisprudence of human rights to be thoroughly independent of national jurisprudence. Yet even in those circumstances, the fact that a state court exercises independent judgment about the appropriate level of human rights protection in the United States says nothing about either the substance of that judgment, or how it will be expressed at the doctrinal level. If the state court, in the exercise of its
independent judgment, finds that the U.S. Supreme Court is doing an inspired job protecting rights, that judgment might very well result in a convergence of constitutional doctrine. If a state court finds the U.S. Supreme Court's work wanting, it might disagree in either an upward or downward direction from the national baseline; it might, that is, conclude that the national government is striking a poor balance between collective power and individual liberty by providing either too little or too much protection for human rights.

In those cases, the state jurisprudence might correspondingly set the level of protection at a higher level, as Justice Brennan urged, but it is equally possible that the state court could decide that national protection for rights is too high, and set the state bar lower. As the Oregon Court of Appeals has observed, "[i]ndependent development of the law under [the Oregon Constitution] can lead to situations in which that law is less protective than is the law under [the U.S. Constitution]." 168 Similarly, the Texas Court of Criminal Appeals has noted that the supremacy of federal constitutional law "does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution," and that "[t]he ceiling of one may be lower than the floor of the other." 169

Of course state courts in practice lack the power to implement any downward divergence from the national baseline of rights protection by operation of the incorporation doctrine and the Supremacy Clause, but that does not mean that such judgments by state courts are without effect. This kind of disagreement can be meaningful in the long run through the interactive process of dialogic engagement characteristic of judicial federalism. In this process, state and federal courts influence each other's interpretations of law through a pattern of continuous public conversation conducted through judicial rulings and opinions. 170

In some of the best-known instances, state supreme courts have influenced the U.S. Supreme Court to increase the level of national rights protection by taking highly rights-protective positions as a matter of state law. For example, the embrace of the exclusionary rule by state courts during the 1940s and 1950s influenced the U.S. Supreme Court in 1961 to reverse itself and adopt the exclusionary rule as a remedy for searches by state law enforcement officials that violated the Fourth Amendment. 171 More recently, state rulings


interpreting state constitutions to prohibit discrimination against gays and lesbians—and in so doing deliberately rejecting federal constitutional law to the contrary—were instrumental in influencing the U.S. Supreme Court to reverse itself in Lawrence v. Texas and hold that the U.S. Constitution prohibits criminal punishment of gay sex.\textsuperscript{172}

But, as in other arenas of intergovernmental relations, state influence can work in the other direction as well—rulings by state supreme courts can persuade the U.S. Supreme Court to lower, or perhaps more commonly to decline to increase, levels of rights protection afforded by the U.S. Constitution. For example, in deciding whether a warrantless search of an office incident to an arrest made there was reasonable under the Fourth Amendment, the Court looked for guidance to state constitutional law:

> When construing state safeguards similar to the Fourth Amendment of the Federal Constitution, states courts have shown little hesitancy in holding that incident to a lawful arrest upon premises within the control of the arrested person, a search of the premises at least to the extent conducted in the instant case is not unreasonable.\textsuperscript{173}

Similarly, a history of stingy rights protection in the states can influence the U.S. Supreme Court to set the level of protection afforded by the U.S. Constitution at a comparably stingy level. In Atwater v. City of Lago Vista, for instance, the Court found it significant that practice under state constitutions of the founding era, which had provided models for the Fourth Amendment, supported a broad interpretation of state authority under the U.S. Constitution to make warrantless arrests on misdemeanor charges.\textsuperscript{174}

\textbf{V. CONCLUSION}

Justice Brennan's 1977 Harvard Law Review article is justly celebrated for the attention it drew to the independence of state constitutional law and to


\textsuperscript{174}Atwater v. City of Lago Vista, 532 U.S. 318, 339–41 (2001) (relying in part on state interpretations of state constitutional search-and-seizure provisions to conclude that warrantless misdemeanor arrests by state police do not violate the Fourth Amendment). Of course, this is in addition to a much more commonplace way in which state courts influence the Supreme Court to contract rights protections: through stingy interpretations of federal constitutional law. For a recent example, see Heien v. North Carolina, 135 S. Ct. 530, 532 (2014), in which the North Carolina Supreme Court held that the Fourth Amendment does not require suppression of evidence seized during a search incident to an arrest based on a mistake of law by the arresting officer, and the U.S. Supreme Court affirmed.
the potential of this body of law to carry forward the rights revolution initiated by the Warren Court. But the article’s more important legacy is the spotlight it threw on the previously overlooked phenomenon of human rights federalism. Brennan’s article, it is true, initially sowed jurisprudential confusion through its inattention to the large-scale constitutional structures, practical ground-level mechanisms, and official incentives that shape this important arena of intergovernmental contestation. Nevertheless, it is clear in retrospect that Brennan’s article sparked a vigorous public debate about the appropriate role of the state and national governments in the protection of human rights, a debate that at that time seemed to have been settled in favor of national power. In so doing, Brennan provided an important public service that has stimulated useful advances in public and legal understandings of the significance of federalism in the field of human rights protection.

Justice Brennan’s article did not summon into existence the system he envisioned, in which state courts bravely and single-mindedly resist and countermand every retreat on human rights protection effectuated by the U.S. Supreme Court. We do, however, have a much more subtle and responsive system in which state courts monitor the performance of the federal judiciary and express their approval or disapproval of federal performance in the course of adjudicating human rights claims under state constitutions. In so doing, state courts join the federal bench in a crucial, ongoing conversation about human dignity and the appropriate ways for governments to respect it.
Justice Brennan’s Call to Arms—What Has Happened Since 1977?

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I. INTRODUCTION

We are about to observe the fortieth anniversary of the publication of a seminal law review article: State Constitutions and the Protection of Individual Rights by Associate Justice William J. Brennan.1 This Article was


1 William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 489, 491 (1977) (arguing for the reappraisal of the strategy to rest claims involving assertions of individual rights on state constitutional grounds, as state constitutions may offer protections beyond those offered under the Supreme Court’s interpretation of federal law).
also the basis of a talk Justice Brennan later gave at The New York University Law School. It is often said that this article, one of the most-cited in American legal scholarship, sparked the "new judicial federalism."

In 1986, I wrote in a tribute to Justice Brennan: "This one law review article, almost by itself, created the renaissance of state constitutionalism." I have not really changed my view since then. Yet, what has been the impact of Justice Brennan’s article in practice? Have the state courts simply paid lip service to “individual rights” in state constitutions, giving them a modicum of respect while quietly continuing to give supremacy to the rights in the U.S. Constitution? Have the state courts created a robust jurisprudence that advances the powers of the states in the federal system? In this Article, I shall attempt to answer those questions.

This Article proceeds by answering those questions through four related issues. Part II explores the effect of the Michigan v. Long doctrine over the past thirty-plus years since the originating decision. Part III examines the three different approaches taken by state supreme courts in interpreting state constitutions alongside their federal counterpart: lockstepping, limited lockstepping, and independent jurisprudence. Part IV looks at approaches to interpretation where a provision in a state constitution has no analogue in the federal document. Part V asks whether there should be national uniformity in individual rights and, if not, when states should be permitted to deviate from that norm. Through this analysis, the Article evaluates the real-world impact of Brennan’s seminal article.

II. THE EFFECT OF THE MICHIGAN V. LONG DOCTRINE

In 1983, in a seminal case, the United States Supreme Court took a significant step in determining the relationship between state constitutional rights and the Federal Bill of Rights. The Court’s decision endorsed Brennan’s view that individual rights should be viewed independently under state constitutional grounds. However, it is unclear how much of an impact the decision has actually made in practice.
The case was *Michigan v. Long*. The case began in the Michigan Supreme Court, which decided a search and seizure case in favor of the accused on both state and federal constitutional grounds. In that opinion, the Michigan Supreme Court conflated its discussion of both the federal and state claims. In reviewing that opinion, Justice O'Connor, speaking for the United States Supreme Court, refused to consider the federal claim because the Michigan Supreme Court had not made it clear that the state constitutional decision relied upon an "adequate and independent state ground."

Justice O'Connor said that the Michigan court had not "ma[d]e clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Presumably, Justice O'Connor's purpose was to compel state courts to make it clear that they had exhausted all state constitutional claims before ruling on the federal claims. In fact, by this time, it had become quite common for state supreme courts to pay only lip service to state constitutional claims. As one lawyer who clerked for a state supreme court in the 1970s told me, state court opinions would mention both the federal and state constitutional provisions, analyze the federal cases, and then simply state that the analysis and result would be the same under the state constitution. In effect, he said, the opinion would "boilerplate" an adequate and independent state ground.

Of course, by 1983, federal judges were aware of this trend. However, because there was no robust jurisprudence concerning the state constitutional claims, few observers, much less judges, cared. If the search and seizure was
to be held valid under either claim, what difference did it make if the state and federal courts decided under one constitution or the other?

For their part, it is not clear if state supreme courts have truly established the practice of considering all state claims before proceeding to consider federal claims. Each state seems to have marched to its own drummer. This has sometimes resulted in confusion, with state and federal claims bouncing up and down in the courts. Two examples are the Indiana voter identification cases and the Illinois "dog sniff" cases.

Indiana enacted a voter identification statute that required presentation of an approved identification card at the polls before a voter could take a ballot. The challenge, Crawford v. Marion County Election Board, began in federal court on federal grounds. The United States Supreme Court ultimately decided that the Indiana statute did not violate federal constitutional standards. That should have been the end of the litigation. However, the League of Women Voters of Indiana then brought a separate action purely on state constitutional grounds in state court. In League of Women Voters of Indiana, Inc. v. Rokita, the Court of Appeals of Indiana held that the voter identification statute violated the Indiana Constitution. On appeal, the Indiana Supreme Court reversed, holding that the statute comported with the state constitution's standards, apparently because those standards merely reflected the federal standards.

What would have happened if the Indiana Supreme Court had affirmed the Indiana Court of Appeals? Doing so may very well have rendered the United States Supreme Court’s opinion in Crawford moot. In effect, the United States Supreme Court would have wasted its time as far as the Indiana statute was concerned. At best, one could have said that Crawford still had the effect of establishing that a voter identification law like Indiana’s would pass federal muster in the United States Supreme Court. In short, that, at least, could have given some guidance to other states.

The Illinois “dog sniff" cases are more complex. They began when an Illinois state police officer stopped Roy Caballes for speeding on I-80, a highway in Illinois. The officer radioed for a colleague with a drug sniffing

15 See People v. Caballes (Caballes I), 802 N.E.2d 202 (Ill. 2003), vacated, 543 U.S. 405 (2005), remanded to 851 N.E.2d 26 (Ill. 2006).
16 Crawford, 553 U.S. at 185–86.
17 Id. at 186–89.
18 Id. at 204.
19 League of Women Voters, 915 N.E.2d at 154.
20 Id. at 168.
21 League of Women Voters, 929 N.E.2d at 772.
dog. When the dog indicated that there were drugs in the car, the police
searched the car, finding marijuana. The challenge to the search and seizure
originated in state court. The trial court judge upheld the validity of the
search and seizure. So did the Illinois Appellate Court.

On appeal to the Illinois Supreme Court, Caballes’s lawyer raised both the
Fourth Amendment and the search and seizure provision of the Illinois
Constitution, Article I, Section 6. The Illinois Supreme Court reversed the
holding that the search and seizure was valid by a vote of 5–3. Neither the
majority nor the minority referred to the state constitutional claim. Unsurprisingly, Caballes appealed in federal court. In Illinois v. Caballes, the United States Supreme Court held, 6–2, that the search was valid under the Fourth Amendment, thus reversing the Illinois Supreme Court on the federal claim. It remanded the case to the Illinois Supreme Court “for further proceedings not inconsistent” with its opinion.

The remand put the Illinois Supreme Court into a quandary. The federal issue having been decided, the only remaining issue was the Illinois state constitutional claim—which the court had failed to specifically address when the case first arrived at its docket three years previously. The court decided: (1) that it would follow the lockstep doctrine; (2) that it would hold that the state search and seizure provision, despite being cast in different language from the Fourth Amendment, was not broader than the federal provision; and (3) that the specific “right to privacy” in the Illinois Constitution was not implicated in a car search.

Frankly, the history of the litigation is incredibly messy. If the Illinois
Supreme Court had fully determined whether the dog sniff was a valid
“search” under Article I, Section 6 of the Illinois Constitution before it
considered the Federal Fourth Amendment claims, we would have a much
clearer picture of the relationship between federal and Illinois standards.
This failure-to-consider phenomenon occurred more recently in Kansas as well. The United States Supreme Court reviewed an Eighth Amendment Claim under the U.S. Constitution when the Kansas Supreme Court had never first exhausted the state constitutional issue.

Perhaps the United States Supreme Court could obviate the danger of further litigation like Crawford and Caballes by absolutely requiring the states to adjudicate state claims before federal litigation ensues. For example, it could require the Chief Justice of the state supreme court to issue a certificate that all state claims have been fully considered; without that certificate, the federal courts could then refuse to hear the federal claims. This would further promote Brennan’s thesis by forcing more careful consideration of the state constitutional claims. Even if a state did this, however, the manner in which each state interprets state constitutional claims will illustrate the actual impact of Brennan’s article in practice.

III. THE EFFECT OF THE THREE SEPARATE APPROACHES TAKEN BY STATE SUPREME COURTS INTERPRETING STATE CONSTITUTIONS ALONGSIDE THE FEDERAL CONSTITUTION

In the last four decades, roughly since the appearance of Justice Brennan’s article, state supreme courts have taken one of three approaches to determining the relationship between state constitutional rights and federal constitutional rights: the lockstep approach, the limited lockstep approach, and the independent jurisprudence approach.

The first approach is the lockstep approach. Under this approach, the state judges its state constitutional provisions in accordance with the jurisprudence interpreting the corresponding or comparable federal provisions. It is not entirely clear which states follow the lockstep approach all of the time, some of the time, or just occasionally. The Florida Constitution actually mandates...
Florida courts to follow the federal case law on federal rights in regard to "searches and seizures" and "cruel and unusual punishment."

The advantage of this approach is its simplicity. The court does not need to research or think about two distinct approaches. If the federal case law on the Fourth Amendment says that a certain kind of search is valid, then the search is valid for both federal and state purposes. The only time the state court has to engage in original thinking is if the state provision has no federal counterpart.

The second approach is the limited lockstep approach. Under this approach, the state court judges its state constitutional provisions in accordance with the jurisprudence interpreting the corresponding or comparable federal provisions, unless it is clear from the language or the constitutional history of the provision that the state framers intended a different analysis. In effect, this presumption favors the federal jurisprudence; the burden is upon the party claiming a different analysis to show that the framers sought to have a separate jurisprudence.

Using this presumption seems inappropriate, especially where the language in the state constitution is not the same as the federal Constitution. Illinois provides one example. Illinois did not have any kind of lockstep approach until People v. Tisler. Only since that case was decided in 1984 has Illinois given "lockstep deference" to federal constitutional interpretation. Although a few justices of the Illinois Supreme Court have objected to this approach, it seems clear that at least a majority of the current court prefers to

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42 Fla. Const. art. I, § 12 ("Searches and seizures. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.").

43 Id. § 17 ("[T]he prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").


45 See id. at 332–33.

46 Some critics have referred to this as the "lazy" approach for that reason. See, e.g., id. at 333 ("Lockstep' is an intellectually lazy path pretending no more work is necessary because the 'Truth' has already been conclusively established by the United States Supreme Court.").


49 See Leven, supra note 47, at 102.

50 People v. Tisler, 469 N.E.2d 147, 157 (III. 1984); see also Leven, supra note 47, at 100; O'Neill, supra note 44, at 325.

51 See Leven, supra note 47, at 100.
keep this approach. In practice, this has meant that federal jurisprudence prevails, especially in search and seizure situations.

I consider this position untenable. The approach is ironic because Article I, Section 6 of the Illinois Constitution is not exactly the same as the Fourth Amendment. Nonetheless, the Illinois courts seem committed to using identical standards in interpreting both search and seizure provisions. There is apparently a fear that a separate jurisprudence for search and seizure would result in more decisions favoring criminal defendants because the state jurisprudence would hold more searches invalid. It is not clear if that would be so. One veteran of both prosecutions and defense practice in Illinois has told me that he thinks the result—valid versus invalid search—would be the same in ninety to ninety-five percent of the cases.

The third approach is the independent jurisprudence approach. This approach gives the greatest weight to a state constitutional provision. Under this approach, the state court considers the issue purely under state constitutional grounds, without reference to federal jurisprudence. Only after deciding the state issue does the court consider the federal case law. Sometimes the federal and state provisions are identical in language, as is the case with equal protection and due process language. Then, it may be

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52 See supra note 36 and accompanying text.

53 For example, in Caballes II, the Illinois Supreme Court “held that the Illinois Constitution of 1970 does not afford greater protection against unreasonable search and seizure than does the federal constitution.” Jochner, supra note 48, at 799; see also Caballes II, 851 N.E.2d 26, 46 (Ill. 2006).

54 Compare U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”), with Ill. Const. art. I, § 6 (“The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”).

55 See Jochner, supra note 48, at 799.

56 See Anderson, supra note 37, at 1001-03.

57 See id.

58 This approach is also referred to as a “primacy” or “primary” approach. See, e.g., id. at 1002; Leven, supra note 47, at 66; Long, supra note 12, at 48.

59 See Anderson, supra note 37, at 1002 (“Under the . . . ‘primacy’ or ‘primary’ approach, ‘the state court undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance.’” (second alteration in original)).

60 See id.; see also Leven, supra note 47, at 66; Long, supra note 12, at 48 (“Only if the state constitution does not protect the right will the court go on to examine whether the Federal Constitution offers greater protection.”).
permissible to consider federal cases and cases in other states while considering the state constitutional provision.\textsuperscript{61}

Clearly, the independent jurisprudence approach most clearly follows the principles of interpretation proposed by Justice Brennan.\textsuperscript{62} It validates his thesis by seriously considering assertions of individual rights under state constitutions that may offer more protections. Alternatively, the lockstep and limited lockstep approaches vitiate his thesis by giving deference to the federal provisions.

IV. THE JURISPRUDENCE OF NEW STATE CONSTITUTIONAL RIGHTS THAT HAVE NO COUNTERPART IN FEDERAL CONSTITUTIONAL RIGHTS

Further supporting Brennan's thesis and the independent jurisprudence approach is the fact that states have constitutional rights without any federal counterpart. If there is no federal counterpart to a state constitutional right, how can there be any role for the lockstep or limited lockstep approach?

Take, for example, the recent trend towards establishing a state constitutional right to "hunt and fish."\textsuperscript{63} Beginning with Vermont in 1777, nineteen states have enacted such rights by constitutional referenda.\textsuperscript{64} It is not entirely clear what this right means and how courts should analyze claims asserting this constitutional right. Does it require a strict scrutiny analysis of any regulation of that right? Does the state bear a heavy burden to show why it requires a hunting license or fishing license?

Constitutional rights unique to states do not stop there. On August 5, 2014, Missouri adopted a "right to farm."\textsuperscript{65} It is also unclear what this right means.

\textsuperscript{61} See Anderson, supra note 37, at 1002.

\textsuperscript{62} See Brennan, supra note 1, at 502 ("The essential point I am making . . . is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.").


\textsuperscript{64} Nineteen states guarantee the right to hunt and fish in their constitutions; seventeen of those states have provisions approved by the voters. Id. Vermont's language dates back to 1777, and the rest of these constitutional provisions—in Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Wisconsin and Wyoming—have passed since 1996. Id. Two states, California and Rhode Island, have language in their respective constitutions guaranteeing only the right to fish, but not to hunt. Id. Because of Alaska's strong case law history, advocates in that state also consider the state's constitutional language—"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use"—to meet the test. Id. See infra Appendix I for the full language of these provisions.

\textsuperscript{65} MO. CONST. art. 1, § 35 ("That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage
Does it mean that farmers can resist attempts to put highways across their land through eminent domain? Reports indicate that the impetus for the amendment was to stop the efforts of animal rights activists to regulate the manner by which farmers raised animals. Advocates of the amendment believed that there should be a right for farmers to raise animals as they see fit. If that is true, then perhaps it was an anti-PETA amendment.

Apart from general claims based on federal due process or equal protection guarantees, there seem to be no federal counterparts to the rights to hunt, trap, fish, or farm.

Additionally, over thirty states have enacted state constitutional provisions or statutes that might be called "the right to be free from foreign influence." Although the texts of the provisions vary, they frequently forbid the use of "international law" or "foreign law." Nine states—Alabama, Arizona, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, South Dakota, and Tennessee—have enacted measures regarding the application of foreign or religious law in state courts. Eight states enacted statutes, while Alabama changed its constitution in 2014.

A subset of this movement is the effort to amend state constitutions or pass statutes to forbid the use of "religious law" and specifically "Sharia," the body of Islamic religious law. So far, only South Dakota's provision specifically
JUSTICE BRENNAN'S CALL TO ARMS

mentions “religious code.”74 The most talked about of these measures is that of Oklahoma, which led the way by forbidding the use of foreign law.75 Originally, Oklahoma passed a constitutional amendment specifically banning Sharia law.76 Once that measure was struck down as unconstitutional by *Awad v. Ziriax*,77 the legislature passed a statute banning the use of “foreign law.”78 These provisions may be dismissed as merely the result of xenophobia or Islamophobia, but to do so would ignore “real and ominous developments in Western countries with significant Muslim populations.”79 These provisions raise some serious issues.

74 S.D. CODIFIED LAWS § 19-8-7 (Supp. 2015) (prohibiting enforcement of any religious code: “No court, administrative agency, or other governmental agency may enforce any provisions of any religious code.”).

75 See generally Steven M. Rosato, *Saving Oklahoma’s “Save Our State” Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659 (2014) (examining the constitutionality of state statutes or constitutional amendments that seek to ban the consideration of Sharia law in state courts).

76 The original provision states:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.


77 *Awad*, 670 F.3d at 1117, 1119.

78 The new statute states:

Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.

79 Rosato, *supra* note 75, at 660.
One issue is whether the state is seeking to prevent the application of federally negotiated treaties in state cases.\(^80\) If so, that effort will fail because treaties entered into by the United States are “the supreme Law of the Land.”\(^81\) Another issue involves religious freedom, enshrined in the Free Exercise Clause of the First Amendment and in state constitutions.\(^82\) Yet another issue arises within the family law sphere. In a number of family situations such as marriage, dissolution of marriage, and inheritance, there is a role for religious customs and even religious law.\(^83\) For the most part, the state courts try to stay out of those controversies.\(^84\) If, however, a citizen of a state that forbids the use of religious law seeks to enforce a religious divorce, what will happen if one of the parties seeks redress in state courts?

Another new right emerging in state constitutions involves health care.\(^85\) There is a developing movement towards inserting a “right to health care” in state constitutions, although it is unclear what that right would entail.\(^86\)

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\(^81\) U.S. CONST. art. VI, cl. 2; see also Mach & Bhatnagar, supra note 80.


\(^83\) See Linton, supra note 82, at 108–83 (containing a state-by-state examination and analysis of the role of religion in different types of family situations).

\(^84\) See generally Bruce Ledewitz, Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions, 6 ELON L. REV. 37 (2014) (discussing the proper role and scope of religious exemptions from generally applicable laws).


\(^86\) Thirteen states have constitutional provisions mentioning health. See ALA. CONST. art. IV, § 93.12; ALASKA CONST. art. VII, § 4; ARK. CONST. art. XIX, § 19; HAW. CONST. art. IX, §§ 1, 3; ILL. CONST. pmbl., art. XI; LA. CONST. art. XII, § 8; MICH. CONST. art. IV, § 51; MISS. CONST. art. IV, § 86; MO. CONST. art. 4, § 37; MONT. CONST. art II, § 3; N.Y. CONST. art. XVII, §§ 1, 3; S.C. CONST. art. XII, § 1; WYO. CONST. art. VII, § 20. For text of these provisions, see the survey included in Elizabeth Weeks Leonard, State Constitutionalism and the Right to Health Care, 12 U. PA. J. CONST. L. 1325, 1347–68 (2010); see also Helen Hershkoff & Stephen Loffredo, State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis, 115 PENN ST. L. REV. 923, 925–26 (2011) (exploring the phenomenon that state courts view socioeconomic constitutional provisions as nonjusticiable and therefore underutilize the state’s constitution’s authority); Hiroaki Matsuura, State Constitutional Commitment to Health and Health Care and Population Health Outcomes: Evidence from Historical US Data, 105 AM. J. PUB. HEALTH no. S3, July 2015, at e48, e48 (arguing that the existence of provisions correlates with positive outcomes of population health); Soohoo & Goldberg, supra note 85, at 1056–71.
Conversely, between 2010 and 2015, at least twenty-two state legislatures enacted measures relating to challenging or opting out of the federal Affordable Care Act (Obamacare), and five states enacted constitutional provisions to prevent the application of the Affordable Care Act in that state. It is unclear how a state can prevent the application of a federal law apart from refusing to accept federal funds offered to assist the state in implementing the federal law.

Each of the new state constitutional rights described above has no federal counterpart. These unique provisions will require state courts to analyze what exactly each right entails, and the courts will be unable to rely on federal jurisprudence on comparable federal constitutional rights for their decisions. Thus, state courts that normally take the lockstep or limited lockstep approach would be forced to create a body of law only for these unique constitutional rights, despite not doing this for state constitutional provisions with a federal counterpart. Alternatively, by taking the independent jurisprudence approach, the state courts could treat each state constitutional right similarly by first considering all issues purely under state constitutional grounds without reference to federal jurisprudence. This seems to be the fairest approach.


88 See Ala. Const. art. I, § 36.04(a) ("In order to preserve the freedom of all residents of Alabama to provide for their own health care, a law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system."); Ariz. Const. art. XVII § 2(A), preempted by Coons v. Lew, 762 F.3d 891 (9th Cir. 2014) ("A. To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."); Ohio Const. art. I, § 21 ("(A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system. (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance. (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance."); Okla. Const. art. 2, § 37(B) ("To preserve the freedom of Oklahomans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system . . . ."); Wyo. Const. art. I, § 38 ("(a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person. (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.").
V. WHEN THERE SHOULD BE NATIONAL UNIFORMITY IN INDIVIDUAL RIGHTS AND WHEN THE STATES MAY VARY FROM NATIONAL OR UNIFORM STANDARDS

When state constitutional rights do have a federal counterpart, the lockstep and limited lockstep doctrine effectively promote uniformity between states regarding those constitutional rights. The argument for uniformity is based upon the concept of “federal citizenship,” i.e., that as a citizen of the United States all of us have certain basic rights that we carry with us as we move from state to state. In effect, the federal rights are a “floor,” a minimum number of rights enjoyed by all United States citizens.

In a society as mobile as twenty-first century America, this argument carries considerable weight. As we travel from state to state on the interstate highway system, we might well want to have the same rights as we cross borders. But as one drives one’s car from state to state, is it necessary that there be the same rules regarding police searches of that car? As Roy Caballes drove from Iowa across Illinois towards Indiana, he passed through states that may have had very different approaches to police stops and “dog sniffs.” Is that necessarily bad? If Illinois places greater strictures upon searches and seizures that occur within Illinois, why should Iowa and Indiana care?

A. How State Constitutional Analysis Affects Federal Constitutional Analysis

Thus far, the discussion has focused on how federal jurisprudence affects state courts’ analysis of state constitutional rights. However, decisions based on state constitutions can also impact analysis of rights asserted under the federal Constitution. Two examples are cases involving the issue of same sex marriage and cases involving the right to counsel for indigents accused of a crime.

The most recent important development in the trend toward national uniformity has been the same sex marriage, or marriage equality, movement. On state constitutional grounds, the same sex marriage issue began with Goodridge v. Department of Public Health in 2003. There, the Supreme Judicial Court of Massachusetts held that the Massachusetts Constitution forbade the state from depriving two people of the same sex of the right to marry. Litigation in other states ensued, all based on those states’ constitutions. Almost immediately, some states redefined marriage in their

90 Id.
92 Id. at 948.
state constitutions, stating that marriage could be only between one man and one woman.94

The stage was set for federal action. Congress had enacted the Defense of Marriage Act (DOMA) in 1996.95 It defined marriage for federal purposes as being between a man and a woman, and it also allowed states to not recognize the same sex marriage of another state.96 When the United States Supreme Court held DOMA unconstitutional in United States v. Windsor,97 the issue was joined at the federal level. Clearly, marriage status, once almost exclusively the province of the states, was now a federal issue.98

As each federal circuit court of appeals panel held that the Federal Constitution’s Equal Protection Clause required the states to allow same sex marriages, it was clear that the United States Supreme Court would have to decide the issue.99 Normally, however, the United States Supreme Court waits until there is a conflict among the circuit courts. It is important to note that the Court seemed to be in no hurry to take a same sex marriage case.100

The only issue was one of timing: when would the United States Supreme Court feel compelled to take a same sex marriage case? The Court appeared to be waiting to see if each circuit court panel would rule, preferably with unanimity.101 At one point, the Court might have felt that there was a federal consensus favoring same sex marriage as a federal constitutional right.
The issue of a uniform federal right to marry a person of one's own sex came to a head in the Sixth Circuit Court of Appeals. In *DeBoer v. Snyder*, a panel of that circuit held, 2–1, that the issue of same sex marriage should be left to the state legislatures. This holding conflicted with other circuits, which held states’ attempt to ban same sex marriage unconstitutional. When the plaintiffs did not petition for a rehearing en banc, it was clear that the circuits were in conflict, and that the United States Supreme Court would need to decide the issue.

On June 26, 2015, the United States Supreme Court issued *Obergefell v. Hodges*, effectively deciding the issue of a federal right to marry a person of one’s own sex. It was not surprising that the vote was 5–4. Perhaps it was also not surprising that it took many different cases, following a convoluted route, to get the case before the highest court.

These case histories provide several lessons. One lesson is that litigation over state constitutional provisions is often a necessary step in deciding whether there is a need for a federal, uniform right. If it had not been for *Goodridge* and other state constitutional developments, there would have been no *Obergefell*—or at least, the route to the United States Supreme Court would have been quite different.

Same sex marriage is not the first example of the route to achieve a result first through state constitutions and then eventually through the federal constitution. An earlier example of this phenomenon is the right to counsel for indigents accused of a crime. State constitutions frequently provide for a "right to counsel," and some states have provided the funds to employ public defenders to assist indigents in their defense. Yet, the United States Supreme Court held in *Betts v. Brady* that a right to counsel did not exist at the

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102 *See* DeBoer *v.* Snyder, 772 F.3d 388, 404–08 (6th Cir. 2014).

103 *Id.*

104 *See* Watts, *supra* note 98, at S55.


107 *Id.*


110 *Id.* at 305–08.


112 For an excellent discussion of the history of this movement, see generally *id.* , and Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court’s History and the Nation’s Constitutional Dialogue* 306–17 (2015).
federal level for defendants unable to afford a lawyer when a state brought the criminal charges.\textsuperscript{113}

By 1960, it was clear most states realized that, whatever the federal right was or was not, it was necessary to the administration of justice to have proper representation for \textit{all} those accused of a crime.\textsuperscript{114} By the early 1960s, only five states refused to offer legal counsel to indigents accused of felonies: Alabama, Florida, Mississippi, North Carolina, and South Carolina.\textsuperscript{115} It was probably no coincidence that all of the hold-out states were in the South, where a disproportionate share of the accused was impoverished black males.\textsuperscript{116}

Guided by the vast majority of states, the United States Supreme Court, too, soon realized that proper representation for indigent defendants was necessary for justice.\textsuperscript{117} To establish this right, there is some evidence that the Supreme Court was simply looking for the proper case to use as a vehicle for overruling \textit{Betts v. Brady}.\textsuperscript{118} It found that case when a white drifter, convicted of burglary in Florida, wrote the Court from his prison cell.\textsuperscript{119}

The Court appointed a distinguished lawyer, Abe Fortas, to represent the indigent defendant, Clarence Earl Gideon.\textsuperscript{120} It is almost certain that the Court engineered \textit{Gideon v. Wainwright}. But look how long it took for the Court to come to the realization that there was a need for national uniformity and the great role that the states played in bringing the Court to reach that conclusion.\textsuperscript{121}

B. Developing Issues in the Relationship Between Federal and State Constitutional Rights

Let us now consider some developing issues in the relationship between federal and state constitutional rights. Two salient examples are the taking of private property from one person to give to another private person and the privacy issues arising in an era of breathtaking technological developments.

\textsuperscript{113} \textit{Betts v. Brady}, 316 U.S. 455, 473 (1942).
\textsuperscript{115} \textit{Anthony Lewis, Gideon’s Trumpet} 133 (1964).
\textsuperscript{116} See id. at 147–48.
\textsuperscript{118} See \textit{Lewis, supra} note 115, at 48, 54; \textit{Urofsky, supra} note 112, at 312–14; Elizabeth Berenguer Megale, \textit{Gideon’s Legacy: Taking Pedagogical Inspiration from the Briefs that Made History}, 18 BARRY L. REV. 227, 230 n.28 (2013).
\textsuperscript{120} \textit{Gideon}, 372 U.S. at 335.
The leading case on private takings in recent years has been *Kelo v. City of New London*.122 This much criticized case was a 5–4 opinion in the United States Supreme Court.123 The decision allowed a city in Connecticut, possibly under the influence of corruption, to declare some private homes “blighted” and have them moved or torn down so that the city could transfer the land to Pfizer Pharmaceuticals to build a new headquarters and an industrial complex.124 The justification for the enrichment of the coffers of Pfizer, a private company, at the expense of private homeowners was economic development.125 The city claimed that studies showed the Pfizer development would create new jobs and provide much needed tax revenue for the residents of New London.126 Economic development, it said, was a “public use,” and the Supreme Court sided with the city.127

The states have created their own jurisprudence on economic development takings, often rejecting *Kelo*. Three years before *Kelo*, the Illinois Supreme Court had held a similar plan invalid in *Southwest Illinois Development Authority v. National City Environmental*.128 The Southwest Illinois Development Authority (SWIDA) was a state agency created to promote economic development in southwestern Illinois.129 It helped create a private racetrack, and, when the racetrack needed a larger parking lot, SWIDA condemned a nearby privately owned landfill.130 There was no indication of blight, and there was apparently no master plan for development of the area, as had been the case in *Kelo*.131 For all of those reasons, and because state rights, not federal rights, were involved, the Illinois Supreme Court sided with the landfill owner.132

Illinois has certainly not been the only state to choose a path separate from the deference to state officials accorded by the *Kelo* case. Because forty-five states enacted legislation or state constitutional amendments to prevent *Kelo*-

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123 *Id* at 470.
124 See *id*. at 473, 475.
125 *Id*. at 483.
126 *Id*. at 474.
127 Ironically, the economic development never occurred. See *Pfizer and Kelo’s Ghost Town*, WALL STREET J. (Nov. 11, 2009), http://www.wsj.com/articles/SB10001424052748704402404574527513453636326 [https://perma.cc/2XRC-FTGC]. The homes were moved. See *id*. Pfizer suffered so many setbacks during the Great Recession of 2008 that it never built the complex. See *id*.; Shubhankar Chhokra, *Ten Years Later, the Seizure of Private Property in Kelo Hasn’t Done Anything for the Public*, NAT’L REV. (June 23, 2015), http://www.nationalreview.com/article/420180/visiting-kelo-lots-ten-years-later-shubhankar-chhokra [https://perma.cc/VTY9-WLTB].
129 *Id*. at 3.
130 *Id*. at 4.
131 See *id*. at 9–10.
132 *Id*. at 11.
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style decisions in those states, it is impossible to delineate those developments here in detail. It is safe to say that the citizens of most states, the state legislatures, and to a great extent the state courts, have soundly rejected the type of transfer of private property validated in *Kelo*.

The second issue that may be spawning a separate jurisprudence in the states is that of privacy in an era of rapidly changing technology. The leading recent case in the United States Supreme Court is probably *United States v. Jones*. In *Jones*, all nine Justices made it clear that the private owner of a car had an expectation of privacy, and that police could not attach a global positioning system (GPS) device to the bottom of the car without a warrant, at least in most instances. The discussion in the opinions definitely show an awareness of the technological capabilities of both public law enforcement officers and private parties in establishing a surveillance of a private citizen unaware that he or she is being surveilled.

Sooner or later, the courts, including the United States Supreme Court, must address an even newer development, that of commercial or hobby drones. By this, I mean privately owned drones, not military drones. Every day one can see drones in the air space of Chicago and its suburbs. Amazon has even proposed the use of drones to send packages to customers requesting speedy delivery.

Apart from the safety issues, it is clear that some drones could easily invade privacy. Some drones carry cameras. The people near a drone have no idea whether they are being photographed, i.e., surveilled, and have no effective way of stopping the drone. Here is an example: in the autumn of 2015, a friend asked me if I had seen the drone outside my office window the previous day. I said I had not. She said the drone flew over a nearby small park, climbed to a height just outside my eighth floor window and then climbed even higher to clear a taller office building to the west. I have to wonder if that drone took pictures of my office—and possibly me—while I was unaware of the activity. In any event, why was that drone outside my window?

There are reports of homeowners shooting down drones flying above their houses and yards. One homeowner in the South is reported to have shot down

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133 See Blackman, *supra* note 117, at 256.
134 For an excellent discussion of these developments, see *id.* at 261.
136 *id.* at 9, 12.
137 See generally *id*.
140 See Koerner, *supra* note 138, at 1143–47.
141 See *id.* at 1158.
a drone with his firearm.\textsuperscript{142} When the private owner of the drone objected to the destruction of his drone, the homeowner said that if any drone flew so low over his property, he could shoot it because it was a drone that was invading his airspace and his privacy.\textsuperscript{143} Absent federal regulation, the states will have to determine when drones invade privacy by using state standards.\textsuperscript{144}

The standards for drones may well vary from state to state.\textsuperscript{145} We in Chicago are used to being in the public eye, so to speak. As city dwellers, we may not care about drones outside our office windows as much as Southern rural homeowners might be upset by drones flying low over their backyards. What will happen when there is litigation? The Illinois Constitution contains a specific "right to privacy" in Article I, Section 6.\textsuperscript{146} Will Illinois courts be vigorous in their defense of that right in the face of GPS and drone technology? Will Illinois courts be vigorous in protecting Illinoisans from warrantless surveillance by the government, a danger Edward Snowden revealed to us?\textsuperscript{147}

In other words, is the government or a private party less able to snoop under state law than under federal law? How will we as a people reconcile the federal constitutional issues with the state constitutional issues? As the articles in this symposium suggest, there will always be a tension between the federal and state jurisprudence on individual rights.

In his article, Justice Brennan sought to persuade the state courts to find more rights in their state constitutions than the Burger Court had found in the Federal Constitution.\textsuperscript{148} Brennan was right but for the wrong reasons. It is not a matter of the states finding more rights than the federal courts do. Federal decisions on federal rights will ebb and flow in cycles. What is important is that we preserve the federalism of the federal and state rights. It is this dual nature of individual rights in the United States that creates a competition in the interaction between federal and state rights.\textsuperscript{149}

\textsuperscript{143}\textit{Id.}
\textsuperscript{146}ILL. CONST. art. I, § 6.
\textsuperscript{148}See Brennan, \textit{supra} note 1, at 491.
\textsuperscript{149}For good discussions of the federal policy argument, with special emphasis upon Illinois, see generally James K. Leven, \textit{Attention Gun-Rights Advocates! Don't Forget the
In effect, individual rights are a continuous public conversation. And that is how it should be and will be.

VI. CONCLUSION

Nearly forty years after Justice Brennan’s article, many questions still remain as to the proper role of state constitutions in the federal system. And today, as states and the federal government prepare to respond and adapt to technology and other modern developments, we may continue to observe the delicate shifting of power between state constitutional sovereignty and federal supremacy. However, despite the lingering questions, it is apparent that, in at least some states, the “new federalism” championed by Brennan is alive and well.

Illinois Constitutional Right to Keep and Bear Arms, 48 J. MARSHALL L. REV. 53 (2014), and O’Neill, supra note 44.