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# The New Judicial Federalism in Ohio: The First Decade

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# THE NEW JUDICIAL FEDERALISM IN OHIO: THE FIRST DECADE[1]

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## I. INTRODUCTION

I am pleased to have this opportunity to return to my consideration of the Ohio Constitution.[3] Cleveland-Marshall College of Law and the *Law Review* should be commended for taking the Ohio Constitution seriously.[4] This Law School, through the work of Professor Steve Werber, has already made a major contribution to state constitutional law through the analysis of Ohio's controversial tort reform confrontation between the Ohio Supreme Court and the Ohio Legislature.[5] As Professor Richard Kay of the University of Connecticut School of Law has observed:

> The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope....It is also true, however, that this broadening of interest need not be accompanied by

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[1]This is an expanded version of a presentation made at Cleveland-Marshall College of Law at a program entitled "The Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of Its Bicentennial," on Friday, April 25, 2003.

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[3]Robert F. Williams, *Introduction: State Constitutional Law in Ohio and in the Nation*, 16 U. TOL. L. REV. 391 (1985).

[4]*See* Robert C. Welsh & Ronald K.L. Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.-Oct. 1981, at 6.

[5]Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539 (1997); Stephen J. Werber, *Ohio Tort Reform versus the Ohio Constitution*, 69 TEMPLE L. REV. 1155 (1996); Stephen J. Werber, *Ohio: A Microcosm of Tort Reform versus State Constitutional Mandates*, 32 RUTGERS L.J. 1045 (2000).

> an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.[6]

State constitutions have far-reaching importance on questions of how we govern ourselves, and have major consequences for state citizens beyond the area of rights protections.[7] Despite this fact, it is in the area of rights that state constitutional law has received the most attention. The renewed interest in state constitutional rights, referred to as the New Judicial Federalism (NJF), dates from the early 1970s.[8] The NJF describes the process in which state courts[9] interpret their state constitutions to provide rights beyond the national minimum ("federal floor") of rights recognized by the U.S. Supreme Court interpreting the federal constitution. This development was referred to by Justice William J. Brennan, Jr. as "probably the most important development in constitutional jurisprudence of our times."[10] Jon Teaford has recently argued that the NJF is an important element in the late twentieth-century rise in importance of state government.[11] Another scholar noted that "[w]ith the power to

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[6]Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667, 667 (1984) (paragraph break omitted).

[7]*See generally* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U.L. REV. 189 (2002)[hereinafter *Brennan Lecture*]; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

[8]*See generally* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996). Dr. G. Alan Tarr has argued that prior to the beginning of the 1970s, the conditions were not right for the development of an expansive state constitutional rights jurisprudence. He noted:

> Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated — and to some extent actual — retreat from the Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decade had laid the foundation for the development of state civil liberties law. Paradoxically, then, the activism of the Warren Court, which has been often portrayed as detrimental to federalism, was a necessary condition for the emergence of vigorous state involvement in protecting civil liberties.

G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1111-12 (1997) (paragraph break omitted).

[9]Federal courts, of course, may be faced with state constitutional questions under their supplemental jurisdiction. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982); Robert A. Shapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

[10]Justice William J. Brennan, Jr., Special Supplement, *State Constitutional Law*, NAT'L L.J., Sept. 29, 1986, at S1; *accord* Justice William J. Brennan, Jr., *Symposium on the Revolution in State Constitutional Law—Foreword*, 13 VT. L. REV. 11, 11 (1988) (calling the movement "the most significant development in American constitutional jurisprudence today"); Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[11]JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 208-16 (2002). *See also* LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS 1 (2002):

resolve the vast proportion of the nation's legal disputes, and with recent shifts in federal-state relations, the ability of state courts to affect the distribution of wealth and power in the United States is at its zenith."[12]

## II. THE NEW JUDICIAL FEDERALISM IN OHIO

Despite its beginnings in the early 1970s, and its recognition by almost all states in one case or another by the 1980s, Ohio was quite a latecomer.[13] One explanation for this is that there are substantial legitimacy questions that have been raised concerning state courts' willingness to "disagree" with the U.S. Supreme Court.[14] As noted by Alan Tarr:

> For federal constitutional law, the primary legitimacy concern has involved the relation between the United States Supreme Court and other purportedly more democratic branches, such as Congress or state legislatures. For state constitutional law, in contrast, the major legitimacy concern has involved the relation between state courts and the U.S. Supreme Court: when can a state court interpret its state guarantees to reach a result different from that obtained by the Supreme Court interpreting the Federal Constitution?[15]

For whatever reasons, and there are no doubt others, Ohio did not embrace the NJF until only a decade ago, in the 1993 case of *Arnold v. City of Cleveland*.[16] *Arnold* has become the standard citation supporting the independent force of the Ohio Constitution.

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> Increasingly judges on these state courts of last resort are called upon to determine the constitutional fate of state legislation across a range of policy. As a result, many policies governing the daily lives of citizens are resolved by the votes of state supreme court justices; these actors often become the final arbiters of state public policy.

[12]Melinda Gann Hall, *State Judicial Politics: Rules, Structures, and the Political Game*, *in* AMERICAN STATE AND LOCAL POLITICS 114-15 (Ronald E. Weber & Paul Brace eds., 1999).

[13]Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984). For more recent literature on the Ohio Supreme Court, see Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455 (2002); Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002). *See generally* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988).

[14]*See generally* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984) [hereinafter *In the Supreme Court's Shadow*]; Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997) [hereinafter *In the Glare of the Supreme Court*].

[15]G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 853 (1991). *See also* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 175 (1998).

[16]Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

### A. Thrill of Discovery

The development of the NJF nationally has been characterized by three distinct stages.[17] The first is the "thrill of discovery" stage, most often characterized by a single breakthrough or "teaching opinion"[18] which declares the state constitution to be an independent force, and serves as a wake-up call to the bench, bar, legal academy, and media. The second stage, experienced in many states, is a "backlash" against this independent approach to the state constitution, which often results in the recognition of rights, often for criminal defendants, beyond the national minimum standards established by the U.S. Supreme Court.[19] Next, in the third stage, state courts settled down to the long hard task of actually developing understandable doctrines of judicial interpretation under the state constitution's various provisions.[20] Finally, a fourth stage that as of now is only an ideal, would reflect a true dialogue between federal and state judges, as well as academic commentators on constitutional theory, concerning the content of rights protection as a shared enterprise between federal and state constitutional law.[21]

Professor Paul Kahn argued that state courts and federal courts should work together, using both state constitutions and the U.S Constitution to pursue the "common enterprise" of providing interpretive answers to great constitutional questions.[22] Professor Lawrence Friedman has elaborated the elements and benefits of a true constitutional dialogue between state courts and the U.S. Supreme Court on shared constitutional issues.[23] Professor Friedman has argued that insofar as the NJF reflects attempts by state courts independently to interpret the meaning of cognate textual provisions, its legitimacy is buoyed by the federal constitutional value of dialogue—that is, the value that attaches to discourse about law and governance that occurs between and among the different organs of the federal and state governments.[24]

Still, it must be remembered that each state constitution has its own text. The textual focus is an important way to distinguish the interpretation of a state constitution from the U.S. Supreme Court's interpretations of the federal constitution.

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[17]Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003).

[18]*Id*. at 213; *see* Williams, *In the Glare of the Supreme Court*, *supra* note 14, at 1019 (describing a "teaching opinion" as "alerting the bar and bench to the possibilities of independent state constitutional analysis and educating them in the techniques of making state constitutional arguments").

[19]Williams, *supra* note 17, at 215.

[20]*Id*. at 219. *But see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

[21]Williams, *supra* note 17, at 223.

[22]Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1168 (1993).

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

[24]*Id.* at 97.

As noted above, the NJF burst on the scene in Ohio in the 1993 decision in *Arnold v. City of Cleveland.*[25] This was a challenge to the City of Cleveland's ban on assault weapons. The Ohio Supreme Court emphasized the differing language under the Ohio Constitution in comparison to the federal Second Amendment. Article I, Section 4 of the Ohio Constitution provides:

> The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.[26]

The emphasis on textual differences between the federal and state constitutions has been one of the earliest and most persuasive features of the NJF. Alan Tarr has pointed out the appeal of textualism, in addition to historical analysis, as a method to support a state constitutional decision going beyond federal constitutional minimum standards.[27]

A second very influential element of state constitutional interpretation in the NJF has been reliance on the history of the provision being interpreted.[28] In *Arnold* the Ohio Supreme Court noted, however, that both the 1802 and 1851 versions of the Right to Bear Arms Clause were adopted without debate in those respective constitutional conventions.[29]

The Ohio Supreme Court acknowledged that it had not until then been a participant in the NJF, cited the article that declared its performance "a failure,"[30] and issued its Declaration of Ohio State Constitutional Independence:

> In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection

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[25]67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

[26]OHIO CONST. art. I, § 4.

[27]Tarr, *supra* note 15, at 847-48 ("[E]ven when state and federal constitutions contained analogous provisions, the language of the provisions often differed; and where these textual differences were substantial, they seemed to call for independent interpretation. This was especially true when it could be shown that the textual differences reflected a distinctive historical experience or were designed to incorporate a particular perspective."); *see also* Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 400 (1988) ("The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds."); Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1584-85, 1607-08, 1610 (1990).

[28]Tarr, *supra* note 15, at 848 ("[I]f a divergent interpretation may be justified by reference to the distinctive origins or purpose of a provision, then state jurists must pay particular attention to the intent of the framers and to the historical circumstances out of which the constitutional provisions arose.").

[29]67 Ohio St. 3d at 43, 616 N.E.2d at 169.

[30]*Id.* at 42 n.8, 616 N.E.2d at 168 n.8.

> as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.[31]

The court went on, however, to note that no rights are unlimited, and that the state's police power always has to be considered a counter force to assertions of rights. On this basis, it concluded that Cleveland's specific ban on assault weapons was reasonable under the circumstances and would be upheld.[32]

### *B. NJF Methodology*

After *Arnold*, questions arose in Ohio, as they have in all states that embark on the NJF, as to what techniques and methodology the court should use when interpreting state constitutional rights guarantees, which of those rights should be construed more expansively than their federal analogues, and under what circumstances would such an outcome be appropriate. This article now turns to some preliminary observations on these matters, without purporting to be an exhaustive analysis of Ohio's state constitutional rights decisions of the last decade.

I have referred to U.S. Supreme Court decisions denying rights claims as the "middle" of American constitutional litigation,[33] and expansive state court decisions after the Supreme Court's rejection of similar federal constitutional claims as "second looks" at constitutional issues.[34] This is no longer, as noted above, a recent phenomenon. One commentator noted bluntly almost twenty years ago: "The 'new federalism' isn't new anymore."[35] But it is not the absence of judicial *activism* that should be criticized. Rather, it is the Ohio courts' apparent failure, until recently, seriously to consider state constitutional claims, regardless of the ultimate outcome, that merits criticism. Win or lose, state constitutional arguments must still be considered and analyzed.

In a 1997 decision, *State v. Robinette*,[36] the Ohio Supreme Court considered whether, as a matter of state constitutional search and seizure law, a police officer must inform a person that he is "free to go" after a valid traffic stop. The court had earlier concluded in the same litigation that, under *both* the federal and state constitutions, such a statement had to be given.[37] The court's opinion did not contain a "plain statement" that its decision was based on an adequate and independent state

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[31]*Id*. at 42, 616 N.E.2d at 168-69. *See also* State *ex rel.* Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation, 97 Ohio St. 3d 504, 514, 780 N.E.2d 981, 991-92 (2002) (declaring in a search and seizure case that Ohio's constitution is a "document of independent force").

[32]67 Ohio St. 3d at 44-49, 616 N.E.2d at 170-73.

[33]Williams, *In the Supreme Court's Shadow*, *supra* note 14, at 360.

[34]*Id*. at 361.

[35]Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi (1984); Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5 (1989).

[36]80 Ohio St. 3d 234, 685 N.E.2d 762 (1997).

[37]State v. Robinette, 73 Ohio St. 3d 650, 653 N.E.2d 695 (1995).

law ground, as required by the U.S. Supreme Court in *Michigan v. Long*.[38] There, the U.S. Supreme Court had stated:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[39]

In *Robinette*, therefore, the U.S. Supreme Court was able to accept the case for review and reversed on the federal constitutional ground, remanding the case to the Ohio Supreme Court.[40]

The procedural history of *Robinette* provides a perfect illustration of Justice Stevens's objections to the *Michigan v. Long* approach. In dissenting from that decision, Justice Stevens had criticized the majority for adopting a presumption of U.S. Supreme Court jurisdiction:

> These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected" the citizen. Such cases should not be of inherent concern to this Court.
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[38]463 U.S. 1032 (1983). A survey of over 500 decisions, from all 50 states, between the time of the *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfield, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988). *See generally* Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TULANE L. REV. 379 (1988); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts,* 63 TEX. L. REV. 977 (1985); Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371 (1991).

[39]463 U.S. at 1040-41.

[40]Ohio v. Robinette, 519 U.S. 33 (1996).

> Until recently we had virtually no interest in cases of this type....Some time during the past decade...our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future Court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction.[41]

Three years later, Justice Stevens continued his critique in *Delaware v. Van Arsdale*:[42]

> Even if the Court is unconcerned by the waste inherent in review of such cases, even if it is unmoved by the incongruity between the wholly precatory nature of our pronouncements on such occasions and Art. III's prohibition of advisory opinions, it should be concerned by the inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful, conscientious application of this Court's expositions of federal law. Less obvious is the impact on mutual trust when the state court on remand—*perhaps out of misplaced sense of duty*—confines its state constitution to the boundaries marked by this Court for the Federal Constitution.[43]

Justice Stevens went on to suggest that state courts follow the primacy or "first-things-first" approach, rather than the interstitial approach, as a way of clearly differentiating their state constitutional from federal constitutional analysis.[44]

In any event, on remand the Ohio Supreme Court reconsidered its earlier conclusion that the state constitution (in addition to the federal constitution) required a "free to go" statement by law enforcement officials after a valid traffic stop. The court, noting the identical state and federal constitutional texts, and relying on earlier decisions, decided to adopt the U.S. Supreme Court's view of the Fourth Amendment as the authoritative judicial interpretation of the state constitutional search and seizure clause. The court relied specifically on its 1981 decision *State v. Geraldo*, where it had stated:

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

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[41]*Michigan v. Long*, 463 U.S. at 1067-68, 1069-70 (Stevens, J., dissenting) (paragraph break omitted).

[42]475 U.S. 673 (1986).

[43]*Id*. at 699 (Stevens, J., dissenting) (emphasis added) (paragraph break omitted).

[44]*Id*. at 701-07 (Stevens, J., dissenting). For a description of the primacy approach, see Williams, *In the Glare of the Supreme Court*, *supra* note 14, at 1018.

> the conclusion that his rights under Section 14, Article I of the Ohio Constitution have not been violated either.[45]

The court noted the need for uniformity in this area of criminal procedure, and noted that in the future, in the absence of "persuasive reasons to find otherwise," it would follow the U.S. Supreme Court's interpretations of the Fourth Amendment as a matter of Ohio constitutional law.[46] The Ohio Supreme Court seems to have adopted the "interstitial"[47] approach to the NJF, stating that after the federal Bill of Rights was made applicable to the states, "the United States Constitution became the primary mechanism to safeguard an individual's rights."[48] Under the interstitial approach, a state court looks first to the federal constitution and only if the rights claimant does not prevail on that claim does the court reach the state constitutional claim, relying on the state constitution to fill in gaps in federal constitutional protections.[49]

The decision by the Ohio Supreme Court in *Robinette* could be seen as an example of Justice Stevens's warning about the "misplaced sense of duty" that state courts might feel after the U.S. Supreme Court made its ruling in a case based on both the state and federal constitutions. On the other hand, *Robinette* can also be seen as an example of "reflective adoptionism," as described by Dr. Barry Latzer:

> It is illogical, the argument runs, to retract state constitutional rights simply because the Supreme Court has not found those rights in the U.S. Constitution. This argument is quite persuasive if the premise of unreflective adoptionism is correct. However, if the state courts are not merely presuming that state and federal law are alike, but are coming to this conclusion after independent evaluation of the meaning of the state provision, then the critique collapses. There is nothing improper in concluding that the Supreme Court's construction of similar text is sound. Adoptionism is not per se unjustifiable.[50]

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[45]80 Ohio St. 3d at 239, 685 N.E.2d at 767 (citing State v. Geraldo, 68 Ohio St. 2d 120, 126, 429 N.E.2d 141, 146 (1981)). *See also* State v. Andrews, 57 Ohio St. 3d 86, 87 n.1, 565 N.E.2d 1271, 1273 n.1 (1991).

[46]80 Ohio St. 3d at 239, 685 N.E.2d at 767. The court cited two cases for the proposition that it had applied the "persuasive reasons" approach to several other provisions. *Id*. at 238, 685 N.E.2d at 766. *See* Eastwood Mall, Inc. v. Slanco, 68 Ohio St. 3d 221, 222-23, 626 N.E.2d 59, 60 (1994); State v. Gustafson, 76 Ohio St. 3d 425, 432, 668 N.E.2d 435, 441 (1996). In fact, although both of these cases interpret the Ohio Constitution coextensively with the federal Constitution, neither of them mentions the "persuasive reasons" approach.

[47]Williams, *In the Glare of the Supreme Court, supra* note 14, at 1018.

[48]80 Ohio St. 3d at 237, 685 N.E.2d at 766.

[49]*See*, *e.g.*, Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 708 (1983) ("The challenge is to develop a jurisprudence of state constitutional law, a jurisprudence that will make more predictable the recourse to and the results of state constitutional law analysis."); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1326, 1361 (1982).

[50]Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991) (paragraph break omitted).

Dr. Latzer also noted that "law ambiguity...refers to cases in which the state court fails to make clear, in its judicial opinion, whether the decision was based on an interpretation of the U.S. Constitution, the State Constitution or both."[51] He concluded:

> Even law-ambiguity may be viewed as a mark of caution: perhaps the failure to "commit" state law to a position is a way of preserving future interpretive options, so that the court could someday say that the previous case was not construing the state constitution after all. In any event, one point is clear beyond question: state constitutional law is not just about broadening rights that the Supreme Court has narrowed.[52]

### *C. Backlash—The Criteria Approach?*

There is another important element contained in the Ohio Supreme Court's decision on remand in *Robinette.* In stating that it would follow the U.S. Supreme Court's interpretations of the Fourth Amendment when interpreting the Ohio Constitution's Search and Seizure Clause, the Ohio court seems to have been creating a "presumption of correctness" for U.S. Supreme Court decisions, at least in the area of search and seizure. While it did not define what might constitute "persuasive reasons to find otherwise," this approach can be seen as a tentative adoption of the "criteria" approach. I have described the "criteria approach" as follows:

> Under this methodology, the state supreme court...sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution. These criteria, then, are used by advocates to present, and judges to decide, claims made under the state constitution in cases where there is also a federal claim that is unlikely to prevail. On the one hand, the criteria approach is laudable because it teaches and calls attention to the nature of state constitutional arguments. On the other hand, however, I have been critical of this approach for a number of reasons that I believe have demonstrated themselves in the past fifteen years.[53]

A number of states that follow the "interstitial" approach to state constitutional rights interpretation have attempted to set forth criteria, or factors, which might be relied on by the court to justify a more expansive interpretation of a state constitutional clause despite a contrary ruling by the U.S. Supreme Court. This criteria approach, although it serves positive functions in terms of educating the lower bench and the bar, has the potential to be a substantially limiting doctrine with respect to independent state constitutional interpretation.

Although the Ohio Supreme Court does not seem to have expanded its "persuasive reasons," or tentative criteria approach, beyond the search and seizure

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[51]Barry Latzer, *Into the 90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES IN STATE CONST. L. 17, 21 (1991).

[52]*Id*. at 32.

[53]*See* Williams, *In the Glare of the Supreme Court*, *supra* note 14, at 1021-22.

area, it recently applied this approach *retroactively*. In a 2002 decision in *State v. Murrell*,[54] the court reexamined its 1992 search and seizure decision in *State v. Brown*.[55] Although *Brown* had attempted to distinguish the controlling U.S. Supreme Court interpretation of the federal Constitution, the *Murrell* court determined that the attempted distinction was based on a faulty understanding of the Supreme Court decision.[56] The court, therefore, had to decide whether to reaffirm *Brown* and interpret the Ohio Constitution's search and seizure clause more expansively than the federal constitutional requirements, on the one hand, or to overrule *Brown*, on the other hand. Determining that there were no "persuasive reasons" for diverging from federal analysis, either originally in 1992 or in 2002, the court determined to overrule *Brown*.[57]

As an aside, the Ohio Supreme Court, like most state supreme courts, did not consider whether the doctrine of *stare decisis* was any different in state constitutional law from its federal constitutional law counterpart. In other words, even though federal constitutional precedents are said to be only correctable by the U.S. Supreme Court itself because of the relative *difficulty* of amending the federal Constitution, state constitutional precedents might not be considered in the same light because of the relative *ease* of amending state constitutions.[58]

It is also important to note that in the search and seizure context, courts rarely have to consider the constitutionality of a *statute*.[59] It is, rather, the actions of *executive branch* law enforcement officers that must be considered. This distinction has been recognized by the Ohio Supreme Court.[60]

I have associated the development of a criteria approach with the onset of a stage two backlash in the evolution of the New Judicial Federalism. Ohio's version is rather mild, and in applying the criteria approach to search and seizure cases, the Ohio Supreme Court is in the company of a number of other states that see the value of uniformity in search and seizure doctrine.[61] It remains to be seen, of course, whether the Ohio Supreme Court will expand its "persuasive reasons" approach into other areas of rights protection under the state constitution. The *Arnold* decision, of course, with its emphasis on textual difference, relies on the criterion that is number one on most states' lists of reasons they will consider diverging from federal constitutional law.

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[54]94 Ohio St. 3d 489, 764 N.E.2d 986 (2002).

[55]63 Ohio St. 3d 349, 588 N.E.2d 113 (1992).

[56]94 Ohio St. 3d at 493, 764 N.E.2d at 990.

[57]*Id.* at 495-96, 764 N.E.2d at 993.

[58]Williams, *Brennan Lecture*, *supra* note 7, at 227-29.

[59]*Id.* at 221.

[60]City of Cleveland v. Trzebuckowski, 85 Ohio St. 3d 524, 531 n.2, 709 N.E.2d 1148, 1153 n.2 (1999).

[61]*See*, *e.g.*, State v. Florance, 527 P.2d 1202, 1209 (Or. 1974); People v. Gonzalez, 465 N.E.2d 823, 825 (N.Y. 1984). *See generally* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1006-23 (1985).

### *D. Distinctive Text: Religion*

In 2000 the Ohio Supreme Court considered another case involving a substantial textual distinction between the federal and state constitutions. In *Humphrey v. Lane*,[62] the court considered a free exercise of religion claim by a Native American who, for religious reasons, wanted to wear long hair despite a Department of Corrections regulation to the contrary.[63] Here, again, the court confronted a claim that did not require it to evaluate the constitutionality of a statute, but rather an executive branch administrative regulation.[64] The court noted the substantial distinction between the texts of the First Amendment and Ohio's Article I, Section 7. The Ohio provision reads:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[65]

Assessing the structural differences in the provisions, the court noted that, by contrast to the First Amendment, "the Ohio Constitution contains a section devoted entirely to freedom of religion."[66] The court was very specific in describing its federal-state textual comparison:

> Verbiage does not indicate commitment to an ideal. The one phrase in the United States Constitution regarding the freedom of religion is one of the most powerful statements in human history. Ohio's more detailed description of the right does not by itself prove that Ohio's framers created a broader freedom of religion than exists in the United States Constitution. However, the words of the Ohio framers do indicate their intent to make an independent statement on the meaning and extent of the freedom. Whether that statement creates a relevant difference is the

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[62]89 Ohio St. 3d 62, 728 N.E.2d 1039 (2000).

[63]*Id*. at 62-64, 728 N.E.2d at 1041-42.

[64]*See supra* notes 59-60 and accompanying text.

[65]OHIO CONST. art. I, § 7. *See generally* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).

[66]89 Ohio St. 3d at 66, 728 N.E.2d at 1043.

> question we face today. In employing our comparison we are not doing a mere word count, but instead are looking for a qualitative difference.[67]

The court concluded that the tests under this provision required a compelling state interest to justify the restriction on religious practice, as well as the least restrictive alternative. The court held that the state did have a compelling interest, but that it had not chosen the least restrictive alternative to accomplish that interest.[68]

In the *Humphrey* situation, there was a very clear federal constitutional conclusion that the rights claimant would not be protected. This was clear from the U.S. Supreme Court decision in *Employment Division v. Smith*,[69] which had fairly recently changed federal First Amendment analysis of free exercise of religion claims. Knowing that, in the past, it had followed federal analysis despite the wide textual distinctions, the court indicated that it was not now willing to follow the new *Smith* test for a *free exercise* of religion claim.[70] The court did not make any attempt to specify any "persuasive reasons otherwise." It is true, of course, as noted above, that textual differences constitute the most persuasive reason for divergent state constitutional interpretation. Interestingly, however, just the year before, the Ohio Supreme Court, in an *establishment* of religion claim, had rejected arguments based on the same textual distinctions, and decided to follow the U.S. Supreme Court's *Lemon*[71] test and not to diverge from it.[72]

That 1999 decision, *Simmons-Harris v. Goff*, was a challenge to Ohio's school voucher statute. The Ohio Supreme Court stated that the federal and Ohio religion provisions were "the approximate equivalent."[73] The court noted that it had "had little cause to examine" the Ohio clause and had "never enunciated a standard for determining whether a statute violates it."[74] The court proceeded to adopt the federal constitutional *Lemon* test,[75] but did not conclude that the federal and state provisions were "coextensive,"[76] nor did it commit to "irreversibly tie ourselves" to the federal constitutional standards.[77] Citing *Arnold*, it stated:

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[67]*Id*. at 66-67, 728 N.E.2d at 1043-44 (paragraph break omitted).

[68]*Id*. at 71, 728 N.E.2d at 1047. The identical Department of Corrections hair-length regulation had survived a First Amendment challenge in federal court, in litigation that did not raise a state constitutional claim. Blanken v. Ohio Dept. of Rehab. & Corrections, 944 F. Supp. 1359 (S.D. Ohio 1996). On state constitutional claims in federal court, see *supra* note 7.

[69]494 U.S. 872 (1990). *See* Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747 (1993).

[70]89 Ohio St. 3d at 68, 728 N.E.2d at 1044-45.

[71]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[72]Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

[73]*Id*. at 10, 711 N.E.2d at 211.

[74]*Id*. at 10, 711 N.E.2d at 211.

[75]*See supra* note 71.

[76]86 Ohio St. 3d at 10, 711 N.E.2d at 211.

[77]*Id*. at 10, 711 N.E.2d at 212.

> We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, *whether because the federal constitutional standard changes* or for any other relevant reason.[78]

Of course, it was because "the federal constitutional standard chang[ed]" that the court in *Humphrey*, just a year later, gave independent force to Article I, Section 7 in the free-exercise, long-hair case.[79]

### *E. Equal Protection: More Distinctive Text*

In 2002 the Ohio Supreme Court decided the latest in a line of cases interpreting Article I, Section 2 of the Ohio Constitution, which provides:

> All political power is inherent in the people. Government is instituted for their *equal protection* and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and *no special privileges or immunities* shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.[80]

In *State v. Thompson*,[81] the court considered a challenge to Ohio's "importuning" statute, which prohibited persons of the same gender, but not those of the opposite gender, from soliciting sex acts from others. In an earlier decision, the court had saved this statute from a free speech challenge under the state constitution by imposing a limiting interpretation requiring "fighting words."[82] Because the free speech claim was no longer available,[83] the court entertained an equal protection challenge. Relying on an earlier case,[84] the court reiterated its view that Ohio's "equal protection" provision was "functionally equivalent" to the Fourteenth Amendment Equal Protection Clause.[85] It therefore applied the federal levels of scrutiny analysis, concluding that the statute was "facially invalid as a content-based restriction on speech, which by extension violates the equal protection guarantees both United States and Ohio Constitutions."[86] The court, once again, failed to provide any "plain statement" under *Michigan v. Long*,[87] and therefore this decision was potentially reviewable by the U.S. Supreme Court on the federal constitutional

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[78]*Id*. at 10, 711 N.E.2d at 212 (emphasis added).

[79]*See supra* notes 69-70 and accompanying text.

[80]OHIO CONST. art. I, § 2 (emphasis added). *See* Williams, *supra* note 3, at 395 (referring to art. I, § 2 as a "potentially interesting Equal Protection and Benefit clause").

[81]95 Ohio St. 3d 264, 767 N.E.2d 251 (2002).

[82]State v. Phipps, 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979).

[83]95 Ohio St. 3d at 265-66, 767 N.E.2d at 254-55. The concurring opinion would have ruled on free speech and overruled the earlier case. *Id*. at 273, 767 N.E.2d at 260-61 (Pfeifer, J., concurring).

[84]American Association of University Professors v. Central State University, 87 Ohio St. 3d 55, 717 N.E.2d 286 (1999).

[85]95 Ohio St. 3d at 266, 767 N.E.2d at 255.

[86]*Id*. at 266, 767 N.E.2d at 255.

[87]*See supra* note 39 and accompanying text.

ground. The State, however, did not seek review in the U.S. Supreme Court, probably because it had substantial doubts itself as to the constitutionality of the statute.[88]

As authority for its "functionally equivalent" approach to state equal protection, the Ohio Supreme Court cited its 1999 decision in *American Association of University Professors v. Central State University*.[89] This was another situation where the court had ruled earlier on both federal and state constitutional grounds,[90] the U.S. Supreme Court accepted the case and reversed,[91] and the case returned on remand to the Ohio Supreme Court. There was a clearly independent state constitutional equality argument made[92] and rejected[93] by the court. The Ohio Supreme Court's "functionally equivalent," lockstep approach seems to have been applied consistently,[94] at least since 1937.[95]

Ohio's Article I, Section 2 is, of course, both textually distinct from the Fourteenth Amendment Equal Protection Clause, as well as emanating from a different period in history, and, undoubtedly, being aimed at a different set of concerns from those at which the federal constitutional provision was aimed after the Civil War. There are a number of states which, like Ohio, equate their different equality provisions with the federal Equal Protection Clause, so Ohio's position is not unusual. This approach does, however, fail to acknowledge the differing text, history, and purposes of its state constitutional equality guarantees.[96] Other states

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[88]95 Ohio St. 3d at 266, 767 N.E.2d at 255.

[89]87 Ohio St. 3d 55, 717 N.E.2d 286 (1999).

[90]American Association of University Professors v. Central State University, 83 Ohio St. 3d 229, 233, 699 N.E.2d 463, 467 (1998) ("These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.").

[91]Central State University v. American Association of University Professors, 526 U.S. 124 (1999). Justice Stevens, predictably, dissented:

> Seven of the eleven Ohio judges who reviewed the case concluded that the Ohio statute violated the Ohio Constitution. Indeed, the majority opinion of the Ohio Supreme Court did not cite a single case decided by this Court. If the State Supreme Court did misconstrue the Equal Protection Clause of the Federal Constitution, the impact of that arguable error is of consequence only in the State of Ohio, and will, in any event, turn out to be totally harmless if that court adheres to its previously announced interpretation of the State Constitution. I therefore believe that the Court should deny the petition for certiorari.

*Id*. at 131-32 (Stevens, J., dissenting) (paragraph break omitted).

[92]87 Ohio St. 3d at 56-60, 717 N.E.2d at 289-91.

[93]*Id*. at 60, 717 N.E.2d at 291.

[94]*See*, *e.g.*, State *ex rel.* Dayton Fraternal Order of Police v. State Employment Relations Bd., 22 Ohio St. 3d 1, 6, 488 N.E.2d 181, 185 (1986); Fabrey v. McDonald Police Dept., 70 Ohio St. 3d 351, 353, 639 N.E.2d 31, 33 (1994).

[95]State *ex rel*. Struble v. Davis, 132 Ohio St. 555, 560, 9 N.E.2d 684, 687 (1937) ("substantially the same").

[96]*See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985) ("Most state constitutions do not contain an 'equal protection'

that initially equated their equality clauses with federal doctrines have begun to move in the direction of independence. States like Indiana,[97] Vermont,[98] Minnesota,[99] Alaska,[100] and Idaho[101] have been moving to decouple their state constitutional equality doctrines from the formerly dominant federal equal protection analysis.

It should also be noted that the Ohio Constitution contains another clause—Article I, Section 1—that has been interpreted in other states to provide a guarantee of equality. Article I, Section 1 provides:

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.[102]

States like New Jersey have interpreted these provisions as the basis for their equality jurisprudence.[103] The Ohio Constitution contains, as well, a number of other provisions reflecting equality concerns, such as the requirements of uniformity in taxation,[104] and that general laws have a uniform operation throughout the state.[105]

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clause. But they do contain a variety of equality protections."). For further elaboration of the differences between federal equal protection and state equality provisions, see Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992). For an excellent treatment of equality provisions in state constitutions, see 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 3-1 to 3-55 (3d ed. 2000).

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

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

[99]*See*, *e.g.*, Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 338, 348-81 (1994) (discussing deviations between the Minnesota Supreme Court's interpretation of the state and federal equal protection clauses).

[100]*See*, *e.g.*, Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 402 (Alaska 1997); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 1, 11-17 (1995); Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986).

[101]*See*, *e.g.*, Concerned Taxpayers of Kootenai County v. Kootenai County, 50 P.3d 991, 994 (Idaho 2002). *But see* Rudeen v. Cenarrusa, 38 P.3d 598, 606-07 (Idaho 2001).

[102]OHIO CONST. art. I, § 1. *See* Williams, *supra* note 3, at 395 n.27 (noting potential of art. I, § 1).

[103]ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 29-30 (rev. ed. 1997).

[104]OHIO CONST. art. XII, § 2.

[105]OHIO CONST. art. II, § 26.

Critics of the federal equal protection approach point to a number of reasons for developing an independent approach to interpreting equality provisions. For example, Professor Lawrence Sager pointed out that the federal Equal Protection Clause is among the most "underenforced" of federal constitutional provisions.[106] This underenforcement pattern is due to the deference to states because of concerns for federalism, the rigid application of the state-action requirement, and the tiered "suspect class/levels of scrutiny" constructs imposed by the U.S. Supreme Court.[107] Thus, federal equal protection decisions should hardly be viewed as limiting the interpretation of state constitutional equality provisions.

In addition, several years after Professor Sager offered his underenforcement thesis, he described another important reason why state courts should not blindly follow federal constitutional interpretations.[108] Describing the substantial role of "strategic" considerations in judicial enforcement of constitutional norms, Professor Sager identified the possibility of state and federal courts employing different strategies in constitutional interpretation: "Like other legal rules, constitutional rules bear pragmatic, *strategic* relationship to the concerns that animate them. Norms of political morality comprise the targets of constitutional law, but not the necessary or exclusive content of its rules."[109] He noted that strategic concerns account, in part, for the Supreme Court's limiting equal protection doctrines.[110] State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying a similar "norm of political morality" equality.[111] Sager concluded:

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

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[106]Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978).

[107]Professor Sager stated:

> While there is no litmus test for distinguishing these norms, there are indicia of underenforcement. These include a disparity between the scope of federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies.

*Id*. at 1218-19.

[108]Professor Sager asked, "[T]o what extent, if any, should state judges faced with claims under provisions of their state constitutions feel themselves bound to defer to Supreme Court interpretations of equivalent federal constitutional provisions?" Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985); *see also* Linzer, *supra* note 27, at 1580 ("The gut issue, though, is how closely the state courts should follow federal precedents in applying their states' provisions.").

[109]Sager, *supra* note 108, at 962 (emphasis in original).

[110]*Id*. at 974.

[111]*Id*. at 967.

> constitutional rules the state judges' instrumental impulses and judgments differ.
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> In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.[112]

### *F. Free Speech: Still More Distinctive Text*

In a 1994 decision, *Eastwood Mall, Inc. v. Slanco*,[113] the Ohio Supreme Court confronted the question, faced by a number of states,[114] whether an injunction against picketing and leafletting in a privately-owned shopping mall violated Article I, Section 11 of the Ohio Constitution:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; *and* no law shall be passed to restrain or abridge the liberty of speech, or of the press.[115]

There was a "well settled" negative answer to this question under the federal First Amendment. Because there was no "state action," the U.S. Supreme Court had already ruled against the identical claim.[116]

The court acknowledged the substantial textual differences between the federal and Ohio provisions, and the fact that the U.S. Supreme Court had observed that states might recognize free speech rights in shopping malls,[117] but it concluded, relying on a 1992 case,[118] "that the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment

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[112]*Id*. at 975-76; *see also* Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 TUL. L. REV. 928, 936-37 (1985).

[113]68 Ohio St. 3d 221, 626 N.E.2d 59 (1994).

[114]*See*, *e.g.*, Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property: Where Won't We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 589 (2002).

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

[116]68 Ohio St. 3d at 222, 626 N.E.2d at 60 (citing Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

[117]*Id*. at 222, 626 N.E.2d at 60-61 (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

[118]*Id*. at 222-23, 626 N.E.2d at 61 (citing State *ex rel*. Rear Door Bookstore v. Tenth Dist. Ct. App., 63 Ohio St. 3d 354, 588 N.E.2d 116 (1992)).

is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution."[119] The court continued:

> Furthermore, while Section 11 has an additional clause not found in the First Amendment, the plain language of this section, when read in its entirety, bans only the passing of a law that would restrain or abridge the liberty of speech. When the First Amendment does not protect speech that infringes on private property rights, Section 11 does not protect that speech either.[120]

The court cited the decisions of other state courts rejecting similar claims,[121] relying on "horizontal federalism," but did not analyze those decisions and did not even cite the decisions recognizing such claims.[122] State courts often look *horizontally* for guidance from other state courts interpreting similar or identical *state* constitutional provisions, rather than looking *vertically* to U.S. Supreme Court decisions interpreting *federal* constitutional provisions.[123] Labeled "horizontal federalism" by G. Alan Tarr and M.C. Porter,[124] this is a common feature of the NJF.

Justice Wright's dissent characterized the decision as a "step backward" from *Arnold*, provided a careful textual analysis, distinguished the precedents relied on by the majority, and considered the cases in other states recognizing similar claims.[125]

As noted above,[126] the court relied on a 1992, pre-*Arnold* decision for the proposition that the Ohio free speech provision was "no broader" than the federal First Amendment's protection of free speech. That case involved a challenge to an injunction closing an adult bookstore for a year as a public nuisance.[127] The Ohio Supreme Court affirmed the injunction without opinion, relying on the court of appeals opinion, which it included as an appendix.[128] The Ohio Court of Appeals had followed the lead of the U.S. Supreme Court in upholding such injunctions,[129]

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[119]*Id*. at 223, 626 N.E.2d at 61. *See also* State *ex rel.* Beacon Journal Publishing Co. v. Bond, 98 Ohio St. 3d 146, 150, 781 N.E.2d 180, 187 (2002). *But see* Office of Disciplinary Counsel v. Gardner, 99 Ohio St. 3d 416, 420, 793 N.E.2d 425, 429-30 (2003).

[120]68 Ohio St. 3d at 223, 626 N.E.2d at 61.

[121]*Id*. at 223 n.1, 626 N.E.2d at 61 n.1.

[122]*See* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229 (1999). Professor Friedelbaum discusses Ohio's *Eastwood Mall* case on pages 1243-45.

[123]STATE SUPREME COURTS xxi-xxii (M.C. Porter & G. Alan Tarr eds., 1982).

[124]*Id*.

[125]68 Ohio St. 3d at 225-31, 626 N.E.2d at 62-67 (Wright, J., dissenting).

[126]*See supra* note 118 and accompanying text.

[127]State *ex rel.* Rear Door Bookstore v. Tenth Dist. Ct. App., 63 Ohio St. 3d 354, 588 N.E.2d 116 (1992).

[128]*Id.* at 355, 588 N.E.2d at 118. I will leave it to Ohio practitioners, scholars, and judges to assess the precedential force of such an "opinion."

[129]Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

rejecting the contrary view of New York's highest court.[130] Assessing state constitutional rulings from other jurisdictions on such adult-bookstore injunctions, the Ohio Court of Appeals concluded: "In summary, decisions from our sister states can be cited to support almost any point of view."[131]

## III. CASE-BY-CASE ADOPTIONISM VERSUS PROSPECTIVE LOCKSTEPPING

The Ohio decisions reveal an important point about the methods by which state courts may choose to follow U.S. Supreme Court interpretations of the federal Constitution. The first approach may be referred to in Barry Latzer's terms—"unreflective adoptionism."[132] This would describe state court decisions simply applying federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome. This might be an accurate description of the pre-1993 stance of the Ohio Supreme Court.[133] The next approach, "reflective adoptionism," would describe a state court decision acknowledging the possibility of different state and federal outcomes, considering the arguments *in the specific case* and, on balance, deciding to apply the federal analysis to the state provision. *Simmon-Harris v. Goff*, adopting federal establishment of religion doctrine, seems to reflect this approach.[134] Finally, however, a state court might engage in "prospective lockstepping," where it announces that not only for the instant case, but also *in the future*, it will interpret the state and federal clauses the same. This is what the court seemed to do in *Robinette* (search and seizure), *Eastwood Mall* (free speech and assembly), and in the equal protection cases. In *Robinette*,[135] the court stated that search and seizure cases would be evaluated by the federal constitutional standard, not just under the facts of that case, but also in the future if there were "no persuasive reasons to find otherwise."[136] This approach purports to decide *too much* and to go beyond the court's authority to adjudicate cases. It could be argued that such an approach cannot be referred to as a "holding," because it goes far beyond the facts of the case and purports to prejudge future cases. It is not even clear if it qualifies as dictum. Such statements, therefore, should neither bind lawyers in their arguments nor the court itself in future cases.

Justice Robert Utter of the Supreme Court of Washington criticized the use of a similar lockstep approach to interpreting that state's equality provisions, labeling such an approach a virtual "rewrite" of the state constitution without a constitutional convention or the people's consent.[137] Ron Collins argued that lockstepping results

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[130]63 Ohio St. 3d at 359, 362, 588 N.E.2d at 121, 123 (rejecting People *ex rel.* Arcara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986)).

[131]*Rear Door Bookstore*, 63 Ohio St. 3d at 359, 588 N.E.2d at 121.

[132]*See supra* note 50 and accompanying text.

[133]*See supra* notes 13 and 30 and accompanying text.

[134]*See supra* notes 72-79 and accompanying text.

[135]*See supra* notes 36-53 and accompanying text.

[136]*See supra* note 46 and accompanying text.

[137]State v. Smith, 814 P.2d 652, 661 (Wash. 1991) (Utter, J., concurring).

in the "Problem of the Vanishing Constitution,"[138] where the state constitution is rendered a nullity, and the "Problem of Amending Without Amendments,"[139] where the *court*, in effect, *amends* the state constitution by linking it, prospectively, to federal constitutional analysis. This is not a valid exercise of judicial review. The power to amend the state constitution, even to link its interpretation to federal constitutional doctrine, is a political power reserved to the state's citizens.[140]

Earl Maltz has argued in favor of lockstepping, or "the theory that state constitutional provisions should be interpreted to provide exactly the same protections as their federal constitutional counterparts."[141] He seems clearly, however, to be referring to case-by-case lockstepping, or adoptionism, rather than the prospective approach. His argument is based on deference to the state legislative and executive branches, and on a criticism of judicial activism.[142] He contends:

> In short, the substance of lockstep analysis is entirely consistent with the basic concept of state autonomy. Of course, one can still attack the standard verbal formulations of the lockstep approach, which seem to suggest that U.S. Supreme Court decisions somehow create state constitutional law. For lockstep courts, however, these flaws in articulation have little impact on the practical results reached.[143]

I disagree with this assessment and contend that the Ohio Supreme Court's prospective lockstepping goes far beyond "flaws in articulation." Rather, it has the effect of snuffing out the independent research and analysis that must be undertaken by lawyers, judges, professors, and students in order to make the Ohio Constitution, as stated in *Arnold*, "a document of independent force."[144]

## IV. CONCLUSION

There are a number of tentative conclusions that may be reached based on this selective analysis[145] of the Ohio Supreme Court's first decade of experience with the

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[138]Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1111 (1985).

[139]*Id*. at 1116:

> When a state court withdraws from a constitutional provision its independent legal authority over state action, the court assumes a power that has been constitutionally delegated to others. That power is the right of the people to "alter" their constitution.

[140]Williams, *supra* note 17, at 216-17 (discussing "lockstep" and "forced linkage" amendments).

[141]Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (March 1988). *See also* Maltz, *supra* note 61.

[142]Maltz, *supra* note 141, at 101, 106.

[143]*Id*. at 102.

[144]67 Ohio St. 3d at 42, 616 N.E.2d at 168-69. I will explore these ideas in greater depth in *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, ___ WM. & MARY L. REV. ___ (2004) (forthcoming).

[145]I have not, for example, analyzed the Ohio state constitutional school finance litigation—*see*, *e.g*., Patricia F. First & Barbara M. DeLuca, *The Meaning of Educational Adequacy: The Confusion of DeRolph*, 32 J.L. & EDUC. 185 (2003).

New Judicial Federalism. First, the court is to be commended for taking the first steps toward recognizing the Ohio Constitution as a document of independent political[146] and legal force. The *Arnold* decision, together with the others discussed in this article, serve to alert the lower bench, the bar, the media, and students and professors to the potential contained within state constitutions.

Next, to the extent that there is inconsistency to be detected in the Ohio Supreme Court's approach to the NJF, this has been true as well in most other states.[147] State courts are now confronting major constitutional litigation in controversial cases. The NJF is still relatively new in Ohio. It is very far from being "settled."[148] The bar and legal educators have a responsibility to engage in teaching and analysis concerning state constitutional law, and not just in the area of rights protections.[149] Oregon Justice Hans A. Linde said that in order "to make an independent argument under the state clause [it] takes homework—in texts, in history, in alternative approaches to analysis."[150] This Symposium will go a long way toward meeting that challenge.

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[146]In the words of former Justice Hans Linde of Oregon, "[W]hat the judicial decision applies *was first a political decision that others deemed worthy of constitutional magnitude*." Hans Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 131 (1970) (emphasis added). *See also* Hans Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 253 (1972) ("Constitution [is] directly obligatory on government, with judicial review as a consequence rather than as the source of obligation.").

[147]*See*, *e.g.*, John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law*: *Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993); Williams, *In the Glare of the Supreme Court*, *supra* note 14, at 1016-17.

[148]*See* Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173 (2002) (asserting that federal constitutional law is "settled").

[149]*See* Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL EDUC. 243 (1991).

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