

# William & Mary Law Review

---

Volume 46 (2004-2005)  
Issue 4 Symposium: Dual Enforcement of  
Constitutional Norms

---

Article 12

February 2005

## State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?

Robert F. Williams

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

---

### Repository Citation

Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499 (2005),  
<https://scholarship.law.wm.edu/wmlr/vol46/iss4/12>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmlr>

# STATE COURTS ADOPTING FEDERAL CONSTITUTIONAL DOCTRINE: CASE-BY-CASE ADOPTIONISM OR PROSPECTIVE LOCKSTEPPING?

ROBERT F. WILLIAMS\*

Some states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision.

\* \* \*

Today's courts are qualifying these precedents; they explain that past adherence to federal decisional law does not signify that the state court is bound to construe the state constitution in accordance with the federal interpretation of the federal constitution for all times and under every circumstance.

—Honorable Shirley S. Abrahamson  
Supreme Court of Wisconsin<sup>1</sup>

---

\* Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey. This Article is an expanded version of a presentation made at a conference on "Dual Enforcement of Constitutional Norms" held November 14, 2003, at the William & Mary School of Law, cosponsored by the Institute of Bill of Rights Law and the National Center for State Courts. I would like to acknowledge the invaluable ideas offered by Larry Sager, G. Alan Tarr, Robert A. Schapiro, and Hans A. Linde.

1. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1166, 1169 (1985).

## INTRODUCTION

Since the beginning of the New Judicial Federalism,<sup>2</sup> there has been heated debate over state court interpretation of state constitutional rights provisions that are identical or similar to federal constitutional provisions that have already been interpreted in a certain way by the United States Supreme Court.<sup>3</sup> The “shadow”<sup>4</sup> or “glare”<sup>5</sup> of these United States Supreme Court decisions, both as

---

2. See generally Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. at xiii (1996) (describing the history of state constitutional law since 1969) [hereinafter Williams, *Looking Back*]; Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003) (describing the recent stages of the New Judicial Federalism) [hereinafter Williams, *Third Stage*]. The matters of state constitutional structure-of-government or distribution-of-powers also raise important questions about the relationship between state and federal constitutional doctrine, but they are different from those in rights cases. See generally John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993) (arguing that states should take a “state-based approach” to the issue of “the performance of administrative functions by legislators or legislative appointees”); Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031 (2002) (discussing state constitutional decisions adopting federal constitutional law standards without examination); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998) (arguing that the convergence of state and federal constitutional law can be explained “in part as the natural continuation of a long, powerful tradition on the state level of constitutional universalism”); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1554-62 (1997) (discussing the effects of separation of powers in state courts as compared to federal courts); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998) (analyzing and critiquing the influence of federal constitutional law over state separation of powers doctrine); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003) (arguing that states require a “distinctive separation-of-powers jurisprudence”); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004) (analyzing California's separation of powers based on its unique arrangements).

3. Federal courts, of course, may be faced with state constitutional questions under their diversity and supplemental jurisdiction. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 291, 293-94 (1982); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1411-12 (1999).

4. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 353 (1984).

5. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and*

to their substantive outcome and their techniques of constitutional interpretation, seem to raise legitimacy questions about state courts reaching more protective, often more liberal, results when they interpret their own state constitutions.<sup>6</sup> These questions arise from America's system of dual enforcement of constitutional norms.

Much legal literature and many state judicial opinions have addressed such questions, often presenting arguments as to why it is, in fact, legitimate for state courts to "diverge" from the United States Supreme Court's interpretation of similar or identical provisions in the Federal Constitution. The literature has even differentiated between such provisions, contending that where the United States Supreme Court "underenforce[s]" certain federal constitutional norms, such as the Equal Protection Clause,<sup>7</sup> or where "strategic concerns" in enforcing such norms differ between the state and federal systems, state courts are even more justified in diverging from the Supreme Court's interpretation of the Federal Constitution.<sup>8</sup> State courts might even agree with the United States Supreme Court on the *meaning*—both textually and historically—of identical or similar federal and state constitutional provisions, but proceed to *apply* them differently under particular circumstances.<sup>9</sup> This is a discussion that continues to become more sophisticated, both in the courts and in the academic literature.<sup>10</sup>

---

*Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1015 (1997).

6. *Id.* at 1016-17.

7. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215-19 (1978).

8. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 964 (1985).

9. I am indebted to Hans Linde for this important insight.

10. See, e.g., G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 185-209 (1998); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

# I. STATE COURT ADOPTION OF FEDERAL CONSTITUTIONAL DOCTRINE: THE FORMS OF LOCKSTEPPING

Much less attention has been devoted, however, to the circumstances where state courts decide to *follow*, rather than *diverge from*, federal constitutional doctrine. This is, in fact, the clear majority of cases,<sup>11</sup> and represents an important feature of the dual enforcement of constitutional norms. Michael Solimine and James Walker have argued that this prevalence of lockstepping supports the view that there is “parity” between federal and state courts as effective enforcers of *federal* constitutional norms.<sup>12</sup> Alan Tarr has noted that, by contrast to the great question in federal constitutional law about the legitimacy of judicial review itself, the central question in state constitutional law concerns the legitimacy of state constitutional rulings that diverge from, or “go[] ‘beyond,’” federal constitutional standards.<sup>13</sup> Perhaps the time has come to raise the issue of legitimacy, as well as other questions, about state courts *adopting* federal constitutional standards.<sup>14</sup>

What are the implications for state constitutional law when state courts decide to interpret their state constitutional provisions in the same manner—or to reach the same outcome—as the United States Supreme Court under a similar or identical clause of the Federal Constitution? How does this “doctrinal convergence” actually work?<sup>15</sup> Upon closer examination, there is a range of different approaches, each with different implications.

11. See Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338-39 (2002); see also BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 158 (1991); James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1194-1201 (2000); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 29-31 (1994); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788-93 (1992); Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 JUDICATURE 190, 190 (1991); Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1467 & nn.68-70 (1997).

12. MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 93-96 (1999). See generally Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

13. TARR, *supra* note 10, at 174-77 (citation omitted).

14. See William F. Cook, *The New Jersey Bill of Rights and a “Similarity Factors” Analysis*, 34 RUTGERS L.J. 1125, 1160-66 (2003) (suggesting an approach where state courts must justify their decision to adopt federal constitutional doctrine).

15. This is Jim Gardner’s term. See Gardner, *supra* note 2, at 110.

Until recently, I had focused my attention almost exclusively on the former category of state cases (divergence) and not given much attention to the latter category of states adopting federal constitutional doctrine (convergence). In taking a careful look at Ohio state court decisions in connection with the bicentennial of that state's first constitution,<sup>16</sup> it finally dawned on me that state cases following federal constitutional doctrine are in fact much more nuanced and varied than I had thought. Accordingly, they have a wide variety of implications—for both bench and bar—for the future development of state constitutional law. I should have realized this much earlier based on the very insightful observations of then-Justice Shirley Abrahamson quoted at the beginning of this Article.<sup>17</sup> In 1985 she noted that state constitutional law cases could “be classified into ... two distinguishable groups.”<sup>18</sup>

On one side stand the cases intentionally adopting federal decisional law as interpretive of their own constitutions. Some state courts merely say that the texts of the two constitutions are substantially similar and should be similarly construed. Other state courts analyze the state constitution, or the federal doctrine, or both, and explain the reasons for adopting federal decisional law.<sup>19</sup>

She concluded that:

[S]tate cases adopting federal law as state constitutional law will have to be studied carefully to analyze the reasons for and manner of adopting federal law, and to determine whether state courts change their interpretations of the state constitutions as United States Supreme Court and sister state court decisions take new paths.<sup>20</sup>

---

16. See generally Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415 (2004). The following analysis of Ohio cases is based on that article.

17. Abrahamson, *supra* note 1.

18. *Id.* at 1181.

19. *Id.* at 1181-82.

20. *Id.* at 1182. Justice Abrahamson continued: “The second group of cases ... *do* depart from federal precedent. These cases will also have to be studied to analyze the reasons for and manner of the departure.” *Id.*

Her suggestion that legal scholars analyze the state constitutional cases adopting federal doctrine has gone unheeded, certainly in my work. I have now paid attention to decisions adopting federal constitutional doctrine for several years, albeit without going back and researching such cases systematically in the past.

*A. Judicial Approaches to Adopting Federal Constitutional Doctrine as State Constitutional Law*

Many of us have denigrated state constitutional law cases adopting federal constitutional interpretations as a form of knee-jerk lockstepping.<sup>21</sup> Justice Hans Linde of Oregon described state courts' uncritical adoption of federal constitutional doctrine in interpreting state constitutional provisions as the "non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively *fix* its correct meaning also in state constitutions."<sup>22</sup> In addition, Justice William J. Brennan, Jr., noted that "decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."<sup>23</sup> Finally, state court justices have criticized their courts when they "parrot"<sup>24</sup> or "mimick[]"<sup>25</sup> the United States Supreme Court approach.

Of course, Justices Linde and Brennan are correct. The Supreme Court cannot "fix"<sup>26</sup> the meaning of a state constitution, nor can its decisions be "dispositive"<sup>27</sup> of state constitutional issues. This does not mean, however, that we should ignore the instances where state courts *choose* to follow federal doctrine. The Ohio cases illustrate the two extreme points on what is actually a continuum of approaches to adopting federal constitutional doctrine as state constitutional law. These cases, as well as those in many other

---

21. See Robert F. Williams, A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine, 3 WIDENER J. PUB. L. 343, 373-79 (1993) [hereinafter Williams, *Row of Shadows*]; Williams, *supra* note 4, at 397-402.

22. State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983) (emphasis added).

23. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

24. Brown v. State, 657 S.W.2d 797, 807 (Tex. Crim. App. 1983) (Clinton, J., concurring).

25. *Id.* at 810 (Teague, J., dissenting).

26. Kennedy, 666 P.2d at 1322.

27. Brennan, *supra* note 23, at 502.

states, reveal the range of different methods by which state courts may choose to follow Supreme Court interpretations of the federal Constitution. The cases also suggest differing implications of each of these techniques for the bench and bar.

### *1. Unreflective Adoptionism*

The first approach may be referred to in Barry Latzer's terms: "unreflective adoptionism."<sup>28</sup> He stated that "[i]t is illogical, the argument runs, to retract state constitutional rights simply because the Supreme Court has not found those rights in the U.S. Constitution. This argument is quite persuasive if the premise of unreflective adoptionism is correct."<sup>29</sup> He was referring to state court decisions simply applying federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome. This might be an accurate description of the pre-1993 stance adopted by the Ohio Supreme Court. Throughout this period, the court virtually never recognized the independent force of the Ohio Constitution, opting instead for "kneejerk lockstepping" or "instant

---

28. See Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991); see also Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 323-24 (1986) (discussing the "equivalence model").

29. Latzer, *supra* note 28, at 864. This can, unfortunately, lead to what Nebraska Supreme Court Justice Thomas M. Shanahan called a "pavlovian conditioned reflex in an uncritical adoption of federal decisions." *State v. Havlat*, 385 N.W.2d 436, 447 (Neb. 1986) (Shanahan, J., dissenting).



agreement" with federal doctrine.<sup>30</sup> Many other state courts have followed this approach as well.

## 2. *Reflective Adoption*

The next approach, "reflective adoption," describes a state court decision acknowledging the possibility of different state and federal outcomes, considering the arguments *in the specific case* and, on balance, deciding to apply federal analysis to the state provision.<sup>31</sup> Under this approach, the state courts conform their decisions to existing federal constitutional precedents.<sup>32</sup> As Dr. Latzer noted:

[I]f the state courts are not merely presuming that state and federal law are alike, but are coming to this conclusion after independent evaluation of the meaning of the state provision, then the critique collapses. There is nothing improper in concluding that the Supreme Court's construction of similar text is sound. Adoptionism is not per se unjustifiable.<sup>33</sup>

---

30. See *Arnold v. City of Cleveland*, 616 N.E.2d 163, 168 n.8 (Ohio 1993); Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984). I am indebted to Larry Sager for the "instant agreement" formulation.

The Maryland Court of Appeals often refers to similar state and federal constitutional provisions as "*in pari materia*." See, e.g., *Hof v. State*, 655 A.2d 370, 373 n.3 (Md. 1995); *Henderson v. State*, 597 A.2d 486, 488 (Md. 1991); *Craig v. State*, 588 A.2d 328, 334 (Md. 1991); *Lodowski v. State*, 513 A.2d 299, 306 (Md. 1986); *WBAL-TV Div., Hearst Corp. v. State*, 477 A.2d 776, 781 n.4 (Md. 1984). This approach is criticized in Michael R. Braudes, *When Constitutions Collide: A Study in Federalism in the Criminal Law Context*, 18 U. BALT. L. REV. 55 (1988). It is not entirely clear what the court means by its use of this statutory interpretation term, but it seems to be a prospective lockstepping approach. On several recent occasions, though, the Maryland Court of Appeals has indicated that the *in pari materia* approach "does not mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart." *Pack Shack, Inc. v. Howard County*, 832 A.2d 170, 176 n.3 (Md. 2003) (quoting *Dua v. Comcast Cable*, 805 A.2d 1061, 1071 (Md. 2002)); see also *State v. Brookins*, 844 A.2d 1162, 1165 n.2 (Md. 2004) (quoting *Dua*, 805 A.2d at 1071); *Md. Green Party v. Md. Bd. Of Elections*, 832 A.2d 214, 232 (Md. 2003) (quoting *Dua*, 805 A.2d at 1071). This can be seen as a form of "mixed message." See *infra* Part I.A.5.

31. See Latzer, *supra* note 28, at 864.

32. *Id.*

33. *Id.* (footnote omitted). For several examples—among many—of reflective adoptionism, see *People v. Batts*, 68 P.3d 357 (Cal. 2003); *State v. McClellan*, 817 A.2d 309, 312-13 (N.H. 2003); *State v. Stephenson*, 878 S.W.2d 530, 545-47 (Tenn. 1994).

Professor James A. Gardner has recently made a strong argument favoring the legitimacy of reflective adoption.<sup>34</sup> Gardner argues that states and their constitutions "are part of an interlocking plan of federalism devised collectively by the people of the nation and maintained by them as part of a comprehensive plan designed to serve the overriding national purpose of protecting the liberty of all Americans."<sup>35</sup> In his view, therefore, state courts can resist what he refers to as abuses of national power reflected in unreasonably narrow rulings on rights by the United States Supreme Court by rejecting such rulings in interpreting their state constitutions.<sup>36</sup> The corollary to this assertion, however, is that where state courts are convinced that Supreme Court rulings on federal rights provide adequate protection for the citizens of the states, it is perfectly reasonable for state courts to adopt such federal rulings as part of their state constitutional law. His account of state courts adopting federal constitutional doctrine is as follows:

The likeliest explanation is undoubtedly the most obvious one: state judges adopt the Supreme Court's approach because they like it and think that it does a perfectly adequate job of protecting the liberty in question. No innovative, pathbreaking, independent analysis of the state constitution is needed because there is no threat to liberty that the state constitution need be invoked to counteract.

....  
... [T]here is nothing at all wrong with state judges adopting U.S. Supreme Court terminology and analyses merely because they think the Court's approach does an effective job of protecting the relevant liberties. Quite the contrary. If a state court believes that some individual liberty is being adequately protected under some formulation developed by the U.S. Supreme Court, it has no particular reason to undertake the effort of independently deriving a different, equivalent formulation to protect that same liberty under the state constitution merely for the sake of demonstrating its independence.<sup>37</sup>

---

34. Gardner, *supra* note 10, at 1058-61.

35. *Id.* at 1005; see also James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1044-54 (1993).

36. Gardner, *supra* note 10, at 1032-48.

37. *Id.* at 1059.

Quite obviously, Professor Gardner is talking about *reflective* adoptionism on a case-by-case basis. In other words, "[f]ederalism may require mutual checking, but where there is no abuse of power there is nothing to check. State acquiescence in the *proper* use of national power is no cause for concern."<sup>38</sup>

Professor Gardner seems to conclude, however, that *unreflective* adoptionism would be inappropriate. He reaches this conclusion not because it represents a failure of independent state constitutionalism, but rather because such courts "are failing to discharge the responsibility for monitoring and checking abusive exercises of national power that a well-functioning system of federalism presupposes."<sup>39</sup> Under this view, state courts adopt federal constitutional doctrine "not because they think such rulings presumptively correct, but because, in the *exercise of their independent judgment*, they deem such rulings to provide adequate protection for the liberties at issue."<sup>40</sup> In these circumstances, "a state court might reasonably conclude that there is no need, *at least for the moment*, to explore in any greater depth the possibilities presented by the state constitution to protect liberty any more or less vigorously than it is already protected by the national judicial analysis."<sup>41</sup> Regardless of whether one agrees entirely with Professor Gardner's thesis, it is an important new contribution to the study of the dual analysis of constitutional norms, and it contributes to the dialogue on constitutional law between state and federal courts.<sup>42</sup> It also further elaborates the possible reasons for state adoption of federal constitutional doctrine.

The Ohio Supreme Court decision in *Simmons-Harris v. Goff*,<sup>43</sup> adopting federal establishment of religion doctrine,<sup>44</sup> seems to

---

38. *Id.* at 1060.

39. *Id.* (footnote omitted).

40. *Id.* at 1061 (emphasis added).

41. *Id.* (emphasis added).

42. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 137 (2000). Professor Gardner argues that because the federal Constitution limits states in what they may do, state constitutional interpretation must take Federal constitutional law into account. See James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245 (2005); see also Lawrence Gene Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385 (2005).

43. 711 N.E.2d 203 (Ohio 1999).

44. *Id.* at 207-08.

illustrate the reflective adoptionism approach. This case involved a challenge to the Ohio school voucher statute. The Ohio Supreme Court stated that the Federal Establishment Clause and Ohio's religion provisions were "the approximate equivalent."<sup>45</sup> The court noted that it "had little cause to examine" the Ohio clause and had "never enunciated a standard for determining whether a statute violates it."<sup>46</sup> The court then adopted the federal constitutional *Lemon* test,<sup>47</sup> but did not conclude that the federal and state provisions were "coextensive,"<sup>48</sup> nor did it commit to "irreversibly tie" itself to the federal constitutional standards.<sup>49</sup> The court concluded by stating: "We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, *whether because the federal constitutional standard changes* or for any other relevant reason."<sup>50</sup> As demonstrated in *Simmons-Harris*, this approach treats United States Supreme Court decisions construing similar or identical federal constitutional provisions as only one source among many. The court looks back only at the controversy before it and the existing, relevant legal materials, including federal doctrine.

### 3. Prospective Lockstepping

Next, a state court might engage in "prospective lockstepping," where it announces that not only for the instant case, but also *in the future*, it will interpret the state and federal clauses the same.<sup>51</sup> This is what the Ohio Supreme Court has seemed to do in a number of other cases.

In *Eastwood Mall, Inc. v. Slanco*,<sup>52</sup> the Ohio Supreme Court confronted the question faced by a number of states with regard to their own state constitutions<sup>53</sup> of whether an injunction against

---

45. *Id.* at 211.

46. *Id.*

47. *Id.* The relevant test is set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

48. *Simmons-Harris*, 711 N.E.2d at 211.

49. *Id.* at 212.

50. *Id.* (emphasis added).

51. See, e.g., *In re Rosenkrantz*, 59 P.3d 174, 193 n.6 (Cal. 2002).

52. 626 N.E.2d 59 (Ohio 1994).

53. See, e.g., Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property: Where Won't We Have the*

picketing and leafletting in a privately owned shopping mall violated Article I, Section 11 of the Ohio Constitution, which provides that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."<sup>54</sup> There was a clear negative answer to this question under the Federal First Amendment. Because there was no state action, the United States Supreme Court had already ruled against the identical claim.<sup>55</sup>

The court acknowledged the obvious textual differences between the federal and Ohio provisions, and the fact that the United States Supreme Court had observed that states might recognize free speech rights in shopping malls.<sup>56</sup> Relying on a case from 1992,<sup>57</sup> however, it held "that the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment is the proper basis for interpretation of Article I Section 11 of the Ohio Constitution."<sup>58</sup> The court also stated:

Furthermore, while Section 11 has an additional clause not found in the First Amendment, the plain language of this section, when read in its entirety, bans only the passing of a law that would restrain or abridge the liberty of speech. *When the First Amendment does not protect speech that infringes on private property rights, Section 11 does not protect that speech either.*<sup>59</sup>

---

*Freedom to Speak Next?*, 33 RUTGERS L.J. 589, 599-601 (2002); see also Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1243-45 (1999).

54. OHIO CONST. art. I, § 11 (emphasis added). For an in-depth analysis of the very similar Pennsylvania provision, see Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12 (2002).

55. *Eastwood Mall*, 626 N.E.2d at 60 (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)).

56. *Id.* at 60-61 (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

57. *Id.* at 61 (citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. App.*, 588 N.E.2d 116, 123 (Ohio 1992); *Zacchini v. Scripps-Howard Broad. Co.*, 376 N.E.2d 582, 583 (Ohio 1978); *State v. Kassay*, 184 N.E. 521, 525 (Ohio 1932)).

58. *Id.*; see also *State v. Mendez*, 66 P.3d 811, 820 (Kan. 2003) (concluding that the Kansas Constitution and the U.S. Constitution provide identical protection: "If conduct is prohibited by one it is prohibited by the other.").

59. *Eastwood Mall*, 626 N.E.2d at 61 (emphasis added); see also *Elliott v. Commonwealth*,

This is a clear example of a state constitutional decision going well beyond mere case-by-case adoptionism (even if reflective) and adopting a prospective lockstepping approach.

In *State v. Robinette*,<sup>60</sup> the Ohio Supreme Court considered, under state constitutional search and seizure doctrine, whether a police officer must inform a person that he is “free to go” after a valid traffic stop.<sup>61</sup> The court concluded earlier in the same course of litigation that, under *both* federal and state constitutions, such a statement had to be given.<sup>62</sup> The United States Supreme Court reversed that conclusion on the federal constitutional ground, remanding the case to the Ohio Supreme Court.<sup>63</sup> The Ohio Supreme Court then went a step beyond its earlier decision.

Despite an earlier decision declaring that the Ohio Constitution was “a document of independent force,”<sup>64</sup> on remand the Ohio Supreme Court reconsidered its earlier conclusion that the state constitution, in addition to the Federal Constitution, required a “free to go” statement by law enforcement officials after a valid traffic stop.<sup>65</sup> The court, noting the identical state and federal constitutional texts, and relying on earlier decisions, decided to adopt the United States Supreme Court’s view of the Fourth Amendment as the authoritative judicial interpretation of the state constitutional search and seizure clause.<sup>66</sup> The court relied specifically on its 1981 decision in *State v. Geraldo*,<sup>67</sup> where it stated:

It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution with respect to the warrantless monitoring of a consenting informant’s telephone conversation is coextensive with that of the Fourth Amendment to the United States Constitution. *As a consequence thereof, appellant’s failure to prove a violation of the Fourth Amendment dictates the conclu-*

---

593 S.E.2d 263, 269 (Va. 2004) (finding that the free speech provisions in both the Federal Constitution and Virginia Constitution are “coextensive”).

60. 685 N.E.2d 762 (Ohio 1997).

61. *Id.* at 771.

62. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995).

63. *Ohio v. Robinette*, 519 U.S. 33, 40 (1996).

64. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993).

65. *Robinette*, 685 N.E.2d at 771.

66. *Id.* at 767.

67. 429 N.E.2d 141 (Ohio 1981).

*sion that his rights under Section 14, Article I, of the Ohio Constitution have not been violated either.*<sup>68</sup>

The court noted the need for uniformity in this area of criminal procedure, and stated that in the future, absent “persuasive reasons to find otherwise,” it would follow the United States Supreme Court’s interpretations of the Fourth Amendment as a matter of Ohio constitutional law.<sup>69</sup> It abandoned its earlier holding that there was a *state* constitutional violation as a direct reaction to the United States Supreme Court’s finding that there was no *federal* constitutional violation in the same litigation. The Court thereby moved from at least recognizing state constitutional claims in this area to a prospective lockstep, or *incorporation*, approach.<sup>70</sup>

Other state courts have abandoned their state constitutional holdings after the United States Supreme Court reversed its interpretation of a similar or identical federal constitutional provision. For example, after the Pennsylvania Supreme Court ruled in a “stop and frisk” case that both the state and federal constitutional search and seizure provisions were violated,<sup>71</sup> the United States Supreme Court vacated the Pennsylvania Supreme Court’s judgment on the federal ground<sup>72</sup> and remanded for further consideration in light of an earlier decision.<sup>73</sup> The Pennsylvania Supreme Court then reversed its prior state constitutional in-

---

68. *Id.* at 146; *see also* State v. Morris, 72 P.3d 570, 576 (Kan. 2003) (explaining that the state search and seizure provision “provides protection identical to that provided under the Fourth Amendment to the United States Constitution”); State v. Andrews, 565 N.E.2d 1271, 1273 n.1 (Ohio 1991) (“A review of Ohio case law indicates that we have interpreted Section 14, Article I of the Ohio Constitution to protect the same interests and in a manner consistent with the Fourth Amendment to the United States Constitution.”); State v. Garcia, 123 S.W.3d 335, 343 (Tenn. 2003) (finding the state and federal search and seizure provisions “identical in intent and purpose”) (citation omitted).

69. *Robinette*, 685 N.E.2d at 767. The court cited two cases for the proposition that it had applied the “persuasive reasons” approach to several other provisions. *Id.* at 766 (citing Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 60 (Ohio 1994); State v. Gustafson, 668 N.E.2d 435, 441 (Ohio 1996)). In fact, although both of these cases interpret the Ohio Constitution coextensively with the U.S. Constitution, neither of them mentions the “persuasive reasons” approach.

70. The term “prospective incorporation” is Larry Sager’s.

71. *In re D.M.*, 743 A.2d 422, 424 (Pa. 1999).

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

73. *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

terpretation,<sup>74</sup> stating that it had “consistently followed” federal doctrine in this area and saw “no reason at this juncture to embrace a standard other than that adhered to by the United States Supreme Court.”<sup>75</sup> Justice Zappala dissented:

In our original opinion addressing this matter, we relied upon *both* the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution in holding that the police officer here did not possess the requisite cause to stop appellant based upon flight alone. While the United States Supreme Court’s decision ... impacts upon our analysis as it relates to the Fourth Amendment, the Court’s decision is not dispositive of our state constitutional analysis. Moreover, regardless of the majority writer’s *current* disagreement with his prior disposition of the case pursuant to Article 1, Section 8, principles of *stare decisis* mandate that such disposition, a majority opinion of this Court, remains the law of this case and of the Commonwealth.<sup>76</sup>

Analyzing the same state constitutional “turnaround” phenomenon in Montana in the 1980s, Ron Collins referred to this type of changed opinion as the “Montana Disaster.”<sup>77</sup> In each of these instances the state court decided to, in Barry Latzer’s words, “retract state constitutional rights simply because the Supreme Court has not found those rights in the U.S. Constitution.”<sup>78</sup> As in the Ohio cases of *Eastwood Mall* and *Robinette*, those decisions reflect the prospective lockstepping approach under both circumstances of state and federal constitutional textual identity as well as textual distinctiveness.

---

74. *In re D.M.*, 781 A.2d 1161, 1165 (Pa. 2001).

75. *Id.* at 1163; *see also* *People v. Dunaway*, 88 P.3d 619, 628-31 (Colo. 2004) (applying similar reasoning as *In re D.M.*, 781 A.2d 1161 (Pa. 2001)).

76. *In re D.M.*, 781 A.2d at 1165 (Zappala, J., dissenting) (citation omitted).

77. Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1095 (1985).

78. Latzer, *supra* note 28, at 864.



#### 4. State Courts Prospectively Adopting a United States Supreme Court "Test"

In a related approach, a state court "borrows" a well-established test, formula, or mode of reasoning developed by the United States Supreme Court when interpreting the federal Constitution and announces it will apply these approaches in interpreting an identical or similar state constitutional provision in the future. This is slightly weaker than the strong form of prospective lockstepping just discussed, because the state court may apply the federal test but reach a different outcome.<sup>79</sup> The state court's actual decision or outcome in a specific case, in other words, might not in all cases conform with federal precedents. Still, it operates as an announced approach of ongoing, or prospective, deference to federal constitutional doctrine.<sup>80</sup> For example, the Texas Court of Criminal Appeals announced: "Because we have adopted the federal standard for reviewing claims of ineffective assistance of counsel under the corresponding provision of the Texas Constitution, we will analyze both federal and state constitutional claims under *Strickland v. Washington*."<sup>81</sup> Similarly, the Connecticut Supreme Court stated: "The determination of whether probable cause exists under the [F]ourth [A]mendment to the federal [C]onstitution, and under

---

79. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1219-20 (1985). For a good example, see *Ex parte Peterson*, 117 S.W.3d 804, 813-20 (Tex. Crim. App. 2003).

80. The "ongoing deference" formulation is Larry Sager's. This very question is debated by both the majority and dissent in *City of Seattle v. Mighty Movers, Inc.*, 96 P.3d 979 (Wash. 2004).

81. *Thompson v. State*, No. 73128, 2003 WL 21466925, at \*2 (Tex. Crim. App. June 25, 2003) (citation omitted); see also *Holding v. Municipality of Anchorage*, 63 P.3d 248, 251 n.15 (Alaska 2003); *State v. Spivey*, 579 S.E.2d 251, 254 (N.C. 2003) (adopting the test laid out by the United States Supreme Court in *Barker v. Wingo*); *Damron v. State*, 663 N.W.2d 650, 654 (N.D. 2003) (adopting the test in *Strickland v. Washington*); *State v. Allen*, 837 A.2d 324, 326 (N.H. 2003) (adopting the test laid out by the United States Supreme Court in *Barker v. Wingo*); *Commonwealth v. Busanet*, 817 A.2d 1060, 1066 (Pa. 2002) ("It is well-settled that the test for counsel ineffectiveness is the same" as that applied in *Strickland v. Washington*, under either the Pennsylvania Constitution or the U.S. Constitution); *State v. Saylor*, 117 S.W.3d 239, 246 (Tenn. 2003) (holding that "the standard for a valid invocation of the right to counsel" is the same under the Tennessee Constitution and the U.S. Constitution); *State ex rel. Myers v. Painter*, 576 S.E.2d 277, 280 (W. Va. 2002) (adopting the test in *Strickland v. Washington*); *State v. Thiel*, 665 N.W.2d 305, 313-14 (Wis. 2003) (noting that the court has "consistently" followed the approach in *Strickland v. Washington*).

article first, § 7, of our state constitution, is made pursuant to a 'totality-of-the-circumstances' test."<sup>82</sup> Although it may apply an earlier *reflective* adoption of the federal test, this technique clearly implies that the court will continue to apply the federal test in the future.<sup>83</sup> It does seem to constitute *state* constitutional law.

How does this approach differ from one in which state courts adopt their own tests or approaches under the state constitution? Is the state court (as well as lower courts and counsel) obliged to apply the United States Supreme Court's future decisions using such well-established, familiar *federal* tests? If the state court misapplies the federal test, will its decision be insulated from United States Supreme Court review under the doctrine of adequate and independent state grounds? Is there any point for lawyers, scholars, and judges to continue the "homework"<sup>84</sup> involved

---

82. *State v. Nowell*, 817 A.2d 76, 84 (Conn. 2003) (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

83. Often state courts cite their earlier decisions for the proposition that a federal test has been adopted at an earlier point in time. It is incumbent on courts and counsel to "peel back the layers" of these precedents to see if the initial decision adopting the federal test was reflective or not. For example, the Supreme Court of Pennsylvania commonly states that the test for ineffective assistance of counsel is the same under the state and the federal Constitution. See, e.g., *Busanet*, 817 A.2d at 1066. The court cited *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987), for this proposition. Upon examination, it appears that the earlier decision was fairly reflective. *Id.* at 974-77. For a similar conclusion, compare *People v. Gherna*, 784 N.E.2d 799, 806 (Ill. 2003) (noting that the court has construed the search and seizure provision in the Illinois Constitution "in a manner that is consistent with the [U.S.] Supreme Court's [F]ourth [A]mendment jurisprudence" (citing *Fink v. Ryan*, 673 N.E.2d 281, 288 (Ill. 1996))) with *People v. Mitchell*, 650 N.E.2d 1014, 1017-19 (Ill. 1995) (concluding that, although the court is "not bound to follow the Supreme Court's interpretation," there is "nothing ... to support divergence in interpretation of our ... search and seizure clause from the Federal [F]ourth [A]mendment interpretation") and *People v. Tisler*, 469 N.E.2d 147, 155-57 (Ill. 1984) (analyzing and adopting the test laid out by the Supreme Court in *Illinois v. Gates*, but noting that the court "may construe [the] terms [of the search and seizure clause] as contained in [the Illinois] constitution differently from the construction the [U.S.] Supreme Court has placed on the same terms in the Federal Constitution").

On the other hand, the Wisconsin Supreme Court has adopted the federal double jeopardy approaches as state constitutional law. See, e.g., *State v. Davison*, 666 N.W.2d 1, 6-7 (Wis. 2003). Peeling back the layers to the 1975 decision adopting this approach reveals virtually no analysis or reflection. See *State v. Calhoun*, 226 N.W.2d 504, 512 (Wis. 1975). There the court stated: "With the provisions of both state and federal constitutions as to double jeopardy being identical in scope and purpose, we accept as *completely controlling* the decisions of the United States Supreme Court ...." *Id.* (emphasis added). Subsequently, the court has simply followed this approach. See, e.g., *Day v. State*, 251 N.W.2d 811, 812-13 (Wis. 1977).

84. "[T]o make an independent argument under the state clause takes homework—in

in developing independent state constitutional arguments under such state constitutional clauses, or are such efforts effectively chilled?

Other state courts, rather than adopting a specific *test* developed by the United States Supreme Court, announce that they follow the same approach as the Supreme Court and that its decisions will be applied in interpreting the state constitution.<sup>85</sup> For example, the Wisconsin Supreme Court stated: "Our tradition is to view these provisions as identical in scope and purpose. Consequently, this court accepts decisions of the United States Supreme Court as *controlling* interpretations of the double jeopardy provisions of both constitutions."<sup>86</sup>

We can see a variation on the prospective lockstepping "test" approach in the Pennsylvania cases interpreting the various state constitutional equality provisions. Here, the state court gathers up a variety of state constitutional provisions and announces that they will be interpreted the same way as the United States Supreme Court interprets a related federal constitutional provision. The Pennsylvania Constitution includes a number of provisions reflecting equality concerns. None of these amendments has the same origins, text, or date of adoption as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>87</sup> The Supreme Court of Pennsylvania, however, has consistently interpreted Pennsylvania's state constitutional equality provisions in lockstep with the federal Equal Protection Clause. For example, the court stated in *Love v. Borough of Stroudsburg*<sup>88</sup> that "the equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the *same standards* used by the United States Supreme Court when reviewing equal protection

---

texts, in history, in alternative approaches to analysis." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

85. This is the Ohio Supreme Court's approach to its state constitutional free speech provision. See *supra* notes 52-59 and accompanying text.

86. *Davison*, 666 N.W.2d at 6 (internal citation omitted) (emphasis added); see also *State v. Seefeldt*, 661 N.W.2d 822, 827 n.4 (Wis. 2003) (noting that the court is "guided by" federal doctrine).

87. See generally Williams, *Row of Shadows*, *supra* note 21.

88. 597 A.2d 1137 (Pa. 1991).

claims under the Fourteenth Amendment to the United States Constitution.”<sup>89</sup>

This view has often been repeated by the Pennsylvania courts regarding nearly all of the state constitutional provisions that reflect equality concerns.<sup>90</sup> For example, the Pennsylvania Supreme Court, interpreting the state constitution’s ban on “special laws,” concluded:

The analysis of both federal and state claims is essentially the same. As this court stated in *Laudenberger v. Port Auth. of Allegheny Co.*.... “Appellees’ contentions concerning the Equal Protection Clause of the federal Constitution and Art. III, § 32 of the Pennsylvania Constitution may be reviewed simultaneously, for the meaning and purpose of the two are sufficiently similar to warrant like treatment.”<sup>91</sup>

The Pennsylvania Supreme Court has noted that its “same standards” approach to state constitutional equality cases is a matter of its own choice.<sup>92</sup> The court stated: “In the equal protection area ... *we have chosen* to be guided by the standards and analysis employed by the United States Supreme Court ....”<sup>93</sup>

On at least one occasion, though, the Pennsylvania Supreme Court stated that “the *content* of” the special laws prohibition “is not significantly different from the Equal Protection Clause,” and that “we should be guided by the same principles in interpreting our

---

89. *Id.* at 1139 (emphasis added); see also *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 820 (Pa. Super. Ct. 1993) (utilizing the same approach).

90. See generally *Williams, Row of Shadows*, *supra* note 21. For a similar criticism of Ohio cases, see *Williams, supra* note 16, at 428-32. For examples of approaches that are similar to Pennsylvania’s, see *Park Corp. v. City of Brook Park*, 807 N.E.2d 913, 917 (Ohio 2004); *E. Okla. Bldg. & Constr. Trades Council v. Pitts*, 82 P.3d 1008, 1012 (Okla. 2003); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 97-98 (Tex. 2004). The Tennessee Supreme Court actually acknowledged the “historical and linguistic differences between the equal protection provisions” of the state and federal constitutions, but stated that the two provided “*essentially* the same protection.” *Gallagher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (emphasis added).

91. *Harristown Dev. Corp. v. Commonwealth Dep’t of Gen. Servs.*, 614 A.2d 1128, 1132 (Pa. 1992) (citations omitted) (quoting *Laudenberger v. Port Auth.*, 436 A.2d 147, 155 n.13 (Pa. 1981)); see also *DeFazio v. Civil Serv. Comm’n*, 756 A.2d 1103, 1105-06 (Pa. 2000).

92. See *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114, 121 (Pa. 1985).

93. *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1362 (Pa. 1986) (emphasis added); see *infra* note 137 and accompanying text.

Constitution," but reached a result different from that under the Federal Constitution.<sup>94</sup> In *Kroger Co. v. O'Hara Township*, the court struck down the Sunday Closing Laws (a result never reached by the United States Supreme Court), with specific reliance on the explicit prohibition in Article III, Section 32 on special laws regulating "trade."<sup>95</sup> The court found that the numerous amendments over time, creating exceptions, resulted in the Sunday Closing Laws becoming "special."<sup>96</sup> A decision like *Kroger*, in the midst of all the earlier and later proclamations that the Pennsylvania court would apply the "same principles" as federal equal protection doctrine, exposes the court to the charge that its aberrational decision is unprincipled or result-oriented. A well-reasoned, case-specific decision based on reflective adoptionism, however, would not be vulnerable to this charge.

In addition to those equality cases, Article VIII, Section 1 of the Pennsylvania Constitution provides: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."<sup>97</sup> In the words of the Pennsylvania Supreme Court: "It is well established, however, that in matters of taxation both constitutional standards are relevant, and that allegations of violations of the equal protection clause, and of the Uniformity Clause, are to be analyzed in the same manner."<sup>98</sup> There are examples, however, where the court announces that the state and federal provisions are interpreted in the same manner, but proceeds to strike down a tax statute that might well withstand a federal challenge.<sup>99</sup>

---

94. *Kroger Co. v. O'Hara Township*, 392 A.2d 266, 274 (Pa. 1978).

95. *Id.* at 274 ("We therefore find that it is our judicial duty to carefully examine any law regulating trade."). The court did recognize the additional specific language in the Pennsylvania Constitution, noting it was "not free to treat that language as though it was not there." *Id.*

96. *Id.* at 273.

97. PA. CONST. art. VIII, § 1.

98. *Leonard v. Thornburgh*, 489 A.2d 1349, 1351 (Pa. 1985); *see also* *Minn. Automatic Merch. Council v. Salomone*, 682 N.W.2d 557, 561 (Minn. 2004).

99. *See, e.g., City of Harrisburg v. Sch. Dist.*, 710 A.2d 49, 52-53 (Pa. 1998) (striking down an attempt by a school district to tax publicly leased properties that were exempt from city taxes).

### 5. Other Forms of Prospective Lockstepping

State courts have adopted a number of other ways to describe their lockstep approach to federal and state constitutional rights, without making it entirely clear whether it is a prospective mandate. For example, state courts have indicated that identical or similar federal and state constitutional provisions have been interpreted "in a manner that is consistent,"<sup>100</sup> as "substantial equivalents,"<sup>101</sup> "coextensive,"<sup>102</sup> "equivalent,"<sup>103</sup> "synonymous,"<sup>104</sup> "in accord,"<sup>105</sup> "virtually identical,"<sup>106</sup> or having "the same in 'scope, import, and purpose,'"<sup>107</sup> among many other formulations. It is unclear to what extent the precise meanings of these characterizations differ from each other and, more importantly, what messages they send about the utility of making independent state constitutional arguments in future cases.

Some state courts, rather than announcing a firm prospective lockstepping methodology, unintentionally send a form of "mixed message" for future cases to the bar and bench. For example, the Michigan Supreme Court, deciding a state equal protection case, cited a number of earlier cases stating that it had "interpreted this clause to be coextensive with its federal counterpart."<sup>108</sup> It then provided the following caveat in a footnote:

---

100. *People v. Gherna*, 784 N.E.2d 799, 806 (Ill. 2003); *accord* *People v. Gonzalez*, 789 N.E.2d 260, 264 (Ill. 2003) ("in a manner consistent"); *State v. Nobles*, 584 S.E.2d 765, 768 (N.C. 2003) ("consistent").

101. *State v. Jorgensen*, 667 N.W.2d 318, 327 (Wis. 2003); *accord* *Commonwealth v. Hall*, 830 A.2d 537, 545 n.6 (Pa. 2003) ("functional equivalent").

102. *Ex parte Ebberts*, 871 So. 2d 776, 786 (Ala. 2003); *State v. Smith*, 816 A.2d 57, 58 (Me. 2002); *State v. Martello*, 780 N.E.2d 250, 253 (Ohio 2002); *Commonwealth v. 5444 Spruce St.*, 832 A.2d 396, 399 (Pa. 2003).

103. *State v. Wittsell*, 66 P.3d 831, 834 (Kan. 2003).

104. *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 711 n.4 (Tenn. 2003).

105. *State v. Ring*, 65 P.3d 915, 926 n.4 (Ariz. 2003).

106. *In re City of Wichita*, 59 P.3d 336, 341 (Kan. 2002); *accord* *State v. Davenport*, 827 A.2d 1063, 1071 (N.J. 2003) ("substantially identical and coextensive"); *State v. Thiel*, 665 N.W.2d 305, 314 n.7 (Wis. 2003) ("standard ... is identical").

107. *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382, 398 (Iowa 2002); *accord* *Lutheran Bhd. Research Corp. v. Comm'r of Revenue*, 656 N.W.2d 375, 382 (Minn. 2003) ("scope of protection ... is identical"); *In re Percer*, 75 P.3d 488, 492 (Wash. 2003) ("same scope of protection").

108. *Harvey v. Dep't of Mgmt. & Budget*, 664 N.W.2d 767, 770 (Mich. 2003).

By this, we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of [Michigan's] Const. 1963, art. 1, § 2 as well.<sup>109</sup>

The footnote may be seen as an admirable recognition of the potential independence of the Michigan equal protection provision, but what are lawyers and lower court judges to do? Is it worth their time to do the difficult research in Michigan constitutional text, history, and caselaw that is required to make an independent argument, or has the court signaled that the effort would be a waste of time?<sup>110</sup>

Upon careful examination of the wide range of state constitutional cases adopting federal constitutional doctrine, it becomes apparent that there are in fact a large number of points, each one escalating in its level of purported deference to federal constitutional doctrine, on the continuum between the extreme end points represented by the Ohio cases discussed above.

## II. PROBLEMS WITH PROSPECTIVE LOCKSTEPPING

Of course, there are many other reasons given by state courts for adopting federal constitutional doctrine,<sup>111</sup> often including a special

---

109. *Id.* at 770 n.3.

110. A recent case from the Indiana Supreme Court provides an interesting example of this dilemma. Responding to a due process challenge to the Indiana Sex and Violent Offender Registry, the court stated that although it had "previously held that [it would] employ the same methodology ... as the Supreme Court ... used to analyze claimed violations of the Due Process Clause," the most recent due process decision from the Supreme Court did not control the present analysis. *Doe v. O'Connor*, 790 N.E.2d 985, 988 (Ind. 2003). Significantly, the court also stated that it would "employ a similar method of analysis and reach a similar result" as the recent Supreme Court case. *Id.* In a similar show of indecision, the Supreme Court of Arizona asserted that, "[n]ormally we interpret clauses in the Arizona Constitution in conformity with decisions of the United States Supreme Court and its interpretation of similar clauses in the United States Constitution. However, interpretation of the state constitution is, of course, our province." *State v. Casey*, 71 P.3d 351, 354 (Ariz. 2003) (quoting *Pool v. Superior Court*, 677 P.2d 261, 271 (Ariz. 1984)).

111. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269,

concern for “uniformity” in the area of criminal procedure.<sup>112</sup> Throughout the spectrum of judicial approaches to lockstepping, however, several problems have become apparent. First, even if the prospective lockstepping approach could be seen as “reflective,” it purports to decide *too much* and to go beyond the court’s authority to adjudicate cases. It could be argued that such an approach cannot even be referred to as a “holding,” because it goes far beyond the facts of the case and purports to prejudge future cases. In addition, it is not clear if it qualifies as dictum. Such statements, therefore, should neither bind lawyers in their arguments nor the court itself in future cases. It is beyond the state judicial power to incorporate the Federal Constitution and its future interpretations into the state constitution. When a court engages in prospective lockstepping, it not only looks *back* at the case before it and the existing, relevant legal materials, including federal doctrine, but it also purports to foresee, and to attempt to control, the *future*. In other words, it is not within the state judicial authority to receive,

---

306 (1994).

112. In 1974 the Oregon Supreme Court stated:

There are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States and the rights of citizens under the provisions of that Constitution, as well as under identical or almost identical provisions of state constitutions, as in this case .... The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges, provided, of course, that this may be done in such a manner as not to violate the constitutional rights of the individual.... The rule stated in *United States v. Robinson* ... is a simplification. Not adopting the rule of *Robinson* would add further confusion in that there would then be an “Oregon rule” and a “federal rule.” Federal and 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. For these reasons, we overrule our previous decision in *State v. O’Neal* ... and other previous decisions to the same effect to the extent that they are contrary to the rule which we now adopt.

*State v. Florance*, 527 P.2d 1202, 1209 (Or. 1974).

In *People v. Gonzalez*, 465 N.E.2d 823, 825 (N.Y. 1984), Judge Simons of the New York Court of Appeals stated: “We deem it desirable to keep the law of this State consistent with the Supreme Court’s rulings on inventory searches ....” Judge Wachtler, dissenting in *Gonzalez*, contended that the United States Supreme Court decisions were distinguishable, and noted “[i]t is often difficult enough to follow the Supreme Court’s decisions in the Fourth Amendment areas without also trying to anticipate them.” *Id.* at 826 (Wachtler, J., dissenting); see also *supra* note 69 and accompanying text.



wholesale, the law of a different sovereign as a part of its domestic law.

This problem has received mixed treatment in academic literature. For example, Professor Earl Maltz has argued in favor of lockstepping, or "the theory that state constitutional provisions should be interpreted to provide exactly the same protections as their federal constitutional counterparts."<sup>113</sup> His argument is based on deference to the state legislative and executive branches, and on a criticism of judicial activism.<sup>114</sup> He seems clearly, however, to be referring to case-by-case, or reflective, adoptionism, rather than the prospective lockstepping approach.

In contrast, Justice Robert Utter of the Supreme Court of Washington criticized the use of the prospective lockstep approach to interpreting that state's equality provisions, labeling such an approach a virtual "rewrite" of the state constitution without a constitutional convention or the people's consent.<sup>115</sup> Ron Collins argued that prospective lockstepping results in the "Problem of the Vanishing Constitution,"<sup>116</sup> where the state constitution is rendered a nullity, and the "Problem of Amending Without Amendments,"<sup>117</sup> where the court, in effect, *amends* the state constitution by linking it, prospectively, to federal constitutional analysis. This is not a valid exercise of judicial review. The power to amend the state constitution, even to link its interpretation to federal constitutional doctrine, is a political power reserved to the state's citizens.<sup>118</sup>

Second, prospective lockstepping seems to operate as a form of a "precommitment device" or "prophylactic rule," described by

---

113. Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (1988) [hereinafter Maltz, *Lockstep*]; see also Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1006-23 (1985) [hereinafter Maltz, *Dark Side*].

114. Maltz, *Lockstep*, *supra* note 113, at 101-02, 106.

115. *State v. Smith*, 814 P.2d 652, 661 (Wash. 1991) (en banc) (Utter, J., concurring).

116. Collins, *supra* note 77, at 1111.

117. *Id.* at 1116 ("When a state court withdraws from a constitutional provision its independent legal authority over state action, the court assumes a power that has been constitutionally delegated to others. That power is the right of the people to 'alter' their constitution.") (footnote omitted).

118. Williams, *Third Stage*, *supra* note 2, at 216-17 (discussing "lockstep" and "forced linkage" constitutional amendments).

Professor Adrian Vermeule, albeit in the context of free speech doctrine.<sup>119</sup> He explained:

It is a precommitment device insofar as judges ... at time 1 worry that at time 2 their own cognition or decision-making processes will be affected by some overpowering influence.... So the judges restrict their choices at time 2 by announcing, at time 1, a rule that will prevent their future selves from surrendering to the passions of the moment. It is a prophylactic device insofar as judges ... at time 1 worry, not about their own future cognition, but about the cognition of other judges deciding future cases, either judges of subordinate courts or future members of the very court that devised the rule at time 1. Here the judges formulate legal doctrine in order to restrict other judges' future choices.<sup>120</sup>

The "overpowering influence" or "passions of the moment" would, in the state constitutional law context, be future disagreement with established or probable federal constitutional doctrine. In this sense, prospective lockstepping operates as a form of an irrebuttable presumption that future cases raising state constitutional claims must be decided the same way the United States Supreme Court has decided, or would decide, the same issue under the federal constitution.

Third, as Professor Maltz has contended:

The substance of lockstep analysis is entirely consistent with the basic concept of state autonomy. Of course, one can still attack the standard verbal formulations of the lockstep approach, which seem to suggest that U.S. Supreme Court decisions somehow create state constitutional law. For lockstep courts, however, these *flaws in articulation* have little impact on the practical results reached.<sup>121</sup>

---

119. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 366 (2001).

120. *Id.* (citing GEORGE AINSLIE, *PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON* 123-79 (1992); JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 37-47 (1979); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988)).

121. Maltz, *Lockstep*, *supra* note 113, at 102 (emphasis added).

Prospective lockstepping, however, goes far beyond mere "flaws in articulation." Rather, it has the effect of snuffing out the independent research and analysis that must be undertaken by lawyers, judges, scholars, professors, and students in order to make the state constitution an independent document. Verbal formulations can, in fact, have important consequences for the development of state constitutional law.

Fourth, as Professor Gardner has stated:

By engaging in extensive lockstep analysis, many courts have also created an atmosphere in which it is unnecessary to distinguish between the state and federal constitutions because they are generally held to have the same meaning. This reduces state constitutional law to a *redundancy* and greatly discourages its use and development.<sup>122</sup>

This is a negative form of redundancy. In contrast, shared responsibility for constitutional decision making under different constitutions, or dual enforcement of constitutional norms, is an element of American "jurisdictional redundancy" based on the use of redundant systems to protect against technological malfunction and to ensure reliability.<sup>123</sup> Professor Robert Cover asserted that redundancy in federal and state jurisdiction provides a variety of *positive* influences,<sup>124</sup> which differs from the *negative* sense in which Professor Gardner used the word above. Cover noted that "the jurisdictional structure frequently permits recourse to the courts of another system after one system has adjudicated and reached a result."<sup>125</sup>

---

122. Gardner, *supra* note 11, at 804 (emphasis added); see also *id.* at 788-93 (discussing lockstep analysis). Professor John Devlin has criticized the lockstep approach, even with respect to state constitutional rights provisions that were copied from the U.S. Constitution. See John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES ST. CONST. L. 195, 234-37 (1990).

123. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639-40 (1981). The concept of redundancy is common to the understanding of federal systems. See Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS: J. FEDERALISM 173, 187-96 (1973) (discussing the definition and effects of federalism).

124. See Cover, *supra* note 123, at 642. But see Maltz, *Dark Side*, *supra* note 113.

125. Cover, *supra* note 123, at 648; see also *id.* at 673 ("If there were a unitary source of

Cover terms redundancy in constitutional interpretation as either “confirmatory” or “nonconfirmatory.”<sup>126</sup> As Professor Alan Tarr explained: “When two sets of interpreters reach the same outcome in a constitutional case, this increases confidence that the result is rooted in law rather than in will.”<sup>127</sup> He noted that where there is disagreement it is either because there is no “right answer” or that one of the interpreters has interpreted the provision “wrongly by mistake or by design.”<sup>128</sup> This form of redundancy, particularly with respect to norm articulation, is a positive aspect of federalism. The prospective lockstep approach frustrates this positive aspect. At least reflective, case-by-case adoptionism retains the potential of the beneficial qualities of jurisdictional redundancy in future cases. Of course, it must be remembered that redundant systems are not made to be used all of the time, but they must remain available for use when necessary.

Fifth, the prospective lockstep approach also relegates the state constitutional protections to “a mere row of shadows.”<sup>129</sup> As Justice Souter observed:

If we place too much reliance on federal precedent we will render the State rules *a mere row of shadows*; if we place too little, we will render State practice *incoherent*. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.<sup>130</sup>

A state’s constitutional provisions need not, and should not, be reduced to a “row of shadows” through too *much* reliance on federal precedent. Swinging the pendulum in the other direction, however, where too *little* reliance on federal precedent will “render State practice incoherent,” is also unnecessary. Reflective adoptionism, but not prospective lockstepping, could be seen to meet the requirements set forth by Justice Souter.

---

norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered throughout the domain.”).

126. *Id.* at 674-75.

127. TARR, *supra* note 10, at 175-76.

128. *Id.* at 176.

129. *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

130. *Id.* (emphasis added).

Sixth, state court decisions, such as the Ohio cases of *Robinette* or *Eastwood Mall*, purporting to lockstep prospectively with federal constitutional doctrine will have the effect of chilling scholarship on the associated state constitutional provision, and inhibiting independent state constitutional arguments and analysis by lawyers and lower courts. Such decisions seem like binding "holdings,"<sup>131</sup> resolving the question in the future, even possibly despite unanticipated changes in federal constitutional doctrine. Such decisions will render lawyers, scholars and lower court judges "literally speechless" when it comes to independent state constitutional analysis.<sup>132</sup> This approach may also result, in a circular way, in excusing lawyers for not making independent state constitutional arguments. For example, the Pennsylvania Supreme Court, in describing counsel's arguments in an ineffective assistance of counsel case stated:

[I]t is not clear whether these offhanded references to prior counsel's alleged ineffectiveness are intended to sound under the Federal or the Pennsylvania Constitution, or both. Since the

---

131. In discussing independent state constitutional rights, Justice Robert F. Utter of the Washington Supreme Court has cautioned that:

[O]ne should be neither ignorant of nor intimidated by the case law and doctrines that may be cited by parties opposing independent interpretation. In most cases the problems they present can and should be overcome. For example, a number of Washington cases contain dicta, and sometimes actual holdings, to the effect that provisions of our constitution should be interpreted in exactly the same way that the federal courts interpret the federal Constitution, unless a very good reason for variance can be shown. While the Washington Supreme Court's holdings must of course be followed unless overturned by that court, it is clear from a number of more recent cases that such an approach does not reflect the court's current attitude. Thus, older state supreme court pronouncements should be scrutinized to determine whether they constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid.

Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 507 (1984).

There are many examples of state courts reevaluating earlier "precedents" announcing that the court would apply state and federal constitutional provisions in lockstep. See, e.g., *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994); *State v. Johnson*, 719 P.2d 1248, 1254-55 (Mont. 1986); *Baker v. State*, 744 A.2d 864, 870-79 (Vt. 1999); see also *supra* note 83 and accompanying text.

132. Linde, *supra* note 84, at 391.

constitutional test for counsel effectiveness is the same under both charters—i.e., it is the *Strickland* test—we will assume that appellant intends his averments to pose coextensive questions sounding under both charters.<sup>133</sup>

It is difficult to see how decisions applying such a doctrine could ever be based on an adequate and independent state ground.<sup>134</sup> In effect, prospective lockstepping purports to force future courts to make a “federal case” out of state constitutional claims.

### III. A QUESTION OF JUDICIAL STRATEGY?

On the other hand, cases engaging in reflective, case-by-case adoptionism, such as *Simmons-Harris*, settle only the immediate question before the court. Such decisions invite, and preserve the possibilities for, future dialogue about related issues under even the same state constitutional provision. This approach provides at least a partial stimulus for continuing scholarship and independent state constitutional arguments. Furthermore, this approach preserves state court flexibility in the face of future changes in federal constitutional doctrine and treats the United States Supreme Court decision as one source among many available sources for resolution of the problem. Decisions utilizing this approach are much more likely to be viewed as based on an adequate and independent state ground.<sup>135</sup>

Both prospective lockstepping and reflective adoptionism involve “following” the United States Supreme Court’s interpretation of the

---

133. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002) (citations omitted).

134. According to the Supreme Court:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

*Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). See generally Collins & Galie, *supra* note 28, at 323-24; Richard W. Westling, Comment, *Advisory Opinions and the “Constitutionally Required” Adequate and Independent State Grounds Doctrine*, 63 TULANE L. REV. 379 (1988); Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041 (1988).

135. See *supra* note 134 and accompanying text.

Federal Constitution, but they do it in very different ways. The differing approaches have drastically divergent future consequences for lawyers and courts.<sup>136</sup> State courts should become more self conscious about these differing consequences that flow from alternative techniques of adopting federal constitutional doctrine in state constitutional interpretation.

Another point emerges clearly from a recognition that the prospective lockstepping approach is a conscious *choice* made by state courts. The choice to commit prospectively to following federal doctrine and outcomes cannot arise directly from the state constitutional clause that the court is interpreting. This might be possible for reflective adoptionism on a case-by-case basis; prospective lockstepping, however, is not based on interpretation, but rather is based on *judicial strategy*.<sup>137</sup> Like judicial precommitment devices and prophylactic rules, the strategic choice to commit to prospective lockstepping reflects the result of a judicial calculation about how best to go about enforcing the state constitutional clause under consideration, beyond the case at hand. This set of calculations by courts should also take into account the negative, chilling effects mentioned earlier in connection with prospective lockstepping.

Even case-by-case, reflective adoptionism may reflect the exercise of strategic choices by state judges. Barry Latzer, commenting on the fact that most state constitutional rights cases follow federal doctrine, speculated as follows:

Although diehard rights-expansionists might disagree, the fact that the state constitutional revolution is less radical than its billing would suggest ought to be considered an encouraging sign. It means that the state courts are not the captives of ideologies, and that state constitutional law is not merely

---

136. See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1073 n.23 (1997) (criticizing prospective lockstepping).

137. See *supra* note 93 and accompanying text. I am indebted to Robert Schapiro for this insight; see also Jeffrey L. Amestoy, *Pragmatic Constitutionalism: Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2005) (describing prudential reasons for caution by state courts in reaching judicial resolution of state constitutional claims that have not been resolved nationally by the United States Supreme Court, partially because state citizens can overrule such decisions by constitutional amendment). See generally Sager, *supra* note 8.

unprincipled rejectionism. It is a sign that the state judges are proceeding cautiously, borrowing generously from federal law, selectively rejecting it in a significant minority of decisions. Even law-ambiguity may be viewed as a mark of caution: perhaps the failure to "commit" state law to a position is a way of preserving future interpretive options, so that the court could someday say that the previous case was not construing the state constitution after all. In any event, one point is clear beyond question: state constitutional law is not just about broadening rights that the Supreme Court has narrowed.<sup>138</sup>

The differing techniques of state courts in following federal constitutional interpretation can also be evaluated within the current discussion of judicial "minimalism" and "maximalism."<sup>139</sup> Clearly, prospective lockstepping qualifies as a form of activist, bright-line maximalism,<sup>140</sup> while case-by-case adoptionism (although subject to the criticism that it does not reflect independent state constitutional analysis) constitutes a form of judicial minimalism.<sup>141</sup>

---

138. Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17, 31-32 (1991). By contrast, Ann Althouse has argued that the *Michigan v. Long* "plain statement" requirement eliminates "law ambiguity" as a choice for state judges:

State judges who want to expand the rights of an unpopular group, such as the criminally accused, may not want to call attention to their independence and thereby make themselves targets for political retaliation. By obscuring the source of the expanded rights they announce, state judges may create the impression that they act under the coercion of federal law and thus deflect voter wrath .... Justice O'Connor's presumption forces state judges to endure one form of scrutiny or the other [possible U.S. Supreme Court review] and deprives them of the ability to immunize themselves with ambiguity.

Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988-89 (1993) (footnote omitted); see also Richard B. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 486 (2004) (describing the lockstep approach as the "path of less resistance").

139. See generally Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2003).

140. Sunstein, *supra* note 139, at 15 (defining activist maximalism as "an effort to decide cases in a way that establishes broad rules for the future").

141. Young, *supra* note 139, at 1151 (defining minimalism as "leaving as much as possible undecided for consideration in the next case.").



## CONCLUSION

These are preliminary observations, admittedly not based on an exhaustive study of state constitutional cases. On the other hand, it is not necessary to identify the number of cases taking these various approaches. Rather, the implications arising from the *quality* of state constitutional decisions adopting federal doctrine in different ways is what is important.<sup>142</sup> This Article has identified a number of such implications arising from the variety of ways state courts choose to go about adopting federal constitutional doctrine as state constitutional law.

Am I reading too much into these subtle distinctions in the language of state court opinions? Are these differing methodological approaches adopted by state courts intentional? Do the courts that express the prospective lockstepping approach really mean it? *Can* they really mean it? Rather, are they unintentional products of busy, multi-member courts that do not have the luxury of academic reflection available to the authors in this symposium? This Article's premise is the latter assumption. With just a bit of recognition of the impact of these choices, and consideration of the future impact of the chosen state constitutional methodology, state courts may avoid choking off advocacy and scholarship in independent state constitutional analysis. Such courts will then recognize that even subtle changes in methodology may have a substantial impact on the future of state constitutional law.

Courts that have been involved in the New Judicial Federalism have spent a good deal of time attempting to inform the bench and bar about how to make independent state constitutional arguments.<sup>143</sup> They need to recognize that even where they adopt

---

142. The cases analyzed in this Article are assessed *qualitatively* rather than *quantitatively*. See James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Model*, 63 ALB. L. REV. 1183, 1183-84 (2000).

143. Williams, *supra* note 5, at 1019-21 (describing "teaching opinion[s]"). Of course, it is possible for state courts to interpret state constitutional provisions to provide *less* protection than the Federal Constitution. As the Supreme Court of North Carolina noted:

Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on

federal constitutional law they must do it in a way that does not chill, or even cast doubt on the value of, independent state constitutional arguments. State courts should carefully consider their messages to the bench, bar, and academy.

---

the states, the rights it guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

State v. Jackson, 503 S.E.2d 101, 103 (N.C. 1998). For other recognitions that the state constitutions are sometimes *less* protective than the Federal Constitution, see *Serna v. Superior Court*, 707 P.2d 793, 799 (Cal. 1985) (analyzing the right to a speedy trial); *State v. Hopper*, 822 P.2d 775, 778 (Wash. 1992) (evaluating the requirements for a valid indictment); see also Collins & Galie, *supra* note 28, at 336; Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399 (1998); Earl Maltz, *False Prophet - Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 443-44 (1988). See generally Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1125-30 (1992).