Speech

Presenting a State Constitutional Argument: Comment on Theory and Technique*

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I. INTRODUCTION

Your invitation to join you as a Distinguished Jurist-in-Residence affords me an opportunity to make some small contribution towards repaying the large constitutional debt we in the Pacific Northwest owe the people of Indiana. Few citizens of Indiana realize that both Washington and Oregon modeled their bills of rights on the Indiana Constitution of 1851.[1] Indiana's charter, adopted initially in 1816, has antecedents dating back to revolutionary era state constitutions.[2] Each of these state constitutions provides a rich source of civil liberty pro-

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[1]Washington's Declaration of Rights, adopted in 1859, borrowed heavily from the Indiana Constitution. *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 496 n.12 (free expression), 500 n.19 (no religious test for office), 511 n.37 (rights of criminally accused), 501 n.20 (equal privileges) (B. Rosenow ed. 1962) [hereinafter WASHINGTON JOURNAL]. Oregon adopted its Bill of Rights in 1859, copying its provisions almost verbatim from Indiana. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857, at 302, 478-79 (Salem, Or. 1926) [hereinafter OREGON PROCEEDINGS]. Delegates to the Oregon convention considered the Indiana Constitution to be the best of all the state constitutions in existence at that time. *Id.* at 101 (statement of delegate Delazon Smith).

In choosing the Indiana Constitution as a model, rather than the federal Bill of Rights, Oregon and Washington continued a long tradition of states taking their bills of rights from preexisting state constitutions. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

[2]Both the 1816 and 1851 bills of rights derived many of their constitutional guarantees from the Kentucky Constitution of 1792 and the Ohio Constitution of 1803. Twomley, *The Indiana Bill of Rights*, 20 IND. L. J. 211, 212-13 (1945). Ohio had based its rights provisions on guarantees found in the original thirteen written constitutions, each of which predated the federal Bill of Rights. Linde, *supra* note 1, at 381. *See also* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLIAMETTE L. REV. 641, 655 (1983).

tections. However, despite borrowing from earlier state charters, each state constitution reflects, in its wording and protections, the unique concerns and history of its state. For example, as a rule, in the area of religious freedoms, state constitutions differ significantly from the free exercise and establishment provisions of the first amendment.[3] The Indiana Bill of Rights makes the point vividly with six separate clauses dealing with freedom of religion,[4] reflecting an intention to have an absolute separation of state and church in their respective fields.[5]

Framers of the various state constitutions intended their charters as the primary devices to protect individual rights. The federal Bill of Rights was perceived as a secondary layer of protection, applying only against the federal government.[6] Nevertheless, we have witnessed in our lifetimes a complete reversal in roles due to the United States Supreme Court's application of much of the federal Bill of Rights against the states through selective incorporation into the fourteenth amendment's due process clause.[7] As federal constitutional law came to dominate the individual rights field, state constitutional rights litigation all but disappeared. Out of the countless decisions reached by state courts during the 1950's and 60's, only ten state court decisions relied on state constitutional provisions to protect individual rights.[8]

In recent years various state supreme courts across the nation have begun to rediscover the broad, and often unique, protections their state constitutions afford. Relying on the rich constitutional heritage it inherited from Indiana, Oregon has become the nation's second leading court in state constitutional rights decisions.[9] In one case, the Oregon Supreme

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[3]Collins, *Bills & Declarations of Rights Digest*, in THE AMERICAN BENCH 2483, 2496 (1985).

[4]IND. CONST. art. 1, § 2 (natural right to worship), § 3 (freedom of religious opinions and conscience), § 4 (freedom of religion), § 5 (no religious test for office), § 6 (no public funds), § 7 (witness competent regardless of religious opinions).

[5]Twomley, *supra* note 2, at 223 (citing Op. Att'y Gen. of Ind. 358 (1934)).

[6]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, 497 (1984). The historic role of state judges included serving as "the primary defenders of civil liberties and equal rights." Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 188 (1984).

[7]*See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to a jury); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment exclusionary rule); NAACP v. Alabama, 357 U.S. 229 (1958) (freedom of association); Wolf v. Colorado, 338 U.S. 25 (1949) (fourth amendment but not the exclusionary rule); Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment of religion clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion clause); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech and press).

[8]Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141, 142 Table 1 (1986).

[9]*Id.* at 161 (measured in terms of actual number of decisions rendered based on state constitution).

Court held that punitive damages were unavailable in a libel suit,[10] basing its decision on the interplay between the free speech guarantee and the constitutional guarantee of a remedy for injuries to a person's reputation,[11] provisions copied directly from Indiana.[12] In Washington, we found that the language of our state free speech provision, which is nearly identical to that of Indiana,[13] prohibits prior restraints on protected speech under any circumstances.[14]

State constitution based decisions do not always result in rights broader than those guaranteed by the federal Constitution. For example, suppose you were involved in an effort to get an initiative on the ballot in your state. You approach the owners of the largest private shopping mall in your area and request permission to gather signature petitions at the mall. Other mall proprietors in the area have already agreed, but this owner denies your request. Believing such denial to be unconstitutional, you seek the protection of the courts. What result?[15] If you based your claim on the first amendment to the federal Constitution, you would lose on a 12(b)(6) motion; the United States Supreme Court has repeatedly held that due to the state action requirement, the first amendment does not protect free speech activities in private shopping centers.[16] Similar results would occur under the state constitutions of North Carolina,[17] Connecticut,[18] and Michigan.[19] However, the state

[10]Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979) (rejecting federal approach adopted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[11]OR. CONST. art. 1, §§ 8, 10.

[12]IND. CONST. art. 1, §§ 9, 12.

[13]The Washington Declarations of Rights provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. 1, § 5. By comparison, the Indiana Bill of Rights provides that "[n]o law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. 1, § 9. In Washington, a plurality of the state supreme court has viewed the difference in text as negating a state action requirement under art. 1, § 5. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

[14]State v. Coe, 101 Wash. 2d 364, 374, 679 P.2d 353, 358 (1984).

[15]For a case with facts similar to these, see Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

[16]*See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976) (no first amendment right to enter private shopping center to advertise strike against employer located in center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (federal first amendment does not prevent shopping center owner from prohibiting handbill distribution); *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980) (while federal constitution does not protect free speech in a shopping center, application of California's free expression provision to shopping centers does not violate any federally protected property rights).

[17]State v. Felmet, 303 N.C. 171, 273 S.E.2d 708 (1981) (state constitution does not protect solicitation of petition signatures in private parking lot).

[18]Cologne v. Westfarms, 192 Conn. 48, 469 A.2d 1201 (1984).

[19]Woodland v. Michigan Citizens Lobby, 128 Mich. App. 649, 341 N.W.2d 174 (1983) (state constitution grants no right to petition signature gatherers to solicit in shopping mall).

constitution would protect your right to gather petition signatures at shopping centers located in Washington,[20] California,[21] and Massachusetts.[22] Broader protection, however, is not always the issue. A recent example of a state constitution providing less protection than the federal minimum occurred, ironically, in Oregon. A plurality of the Oregon Supreme Court held that unlike federal law, the Oregon Constitution does not require *Miranda*-style warnings before police officers can interrogate a suspect.[23]

Undoubtedly, a resurgence has occurred in the amount of attention paid to, and the importance of, state constitutions. United States Supreme Court Justice William J. Brennan described this reawakening of state constitutional law as "probably the most important development in constitutional jurisprudence of our time."[24] Yet, despite the notable increase in the serious consideration of state constitutional issues since 1980,[25] the majority of states have a low level of state constitutional rights litigation.[26] Some state courts have virtually no record of reliance on their state constitutions[27] so that large sections of the country, including the Midwest, remain largely unaffected by the growing trend toward development of independent state constitutional jurisprudence.[28]

As we shall see, one of the major reasons for state court reluctance to interpret and to apply state constitutions is the failure of litigators to claim state constitutional errors.[29] Consequently, I urge you to discover

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[20]Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981) (plurality found state free speech provision has no state action requirement).

[21]Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (state free speech guarantee requires access to shopping center, but court expressed no opinion on state action requirement), *aff'd*, 447 U.S. 74 (1980).

[22]Batchelder v. Allied Stores Int'l Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (relying on state's fundamental interest in elections, rather than the state's free expression provision).

[23]State v. Smith, 301 Or. 681, 725 P.2d 894 (1986).

[24]"The Fourteenth Amendment" Address by Justice William J. Brennan, Jr., American Bar Association Section on Individual Rights and Responsibilities, New York University Law School (Aug. 8, 1986).

[25]Collins, Galie & Kincaid, *supra* note 8, at 143-44.

[26]*Id.* at 160-61. A 1982 study identified only fourteen states as having a moderate or better reputation for protecting civil liberties under their state constitutions. Tarr & Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 953-54 app. (1982) (Table A) (Alaska, California, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin). As of 1985, Wisconsin Justice Shirley Abrahamson suggested adding four states for a total of eighteen. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1181 (1985) (Arizona, Mississippi, New Hampshire, and Vermont).

[27]Collins, Galie & Kincaid, *supra* note 8, at 146.

[28]*Id.* at 146 (Table 3) (of 311 actual cases decided since 1950 on independent state constitutional grounds, the Midwest accounted for only 6.8%).

[29]*See infra* note 31.

the richness of the Indiana Constitution. Hopefully, I can provide you with some of the tools necessary to formulate persuasive state constitutional arguments. First, we will review why gaining a working familiarity with your state constitution plays an important role in your future legal career. Next, we will discuss some of the key concepts you need to master, including an understanding of the pivotal effect federalism has on a state judge's constitutional perspective and how various state courts approach state constitutional analysis. Our focus then turns to what factors play the most important roles in framing a state constitutional argument. Finally, we will look at how state courts have interpreted and applied several bill of rights provisions that have analogs in the Indiana Constitution.

II. The Importance of State Constitutional Law to the Practitioner

Given the slower development of state constitutional litigation in the Midwest, you may be asking why you should be concerned with learning about the use of state constitutions. Commentators have identified several reasons, over which you as lawyers will have little control, for a court's failure to examine the state constituton.[30] However, whether you raise the state constitutional issue is within your control, and the failure to squarely raise the issue is cited often as the major reason why state appellate courts do not look to the state constitution.[31] An example will illustrate the point. Under its usual practice, the Maine Supreme Court reviews the state constitution before addressing federal constitutional issues.[32] The 1984 case of *State v. Philbrick*[33] implicated important state constitutional issues.[34] Nevertheless, because of judicial restraint considerations, the Maine court departed from its usual practice and refused to examine the state constitutional issues because the defendant did not argue that his state constitutional rights had been infringed.[35]

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[30]Abrahamson, *supra* note 26, at 1160 (possibilities include judicial oversight and carelessness, constitutional issue not ripe for decision, author of majority opinion not sympathetic to use of state constitution).

[31]Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1982). Almost 80% of the state supreme court justices responding to a recent survey indicated that their court would decline to hear a state constitutional claim if the litigant failed to raise the claim below. Collins, Galie & Kincaid, *supra* note 8, at 154. Justices of the Indiana Supreme Court were among those responding. *Id.* at 142 n.2.

[32]*See generally* Comment, *The Primacy Method of State Constitutional Decision-making: Interpreting the Maine Constitution*, 38 Me. L. Rev. 491 (1986).

[33]481 A.2d 488 (Me. 1984).

[34]*Id.* at 493 n.3.

[35]*Id.* Even where the United States Supreme Court remands and explicitly reminds a state court that it is free to interpret its own constitution, some state courts refuse to

In order to protect your clients, you will have a duty to raise, and effectively develop, state constitutional issues where appropriate. If you intend to practice here in Indiana, you should note that decisions by the Indiana Supreme Court display a willingness to examine the state constitution.[36] Your responsibility to your client will dictate that you take advantage of the court's willingness. If you intend to practice outside Indiana, state supreme court justices across the country have increasingly urged lawyers to base claims for individual protections on state constitutions.[37] The failure to raise state issues could have a serious effect on you personally; various jurists and commentators believe that lawyers "skate on the edge of malpractice" if they fail to argue and adequately brief state constitutional issues in claiming constitutional protections for their clients.[38]

State constitutional law is still in the initial stages of reawakening.[39] I cannot overemphasize the importance of the role you play in the rediscovery of civil liberty protections contained in state constitutions. As Vermont State Supreme Court Justice Thomas L. Hayes has pointed out, "[l]awyers have an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people."[40]

III. Historical and Legal Relationship Between State and Federal Constitutions

To construct a successful state constitutional argument, a lawyer must understand the relationship, both historical and legal, between the state and federal constitutions. Early constitutional history of the United States reveals that while federal law was to be supreme,[41] the framers intended the states' bills of rights to work independently of the federal Constitution.[42] Most of the states had declarations of rights years before the United States Constitution.[43] Somewhat later, the federal Bill of Rights

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address the issue when the parties fail to raise it. *See, e.g.*, White v. State, 521 S.W. 2d 225, 258 (Tex. Crim. App. 1974), *rev'd. per curiam*, 423 U.S. 67 (1975).

[36]*See, e.g.*, Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (state court interpretation of a state constitutional provision is an independent judicial act and federal cases have only persuasive force); Sidle v. Majors, 264 Ind. 206, 210, 341 N.E.2d 763, 767 (1976) (interpreting article 1, section 12).

[37]Bamberger, *Boosting Your Case with Your State Constitution*, 72 A.B.A. J. 49, 49 (1986).

[38]Welsh & Collins, *Taking State Constitutions Seriously*, Center Mag., Sept.-Oct. 1981, at 6-12.

[39]Abrahamson, *supra* note 26 at 1186.

[40]State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985).

[41]U.S. Const. art. VI.

[42]Bamberger, *supra* note 37, at 49.

[43]Utter, *supra* note 6, at 496.

was finally added to the Constitution to meet demands for the same guarantees against federal power as people enjoyed against state governments.[44] During the early years of the republic, some argued that the federal Bill of Rights also limited state authority. However, in the 1833 case of *Barron v. Mayor of Baltimore*,[45] the Supreme Court confirmed that state authority remained unfettered by the federal Bill of Rights, which the Court found served only as a limit on the power of the federal government. Thus, throughout the nineteenth and early twentieth centuries, state constitutional rights guarantees, as interpreted by state courts, served as the primary protection of individual liberty against the government expected to have the most effect on everyday life—the individual states.[46]

During the ascendancy of state constitutional law, state judges were the "primary defenders of civil liberties and of equal rights."[47] State court interpretations of state civil liberty protections often served as models for later Supreme Court interpretations of the federal Constitution. Most notably, state decisions shaped federal law in the areas of judicial review, substantive due process, freedom of speech and religion, eminent domain, the right to bear arms, and the rights of the accused.[48] For example, decades before the United States Supreme Court acted in *Gideon v. Wainwright*,[49] the Indiana Supreme Court held that the state constitutional right to counsel entitled indigent criminal defendants to counsel at state expense.[50]

As the simple agrarian society of the founders metamorphosed into a national, high technology, industrialized society, power naturally shifted from the states to the federal government.[51] As part of this power shift, civil liberties became federalized. Several historical events played a crucial role in this federalization process: the ratification of the fourteenth amendment, selective incorporation of the federal Bill of Rights into the due process clause, and the Warren Court's revolutionary use of the

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[44]*Id.*; Linde, *supra* note 1, at 381; *see also* Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1083 (1985).

[45]32 U.S. (7 Pet.) 243, 250 (1833).

[46]THE FEDERALIST No. 45 at 319 (J. Madison) (E. Bourne ed. 1937).

[47]Wright, *supra* note 6, at 188.

[48]Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1030 (1985).

[49]372 U.S. 335 (1963).

[50]Rader v. State, 181 Ind. App. 546, 552, 393 N.E.2d 199, 203 n.3 (1979); Note, *The Indigent Defendant in the State Criminal Proceeding:* Betts v. Brady *Is Interred*, 38 IND. L.J. 623 (1963); *see also* Campbell v. State, 229 Ind. 198, 203, 96 N.E.2d 876, 878 (1951).

[51]Wisdom, *Foreword: The Ever Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1078 (1984).

equal protection clause to guarantee equality.[52] Most importantly, however, application of federal guarantees against state authority arose because, despite their role as the primary protector of individual liberty, state courts often did not give serious consideration to civil liberty protections.[53] Take Indiana's free speech provision, article 1, section 9 for instance. During the 1920's, the Indiana Supreme Court had a poor record for protecting the right of free speech.[54] In one case the Indiana court upheld a city ordinance making it unlawful to carry any banner, placard, advertisement, or handbill in any public place.[55] In another case, the court upheld an ordinance prohibiting all picketing.[56] Indiana was by no means alone. Other states also failed to adequately assure freedom of expression.[57] As a result, the United States Supreme Court stepped in, applied the first amendment to state authority,[58] and invalidated both types of ordinances.[59]

Today, much of the federal Bill of Rights has been incorporated into the fourteenth amendment.[60] Because of incorporation and the supremacy clause, Supreme Court interpretations of federal civil liberty guarantees set a minimum level of protection.[61] While state courts must enforce these minimum federal constitutional standards, no one questions a state court's power to construe state provisions as providing broader protection for individual rights.[62] Incorporation of federal guarantees into the fourteenth amendment does not relieve state courts from their primary responsibility for protecting individual rights.[63]

At the very heart of a state court's responsibility you will find the concept of federalism, America's gift to political theory.[64] The framers

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[52]Kurland, *The Supreme Court, 1963 Term-Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145-62 (1964) (Warren Court worked an "egalitarian revolution"); Mosk, *supra* note 44, at 1084.

[53]*See, e.g.*, Mosk, *The State Courts*, in AMERICAN LAW: THE THIRD CENTURY 213, 216 (B. Schwartz ed. 1976).

[54]Twomley, *supra* note 2, at 223.

[55]Waters v. Indianapolis, 191 Ind. 671, 134 N.E. 482 (1921).

[56]Thomas v. Indianapolis, 195 Ind. 440, 145 N.E. 550 (1924).

[57]*See generally* Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KANSAS L. REV. 305 (1985).

[58]Gitlow v. New York, 268 U.S. 652 (1925); *see* Simon, *supra* note 57, at 305.

[59]*See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (invalidating bans on picketing); Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating bans on handbill distribution in public places).

[60]See *supra* note 7 and accompanying text.

[61]*See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Haas, 420 U.S. 714, 719 n.4 (1975).

[62]*Pruneyard*, 447 U.S. at 81; *Haas*, 420 U.S. at 719.

[63]Utter, *supra* note 6, at 497.

[64]Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 194 (1984).

of the United States Constitution designed a compound American republic, in which the people surrendered power to dual sovereign governments—state and federal.[65] By choosing this "classical model" of federalism,[66] the framers intended to provide double security for the people's individual rights.[67] The dual sovereignty federal structure also provides the people of each state with the opportunity to serve as constitutional laboratories, experimenting with "novel social and economic experiments."[68] The federal nature of our compound republic mandates that state courts determine the scope of a state constitution's liberty protections.[69] When a state court fails to independently evaluate its state constitution, it deprives the people of the double security the nation's founding fathers intended to provide.

Even though state courts have the power to independently interpret their state constitutions, defining the scope of state protections in the face of federally mandated minimum standards can lead to tensions between the federal and state judicial systems.[70] The type of state constitutional provision determines whether such tension exists. Interpretations of state provisions without federal analogs need not take into account federal minimum standards. As a result, such decisions create no tension with federal law. Most often, a state court will look to other state court decisions interpreting analogous state provisions. For example, unlike the federal Constitution, the Indiana Constitution contains a right to a remedy for personal injury.[71] When the Indiana Supreme Court held that automobile guest statutes do not violate that provision, the court had no need to look to federal law. Instead, the court reached its result after an independent analysis, which included reviewing decisions by sister state supreme courts.[72]

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[65]THE FEDERALIST No. 51, at 339 (A. Hamilton or J. Madison) (Modern Library ed. 1937).

[66]Comment, *supra* note 32, at 503. Federalism often gets divided into separate concepts. Vertical federalism refers to the general relationship between a state and the federal government. *See* M. PORTER & G. TARR, STATE SUPREME COURTS POLICYMAKERS IN THE FEDERAL SYSTEM xix-xx (1982). Horizontal federalism refers to the general political and legal relations among the states. Comment, *supra* note 32, at 503 n.37.

[67]*See* Comment, *supra* note 32, at 503 n.37.

[68]"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . ." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan J., concurring).

[69]Utter, *supra* note 6, at 493 (quoting Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237-38, 635 P.2d 108, 113 (1981) (citations omitted)).

[70]*See* Comment, *supra* note 32, at 521.

[71]IND. CONST. art. 1, § 12.

[72]Sidle v. Majors, 264 Ind. 206, 211, 341 N.E.2d 763, 767 (1976).

When you intend to raise state provisions that have federal analogs, you should be aware of the tensions created by the supremacy clause and federal minimum standards. There are two types of analogs. Language analogs exist when federal and state provisions have identical or nearly identical text. Substantive analogs occur when federal and state provisions have different text, but provide similar substantive protection.[73] In determining the meaning and scope of state provisions that have either type of federal analog, state courts often refer to federal precedent in their analysis. In so doing they run the risk of Supreme Court review and reversal. In *Michigan v. Long*,[74] the Supreme Court established a presumption of federal review of state decisions that do not "indicate clearly and expressly that the [decision] is alternatively based on bona fide, separate, adequate and independent grounds."[75] Under this approach, the Court will exercise jurisdiction if the state decision interweaves state and federal law excessively or if a state court's reasoning and conclusion appear compelled by federal precedent.[76]

Federal minimums and the potential for Supreme Court review and reversal create tension when state courts determine the scope of state constitutional provisions. Often, this tension manifests itself within a state supreme court over what approach to take in state constitutional interpretation. For example, members of the New Jersey court split over the need to refer to a neutral set of criteria to determine if state provisions provide protections broader than federal minimums.[77] State court decisions that interpret a state provision more broadly often create tension with United States Supreme Court Justices. For example, before retiring, United States Supreme Court Chief Justice Warren E. Burger criticized state court broader-protection-decisions favoring criminal defendants as not being "rational law enforcement."[78] The response this comment generated highlights state-federal tensions, with one state justice characterizing the Chief Justice's approach as exemplifying a Supreme Court policy of unwarranted intrusion into state authority.[79]

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[73]*See infra* notes 160-69 and accompanying text.

[74]463 U.S. 1032 (1983).

[75]*Id.* at 1048. The *Long* approach has reversed the traditional Supreme Court presumption that state courts act independently unless the record establishes differently. *Id.* at 1066 (Stevens, J., dissenting). *See* Utter, *supra* note 48, at 1026 n.2.

[76]*See* Comment, *supra* note 32, at 512 n.56.

[77]*Compare* State v. Hunt, 91 N.J. 338, 364-68, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring) (proposing neutral criteria to justify departure from federal precedent) *with* Right to Choose v. Byrne, 91 N.J. 287, 332-33, 450 A.2d 925, 948-49 (1982) (Pashman, J., concurring in part and dissenting in part) (arguing that state constitutions must be interpreted separately unless there are good reasons of policy to establish a uniform interpretation). *See infra* notes 114-25 and accompanying text.

[78]Florida v. Casal, 462 U.S. 637, 639 (1983).

[79]State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea J., dissenting), *overruled*, State v. Johnson, 719 P.2d 1248 (Mont. 1986).

Electoral tensions also arise between state courts and the people. Various states have experienced attempts, some successful, at amending the state constitution to counter independent grounds decisions. One such attempt failed in Washington,[80] but succeeded in California and Florida.[81] Chief Justice Burger may have exacerbated federal-state tensions when he applauded the good sense of the people of Florida for amending their state constitution's analog to the fourth amendment to require judicial conformance with Supreme Court announced fourth amendment standards.[82] These various intra-state and state-federal tensions continue to have a significant impact on state constitutional decisionmaking.

IV. Methods of State Court Analysis

In interpreting the scope of state constitutional provisions, state courts should have as their goal providing their citizens with the protections contemplated by the drafters of the state constitution.[83] Courts, however, choose an approach to state constitutional analysis for a variety of reasons. Often, that choice reveals how a state court perceives its role in the federal structure and what weight it will give to federal precedent. Some courts vary their approach according to the type of civil liberty being protected.[84] In preparing a state constitutional argument, counsel should carefully analyze the approach the state court has chosen. Several approaches or methods have been adopted, including the absolute harmony, primacy, interstitial, and dual sovereignty approaches.[85]

A. The Lock-Step or Absolute Harmony Approach

Some state courts employ a lock-step or absolute harmony approach in interpreting state provisions having federal analogs. In reality, this is a non-approach to state interpretation because it results in "absolute deferential conformity" with Supreme Court interpretations.[86] The absolute harmony approach has a long history. For example, in the early 1920's, when it was widely recognized that the fourth amendment did not apply to the states, several state courts adopted the federal exclusionary rule because they felt bound to conform their interpretations of

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[80]A 1985 bill proposing to substitute fourth amendment language for Wash. Const. art 1, § 7 failed to get out of committee. *See* Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 489-90 (1986).

[81]*Id.*

[82]Florida v. Casal, 462 U.S. at 638.

[83]Utter, *supra* note 48, at 1050.

[84]Abrahamson, *supra* note 26, at 1176.

[85]*See* Utter, *supra* note 48, at 1027-30.

[86]*Id.* at 1168.

the state constitution with Supreme Court analysis.[87] More recently, the Texas Court of Criminal Appeals expressed its commitment to absolute harmony with Supreme Court fourth amendment interpretations "until such time as [it is] statutorily or constitutionally mandated to do otherwise."[88]

Absolute harmony has been criticized on a variety of grounds. As we have seen, this approach contradicts the historical relationship between the state and federal constitutions.[89] It is also inconsistent with the roles that state and federal governments play in the classical model of federalism.[90] Most importantly, absolute deference violates a state judge's duty to independently interpret the scope of the state constitution.[91] As a result of these criticisms, state courts continue to struggle with the appropriateness of a lock-step approach. While they follow such an approach in criminal matters, Texas courts do not absolutely defer in civil cases.[92]

Montana provides the best example of a court struggling with absolute harmony. In 1977, the Montana Supreme Court applied the absolute harmony approach to the state privilege against compelled self-incrimination.[93] Then in 1981, Montana adopted an independent grounds approach,[94] only to reassert the absolute harmony approach in the same case after its original decision was vacated by the United States Supreme Court.[95] Most recently, in 1986, the Montana court reversed itself again, making it clear that from now on it would no longer " 'march lock-step' with the United States Supreme Court where constitutional issues are concerned, even if the applicable state constitution provisions are identical or nearly identical to the United States Constitution."[96]

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[87]Comment, *supra* note 80, at 473 n.83.

[88]Brown v. State, 657 S.W.3d 797, 799 (Tex. Crim. App. 1983) (en banc).

[89]*See supra* notes 42-46 and accompanying text; *see also* Linde, *supra* note 1, at 380-83.

[90]*See supra* note 67 and accompanying text; *see also* State v. Badger, 141 Vt. 430, 447-49, 450 A.2d 336, 346-47 (1982).

[91]*See* Baker v. Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (court has duty to develop additional constitutional protections if within the intention and import of state constitution); State v. Kimbro, 197 Conn. 219, 234, 496 A.2d 498, 506 (1985) (court has duty to interpret state constitution's civil liberty protections); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237-38, 635 P.2d 108, 113 (1981) (courts are obliged to interpret state constitution).

[92]*See* Abrahamson, *supra* note 26, at 1167 n.96.

[93]State v. Finley, 173 Mont. 162, 164-65, 566 P.2d 1119, 1121 (1977). *See generally* Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985).

[94]State v. Jackson, 195 Mont. 185, 637 P.2d 1 (1981), *vacated*, 460 U.S. 1030 (1983). *See* Collins, *supra* note 93, at 1095-1102.

[95]State v. Jackson, 672 P.2d 255 (Mont. 1983), *overruled*, State v. Johnson, 719 P.2d 1248 (Mont. 1986). *See* Collins, *supra* note 93, at 1108-11.

[96]State v. Johnson, 719 P.2d 1248, 1254 (Mont. 1986) (holding that unlike under

B. Primacy Approach

On the opposite end of the spectrum from the absolute harmony approach you will find the primacy approach, first articulated by Oregon Supreme Court Justice Hans A. Linde.[97] Under this approach, a state court examines state constitutional issues first, reasoning that a federal question cognizable under the fourteenth amendment's due process clause becomes an issue only if state law does not protect the right in question.[98] Courts using this approach do not consider federal law and analysis presumptively valid, viewing them instead as no more persuasive than decisions of sister state supreme courts.[99] Thus, primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought.[100]

The primacy approach flows out of the classical model of federalism by assuming "that the states are the primary sovereigns and that the state constitutions are the basic charters of individual liberties and of the limits of governmental authority."[101] States applying this approach include Oregon,[102] Maine,[103] and New Hampshire.[104]

Commentators identify a variety of benefits of the primacy approach. These include development of a sound body of state constitutional law, protection of state decisions from federal review, and promotion of healthy federalism, in which federal and state courts respect each others' authority in their respective spheres.[105] Although the primacy approach may insulate state decisions from Supreme Court review, state primacy does not necessarily result in state court decisions expanding upon federal minimums.[106]

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federal law, defendant's request to speak with somebody invoked his constitutional right to counsel, but the failure to suppress his tape recorded statements was harmless error in the case at hand).

[97]*See* Linde, *supra* note 1, at 383-84; Linde, *supra* note 64, at 178.

[98]Linde, *supra* note 64, at 178.

[99]*Id.*

[100]Utter, *supra* note 48, at 1028.

[101]Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982).

[102]*See, e.g.*, State v. Kennedy, 295 Or. 260, 262-63, 666 P.2d 1316, 1318 (1983).

[103]*See, e.g.*, State v. Cadman, 476 A.2d 1148 (Me. 1984). *See generally* Comment, *supra* note 32. In many instances prior to 1984, Maine's highest court applied constitutional analysis totally dependent upon federal doctrine. State constitutional provisions were tacked on as afterthoughts or characterized as equivalent to their federal counterparts. *Id.* at 499 n.19, 501 n.21. After adopting the primacy approach, the Maine court cites federal cases because it finds them persuasively reasoned, not because it feels bound to do so. State v. Flick, 495 A.2d 339, 343-44 n.2 (Me. 1985); *Cadman*, 476 A.2d at 1150.

[104]*See, e.g.*, State v. Ball, 124 N.H. 226, 230-32, 471 A.2d 347, 350-52 (1983).

[105]*See, e.g.*, Comment, *supra* note 32, at 507-24.

[106]*See, e.g.*, State v. Smith, 301 Or. 681, 725 P.2d 894 (1986) (plurality concluded that Oregon constitution does not require *Miranda*-style warnings); *see also* Comment,

As you would expect, the primacy approach has generated heated criticism. Many commentators argue that the classical federalism model of distinct bodies of law, providing double protection, has become unnecessary due to the extensive incorporation of the federal Bill of Rights.[107] Others contend that the need for nationwide uniformity, at least in the area of criminal law, makes the primacy method ill-advised.[108] I also see the primacy method as creating some problems. In particular, primacy courts often address only the state constitution, resulting in state decisions that do not comment on federal law. Consequently, state courts would no longer play their crucial and historic role in the development of federal jurisprudence.

C. Interstitial or Supplemental Approach

Under the supplemental approach, a state court always addresses the federal claim first. Only if the federal claim fails does the court look to the state constitution to determine if it "offers a means of supplementing or amplifying federal rights."[109] This approach flows out of a perceived need to foster uniformity and avoid conflict with federal precedent if at all possible. Apparently, decisions by the Indiana Supreme Court indicate that it will follow this approach.[110]

The supplemental approach differs from both the primacy and absolute harmony models. Unlike under the primacy model, courts using the supplemental approach view federal interpretation of analogous pro-

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supra note 32, at 525 n.95 (arguing that despite Maine's adoption of the primacy approach, expanded state rights remains the exception, not the rule).

[107] *See, e.g.*, Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 985 (1985); Note, *supra* note 101, at 1336.

[108] *See, e.g.*, People v. Corr, 682 P.2d 20, 33 (Colo.) (Erickson, C.J., dissenting), *cert. denied*, 469 U.S. 855 (1984) (need for state officers to be able to rely on federal interpretations in criminal area); State v. Ringer, 100 Wash. 2d 688, 703, 674 P.2d 1240, 1250 (1983) (Dimmick, J., dissenting) (independent interpretation in criminal area will confound the police); Maltz, *supra* note 107, at 1005; Simon, *supra* note 57, at 318-19 & n.113; Comment, *supra* note 32, at 518-19 n.72.

[109] Utter, *supra* note 48, at 1028.

[110] [W]here a provision of a state Constitution is similar in meaning and application to a provision of the federal Constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts on the subject involved. While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the Fourteenth Amendment is not absolutely binding on the courts of the state when the statute is attacked as being in conflict with a provision of the state Constitution having the same effect, still, the federal decision in such cases is strongly persuasive authority, and is generally acquiesced in by the state courts.

City of Indianapolis v. Wright, 267 Ind. 471, 476, 371 N.E.2d 1298, 1300, 1301 (1978) (citation omitted).

visions as presumptively correct.[111] Unlike courts that follow the absolute harmony approach, under the supplemental approach, state courts do not automatically follow the federal interpretation in construing state provisions.[112] Thus, a similarity between parallel state and federal provisions makes federal precedent persuasive, not binding. Although Indiana often recognizes that it has the power to go beyond the federal minimum, it seldom, if ever does. An interesting comparison can be made with states such as New Hampshire, which often treats parallel state and federal provisions similarly, but also selectively uses its power to afford greater protection under the state constitution.[113]

New Jersey's experience provides an example of the organic development of the supplemental approach. In 1982, in *Right to Choose v. Byrne*,[114] the New Jersey Supreme Court considered the constitutionality of a state statute that restricted Medicaid funding for abortions necessary to save the life of the mother. After finding that the statute did not run afoul of the federal Constitution,[115] the court invalidated the statute under the New Jersey Constitution.[116] In rejecting the federal analysis, the court noted that it would proceed cautiously in interpreting state provisions because of the "general advisability" of uniform interpretations of state and federal analogs.[117] However, because of the significant textual differences between the state and federal due process guarantees and a preexisting New Jersey jurisprudence, the court used its power to independently interpret the state constitution more broadly than the federal minimum.[118]

In *State v. Hunt*,[119] the New Jersey court again used the supplemental approach to hold that, unlike its fourth amendment analog, the state search and seizure provision protected an individual's long distance telephone records. In a concurring opinion, Justice Handler criticized the court's supplemental approach because of the lack of consistent standards to justify departure from federal analysis. Instead, he offered a set of seven neutral criteria to solve the perceived problem.[120] One

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[111]Utter, *supra* note 48, at 1028.

[112]*See* Abrahamson, *supra* note 26, at 1176.

[113]*See, e.g.*, State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985) (non-random roadblocks violate the state constitution); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983) (officer's reaching into defendant's automobile to retrieve suspicious-looking cigarette butt violated state constitution).

[114]91 N.J. 287, 450 A.2d 925 (1982).

[115]*See* Harris v. McRae, 448 U.S. 297 (1980).

[116]*Right to Choose*, 91 N.J. at 293, 450 A.2d at 928.

[117]*Id.* at 301, 450 A.2d at 932.

[118]*Id.* at 303, 450 A.2d at 932.

[119]91 N.J. 338, 450 A.2d 952 (1982).

[120]*Id.* at 343-46, 450 A.2d at 965-67 (Handler, J., concurring). The criteria included: textual differences, legislative history, preexisting state law, structural differences between

year later in *State v. Williams*,[121] a majority of the New Jersey court adopted the neutral criteria approach in the context of whether pretrial proceedings should be open.[122] Most recently, in January 1987, the New Jersey court used neutral criteria to support its refusal to adopt, under the state search and seizure provision, the federal good faith exception to the exclusionary rule.[123]

Former New Jersey Supreme Court Justice Morris Pashman has articulated one of the major criticisms of the supplemental approach's neutral criteria. He correctly pointed out that use of criteria creates an unwarranted presumption of validity for federal analysis under the state constitution.[124] According to Justice Pashman, a state court has a duty to interpret the state constitution on its own merits. Thus, "particular reasons" must exist before a state court eschews its responsibility to independently interpret the state constitution in favor of conforming to the Supreme Court's result.[125]

Another major criticism of the supplemental approach focuses on the advisability of relying solely upon federal grounds for state decisions.[126] Massachusetts' experience highlights the problem. In *Commonwealth v. Upton*,[127] the Massachusetts court reversed a conviction for lack of probable cause, grounding its decision solely on the fourth amendment. Because the decision did not involve independent and adequate state grounds, the Supreme Court asserted jurisdiction and reversed,[128] disagreeing with Massachusetts' application of *Illinois v. Gates*.[129]

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state and federal constitutions, matters of particular local or state interest, state traditions or history, and particular attitudes of the state's citizens. Washington has adopted a similar set of nonexclusive criteria. State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 831 (1986).

[121]93 N.J. 39, 459 A.2d 641 (1983).

[122]*Id.* at 57-58, 459 A.2d at 650. Despite New Jersey's attempt to develop a set of neutral principles underlying its supplemental approach, it has not escaped criticism. *See* Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491, 499-505 (1984) (suggesting that the court arbitrarily applies its neutral criteria).

[123]State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987).

[124]*See Hunt*, 91 N.J. at 355, 450 A.2d at 960 (Pashman, J., concurring). Justice Handler argued that by proposing neutral criteria, he did not intend to create a presumption favoring federal analysis. *See id.* at 367 n.3, 450 A.2d at 967 n.3; Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 206 n.29 (1983).

[125]*Hunt*, 91 N.J. at 355, 450 A.2d at 960 (Pashman, J., concurring). *See generally* Cohn, *Justice Pashman as Federalist: The New Jersey Constitution Unbound*, 35 RUTGERS L. REV. 213 (1983). For further discussion of the New Jersey approach, see Handler, *supra* note 124; Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

[126]*See* Massachusetts v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J., concurring).

[127]390 Mass. 562, 458 N.E.2d 717, *rev'd*, 466 U.S. 727 (1983).

[128]Massachusetts v. Upton, 466 U.S. 727 (1983).

[129]*Id.*

On remand, the Massachusetts court turned to the state constitution, independently adopted the two-prong *Aguilar-Spinelli* probable cause test, and affirmed its earlier decision.[130] United States Supreme Court Justice John Paul Stevens criticized Massachusetts' use of the supplemental approach, characterizing it as creating needless work for the Supreme Court and unnecessarily inviting Supreme Court review and possible reversal.[131] Finally, Massachusetts' experience highlights Justice Linde's criticism of the supplemental approach. Because the supplemental approach requires review of the state constitution only when federal doctrine fails to provide protection, state court decisions that provide broader protection run the risk of being criticized as pragmatic and result oriented, rather than principled.[132]

D. Dual Sovereignty Approach

Thus far we have seen the strengths and weakness of the absolute harmony, primacy, and supplemental approaches. Several state courts have adopted another model, the dual sovereignty approach,[133] which attempts to use the other approaches' strengths while avoiding their weaknesses. Under this approach, courts always evaluate both federal and state constitutional provisions, reaching conclusions as to the protection afforded under each, even if the decision rests firmly on state grounds.[134] According to Vermont Supreme Court Justice William C. Hill, who calls this the "Vermont approach," reaching independent decisions under both constitutions "accommodates, rather than evades, the relationship of state and federal constitutional rights."[135]

A Washington case offers an excellent example of the approach at work. In *State v. Coe*,[136] the trial court held a radio and television station in contempt for violating a court order prohibiting the broadcast of accurate, lawfully obtained copies of tape recordings played at a criminal trial. We first analyzed the trial court's prior restraint order under Washington's free speech provision, the text of which differs significantly from its federal analog.[137] We concluded that the Washington Constitution absolutely forbade prior restraints against publication or

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[130]Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985).

[131]Massachusetts v. Upton, 466 U.S. at 735 (Stevens, J., concurring).

[132]Linde, *supra* note 64, at 178.

[133]*See, e.g.*, State v. von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984); Kearns-Tribune Corp. v. Lewis, 685 P.2d 515 (Utah 1984); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).

[134]*See* Utter, *supra* note 48, at 1029.

[135]Hill & Marks, *Foreword: Toward a Federalist System of Rights*, 1984 ANN. SUR. AM. L. 1, 11.

[136]101 Wash. 2d 364, 679 P.2d 353 (1984).

[137]*Compare* WASH. CONST. art. 1, § 5 *with* U.S. CONST. amend. I.

broadcast of constitutionally protected speech.[138] We then turned to the federal Constitution, holding that the first amendment also prohibited prior restraints against the broadcast in question.[139] Other states that have employed the dual sovereignty approach, notably Rhode Island, Utah, and Vermont, differ from our approach in *Coe* only to the extent that they address the federal issue prior to discussing the state constitution.[140]

In addition to authoring the *Coe* opinion, I have written separately in the *Texas Law Review* in support of the dual sovereignty approach.[141] In some ways reaching dual decisions under the federal and state constitutions was the original method of constitutional analysis.[142] "It reflects the policies underlying our federal system by making available the maximum protection both levels of government offer to citizens."[143] The major criticism lodged against the dual sovereignty approach is that once a court affords protection under the provision analyzed first, subsequent discussion under the other constitution constitutes dicta, unnecessary to the final disposition of the case.[144] In addition, Justice Stewart G. Pollock of the New Jersey court thinks that the dual approach may lead to a "body of state law that merely mimics the federal rulings."[145] Mimicry, he correctly pointed out, would be inconsistent with federalist principles that underlie state independent analysis.[146] My *Texas Law Review* article attempted to rebut such criticisms by focusing on the need to accommodate a state court's duty to interpret its own constitution and the crucial role state court commentary has played in the development of federal jurisprudence.[147] Moreover, unlike Justice Pollock, I see the dual sovereignty approach as facilitating the primary goal of a state court: development of a principled, independent state jurisprudence.

V. Formulating State Constitutional Arguments

Regardless of which approach a court takes, state constitutional law consists of state court pronouncements based on federal constitutional

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[138]*Coe*, 101 Wash. 2d at 375, 679 P.2d at 361.

[139]*Id.* at 380, 679 P.2d at 363.

[140]*See, e.g.*, State v. von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984); Kearns-Tribune Corp. v. Lewis, 685 P.2d 515 (Utah 1984); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).

[141]*See generally* Utter, *supra* note 48.

[142]*Id.* at 1029.

[143]*Id.*

[144]*See, e.g.*, Collins, *supra* note 93, at 1101 n.60; Linde, *supra* note 64, at 176 & n.26.

[145]Pollock, *supra* note 125, at 718.

[146]*Id.*

[147]Utter, *supra* note 48, at 1030-50.

precedent and analytics, as well as state court decisions that depart significantly from the federal model. In addition, adherence to a particular analytical approach is by no means set in concrete. Thus, you must become familiar with the various approaches in order to frame a persuasive state constitutional argument on behalf of your client. In most states, framing a state constitutional argument presents counsel with largely uncharted territory. State courts often observe that even where parties squarely raise state constitutional issues, briefing frequently falls short of the mark, failing to make any substantive analysis or argument on the issue.[148] Even where state courts demonstrate a willingness to carefully review state issues, as we have in Washington, lawyers often view state issues as "throw-ins" most likely because they have not learned how to frame well thought out, persuasive state constitutional arguments.[149] For this reason, I will attempt to provide you with some fundamentals useful for building your state analysis.[150] Keep in mind that your goal is to persuade a state court to examine its state constitution and to find that because of its historical mandate or other factors, a decision favoring your client is required.[151]

A. Structural Considerations

In structuring your argument, you need to consider the effect of topics we have discussed thus far. To take account of a state court's role and responsibility in our federal system, you should present your state constitutional analysis at each stage of the proceedings—prior to trial, during trial, and on appeal. The bona fide, independent grounds requirement announced in *Michigan v. Long*[152] affects your structural presentation in several ways. You must take care to keep your state and federal claims separate and distinct. To do so you should refer specifically to the state provisions upon which you rely, separate your federal and state analysis, and be sure to set out your state law position as a separate argument in all written documents.[153]

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[148]*See, e.g.*, State v. Jewett, 146 Vt. 221, 223-29, 500 A.2d 233, 234-36 (1985) (court admonished parties for their inadequate briefs and ordered supplemental briefing on the state issues).

[149]Justice Shirley Abrahamson has made a similar observation concerning Wisconsin. Abrahamson, *supra* note 26, at 1163.

[150]For other discussions of techniques to effectively argue state constitutional issues, see Bamberger, *supra* note 37; Carson, *supra* note 2, at 658-62; Tinkle, *The Resurgence of State Constitutional Law*, 18 ME. BAR. BULL. 257, 288-91 (1984); Utter, *supra* note 6, at 504-24; Comment, *supra* note 32, at 544-87.

[151]Utter, *supra* note 6, at 504-07.

[152]*See supra* notes 74-76 and accompanying text.

[153]*See* Bamberger, *supra* note 37, at 50.

As Wisconsin Supreme Court Justice Shirley Abrahamson observed, a state court's choice of approach to state constitutional interpretation may reflect the court's view of the relation between the state and federal constitutions.[154] As a result, you may wish to order your presentation of federal and state claims to reflect the approach your state court adopts. Thus, in primacy states, discuss state issues first; in supplemental states, discuss your federal claim prior to your state claim; and in dual sovereignty states—since different states order their issue consideration differently—become aware of your state's choice. In addition, as discussed above, some supplemental approach states employ neutral criteria.[155] Consequently, you may wish to order your discussion of the state constitution by referring to the list of criteria and by proposing additional criteria.

B. Argument Building Blocks

Commentators and jurists often refer to various types of constitutional arguments including textual, historical, doctrinal, prudential, structural, and ethical.[156] For example, the Vermont Supreme Court encourages parties to focus on the textual approach, supported by reference to historical, economic, and social materials.[157] For the purposes of today's discussion, I will focus briefly on the use of constitutional text, state constitutional history, preexisting state jurisprudence, and current values.

1. Constitutional text.—The text of the constitutional provision in question provides the starting point for building your argument. In framing your textual argument, feel free to apply the general maxims of statutory construction.[158] Keep in mind the differences between constitutions and statutes. Where the people ratified the provision you rely upon, the common and ordinary meaning of the constitutional language is the meaning understood by the majority of voters, or as the Wisconsin Supreme Court put it, by "the general run of voters to whom the [provision] was submitted."[159] As an additional aid in framing your textual argument, look also to the Enabling Act which paved the way for and set limits on the state constitutional convention.

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[154]Abrahamson, *supra* note 26, at 1169.

[155]*See supra* notes 120-25 and accompanying text.

[156]*See, e.g.*, P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); *see also* State v. Jewett, 146 Vt. 221, 234, 500 A.2d 233, 237 (1985) (court referred parties to Professor Bobbitt's work); Linde, *supra* note 64, at 180-93 (discussing the various constitutional arguments).

[157]*Jewett*, 146 Vt. at 234, 500 A.2d at 237.

[158]Utter, *supra* note 6, at 509; *see In re* Todd, 208 Ind. 168, 193 N.E. 865 (1935) (rules for construing statutes should be applied to constitutional provisions).

[159]B.F. Sturtevant Co. v. O'Brien, 186 Wis. 10, 19, 202 N.W. 324, 327 (1925).

Your textual argument will have to take into account the existence of federal analogs. Where the state constitution guarantees a right unaddressed in the federal Constitution, your job is much easier. For example, article 1, section 12 of the Indiana Constitution specifically recognizes that every person shall have a remedy by due course of law for injuries to his or her reputation.[160] The federal Constitution recognizes no constitutional right to a reputation.[161] However, several state courts have relied on provisions nearly identical to article 1, section 12 to hold that reputation is a fundamental constitutional interest.[162] Recognition of reputation as a fundamental interest has far reaching implications for your client. Once recognized as such an interest, state infringement arguably gives rise to a section 1983 federal civil rights action.[163]

Where a substantive protection analog exists, the difficulty of your job increases. Nevertheless, few provisions of a state's constitution, including Indiana's, contain precisely the same language as their federal protection analogs. In framing your argument, you must persuade your state's judiciary to assign meaning to that textual difference. In Washington, our fourth amendment analog, article 1, section 7, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[164] The Washington Supreme Court gives substantive meaning to this textual departure from the fourth amendment. For example, in *State v. Myrick*,[165] we rejected the federal open fields exception to the warrant requirement as inapplicable under our state constitution. While open fields do not come within the limited scope of fourth amendment protection—that is, persons, homes, papers, and effects—section 7's protection sweeps much broader by guaranteeing the sanctity of one's "private affairs," as well as one's home.[166]

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[160]IND. CONST. art. 1, § 12.

[161]Paul v. Davis, 424 U.S. 693 (1976) (federal courts lack authority to hear claims based on a right to reputation).

[162]*See, e.g.*, Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975) (individual may recover damages to reputation under state constitution); McCall v. Courier-Journal, 623 S.W.2d 882 (Ky. 1981) (state constitution protected attorney from defamation by newspaper), *cert. denied*, 456 U.S. 975 (1982); Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978) (retraction statute unconstitutional as incomplete remedy); Davidson v. Rogers, 281 Or. 219, 574 P.2d 624 (reputation is constitutionally protected but retraction statute does not violate remedy guarantee). Montana has relied on a guaranteed remedy provision similar to Indiana's to invalidate municipal immunity for torts. White v. State, 661 P.2d 1272, 1273-75 (Mont. 1983).

[163]42 U.S.C. § 1983 (1981). *See* Paul v. Davis, 424 U.S. 693 (1976).

[164]*Compare* WASH. CONST. art 1, § 7 *with* U.S. CONST. amend. IV.

[165]102 Wash. 2d 506, 688 P.2d 151 (1984).

[166]*Id.* at 512, 688 P.2d at 155.

Your job becomes most difficult when the state provision has a language analog in the federal constitution. When the state constitution employs language identical or nearly identical to federal provisions, state courts come under pressure to conform their decisions to federal precedent. This pressure is particularly acute in the criminal area.[167] Nevertheless, you must overcome the notion that the divergence from the Supreme Court becomes more legitimate when the state constitution has different text.[168] In either case, state courts have equal responsibility for independently interpreting their state constitutions; a textual difference simply makes it easier for a court to see its responsibility.[169]

Take article 1, section 11 of the Indiana Bill of Rights, which contains language identical to the federal fourth amendment. A state court must seek to discover what the people of Indiana meant by the wording of article 1, section 11. When Indiana's framers drafted section 11 in 1816 and readopted it in 1851, the United States Supreme Court's first significant interpretation of the fourth amendment was still thirty-five years in the future.[170] Undoubtedly, given the independent development of state constitutions, the Indiana framers never intended section 11 to be dependent upon, or interpreted in light of, the fourth amendment.[171] Moreover, significant structural differences exist between state and federal bills of rights. State charters recognize affirmative rights, while the federal charter places limits on federal power.[172] In addition, the differing perspectives of state and federal courts require significantly different analysis of similarly worded provisions.[173]

Regardless of the similarity in constitutional text and regardless of whether a state court looks to the state constitution before, after, or simultaneous with the federal Constitution, you should feel free to adopt modes of analysis that differ from those employed by the United States Supreme Court.[174] State constitutions offer counsel and the courts the ability to be free of inconsistencies, complexities, and restrictions of federal case law.[175] Once free of federal analytics, both counsel and court can rethink fundamental issues involved.[176] In drafting your state

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[167]*See* Abrahamson, *supra* note 26, at 1155 ("criminal law is probably the most public and controversial arena . . . . ").

[168]Linde, *supra* note 64, at 182.

[169]*Id.*

[170]*See* Boyd v. United States, 116 U.S. 616 (1886); Comment, *supra* note 80, at 520 n.318.

[171]*See* Utter, *supra* note 6, at 496.

[172]*Id.* at 494. *See generally* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[173]Utter, *supra* note 48, at 1042.

[174]Utter, *supra* note 6, at 506.

[175]Abrahamson, *supra* note 26, at 1181; Utter, *supra* note 6, at 506.

[176]*Id.*

argument, you should heed the Vermont Supreme Court's advice and avoid the "litany of federal buzz words."[177] If you incorporate federal analysis and law into your state analysis, do so only after careful thought.

2. *Use of State Constitutional History.*—To support your textual argument and to shed light on ambiguous constitutional language, look to the original intent and understanding underlying the constitutional provision. Because a state constitution is the expression of the people's will, a state court must be concerned primarily with the intent of those who ratified the document.[178] Evidence of the drafters' intent becomes important because, in many cases, it is the only evidence we have of the people's understanding.[179] In general, historical arguments focus on the legislative history of a particular clause or provision, the treatment the clause or provision received in subsequent constitutions, and the social and political setting in which the provision originated or when the changes took place.[180]

To frame your argument you should look to the various sources, both primary and secondary, which shed light on the original understanding of a particular state provision. As in any historical research project, primary sources provide the best building blocks for your argument. Look to the Enabling Act, which authorized the State Constitutional Convention's work, and to available published records of the state convention. The Indiana Supreme Court considers state constitutional convention debates as an important tool for interpreting its constitution.[181] In Washington, unfortunately, full proceedings of the state convention have not been made available. Nevertheless, the brief minutes in the convention journal reveal that the Washington framers rejected fourth amendment language in favor of the text of article 1, section 7.[182] This decision to reject federal wording, along with article 1, section 7's broad language, formed the basis of Washington's independent analysis of search and seizure cases under the state constitution.[183] In contrast to Washington's lack of primary sources, in Indiana you have a rich supply of primary sources from both the 1816[184] convention and the revisions adopted in 1851.[185]

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[177]State v. Jewett, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985).

[178]Utter, *supra* note 6, at 511.

[179]*Id.*

[180]Linde, *supra* note 64, at 183.

[181]*See In re* Todd, 208 Ind. 168, 183 N.E. 865 (1935).

[182]WASHINGTON JOURNAL, *supra* note 1, at 51, 497.

[183]*See, e.g.*, State v. Jackson, 102 Wash. 2d 432, 443, 688 P.2d 136, 141 (1984). For a critique of Washington's use of article 1, § 7, see Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331 (1984).

[184]*See, e.g.*, JOURNAL OF THE CONVENTION OF THE INDIANA TERRITORY (Louisville 1816).

[185]*See, e.g.*, JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (1851); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF

Substantial insight can also be gained from newspaper accounts of the constitutional convention, as well as from looking to the constitutions that the Indiana delegates copied from or referred to in drafting specific provisions.[186] However, as noted earlier,[187] even where the Indiana Constitution contains the same or similar language to the federal or other state constitutions, it is quite possible that the framers intended something different from those who drafted the source documents.

As to secondary sources, you can rely on the writings of individual framers as indicative of the intent underlying particular provisions. In Indiana, for example, Robert Dale Owen was a prominent and influential delegate to the 1852 Convention.[188] Consequently, books by and about Owen may offer additional insights into the meaning of various civil liberty guarantees.[189] Other secondary sources include books and articles that concern the convention itself or that detail the history of events leading up to the framing and ratification of the state constitution.[190]

3. Reference to Current Values.—A court's primary goal in determining the scope of a constitutional provision is to give effect to the intent of the framers of the state constitution. Utilizing "interpretivist" review,[191] courts determine original intent by using the textual analysis and historical sources discussed above. In contrast, under a noninterpretative review,[192] courts look to current values such as sound policy, justice, and fundamental fairness to shed light on the scope of a constitutional protection.[193] The pros and cons of the United States Supreme Court's use of the competing approaches have been debated extensively in the literature.[194] As can be expected, the debate over the appropriateness

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THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850). For comments about the Indiana constitution, see generally OREGON PROCEEDINGS, *supra* note 1.

[186]*See* Barnhart, *Sources of Indiana's First Constitution*, 49 IND. MAG. HIST. 55 (1943).

[187]*Supra* notes 170-72 and accompanying text.

[188]R. LEOPOLD, ROBERT DALE OWEN 269 (1969); Madison Courier, Feb. 10, 1851.

[189]*See, e.g.*, R. LEOPOLD, *supra* note 182; R.D. OWEN, TREADING MY WAY (New York 1874); R.D. OWEN, THE WRONG OF SLAVERY (Philadelphia 1864).

[190]*See, e.g.*, J. BARNHART & D. RIKER, INDIANA TO 1816 (1971); CONSTITUTION MAKING IN INDIANA- 1916-1978 (Kettleborough ed. 1979); D. DUNN, INDIANA AND INDIANANS (1919); Barnhart, *supra* note 186; Dionisopoulos, *Indiana, 1851, Alaska, 1956: A Century of Differences in State Constitutions*, 34 IND. L.J. 34 (1958-59); Lambert & McPheron, *Modernizing Indiana's Constitution*, 26 IND. L.J. 185 (1950-51); Twomley, *supra* note 2.

[191]*See* J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

[192]*Id.*

[193]People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986); White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 166-67 (1979) (using the terms supraprofessionalist and intraprofessionalist in place of noninterpretivist and interpretivist).

[194]*Compare* White, *supra* note 193 (arguing that "[w]hen the Supreme Court decides constitutional cases, it is justified in looking beyond the Constitution to the values of American society today") *with* Downs, *Judges, Law-making and the Constitution: A*

of constitutional review based on judicial perception of current values now takes place in the state supreme court forum as well.[195]

Understandably, state judges may feel reluctant to interpret a constitutional provision by referring to their perceptions of current values. Nevertheless, situations arise that require a state court to employ a noninterpretative review. Determining the intent of a single person is often a difficult chore; yet, the task grows "geometrically more complex" when courts attempt to assess the intent of delegates to a constitutional convention that took place one or two centuries ago.[196] Sometimes little practical objective guidance exists concerning the original intent and understanding of a particular provision.[197] Often the text is ambiguous or unclear, or the intent of the people and framers is undiscoverable or obscure. More importantly, the original intent or understanding of a constitutional provision may become inappropriate in the context of modern conditions and values.[198]

The larger principle contained in a constitutional guarantee should not be confined to what the generation that adopted it was willing to live by.[199] For example, at the time of the Indiana Constitutional Convention of 1851, delegates had conflicts over the right of married women, "negroes," and "mulattos" to acquire property.[200] This conflict led to

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Response to Professor White, 63 JUDICATURE 444 (1979) (arguing that "[w]hen the Supreme Court substitutes its judgment for that of Congress, it steps outside its constitutional role—and endangers both law and democracy").

[195]*See, e.g.*, Maltz, *supra* note 107 (arguing that state courts should only use interpretivist review in construing state constitutional provisions). Wisconsin Justice Shirley Abrahamson has predicted that state constitutional interpretation will raise

> the questions posed in the ongoing debate as to the legitimacy of judicial review of constitutional questions by the United States Supreme Court. Thus, the academicians ask whether state courts shall adopt an interpretative or a noninterpretative approach to their state constitutions; whether state courts will take an historical approach or a doctrinal approach; whether judicial review by state courts and elected judges is countermajoritarian; whether the ease of amending the state constitution affects the manner of interpreting the state constitution. The academicians ask us to consider the questions being discussed in the writings of Dean Jesse Choper, Dean John Ely, Professor Phillip Bobbitt, Professor Michael Perry, and others. The academicians raise important issues—issues that state courts have dealt with in the related area of statutory interpretation and will have to consider in interpretation of the state constitutions.

Abrahamson, *Homegrown Justice: The State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 308 (B. McGraw Ed. 1985).

[196]Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, Dec. 1986, at 77, 78.

[197]Utter, *supra* note 6, at 520.

[198]*Id.*

[199]Linde, *supra* note 64, at 182.

[200]Twomley, *supra* note 2, at 213. The 1851 Constitution did, however, outlaw slavery and involuntary servitude. IND. CONST. art. 1, § 37.

the express decision to leave the inalienable right to acquire property out of the list of specific inherent and inalienable rights guaranteed by article 1, section 1 of the Indiana Constitution.[201] Today, few would argue that Indiana courts should refuse to look to modern values in order to honor the inferior legal position assigned to blacks and women in 1851. As Washington courts have long recognized, a state constitution is "designed to endure through the years, and constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life."[202]

Within the past few months, the New Jersey Supreme Court, in *State v. Novembrino*,[203] and the New York Court of Appeals, in *People v. P.J. Video, Inc.*,[204] employed noninterpretative review to construe their state search and seizure provisions as providing broader protection than their fourth amendment analog. Because of the identity of language between the fourth amendment and the state analogs,[205] and because of the history of the state provisions, both courts acknowledged that interpretivist review offered no grounds for providing broader protection.[206] Nevertheless, in *Novembrino*, New Jersey refused to adopt the United States Supreme Court's good faith exception to the exclusionary rule because of "particular state interests" such as "the likely [negative] impact . . . on privacy . . . and on the enforcement of [New Jersey's] criminal laws."[207] In *P.J. Video*, a case implicating both the right of free expression and the right to be free from unlawful government

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[201]Twomley, *supra* note 2, at 213.

[202]State *ex rel.* Evans v. Brotherhoods of Friends, 41 Wash. 2d 133, 147, 247 P.2d 787, 795 (1952) (quoting State *ex rel.* Linn v. Superior Court, 20 Wash. 2d 138, 145, 146 P.2d 543, 547 (1944)).

[203]State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987).

[204]People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). The New York court listed the various noninterpretative factors it looks for as follows:

> any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.

Id. at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[205]*Compare* U.S. CONST. amend. IV *with* N.Y. CONST. art. 1, § 5; N.J. CONST. art. 1, para. 7.

[206]*Novembrino*, 519 A.2d at 849-50; *P.J. Video*, 68 N.Y.2d at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.

[207]*Novembrino*, 519 A.2d at 850. The court noted that "[a]lthough the language of article 1, paragraph 7 of the New Jeresy Constitution is virtually identical with that of the Fourth Amendment, we have held in other contexts that it affords our citizens greater protection against unreasonable searches and seizures than does the Fourth Amendment." *Id.* (citations omitted).

intrusions, the New York court relied on principles of federalism and New York's long tradition of protecting fundamental rights, and refused to apply the *Illinois v. Gates*[208] "totality of the circumstances" test to determine probable cause.[209]

4. Preexisting State and Federal Law.—Framing a state argument becomes more difficult when the United States Supreme Court relaxes federal minimum standards. This becomes a jurisprudential problem when the Supreme Court overrules or reinterprets a large body of federal law that state courts have consistently applied.[210] Once a state supreme court decides a state case using federal standards, does the decision continue to bind state courts even when the United States Supreme Court changes direction?[211] A state supreme court has two choices: it can adopt the new federal standard without much comment, or it can squarely address state cases applying the old federal doctrinal analysis and decide whether those standards had evolved into state constitutional requirements.[212] For example, in *Novembrino* and in *P.J. Video*, the New Jersey and New York courts chose to continue adhering to preexisting federal and state law because it proved more persuasive on legal and normative grounds than more recent Supreme Court interpretations of the fourth amendment.[213] Thus counsel must be prepared to argue the question.

Counsel should take notice of the analysis state courts use in rejecting or following new Supreme Court doctrine. For example, state supreme courts have had varied reactions to *Illinois v. Gates*.[214] In *Gates*, the Supreme Court abandoned the well established *Aguilar-Spinelli* two-pronged probable cause test[215] in favor of the less demanding "totality of the circumstances" analytic.[216] Although they had applied the two-prong approach for many years, some state courts simply changed direction with the Supreme Court and followed *Gates*.[217] In *State v.*

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[208]462 U.S. 213 (1983).

[209]*P.J. Video*, 68 N.Y.2d at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913. The court observed that although the identity of text often called for federal-state uniformity, it does not hesitate to adopt independent standards "when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.' " *Id.* (citations omitted).

[210]Comment, *supra* note 32, at 527-28.

[211]Linde, *supra* note 64, at 177.

[212]*See* Comment, *supra* note 32, at 527-28 (criticizing the Maine court for failing to address the issue of the evolution of independent state standards).

[213]*Novembrino*, 519 A.2d at 857; *P.J. Video*, 68 N.Y.2d at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

[214]462 U.S. 213 (1983).

[215]*See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[216]462 U.S. at 238.

[217]*See, e.g.*, Beemer v. Commonwealth, 665 S.W.2d 912, 915 (Ky. 1984); Potts v.

Jackson,[218] the Washington Supreme Court rejected *Gates* and continued to employ the *Aguilar-Spinelli* test as a matter of state constitutional law.[219] A number of states have done likewise.[220] In *Jackson*, we based our decision to reject the *Gates* standard on several factors. We found the Court's rationale for departing from the *Aguilar-Spinelli* standard singularly unpersuasive; the *Gates* approach lacked "sufficient specificity and analytical structure to adequately inform magistrates as to the appropriate standards required to protect the right of privacy secured by [the state constitution]."[221] Finally, Washington had an established jurisprudence in which the *Aguilar-Spinelli* test was applied under the state constitution.[222]

Even in the absence of a pre-existing state jurisprudence that applied federal doctrine under the state constitution, state courts often find that state constitutions require rejection of Supreme Court departures from established law. A 1986 New York Court of Appeals case, *People v. Bethea*,[223] illustrates the point. Several years ago, in *People v. Chapple*,[224] the New York Court of Appeals interpreted the federal *Miranda* doctrine as requiring suppression of defendant statements made after proper warnings, when they came in close sequence with prior unwarned statements.[225] Recently, the United States Supreme Court, in *Oregon v. Elstad*,[226] held that interpretations such as *Chapple* misconstrued federal law. Only if the police coerced the unwarned statements would the subsequent warned statements have to be suppressed.[227] In *Bethea*, the New York court had to determine whether *Chapple* remained good law in New York.[228] The court of appeals rejected the *Elstad* approach. Despite the lack of pre-existing state cases applying *Chapple* under the

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State, 300 Md. 567, 575-76, 479 A.2d 1335, 1340 (1984); State v. Arrington, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984). New Jersey decided to follow *Gates* as a matter of state law. *Novembrino*, 519 A.2d at 857. Maine opted to follow *Gates* without addressing the state constitutional issue. State v. Knowlton, 489 A.2d 529, 532 (Me. 1985). *See* Comment, *supra* note 32, at 527-28 n.11 (pointing out that despite both its adoption of the primacy approach and the fact that the defendant squarely raised the state constitutional issue, the Maine court did not acknowledge any state constitutional issue).

[218]102 Wash. 2d 432, 688 P.2d 136 (1984).

[219]*Id.* at 438-39, 688 P.2d at 143.

[220]*See, e.g.*, State v. Jones, 706 P.2d 317 (Alaska 1985); State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985); Commonwealth v. Ford, 394 Mass. 421, 476 N.E.2d 560 (1985); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

[221]*Jackson*, 102 Wash. 2d at 443, 688 P.2d at 143.

[222]*Id.*

[223]67 N.Y.2d 367, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986).

[224]38 N.Y.2d 112, 341 N.E.2d 243, 378 N.Y.S.2d 682 (1975).

[225]*Chapple,* 38 N.Y.2d at 114, 341 N.E.2d at 246, 378 N.Y.S.2d at 685.

[226]470 U.S. 298 (1985).

[227]*Id.* at 318.

[228]67 N.Y.2d at 366, 493 N.E.2d at 938, 502 N.Y.S.2d at 714.

state constitution, the New York court continued the *Chapple* rule as "a matter of state constitutional law." In refusing to follow *Elstad*, the court observed that without the *Chapple* rule, the state privilege against self-incrimination would lose all deterrent effect.[229]

As a result of the Warren Court's expansion of civil liberties, pre-existing federal law almost always aids a more expansive view of the state constitution. By contrast, pre-existing state precedent, dating back to preincorporation days, often fails to adequately assure and protect state constitutional rights.[230] Consequently, when the Supreme Court curtails federal minimum protections, state courts must look to preincorporation cases as a starting point for their analysis. During the preincorporation period, few states developed a theoretical basis to build a principled civil rights jurisprudence. Thus, these preincorporation cases challenge courts, counsel, and scholars to analyze prior case law's underlying principles and theoretical bases in light of the plain, historical, or modern meaning assigned to the constitutional text.

Ironically, Oregon, one of the leading state constitutional law courts, provides the most vivid example of the struggle with the limitations of preincorporation case law. Just this past year, the defendant in *State v. Smith*[231] relied solely on Oregon's privilege against compelled self-incrimination to argue that the state constitution required *Miranda*-style warnings to be given at an earlier time than required under federal law.[232] This argument raised the threshold issue of whether the Oregon Constitution required *Miranda* warnings at all. The plurality examined cases, dating back to 1896, finding that although Oregon statutes and the Oregon Constitution required a magistrate to explain the right to remain silent, there was "no question" that the state constitution did not require a police officer to give similar warnings.[233] In dissent, Justice Linde pointed to several recent cases, arguing that in each the Oregon court held that Oregon law independently required warnings before interrogation.[234] The plurality characterized the same cases as merely

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[229]*Id.* at 368, 493 N.E.2d at 938-39, 502 N.Y.S.2d at 714-15.

[230]*See* Simon, *supra* note 57, at 311 (prior to incorporation little judicial concern existed for the protection of free expression and other civil rights).

[231]301 Or. 681, 725 P.2d 894 (1986).

[232]*Id.* at 684, 725 P.2d at 896.

[233]*Id.* at 687-98, 725 P.2d at 897-904. In one prior case the Oregon Supreme Court held that "[a]n extra-judicial confession is admissible in this State even though the officer to whom it was made did not inform the accused of his right to consult counsel, of his own right to remain silent and of the fact that his declarations would be used against him." State v. Henderson, 182 Or. 147, 173, 184 P.2d 392, 403 (1947) (citations omitted).

[234]*Smith*, 301 Or. at 703-05, 725 P.2d at 907-08 (Linde, J., dissenting) (citing State v. Sparklin, 296 Or. 85, 672 P.2d 1182 (1983); State v. Mains, 295 Or. 640, 669 P.2d 1112 (1983)).

assuming, without deciding, that the Oregon Constitution required *Miranda*-style warnings.[235] Because it found Oregon statutes and case law provided sufficient protection against coerced statements, the plurality found "no good reason" to overrule preincorporation case law to interpret the state constitution as requiring extrajudicial warnings.[236]

Cases such as *Elstad* will require state courts to evaluate preincorporation state law. Many states, including Indiana, have preincorporation jurisprudence similar to Oregon's concerning the need to require warnings to protect the privilege against compelled self-incrimination.[237] With the Supreme Court no longer acting as the conscience of the nation,[238] *Smith* stands as a reminder that state courts must choose between retreating to preincorporation case law or employing their state constitutions to maintain decisional consistency with post-incorporation cases.[239] As Justice Linde observed, *State v. Smith* also serves to remind us that, "despite recent progress in many state courts, people in Oregon as elsewhere still need the protection of federal law for the basic liberties common to the national and states' bills of rights."[240]

VI. Practical Applications of State Bill of Rights Provisions

Now that the importance of asserting client rights under the state constitution has been demonstrated, and needed concepts and the building blocks of constructing state constitutional arguments have been set out, it is also important to understand the practical applications of state constitutional protections. Most states have a scarcity of decisions under various constitutional provisions. To frame a persuasive state-based argument, counsel should become aware of and use decisions by sister state courts.[241] To illustrate practical use of state constitutional protections, let us look at how state courts outside Indiana interpret and apply a small sample of state provisions that have analogs in the Indiana Constitution.[242] As we have discussed earlier, counsel should always be aware of whether the state provision he or she intends to rely on has an analog in the federal Constitution.

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[235]*Id.* at 681, 725 P.2d 894 (1986) (distinguishing State v. Sparklin, 296 Or. 85, 672 P.2d 1182 (1983); State v. Mains, 295 Or. 640, 669 P.2d 1112 (1983)).

[236]*Id.* at 701, 725 P.2d at 906.

[237]*See, e.g.*, State v. Campbell, 229 Ind. 198, 96 N.E.2d 876 (1951) (holding that warnings as to right of counsel and right to remain silent must be given by trial court at time of arraignment); Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943) (same).

[238]Mosk, *supra* note 44, at 1087-88.

[239]*Id.*

[240]*Smith*, 301 Or. at 722, 725 P.2d at 914. (Linde, J., dissenting).

[241]*See* Carson, *supra* note 2, at 656-58.

[242]To identify which states have provisions similar to Indiana, see Constitutions of the United States: National and State (F. Grad 2d ed. 1982); B. Sachs, Constitutions of the United States—Fundamental Liberties and Rights, A Fifty State Index (1980);

A. No Federal Analog: Article 1, Section 13 of the Indiana Constitution

Suppose your clients are male inmates at the state penitentiary. They ask you to seek an injunction prohibiting prison officials from assigning female guards to duties that involve frisking male prisoners or observing them while they shower or use the toilets. Assuming that a statutory claim is unavailable, what constitutional interest should you claim was violated? This exact situation arose in the Oregon case of *Sterling v. Cuppy*,[243] where the Oregon Supreme Court reviewed a lower court decision in favor of the inmates, based on the federal "constitutional right to privacy."[244] The Oregon Supreme Court found a federal privacy right to be a difficult premise for decision and turned instead to the Oregon Constitution.[245]

In addition to the state constitution's ban on cruel and unusual punishment, which has a federal analog, the Oregon court noted that the Oregon Constitution establishes penal principles in four provisions, which have no federal analogs.[246] After observing that each of these provisions came out of Indiana's Constitution,[247] the court traced the history of penal reform in the states during the post-revolutionary decades. The court focused on article 1, section 13, because it directly addressed prison practices.[248] Oregon's section 13 is identical to article 1, section 15 of the Indiana Constitution, which provides:

> "No person arrested, or confined in jail, shall be treated with unnecessary rigor."

The Oregon court held that male prisoners had a constitutionally founded objection to searches by female officers under the unnecessary rigor clause, which prohibited such searches unless performance by officers of the opposite sex was compelled by necessity.[249]

W. SWINDLER, SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS (1979). To keep track of state court interpretations of their own constitutions, Oregon Justice William P. Carson, Jr. suggests the following: (1) West's Key Number 18 Under the Heading "Constitutional Law;" (2) *Developments in the Law—The Interpretations of State Constitutional Rights*, 95 HARV. L. REV. 1324-1502 (1982); and (3) most importantly, Ron Collins column, *Developments in State Constitutional Law*, published regularly in The National Law Journal. Carson, *supra* note 2, at 658.

[243]290 Or. 611, 625 P.2d 123 (1981).

[244]Sterling v. Cupp, 44 Or. App. 755, 757, 607 P.2d 206, 207 (1980).

[245]*Sterling*, 290 Or. at 616, 625 P.2d at 127-28.

[246]*Id.* at 616, 675 P.2d at 128 (citing OR. CONST. art. 1, §§ 15, 25, 16, 13).

[247]*Id.* at 617, 625 P.2d at 129. *Compare* OR. CONST. art. 1, §§ 15, 25, 16 and 13 *with* IND. CONST. art. 1, §§ 18 (penal code founded on reformation, not vindictiveness), 30 (effect of conviction), 16 (excessive bails and fines), and 15 (no unnecessary rigor).

[248]*Sterling*, 290 Or. at 619, 625 P.2d at 130.

[249]*Id.* at 632, 625 P.2d at 136.

To support its conclusion that the unnecessary rigor prohibition goes beyond standards contained in other constitutional sections, and in support of its belief that the unnecessary rigor standard was not confined to physical abuse, the Oregon court quoted the Indiana Supreme Court's explanation of the unnecessary rigor prohibition.[250] Whether the Indiana Constitution provides inmates with the protection sought in *Sterling* remains to be seen. Nevertheless, *Sterling* provides counsel with a strong argument to that effect.

B. Substantive Protection Analogs

1. Equal Protection: Article 1, Sections 1, 12 and 23.—Like most state constitutions, Indiana's Bill of Rights does not contain an "equal protection" clause per se.[251] It does, however, contain a guarantee of equal privileges and immunities,[252] a guarantee of a remedy by due course of law,[253] and a broad guarantee of inalienable rights.[254] The wording of these provisions differs substantially from that of their federal constitutional analogs, yet at one time or another, the Indiana Supreme Court has interpreted each of these provisions as providing protections substantively identical to the equal protection clause of the fourteenth amendment to the United States Constitution.[255] Although recognizing

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[250] *Id.* at 619-20, 625 P.2d at 120-30 (quoting Bonahoon v. State, 203 Ind. 51, 56, 178 N.E. 570, 571 (1931) (upholding a conviction of police officers for assault and battery against a prisoner). For other Indiana cases construing the unnecessary rigor prohibition, see, e.g., Roberts v. State, 159 Ind. App. 456, 307 N.E.2d 501 (1974) (citing the prohibition to support tort recovery for physical abuse); Matovina v. Hult, 125 Ind. App. 236, 123 N.E.2d 893 (1955) (same).

[251] *See* Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

[252] "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. 1, § 23.

[253] "Every man, for injury done him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. 1, § 12.

[254] WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.

IND. CONST. art. 1, § 1.

[255] *See, e.g.*, South Bend Pub. Transp. Corp. v. City of South Bend, 428 N.E.2d 217 (Ind. 1981) (art. 1, § 12 contains due process and equal protection guarantees like the fourteenth amendment); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (art. 1, § 23 intended to protect rights identical to those in fourteenth amendment equal protection clause); Department of Ins. v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947) (art. 1, § 1 is similar in meaning and application to fourteenth amendment).

federal equal protection decisions as having only persuasive force,[256] Indiana courts seem to employ the federal suspect class/fundamental right/level of scrutiny approach,[257] and will usually acquiesce in, rather than conflict with, federal decisions.[258]

A recent Indiana Court of Appeals case illustrates the Indiana approach.[259] The plaintiff served as a police officer in a small Indiana community from 1977 until 1982, when she was hired by the South Bend Police Department. However, a state statute forbade hiring police officers after the age of thirty-six, with an exception for those who had previously participated in the state pension plan. Because she was hired after her thirty-sixth birthday and her prior police employer participated in a different pension plan system, state statutes required South Bend to discharge her. The plaintiff invoked the protection of the fourteenth amendment and article 1, section 23 of the Indiana Constitution, bringing an equal protection challenge against the state statute.[260] The court

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[256]City of Indianapolis v. Wright, 267 Ind. 471, 476, 371 N.E.2d 1298, 1300 (1978); *Reilly*, 266 Ind. at 37, 360 N.E.2d at 175; *Schoonover*, 225 Ind. at 194, 72 N.E.2d at 750.

[257]*See, e.g.*, Reed v. United States, 604 F. Supp. 1253 (N.D. Ind. 1984) (same standard of review applies under Indiana's art. 1, § 23 and the fourteenth amendment); *Reilly*, 266 Ind. at 36 n.1, 260 N.E.2d at 175 n.1 (court found rational basis test invalidated use of actuarial tables to determine payments of benefits to retired teachers, making it unnecessary to determine whether United States Supreme Court employs an "intermediate" level of scrutiny in sex-based classifications); Sidle v. Majors, 264 Ind. 206, 210, 341 N.E.2d 763, 767 (1976) (if neither a fundamental right nor a suspect class is involved, standard of review applied by Indiana courts is that the classification not be arbitrary or unreasonable); Sobieralski v. City of South Bend, 479 N.E.2d 98 (Ind. Ct. App. 1985) (finding no fundamental right or suspect class, court applied rational basis standard to uphold age classification for hiring police officers); Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983) (analysis under Indiana case law is applicable to federal equal protection questions).

[258] It is the province of the state courts to interpret and apply the provisions of their state Constitutions, but where a provision of a state Constitution is similar in meaning and application to a provision of the federal Constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts on the subject involved. While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the Fourteenth Amendment is not absolutely binding on the courts of the state when the statute is attacked as being in conflict with a provision of the state Constitution having the same effect, still, the federal decision in such cases is strongly persuasive authority, and is generally acquiesced in by the state courts.

Wright, 267 Ind. at 476, 371 N.E.2d at 1300-01 (quoting Sperry & Hutchinson Co. v. State, 188 Ind. 173, 180, 122 N.E. 584, 587 (1919)). *See also* Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) (because rights intended to be protected under both constitutional provisions were identical, a violation of the fourteenth amendment necessarily violates art. 1, § 23).

[259]Sobieralski v. City of South Bend, 479 N.E.2d 98 (Ind. Ct. App. 1985).

[260]*Id.* at 99-100.

rejected the challenge by citing the equivalency of the state and federal protections, applying the federal analytic, determining that neither a fundamental right nor a suspect class was involved, and upholding the statute under rational basis scrutiny.[261]

Many states have been willing to break free from the federal approach and the perceived need to conform their results with federal decisions.[262] State equal protection doctrine preceded by two centuries today's federal model, which originated relatively recently in what Professor Robert Williams calls "the Warren Court's brief 'egalitarian revolution.' "[263] Several states with provisions similar to Indiana's have begun to rediscover state constitutional equality guarantees.[264] Under a provision similar to Indiana's article 1, section 23, California independently applies the federal analytic, often reaching conclusions different from federal decisions.[265] Washington also has a similar provision, and we relied upon it to reject the federal intermediate scrutiny for sex classifications, in favor of a strict scrutiny/suspect class approach.[266] Similarly, Oregon modeled its equal privileges guarantee on Indiana's provision and relied on it to develop its own equal protection approach.[267] Under a general equality provision similar to Indiana's article 1, section 1, New Jersey rejected the federal two-tiered analysis and employed a balancing test that considers three factors: the nature of the right affected, the extent of the government's intrusion, and the public need for the restriction.[268]

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[261]*Id.* at 99-101.

[262]Williams, *supra* note 251, at 1197.

[263]*Id.* at 1196. Indiana has long applied a rational basis type scrutiny, but has also required that differences used to classify must be inherent, substantial, germane to the subject and purpose of the legislative classification, and must include all within the class. *See, e.g.*, School of City of Elwood v. State *ex rel.* Griffin, 203 Ind. 626, 180 N.E. 471 (1932), *overruled on other grounds,* McQuaid v. State *ex rel.* Sigler, 211 Ind. 595, 6 N.E.2d 547 (1937); Bolivar Township Bd. of Fin. v. Hawkins, 297 Ind. 171, 191 N.E.2d 158 (1934).

[264]State constitutions with provisions similar to IND. CONST. art. 1, § 23 include: ARIZ. CONST. art. 1, § 13; CAL. CONST. art. 1, § 7; IOWA CONST. art. 1, § 7; N.D. CONST. art. 1, § 20; OR. CONST. art. 1, § 20; S.D. CONST. art. 1, § 18; and WASH. CONST. art. 1, § 12.

[265]*See, e.g.*, Committee to Defend Reproductive Rights v. Meyers, 29 Cal. 3d 252, 257, 625 P.2d 779, 783, 172 Cal. Rptr. 866, 868 (1981) (taking a different view concerning abortion financing); Hardy v. Stumpf, 21 Cal. 3d 1, 7, 576 P.2d 1342, 1344, 145 Cal. Rptr. 176, 178 (1977) (finding sex to be a suspect class).

[266]Hanson v. Hutt, 83 Wash. 2d 195, 201, 517 P.2d 599, 603 (1973) (decided prior to passage of state equal rights amendment, art. 31, § 1).

[267]*See, e.g.*, Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970 (1982) (adopted federal suspect class analysis and applied it to sex classifications, but rejected other aspects of federal analytic).

[268]Greenberg v. Kimmelman, 99 N.J. 552, 564, 494 A.2d 294, 302 (1985); Right-To-Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (under art. 1, part 1 of state constitution, court used a balancing approach to assess competing government and individual interest,

Counsel seeking to frame an innovative and persuasive equal protection argument in Indiana should focus on the basic assumption underlying the present Indiana approach: that the equal privileges and immunities provision was intended to provide the same substantive protection as the fourteenth amendment. However, article 1, section 23 differs in text, origin, and focus from the fourteenth amendment.[269] Inserted into the Indiana Bill of Rights in 1851, the provision probably reflects the "Jacksonian opposition to favoritism and special treatment for the powerful."[270] Acting nine years before the Civil War and seventeen years before the Reconstruction Congress enacted the fourteenth amendment, the Indiana delegates' most likely target was prohibition of special privileges. Thus, the purpose of Indiana's provision probably differed substantially from that of the fourteenth amendment, which was concerned with discrimination against disfavored groups, such as former slaves.[271]

In developing its own equal protection approach, the Oregon Supreme Court reviewed this history and concluded that a historically based distinction exists between state equal privileges and immunities provisions and the fourteenth amendment.[272] The former prevent the enlargement of rights, while the latter forbids curtailment of rights belonging to a group or individual.[273] Of course, the question in Indiana is whether the Indiana Supreme Court will recognize this distinction and use it to develop its own equal protection analytic. The answer depends upon whether, in an appropriate case, counsel makes a well-researched and persuasive argument. As I have pointed out elsewhere, counsel has the responsibility for providing a state supreme court with the opportunity to "scrutinize older state court pronouncements to determine whether they constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid."[274]

2. The Right to Bear Arms: Article 1, Section 32.—At first glance, Indiana's right to bear arms guarantee, article 1, section 32, appears to

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and invalidated state statute restricting Medicaid funding); *see also* Carson v. Maurer, 120 N.H. 925, 931-32, 424 A.2d 825, 830-32 (1980) (under N.H. CONST. part 1, arts. 2 & 12, court invalidated state restrictions on medical malpractice claims using a reasonable classification and fair-and-substantial-relation style of analysis).

[269]*See* Williams, *supra* note 251, at 1208.

[270]*Id.* at 1207. Unlike drafters of earlier state constitutions, the 1851 delegates demonstrated their commitment to equality by outlawing slavery and involuntary servitude. IND. CONST. art. 1, § 37. *See* Williams, *supra* note 242, at 1205 (questioning commitment to equality of those who allowed slavery to continue).

[271]*See* Linde, *Without "Due Process:" Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182-83 (1970).

[272]Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 42, 653 P.2d 970, 975 (1982).

[273]*Id.*

[274]Utter, *supra* note 6, at 507.

provide a guarantee substantively identical to the second amendment right.[275] However, because article 1, section 32 contains the phrase "for the defense of themselves and the State," and the second amendment does not, the state provision appears to provide a broader protection. A case now wending its way through Indiana's appellate process provides an excellent illustration of the significance of this textual difference.

In *Kellogg v. City of Gary*,[276] citizens of Gary, Indiana, sought a state court injunction and damages from city officials for an alleged violation of their right to bear arms. In an effort to control the number of handguns on the streets of Gary, the Mayor of Gary and the Chief of Police had adopted a policy of no longer distributing handgun permit applications from the Chief's office.[277] The plaintiffs claimed this policy violated their right to bear arms because, under state statute, citizens of Gary could not obtain the application forms elsewhere.[278] The trial court and the jury agreed.[279] Although the city's appeal of the jury's damage award raises a number of interesting issues,[280] what concerns us here are the state and federal right to bear arms arguments.

The facts of *Kellogg* highlight the narrowness of the second amendment's effect and scope. Because the federal Bill of Rights does not apply in and of itself to the states, the second amendment may not offer Gary citizens any protection at all.[281] In *Quilici v. Village of Morton Grove*,[282] the Seventh Circuit concluded that the second amend-

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[275]IND. CONST. art. 1, § 32 provides that "[t]he people shall have the right to bear arms; for the defense of themselves and the State." U.S. CONST. amend. II provides that "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[276]No. 380-163 (Lake Superior Court, Civ. Div., April 6, 1983).

[277]Motley v. Kellogg, 409 N.E.2d 1207, 1209 (Ind. Ct. App. 1980).

[278]*Id.* at 1208-09.

[279]Initially the trial court issued a preliminary injunction in the plaintiffs' favor, which was affirmed on appeal. *Id.* After the initial appeal, a jury verdict awarded the plaintiffs over $200,000 in compensatory damages and $440,000 in punitive damages. Brief for Appellant at 5-10, City of Gary v. Kellogg, No. 3-983 A291 (Ind. Ct. App. filed Sept. 10, 1983).

[280]The City's appeal of the damage award has not yet been decided. City of Gary v. Kellogg, No. 3-983 A291 (Ind. Ct. App. filed Sept. 10, 1983). Issues awaiting resolution include: whether a 28 U.S.C. § 1983 suit lies for a violation of a state right; whether any federal right was violated; whether the Indiana Tort Claims Act recognizes an action of this type; and whether the defendants have absolute or qualified immunity from suit. Brief for Appellants at 2-5.

[281]Although the Supreme Court has not recently ruled on the issue, several older cases cast serious doubt on whether the Court will incorporate the federal right to bear arms as a fourteenth amendment due process requirement. *See* Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding that the second amendment applied only to actions by the federal government); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[282]695 F.2d 261 (7th Cir. 1982).

ment does not affect city ordinances regulating or even prohibiting handgun ownership.[283] Even if the federal guarantee applies, the Supreme Court has held that the second amendment embraces only those arms necessary to maintain a well regulated militia.[284] This conclusion led the Seventh Circuit to reject a claim similar to that in *Kellogg*, and to hold that the second amendment does not guarantee the right to keep and bear handguns.[285]

Because Indiana's provision explicitly recognizes an individual right to bear arms, the *Kellogg* plaintiffs have a greater chance of prevailing under the state constitution.[286] In *State v. Kessler*,[287] the Oregon Supreme Court relied on Oregon's right to bear arms, which is identical to Indiana's,[288] and invalidated a statute that made possession of a "slugging weapon" a criminal offense.[289] After tracing the history and underlying rationale of Indiana's right to bear arms provision, the Oregon court concluded that unlike the federal analog, the state provision provided an individual the right to possess arms for personal defense.[290] In *Kellogg*, counsel on both sides rely on Oregon's analysis in *Kessler*. In their briefs, counsel for both parties have framed excellent state constitutional arguments in support of their positions, making good use of each building block discussed earlier in this Article.[291] How the Indiana courts decide

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[283]*Id.* at 270.

[284]United States v. Miller, 307 U.S. 174, 178 (1938); *see* Lewis v. United States, 445 U.S. 55 (1980) (citing the *Miller* holding with approval).

[285]*Quilici*, 695 F.2d at 270-71 (holding that a Morton Grove, Illinois, ordinance prohibiting the possession of handguns did not violate the Illinois or the federal Constitutions).

[286]Plaintiffs obviously reached the same conclusion because up until this latest appeal, they explicitly based their right-to-bear arms claim on the Indiana Constitution, rather than on the second amendment. Amicus Curiae Brief of National Rifle Association & Indiana Sportmen's Council at 70, City of Gary v. Kellogg (Ind. Ct. App. filed Sept. 10, 1983) (No. 3-983 A291). Nonetheless, plaintiffs argued on appeal that if presented with the issue, the United States Supreme Court would be "compelled" to incorporate the second amendment into the fourteenth and hold that the city policy violated federally guaranteed rights. *Id.* at 71-80.

[287]289 Or. 359, 614 P.2d 94 (1980).

[288]Oregon's guarantee combines Indiana's art. 1, §§ 32 and 33 into one section, providing that "[t]he people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. 1, § 27; IND. CONST. art. 1, §§ 32, 33.

[289]*Kessler*, 289 Or. at 369, 614 P.2d at 99-100.

[290]However, this is not an unrestricted right to carry or use personal weapons in all circumstances. *Id.* at 369, 614 P.2d at 95-99.

[291]*See* Amicus Curiae Brief for National Rifle Association & Indiana Sportmen's Council at 6-29, City of Gary v. Kellogg (Ind. Ct. App. filed Sept. 10, 1983) (No. 3-983 A291). Appellants at A1-11, City of Gary v. Kellogg (Ind. Ct. App. filed Sept. 10, 1983) (No. 3-983 A291).

Kellogg may have far reaching effects both inside and outside Indiana.[292] Yet, regardless of which party prevails, *Kellogg* vividly demonstrates that state constitutional provisions, even those with substantive federal analogs, offer counsel and courts the opportunity to develop independent state constitutional law.

C. Textual Analogs: Article 1, Section 11

As noted earlier, framing a persuasive independent state argument becomes most difficult when the state provision contains text identical to its federal analog. Due to the great number of criminal law cases and the similarity between state and federal constitutional protections for those accused of a crime, criminal law cases have become "the crucible where the development of a body of state constitutional law is most heatedly disputed and resisted."[293] Perhaps the most public and most controversial are the state and federal protections against unreasonable search and seizure. Like Indiana's article 1, section 11, many state search and seizure provisions contain language identical to the federal fourth amendment.[294] Regardless of whether a state provision employs identical text, state courts have equal responsibility for independently interpreting their state constitutions. Resort to some simple fact patterns provides an opportunity to compare the approaches adopted by various state courts.

Suppose the police get an anonymous tip that a certain individual is involved in drug trafficking. Based on this tip, the police approach the phone company, which agrees to place a pen register (a device that records the numbers dialed) on the phone and to turn over the suspect's long distance call records. As a result of information gleaned from the phone records, the police arrest the suspected individual, who moves at the beginning of his trial to suppress the pen register and toll call records. What result?

Under the federal Constitution the suppression motion would be denied. In *Smith v. Maryland*,[295] the Supreme Court held that the fourth amendment does not prohibit installation of pen registers on personal

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[292]Plaintiffs argued that the Indiana right to bear arms is a fundamental right, the infringement of which is actionable under both the remedy guaranty in IND. CONST. art 1, § 12 and 28 U.S.C. § 1983. *See* Amicus Curiae Brief of National Rifle Association & Indiana Sportmen's Council at 36, City of Gary v. Kellogg, No. 3-983 A291 (Ind. Ct. App. filed Sept. 10, 1983); Brief of Appellees at 29-31, 65, City of Gary v. Kellogg, No. 3-983 A291 (Ind. Ct. App. filed Sept. 10, 1983). If Indiana courts agree, state constitutional rights litigation will increase significantly.

[293]Abrahamson, *supra* note 26, at 1144.

[294]*See e.g.*, ARK. CONST. art. II, § 15; MONT. CONST. art. III, § 7; N.D. CONST. art. I, § 18; W. VA. CONST. art. III, § 6; WIS. CONST. art. III, § 11.

[295]442 U.S. 735 (1979).

telephone lines without a warrant or court order.[296] The Court's rationale emphasized that telephone users voluntarily convey phone numbers to the phone company and therefore no longer have any legitimate expectation of privacy in the information.[297] While no case has provided the right opportunity, the Indiana Supreme Court has indicated that it agrees with the federal "no expectation of privacy" rationale.[298]

One rather doubts that the framers of any of the state constitutions intended to tie the state guarantee against unreasonable search and seizure to a federal analytic developed a century later. Even if we accept that to be the case, the framers would certainly expect a state court to make its own independent determination of the inherently subjective choice involved in deciding whether an individual has a legitimate expectation of privacy which society is willing to recognize. Several state courts have rejected the Supreme Court's subjective choice, for one of their own choosing. For example, in *People v. Sporleder*,[299] the Colorado Supreme Court expressed its conviction that "merely because the telephone subscriber has surrendered some degree of privacy for a limited purpose to those with whom she is doing business does not render the subscriber 'fair game for unrestrained police scrutiny' by virtue of that fact."[300] The court did not reach its conclusion on the basis of different constitutional text; Colorado's article II, section 7 is "substantially similar" to the fourth amendment.[301] Rather, after finding the Supreme Court's reasoning unpersuasive,[302] the Colorado court fulfilled its responsibility by acting on its own well-reasoned conclusion.

Often, conformity of state and federal decisions in the search and seizure area results from a perceived need for uniformity in the criminal enforcement arena.[303] The need for conformity rationale does have some merit.[304] The Oregon Supreme Court, which has a reputation for in-

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[296]*Id.* at 742.

[297]*Id.* at 742-43.

[298]*In re* Order for Indiana Bell Tel. Co. to Disclose Records, 274 Ind. 131, 133, 409 N.E.2d 1089, 1090 (1980) (quoting *Smith* with approval in rejecting Phone Company's first amendment challenge to a subpeona duces tecum, ordering it to turn over long distance phone records to the police).

[299]666 P.2d 135 (Colo. 1983).

[300]*Id.* at 142 (quoting 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.7, at 408 (1978)).

[301]*Id.*

[302]*Id.* at 142-43 n.6. The Colorado court noted the Indiana case on the issue, but found its reasoning equally unpersuasive. *Id.*

[303]*See, e.g.*, People v. Corr, 682 P.2d 20, 33 (Colo. 1984) (Erickson, C.J., dissenting) *cert. denied*, 469 U.S. 855 (1984) (need for state officers to be able to rely on federal interpretations in criminal area); State v. Ringer, 100 Wash. 2d 688, 703, 674 P.2d 1240, 1250 (1983) (Dimmick, J., dissenting) (independent interpretation in criminal area will confound the police); Maltz, *supra* note 107, at 1005; Simon, *supra* note 57, at 318-19 & n.113.

[304]*See* Comment, *supra* note 32, at 518-19 n.72.

dependent decisionmaking, believes that a uniform set of simple *Miranda*-style warnings is required.[305] Nevertheless, the very nature of federalism means that the scope of individual rights will vary from state to state. As the New York Court of Appeals recently observed, "[t]he interest of Federal-State uniformity, however, is simply one consideration to be balanced against other considerations that may argue for a different state rule. When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor."[306] Comparison of the recent application of federal and state exclusionary rules illustrates New York's point.

Let us assume that your client has been arrested as a result of evidence discovered pursuant to a search under warrant. A neutral magistrate issued the warrant based on a police officer's affidavit that included the following: for unknown reasons, a police informant concluded your client dealt drugs; a person previously arrested for drug possession was seen at your client's gas station; after viewing unspecified suspicious activity at the station, a detective, with an unknown level of expertise and experience, concludes that your client is dealing drugs. At trial you move to suppress the evidence. The trial court finds the warrant issued without probable cause, but refuses to suppress because the police officer acted in objectively reasonable belief that the warrant was valid. You appeal. What result?[307]

Under the fourth amendment, the evidence need not be suppressed. This fact pattern fits squarely into the Supreme Court's good faith exception adopted in *United States v. Leon*.[308] The Court's rationale for creating the good faith exception was that the only purpose of the exclusionary rule, deterrence of police misconduct, cannot be served by excluding evidence when officers have a good faith belief in the constitutionality of their actions.[309] Under state law, results will differ. Arizona, for example, often follows an independent path in construing the scope of its search and seizure rule. It adopted the good faith exception, however, because it believed that "one of the few things worse than a single exclusionary rule is two different exclusionary rules."[310] Here in Indiana, the court of appeals explicitly adopted the good faith

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[305]State v. Sparklin, 296 Or. 85, 672 P.2d 1182, 1184 (1983) (refusing to adopt different warnings under state constitution).

[306]People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986).

[307]This identical fact pattern occurred in a recent New Jersey case, in which the court refused to adopt the good faith exception under the state constitution. State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987).

[308]468 U.S. 897 (1984).

[309]*Id.* at 906-08.

[310]State v. Bolt, 142 Ariz. 260, 268, 689 P.2d 519, 527 (1984).

exception on the grounds that the Indiana rule has historical ties to its federal counterpart, the identity of constitutional text, and no compelling reason existed to reject *Leon*.[311] Although the Indiana Supreme Court has applied the exception in dicta, it did so in the fourth amendment context because the defendant did not raise or argue the state constitutional issue.[312] As a result, the good faith issue remains open in Indiana.

Counsel preparing to challenge the exception on state constitutional grounds will find the approach adopted in Washington and New Jersey applicable to the Indiana experience. Both Indiana and Washington adopted state exclusionary rules[313] six decades before the Supreme Court applied the federal rule against the states in *Mapp v. Ohio*.[314] In *State v. White*,[315] the Washington Supreme Court rejected the good faith concept and the deterrence rationale on which it is based. We found them inconsistent with the state constitution's broad privacy protection, with over forty years worth of independent state exclusionary rule jurisprudence, and with federal exclusionary rule jurisprudence.[316] While Indiana's article 1, section 11 text differs substantially from Washington's privacy protection, Indiana's independent exclusionary rule jurisprudence reflects the same influences as Washington's[317] and provides persuasive support for counsel's argument. For example, how does one square a good faith exception with the Indiana Supreme Court's stated belief that "[i]f the search warrant under which . . . officers searched [a defendant's] premises is invalid for any reason, the evidence must be excluded."[318] Review of Indiana's exclusionary rule development may lead counsel and the courts to reach the same conclusion as the Oregon and Washington Supreme Courts: the state exclusionary rule's essential purpose is to protect personal constitutional rights by affording a remedy for the

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[311]Mers v. State, 482 N.E.2d 778, 783 (Ind. Ct. App. 1985).

[312]Blalock v. State, 483 N.E.2d 439, 444 (Ind. 1985) (court held that affidavit was sufficient to establish probable cause under fourth amendment, but remarked in dicta that the *Leon* good faith exception would render the evidence seized admissible).

[313]*See* Callender v. State, 193 Ind. 91, 138 N.E.2d 817 (1922); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

[314]367 U.S. 643 (1961).

[315]97 Wash. 2d 92, 640 P.2d 1061 (1982).

[316]*Id.* at 110-12, 640 P.2d 1071-72.

[317]For an in depth discussion of Washington's independent exclusionary rule, see Comment, *supra* note 77. Indiana case law parallels Washington's. *Compare* the cases cited in *id. with* Bumen v. State, 203 Ind. 237, 179 N.E. 716 (1932); Mata v. State, 203 Ind. 291, 179 N.E. 916 (1932); Wallace v. State, 199 Ind. 317, 157 N.E. 657 (1927); Flum v. State, 193 Ind. 585, 141 N.E. 353 (1923); Callender v. State, 193 Ind. 91, 138 N.E. 817 (1923).

[318]Bumen v. State, 203 Ind. 237, 239, 179 N.E. 716, 717 (1932). Another interesting question would be if an officer's good faith provides immunity to a tort action, then does not the good faith exception deprive the defendant of all possible remedies for the violation of his rights in derogation of IND. CONST. art. 1, § 12.

violation of those rights, the protection of which may result in deterrence, but only as an incidental by-product.[319]

As for other compelling reasons to reject the good faith exception, the New Jersey Supreme Court's decision in *State v. Novembrino*[320] offers counsel a host of persuasive arguments. Even though New Jersey had no state exclusionary rule prior to *Mapp*, the New Jersey Supreme Court relied on the state constitution because twenty-five years of exclusionary rule application imbedded the rule in state constitutional jurisprudence.[321] In addition, the court concluded that the *Leon* decision will undermine police motivation to comply with the constitutional requirement of probable cause.[322] The state interest in preventing the ultimate reduction in respect for, and compliance with, the probable cause standard outweighed the perceived need to maintain federal-state uniformity with regard to the exclusionary rule.[323]

The criminal law offers state courts greater opportunity to decide both state and federal constitutional issues. While several other state courts have agreed with Colorado's rejection of the *Smith v. Maryland* pen register rule,[324] others adopt the federal approach.[325] State courts have divided over the appropriateness of the *Leon* good faith exception.[326] The issue, of course, is not the particular result reached. Rather, state courts should be judged on whether they have created a principled body of state law based on their own independent analysis and interpretation. The importance of counsel's role in the creation of that body of law cannot be overstated.

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[319]State v. Davis, 295 Or. 227, 235, 666 P.2d 802, 806-07 (1983); State v. White, 97 Wash. 2d 92, 108-12, 640 P.2d 1061, 1070-72 (1982); Comment, *supra* note 77, at 496-515.

[320]105 N.J. 95, 519 A.2d 820 (1987).

[321]519 A.2d at 856.

[322]519 A.2d at 854 (citing 1 W. LaFave, Search and Seizure, § 1.2, at 20 (1986 Pocket Part)).

[323]*Id.*

[324]*See, e.g.*, State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).

[325]*See, e.g.*, Hasteter v. Behan, 196 Mont. 280, 639 P.2d 510 (1982); People v. Guerra, 116 Misc. 2d 272, 455 N.Y.S.2d 713 (N.Y. Sup. Ct. 1982).

[326]Examples of courts choosing to follow *Leon* include: McFarland v. State, 284 Ark. 533, 684 S.W.2d 233 (1985); State v. Sweeney, 701 S.W.2d 420 (Mo. 1985) (dictum); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984). Courts rejecting the *Leon* approach include: Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985); People v. Sundling, 153 Mich. App. 277, 395 N.W.2d 306 (1986); People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 548, 497 N.Y.S.2d 630 (1985); State v. Grawien, 123 Wis. 2d 428, 367 N.W.2d 816 (Ct. App. 1985). *See also* Stringer v. State, 491 So. 2d 837 (Miss. 1985) (Robertson, J., concurring).

VII. Conclusion

The structural integrity of our federal system depends upon state constitutions and state courts providing an independent guaranty of individual rights. While the system's state constitutional component was in danger of being overwhelmed by its national counterpart, the danger has subsided with the recent rediscovery of the rich heritage and unique protections offered by our state constitutions. The trend towards development of a principled body of state constitutional law needs nurturing if it is to continue to spread and mature. Each component of a state's legal system—state bar, law schools, and judiciary—bears a measure of responsibility for breathing life into a state constitution.

Practitioners, students, and law faculty each have a unique role to play in the rebirthing process. Due to the low level of state civil rights litigation, especially here in the Midwest, counsel must assume the role of catalyst, presenting well-researched and persuasive arguments on behalf of state constitutional protection for their client's rights. Law students and faculty must also serve as catalysts by fostering change in the content of our constitutional law and individual rights courses to include significant discussion of the history, scope, and meaning of their state constitution. Better academic preparation will assist lawyers in meeting their responsibility to familiarize themselves with the techniques being developed to frame persuasive state constitutional arguments.

Once presented with a squarely-raised and well-argued state constitutional claim, state judges become the key actors in the rebirthing process. They must acknowledge their power to independently interpret and apply their state constitutions. Having done so, state courts will develop a principled decisionmaking process for interpreting the historical mandates contained in their state bill of rights. Explanations will then be offered for why a state court finds the United States Supreme Court's interpretations of federal analogs persuasive or unconvincing and how the state courts will treat future variations in federal doctrine. Once a state court begins to develop an independent jurisprudence, practitioners, students, and faculty must provide scholarly analysis and commentary, which should closely scrutinize the court's interpretations of the state constitution.

As lawyers, students, and faculty take their roles seriously, each can significantly influence the direction and development of a principled body of state constitutional jurisprudence. Limitless opportunities exist for reevaluating the validity of old assumptions and for developing new analytics to solve the difficult constitutional problems facing state courts.