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### Ohio Constitutional Interpretation

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# OHIO CONSTITUTIONAL INTERPRETATION

RICHARD B. SAPHIRE<sup>1</sup>

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## I. SOME PRELIMINARY IMPRESSIONS

I have been teaching and writing about the United States Constitution for over twenty-five years. As I recall, when I was in law school in Ohio, I never heard much about the state's constitution. I'm quite certain there was no course in state constitutional law back then (perhaps there was no such course in any American law school), and I don't recall my constitutional law professor, or for that matter, any other teachers, including or even mentioning the Ohio Constitution during my law school career.

When I graduated law school, I spent some time in Cincinnati engaged in what we used to call "law reform" litigation, much of which was grounded in constitutional law. The point of law reform litigation was two-fold: First, and always foremost, there was the representation of individual clients and the assertion and vindication of their rights. Second, there was the effort to effect broader changes, to "reform" the institutions and practices that often systematically failed to properly account for the interests and rights of my clients and those who found themselves in similar straits. Although my recollection could be mistaken, I don't recall any of this

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litigation being grounded in arguments about the Ohio Constitution, at least not in any primary or fundamental sense.<sup>2</sup> Indeed, for all I can recall, the Ohio Constitution was, if not completely irrelevant, simply not very important to most Ohio law reform litigators at the time.

I graduated from law school in 1971, at what might well be considered the heyday of the Warren Court. The Warren Court period, of course, has been characterized as a time when the U.S. Supreme Court took an expansive approach to individual rights under the federal Constitution. The Court's "activism" provided plenty to think and talk about in law school classrooms, and provided lots of ammunition for law reform lawyers representing the poor and oppressed. To the extent that constitutional law professors back then even thought about state constitutional law, I suspect many of them took a "what's the point" attitude about including state cases in their teaching materials. And I suspect the same attitude influenced law reform litigation. If you thought you could achieve your clients' objectives under the federal Constitution, why spend your (very limited) time and resources trying to develop state constitutional arguments and theories?

This attitude was no doubt reinforced by two other features of the early 1970s jurisprudential landscape. First, state courts, including state supreme courts, frequently took a "mirror image" approach to many state constitutional provisions whose wording was either identical or closely analogous to their federal constitutional counterparts. To the extent that state courts construed state constitutional provisions dealing with such things as due process, equal protection, freedom of speech, and freedom of religion to mean the same as their federal counterparts, there was little reason for plaintiffs' lawyers to take state constitutional claims seriously.<sup>3</sup> Second, there were no prominent or influential theorists or judges who seemed terribly upset with this state of affairs. Justice Brennan's famous essays that are widely credited to have launched the so-called New Judicial Federalism<sup>4</sup> movement had yet to be written.<sup>5</sup> And, at least in Ohio, I recall no famous examples

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<sup>2</sup>I recently contacted a 1970s colleague of mine who has the same recollection. He recalls that occasionally state constitutional claims were stated in his complaints, but does not recall a case where such claims were primary, or even prominent.

<sup>3</sup>If Ohio had had a general fee-shifting statute, according to which successful claims under the state constitution would have entitled plaintiffs to an award of attorneys fees, the Ohio Constitution would probably have attracted more attention (especially since the general federal civil rights attorneys fee statute, 42 U.S.C. § 1988, had not yet been enacted). But I am quite certain that Ohio had no such fee-shifting statute at the time.

<sup>4</sup>For general discussions of "judicial federalism," see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161-72 (1998); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1996); Robert F. Williams, *The New Judicial Federalism: A New Generation*, 30 VAL. U. L. REV. xiii (1996); see also *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 41-42, 616 N.E.2d 163, 168-69 (1993) (discussing the "new federalism").

<sup>5</sup>William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Revival*]. The first of these articles has been called the "Magna Carta" of state constitutionalism. Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716

of the Ohio Supreme Court boldly affirming a set of more-than-the-federal-minimum constitutional doctrines that promised a robust state constitutional jurisprudence of individual rights.

This is not to say that the Ohio Supreme Court had not recognized the conceptual possibility of Ohio constitutional independence. For example, in *Direct Plumbing Supply Company v. City of Dayton*,<sup>6</sup> a case of whose existence I am sure I didn't learn in law school or in practice, that court, at least as early as 1941, had written the following: "In dealing with the validity of an Ohio legislative enactment, state or municipal, it is well to recall that, against the invasion of government upon their fundamental individual rights, the people of Ohio have been wont in the past to rely for their protection upon guaranties written into both the state and federal constitutions."<sup>7</sup> Then, after observing Ohio's tradition of state and federal constitutional equivalency, and in what now might seem as a harbinger of Justice Brennan's later call to state constitutional arms, the Ohio Supreme Court went on to note: "If, in the midst of current trends toward regimentation of persons and property, this long history of parallelism [between state and federal constitutional rights] seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality."<sup>8</sup>

But even if my law school education had alerted me to such independent constitutional rhetoric in the Ohio Supreme Court Reports, I doubt that any impression I might have had of a truly independent Ohio constitutional jurisprudence of individual rights, especially one that was more expansive than its federal counterpart, would have lasted very long. I say this because I recall quite vividly the first case that really made me aware of how problematic, and how unreliable, such rhetoric really was. The case is *Cincinnati City School District Board of Education v. Walter*,<sup>9</sup> and it is worth commenting upon here.

In *Walter*, the Ohio Supreme Court had before it a state constitutional challenge to Ohio's system for financing public elementary and secondary education. This funding system relied importantly on state property taxation, and it resulted in significant variations throughout the state in the amount of funds available for public education. The system was challenged by public school officials, students, and parents from Cincinnati, who claimed that the relatively low level of funding for the

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(1983). Helen Hershkoff has noted that Brennan was "not the first jurist or commentator to call for a more active state constitutionalism." Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 7 n.1 (1993). And Robert Williams has traced the origin of the movement to an article by Professor Robert Force. Williams, *supra* note 4, at xiv (discussing Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969)). But Brennan certainly was the most prominent early advocate of a vigorous and independent state constitutionalism, so much so that he has been called the "patron saint" of the "movement." Earl M. Maltz, *False Prophet: Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 429 (1988).

<sup>6</sup>138 Ohio St. 540, 38 N.E.2d 70 (1941).

<sup>7</sup>*Id.* at 544, 38 N.E.2d at 72.

<sup>8</sup>*Id.* at 545, 38 N.E.2d at 73.

<sup>9</sup>58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

Cincinnati schools, when compared to more “property rich” school districts throughout the state, violated the Equal Protection and Benefit Clause of Article I, Section 2, of the Ohio Constitution.

At the time *Walter* was decided, the Ohio Supreme Court had already determined that the Equal Protection and Benefit Clause of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution were phrased “essentially identical[ly]” and that their content was “substantially equivalent.”<sup>10</sup> Not only were the federal and state clauses equivalent in terms of substantive content; as the *Walter* court noted, the judicial methodologies appropriate for analyzing the state and federal clauses were identical as well. That is, the Ohio courts were to adopt and apply the same standards and tests in analyzing claims under the Equal Protection and Benefit Clause that the U.S. Supreme Court had developed for purposes of Equal Protection Clause analysis.<sup>11</sup> That, according to *Walter*, required the application of a “two-tiered” test: If a classification incorporated “suspect” traits or affected “fundamental interests,” it was subject to “strict judicial scrutiny”; in either case, the classification would be invalidated unless the state established that it was “necessary to further a compelling state interest.” If strict scrutiny was inapplicable, a classification was subject to “rational basis” review, according to which it would be upheld unless the challenger could establish that it was not “rationally related to a legitimate state interest.”<sup>12</sup>

Even at the time *Walter* was decided, it was well understood that the choice between these two standards was crucial and even outcome determinative.<sup>13</sup> Strict scrutiny almost always required the invalidation of a classification,<sup>14</sup> while rational basis review almost always required the opposite result. Indeed, just a few years earlier, the U.S. Supreme Court had illustrated this when, in *San Antonio Independent School District v. Rodriguez*,<sup>15</sup> it rejected a Fourteenth Amendment challenge to the Texas public school funding system that was quite similar to Ohio’s. Applying its two-tiered equal protection methodology, the 5-4 Court found that the system’s reliance on the wealth of a district did not make the resulting classifications “suspect.” The Court then considered whether education was a “fundamental

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<sup>10</sup>Kinney v. Kaiser Aluminum & Chemical Corp., 41 Ohio St. 2d 120, 123, 322 N.E.2d 880, 882-83 (1975). Indeed, the Ohio Supreme Court has referred to the Equal Protection and Benefit Clause as “Ohio’s Equal Protection Clause.” American Association of University Professors v. Central State University, 87 Ohio St. 3d 55, 58, 717 N.E.2d 286, 289-90 (1999).

<sup>11</sup>*Walter*, 58 Ohio St. 2d at 373, 390 N.E.2d at 817 (adopting “federal guidelines”).

<sup>12</sup>*Id.* at 373, 390 N.E.2d at 818. Actually, by 1979, the U.S. Supreme Court had adopted a “three-tiered” test for equal protection analysis. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (adopting an “intermediate” standard of review for gender classifications).

<sup>13</sup>See generally Richard B. Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335, 350-51 (1981) [hereinafter *What Price Purity?*]. For further discussion of modern equal protection methodology, see Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L. J. 591 (1999-2000) [hereinafter *Equal Protection*].

<sup>14</sup>*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (opinion of Brennan, J.) (describing strict scrutiny review as “‘strict’ in theory, but fatal in fact”).

<sup>15</sup>411 U.S. 1 (1973).

interest,” and concluded that it was not. This was so for two reasons. Fundamental interests were those that are “explicitly or implicitly guaranteed by the Constitution.”<sup>16</sup> Since the U.S. Constitution nowhere mentioned a right to education—or, for that matter, “education,” “schools,” or anything like that—it could not be considered an “explicit” right, and therefore was not “fundamental” in the constitutional sense. And apparently because some modicum of education was provided even to those children who lived in the poorest school districts, it had no “implicit” constitutional status.

The plaintiffs in *Walter* were no doubt aware that *Rodriguez* all but foreclosed a successful Fourteenth Amendment challenge to school funding in Ohio.<sup>17</sup> But, presumably, they were also aware that the Ohio Supreme Court had all but committed itself to following the U.S. Supreme Court’s equal protection methodology. And, unlike the U.S. Constitution, the Ohio Constitution *did* explicitly have something to say about education: the so-called “Thorough and Efficient Clause” of Article VI, Section 2, which requires the General Assembly to “secure a thorough and efficient system of common schools throughout the state.” While this language, like almost all constitutional language (state and federal), might have been subject to legitimate interpretive disagreement,<sup>18</sup> it clearly establishes education as an interest bearing some state constitutional status.

Given these circumstances, the *Walter* plaintiffs had every reason to be hopeful. While predicting the actual outcome of the application of constitutional methodologies may be less than scientific, the plaintiffs were certainly entitled to be confident that, at the very least, the Ohio Supreme Court would apply meaningful judicial scrutiny in assessing the constitutionality of Ohio’s school financing system.<sup>19</sup> As things turned out, however, any such confidence was sorely misplaced.

True to its promise, and emulating the relevant federal constitutional methodology, the Ohio Supreme Court announced that it needed to determine whether to apply strict scrutiny.<sup>20</sup> And given the Ohio Constitution’s explicit reference to education, there seemed to be no way around it.<sup>21</sup> This fact was not lost

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<sup>16</sup>*Id.* at 33.

<sup>17</sup>Nonetheless, the plaintiffs did assert a federal equal protection claim in the state trial and intermediate appellate courts, where the claim was rejected. The Ohio Supreme Court affirmed the lower courts on this issue. *Walter*, 58 Ohio St. 2d at 372-73, 387-88, 390 N.E.2d at 817, 825.

<sup>18</sup>A fact that is demonstrated in almost excruciating detail by the Ohio Supreme Court’s so-called *DeRolph* decisions beginning in 1997. *De Rolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (4-3 decision holding Ohio’s system for funding public education to be in violation of the Ohio Constitution).

<sup>19</sup>And this confidence did not necessarily have to depend on any theory of “new” judicial federalism. That is, the plaintiffs did not have to call upon the Ohio Supreme Court to reject and move beyond the U.S. Supreme Court’s “restrictive” interpretation of the Fourteenth Amendment. All they needed to assume was that the Ohio Supreme Court would continue to interpret the Ohio Constitution’s equal protection provision by employing the methodological framework it had already established.

<sup>20</sup>*Walter*, 58 Ohio St. 2d at 374, 390 N.E.2d at 818.

<sup>21</sup>This point was made forcefully in Justice Locher’s dissent. *Id.* at 389-90, 390 N.E.2d at 827 (Locher, J., dissenting) (“Applying the ‘Rodriguez test,’ it follows that in Ohio,

on the court. Indeed, it noted that “if this court were to accept [the strict scrutiny] test, educational opportunity would be a fundamental interest entitled to strict scrutiny.”<sup>22</sup>

But with this acknowledgment, the court’s commitment to federal methodology ended. It explicitly rejected “the ‘Rodriguez test’ for determining what rights are fundamental.” Why? Because “[w]hile the test may have some applicability in determining which rights are fundamental under the United States Constitution, it is not helpful in determining whether a right is fundamental under the Ohio Constitution.”<sup>23</sup>

The court gave several reasons for finding, at least in this instance, federal methodology to be unhelpful. Perhaps the most important, and problematic, of these reasons derived from a purported distinction between the functions of the state and federal constitutions. The court noted that while the federal Constitution was one of delegated powers, the Ohio Constitution “is not one of limited powers, as it contains provisions which would be suitable for statutory enactment which are not fundamental to our concept of ordered liberty.”<sup>24</sup> Even if this were true,<sup>25</sup> it is hard to see how it makes federal equal protection methodology inapplicable. If part of the purpose of equal protection analysis is to place meaningful restrictions on the state’s power to classify with respect to especially important interests, courts will inevitably have to make some judgments about the relative importance of interests. While it may be the case that some state constitutions specify more individual rights or interests than does the U.S. Constitution, that fact alone does not explain why the

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educational opportunity is a fundamental interest entitled to strict scrutiny under Ohio’s Equal Protection Clause.”).

<sup>22</sup>58 Ohio St. 2d at 374, 390 N.E.2d at 818.

<sup>23</sup>*Id.* at 374, 390 N.E.2d at 818.

<sup>24</sup>*Id.* at 374-75, 390 N.E.2d at 818.

<sup>25</sup>I confess that I find this reasoning somewhat ambiguous. A more apt analogy might have been between a federal constitution of *limited* powers and a state constitution embodying general powers. It is not clear, or at least the court did not explain, why the notion of delegated powers explains or justifies the concept of federal fundamental rights in a way that would not be applicable to the notion of a state constitution of limited powers. In fact, state constitutions have frequently been characterized as documents of limitation, rather than, as is true with respect to the federal Constitution, as documents that grant powers. See Robert F. Williams, *The Brennan Lecture: State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 207 (2002). Perhaps the court had in mind the notion that since the state constitution primarily was concerned with granting and not limiting power, the Ohio Constitution’s Thorough and Efficient Clause could not be a proper source from which limits on legislative power could be drawn. This is certainly not the way that the Ohio Supreme Court has more recently understood this clause—see *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997)—and it is not clear that it provides a coherent way of thinking about equal protection. The Ohio Constitution clearly specifies education as an important commodity or value by not leaving the establishment of an educational system as just another discretionary element of otherwise plenary legislative authority. If part of the purpose of equal protection jurisprudence is to place special limits on the state’s ability to classify in ways that adversely affect important public goods, the fact that a commitment to education was explicitly constitutionalized ought to count for something.

assessment of the relative importance of state constitutional rights is not a legitimate aspect of state constitutional interpretation.<sup>26</sup>

Much more could be said about the *Walter* decision. But for present purposes, my primary point is this: At the time it was decided, *Walter* left me with the distinct impression that the Ohio Constitution, at least under *that* Ohio Supreme Court, was quite unlikely to be a source of any robust jurisprudence of individual rights. Instead of a suggesting a *Brennan-esque* commitment, or even an openness, to a serious state constitutional jurisprudence of individual rights, *Walter* suggested state constitutional timidity, a timidity that assumed two troubling forms.<sup>27</sup> First, *Walter* once again reflected the Ohio Supreme Court's reluctance to treat the Ohio Constitution as a free-standing source of constitutional rights and values with an identity independent of the U.S. Constitution. At least with respect to state constitutional provisions which are identical or closely analogous to provisions of the federal Constitution, the Ohio courts were to think about the former the way the U.S. Supreme Court thinks about the latter.<sup>28</sup> In addition, a major emphasis of a *Brennan-esque* new judicial federalism has been the idea that state courts could, and perhaps even *should*, interpret the individual rights provisions of state constitutions *more expansively* than their federal constitutional analogues. On that score, *Walter* proved to be quite a disappointment.

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<sup>26</sup>The *Walter* court also suggested that its refusal to follow federal methodology to what seemed its logical conclusion was influenced by the difficulties in sorting out fundamental from non-fundamental rights. *Id.* at 375, 390 N.E.2d at 819 (observing that the *Rodriguez* test "may not even be adequate for deciding what rights are fundamental under the United States Constitution"). The complexities and challenges of federal fundamental rights jurisprudence are, of course, well known. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 762-68 (2d ed. 2002). But if the Ohio Supreme Court was so intimidated by the challenges of federal equal protection methodology, it is unclear why it would choose to adopt that methodology as the presumptive state constitutional standard.

<sup>27</sup>Challenges to traditional school funding schemes of the sort rejected by the Ohio Supreme Court in *Walter* have met greater, although not universal, success in other states. See Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez*, 30 VAL. U. L. REV. 551 (1996); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 467 n.31 (1996). Of course, the school funding issue in Ohio has been revisited in the *DeRolph* line of cases, with rather mixed (and somewhat bizarre) results. Compare *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (finding state financing system in violation of Ohio Constitution), with *DeRolph v. State*, 97 Ohio St. 3d 434, 780 N.E.2d 529 (2002) (reaffirming the unconstitutionality of state school financing system but effectively relinquishing jurisdiction, and remedial supervision, over the case).

<sup>28</sup>To be sure, as I have characterized the *Walter* court's analysis, one might argue that the Ohio Supreme Court really did demonstrate its independence by refusing to follow federal equal protection analysis to what I have argued was its logical conclusion. But the fact remains that the *Walter* court professed a general policy of applying "federal guidelines" to Ohio's "equal protection clause," 58 Ohio St. at 373, 390 N.E.2d at 817. And the concerns about judicial role that apparently motivated the Ohio Supreme Court to reject fundamental rights analysis were strikingly similar to the institutional concerns that led the U.S. Supreme Court in *Rodriguez* to refuse to conclude that education was a fundamental right for federal equal protection purposes.



One case, of course, does not necessarily reflect a trend.<sup>29</sup> Perhaps *Walter* has proven not to be representative of modern Ohio constitutional jurisprudence. In the next section of this essay, I examine post-*Walter* constitutional jurisprudence in the Ohio Supreme Court. Perhaps post-*Walter* developments have provided reasons to be more hopeful that a “new judicial federalism” has actually taken hold in Ohio. Perhaps there really are good reasons for us to take the Ohio Constitution as seriously as judicial federalism has proposed.

## II. JUDICIAL FEDERALISM IN OHIO: THEN AND NOW

### A. *The Porter and Tarr Critique*

In a 1984 law review article, Professors Mary Cornelia Porter and G. Alan Tarr argued that the Ohio Supreme Court’s experience with judicial federalism had been a “failure.”<sup>30</sup> They reached this conclusion because they believed that the court had failed to meet at least two of judicial federalism’s basic propositions. The first proposition was the need to “revitalize state constitutional guarantees.”<sup>31</sup> The project of revitalization entailed the notion that the Ohio Supreme Court should “follow the lead of other courts” by taking an independent stance with respect to the

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<sup>29</sup>At the time, other state courts had begun to take more independent approaches to their own constitutions. Indeed, I was pleased to learn that the California Supreme Court had relied, in part, on an article I had written when it took a more-than-the-federal-minimum approach to the California Constitution’s due process provision. *See* *People v. Ramirez*, 599 P.2d 622, 626, 627, 632 (Cal. 1979) (citing Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978) [hereinafter *Due Process Values*]).

<sup>30</sup>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, 150 (1984) [hereinafter *Anatomy of a Failure*]. While some commentators still refer to a “new judicial federalism,” *see, e.g.*, G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997) [hereinafter *Perspective*]; Symposium: *The New Judicial Federalism: A New Generation*, 30 VAL. U. L. REV. 421 (1996); G. Alan Tarr, *The Past and the Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63 (Spring 1994), others have argued that the “new judicial federalism” is no longer “new.” *See, e.g.*, Ronald K.L. Collins, *The Once “New Judicial Federalism” and Its Critics*, 64 WASH. L. REV. 5 (1989). In the spirit of economy, I will henceforth, for the most part, leave out the “new” in my references to judicial federalism.

I should note that the Porter and Tarr article represents the only modern, general analysis of Ohio constitutional interpretation of which I am aware. (Even at the time of their article, Porter and Tarr noted that “scholars have paid no systematic attention to the Ohio Supreme Court.” *Anatomy of a Failure, supra*, at 144.) While the last twenty years or so have seen a fairly significant amount of scholarly literature on state constitutional interpretation, there has been relatively little of it directed toward the Ohio Supreme Court. I suspect that there are a number of reasons for this, and I also suspect that some of those reasons explain why the Ohio Supreme Court is seldom featured in general discussions and evaluations of notable “recent developments” in state constitutional interpretation. I will return to these observations at the end of this paper.

<sup>31</sup>*Anatomy of a Failure, supra* note 30, at 144. Actually, Porter and Tarr were looking at the Ohio Supreme Court in relativistic terms in an effort to assess whether, and the extent to which, it had developed “state constitutional law along the lines established by other courts.” *Id.* at 145.

requirements of the Ohio Constitution.<sup>32</sup> This independence required that the Ohio Constitution be approached on its own terms, as a truly independent source of individual rights, and not simply as a mirror image of the U.S. Constitution as construed by the U.S. Supreme Court.<sup>33</sup>

A second failure identified by Porter and Tarr was one of boldness and imagination. Not only was the Ohio Supreme Court an “emulator” of its federal counterpart, it wasn’t even “enthusiastic” about its emulation.<sup>34</sup> And it wasn’t an “innovator.”<sup>35</sup> A robust judicial federalism required a “resurgence of state court creativity.”<sup>36</sup> For Porter and Tarr, this creativity, in turn, contemplates, if it does not require, state courts to be receptive to “new opportunities for policymaking.” But they found that the Ohio Supreme Court’s approach to state constitutional interpretation, at least as of 1984, “generally [had] not been conducive to thoughtful policy development.”<sup>37</sup>

To support these arguments, Porter and Tarr examined five cases decided by the Ohio Supreme Court from 1974 to 1981. In the balance of this Section, I want to update the Porter and Tarr examination of Ohio constitutional interpretation in the Ohio Supreme Court. While the cases I consider do not represent every post-1981 decision in which the Ohio Supreme Court was called upon to interpret the Ohio Constitution, I think they represent a fair sampling of such cases. My ambition here will be to determine whether the Ohio Supreme Court has, consistent with the prescriptions of many modern judicial federalists, taken a more independent stance with respect to the Ohio Constitution than was reflected in the Porter and Tarr study. Moreover, there will be some effort to assess how the Ohio Supreme Court has measured up on the score of “boldness” and “imagination,” although I recognize that these criteria are both controversial in theory and perhaps inherently subjective. In the next Section of this paper, I will return to examine some of the assumptions that underlie the sort of judicial federalism advanced by scholars such as Porter and Tarr.

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<sup>32</sup>*Id.* at 150.

<sup>33</sup>If I understand their argument, Porter and Tarr were not claiming that judicial federalism contemplated that the Ohio Supreme Court should *never* consider or be influenced by federal constitutional interpretation, but that it should not routinely or systematically engage in what subsequent commentators have described as “lockstep” interpretation. *See* *People v. Krueger*, 675 N.E.2d 604, 611 (Ill. 1996) (discussing “lockstep doctrine”). At the very least, Porter and Tarr seemed to be arguing that the Ohio Supreme Court should not “passively accept” and incorporate into Ohio constitutional law U.S. Supreme Court doctrine and methodology. *Cf.* *State v. Hunt*, 558 A.2d 1259, 1291 (N.J. 1989) (Handler, J., concurring in part and dissenting in part) (criticizing the majority for its “passive acceptance of the [U.S.] Supreme Court’s lead”).

<sup>34</sup>*Anatomy of a Failure*, *supra* note 30, at 154.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 158.

<sup>37</sup>*Id.* at 150.

*B. The Cases*

1. *Stone v. City of Stow*<sup>38</sup>

*Stow* involved a challenge to a state statutory scheme that authorized the collection of medical prescription data, without a warrant, by police officers and employees of a state pharmacy board. This scheme was challenged by a number of parties, including doctors, patients, and a pharmacist, who claimed that it violated their “right of privacy and the prohibition of unreasonable searches and seizures found in the United States and Ohio Constitutions.”<sup>39</sup>

In rejecting the challenge, the court first addressed the right to privacy claim. Without ado, the court immediately turned to decisions of the U.S. Supreme Court, with special emphasis on *Whalen v. Roe*,<sup>40</sup> in which the latter Court had indicated that the Fourteenth Amendment to the U.S. Constitution protects a privacy interest in the non-disclosure of personal information, as well as an interest in independent decisionmaking with respect to at least certain kinds of personal matters. In an almost mechanical application of *Whalen’s* reasoning, the Ohio Supreme Court found *Whalen* “dispositive of the privacy issue raised by appellants”<sup>41</sup> and upheld the statutory scheme.<sup>42</sup>

Next, the court turned to the search and seizure issue. In a section of the opinion entitled “Fourth Amendment Challenge,”<sup>43</sup> the court once again turned to decisions of the U.S. Supreme Court prescribing a two-step “expectation of privacy” analysis under the Fourth Amendment.<sup>44</sup> In upholding the statutory scheme against the search and seizure claim, the court, as had been the case in its privacy analysis, largely tracked the federal Supreme Court’s methodology in concluding that the scheme “does not violate the prohibition against unreasonable searches and seizures found in the United States and Ohio Constitutions.”<sup>45</sup>

*Brief Assessment:* From the point of view of judicial federalism, the decision in *Stow* clearly fits within Porter and Tarr’s “failure” thesis. In fact, the failure is quite

<sup>38</sup>64 Ohio St. 3d 156, 593 N.E.2d 294 (1992).

<sup>39</sup>*Id.* at 159, 593 N.E.2d at 297.

<sup>40</sup>429 U.S. 589 (1977).

<sup>41</sup>64 Ohio St. 3d at 163, 593 N.E.2d at 299.

<sup>42</sup>The challengers had apparently asked the court to apply a “balancing test” which they, and presumably the court, assumed was not contemplated by the U.S. Supreme Court in *Whalen*. The Ohio Supreme Court refused to do so, stating that “we follow the lead of the *Whalen* court and choose not to apply any type of heightened scrutiny to the challenged scheme.” *Id.* at 163, 593 N.E.2d at 299.

<sup>43</sup>*Id.* at 163, 593 N.E.2d at 299.

<sup>44</sup>*Id.* at 164, 593 N.E.2d at 300 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). The court also cited, and purported to follow, other U.S. Supreme Court decisions. *Id.* at 165, 593 N.E.2d at 300-01. Its analysis also incorporated discussion of a number of other cases, including at least three of its own precedents.

<sup>45</sup>*Id.* at 166, 593 N.E.2d at 301. Judge Christley, sitting by assignment, wrote a dissent, disagreeing not with the relevance of the U.S. Supreme Court’s decisions, but with their application. *Id.* at 167, 593 N.E.2d at 302.

stark and remarkable. Not only does the Ohio Supreme Court proceed as if the state constitutional guarantee of a right to privacy should mean the same thing as the Fourteenth Amendment's right to privacy as interpreted by the U.S. Supreme Court, but the Ohio court never even identifies the source of a right to privacy in the Ohio Constitution! One might think that a court that purports to be interpreting its state constitution would, at the very least, mention the text, clause, or provision of the document that it purports to be interpreting. Apparently, the *Stow* court saw the identity between the Ohio and U.S. Constitutions to be so complete that it need not even mention the state constitutional provision that it said was at issue.<sup>46</sup>

The court's disposition of the search and seizure issue demonstrated a similar commitment to the federal model. While the court did at least identify the state constitutional source for its search and seizure analysis,<sup>47</sup> the section of its opinion devoted to the search and seizure issue was entitled "Fourth Amendment Challenge."<sup>48</sup> And although its analysis included references to three previous Ohio Supreme Court decisions, there is little question that it was adhering closely to the prescribed methodology of the U.S. Supreme Court.

## 2. *Sorrell v. Thevenir*<sup>49</sup>

In *Sorrell*, the Ohio Supreme Court was faced with a challenge to a provision of Ohio law that required deduction of so-called "collateral benefits" from jury awards in tort cases. These benefits included payments from a variety of sources, such as health insurance, accident insurance, workmen's compensation, and the like. The plaintiff, who had suffered an employment-related injury, obtained a jury verdict, and the defendant asked that the trial judge subtract from that award, as required by the statute, a sum of money that, as it turned out, was greater than the jury award itself.<sup>50</sup> The trial court held that the statute violated provisions of the Ohio Constitution, and entered judgment in favor of the plaintiff for the entire amount of the jury award. The state court of appeals reversed and remanded, and the Ohio Supreme Court granted review.

Three provisions of the Ohio Constitution were implicated in the case, and the court found that the statute violated each of them. For present purposes, I shall focus on two of them: Article I, Section 16 ("Section 16") and Article I, Section 2 ("Section 2").<sup>51</sup> Section 16 provides that every injured person "shall have remedy by due course of law." The court referred to Section 16 as "the equivalent of the 'due

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<sup>46</sup>The opinion of the state court of appeals in *Stow* was equally bereft of any reference to Ohio constitutional materials. See *Stone v. City of Stow*, No. 14691, 1991 WL 11365 (Ohio Ct. App. Jan. 31, 1991).

<sup>47</sup>In a footnote, the court set out in full both the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution. But even here, it noted that it was using "the term 'Fourth Amendment' to collectively refer to both the Fourth Amendment and Section 14, Article I." *Stow*, 64 Ohio St. 3d at 164 n.3, 593 N.E.2d at 299 n.3.

<sup>48</sup>*Id.* at 163, 593 N.E.2d at 299.

<sup>49</sup>69 Ohio St. 3d 415, 633 N.E.2d 504 (1994).

<sup>50</sup>*Id.* at 416, 633 N.E.2d at 506.

<sup>51</sup>The third provision considered by the court was Article I, Section 5, which guarantees a right to trial by jury.

process of law' provision in the Fourteenth Amendment to the United States Constitution."<sup>52</sup> The court next turned to a determination of the appropriate standard of review required by "principles of due process."<sup>53</sup>

Since the court concluded that the right to trial by jury was adversely affected by the challenged statute, and since the court had previously held that right to be "fundamental," it held that a "strict scrutiny standard of review applies."<sup>54</sup> The court, without any supporting reasoning, found that the statute did not meet this standard, and in any event, it also held that the statute failed even the "less stringent" rational basis standard.<sup>55</sup>

The court next turned to Article I, Section 2.<sup>56</sup> The court referred to Section 2 as "the Equal Protection Clause of the Ohio Constitution"<sup>57</sup> and it turned again to the question of the appropriate standard of review. Once again, the presence of a fundamental interest in a trial by jury required the application of strict scrutiny. The court found that the "limits placed upon governmental action by the Equal Protection Clause of the Ohio and United States Constitutions are nearly identical."<sup>58</sup> It then held that the collateral benefits statute failed this test. In addition, as had been the case for the due process issue, the court also held that the statute violated the "less stringent rational basis test."<sup>59</sup>

*Brief Assessment:* From a judicial federalism perspective, at least as understood by Porter and Tarr, *Sorrell* might well be called a disappointment. The case scores quite low in the areas of independence and imagination. The Ohio Supreme Court treats the due process and equal protection provisions of the Ohio Constitution as essentially mirror images of the Fourteenth Amendment, as interpreted by the U.S. Supreme Court. If the court understood the Ohio Constitution, or its own role in interpreting that document, as having any real independence,<sup>60</sup> it provides us little indication of that fact.<sup>61</sup>

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<sup>52</sup>69 Ohio St. 3d at 422, 633 N.E.2d at 511.

<sup>53</sup>*Id.* at 423, 633 N.E.2d at 511. The defendant urged the court to apply the "rational basis test" it had applied in one of its prior cases. *Id.* at 423, 633 N.E.2d at 511.

<sup>54</sup>*Id.* at 423, 633 N.E.2d at 511.

<sup>55</sup>*Id.* at 424, 633 N.E.2d at 512.

<sup>56</sup>This section provides, in pertinent part: "All political power is inherent in the people. Government is instituted for their equal protection and benefit. . . ." OHIO CONST. art. I, § 2.

<sup>57</sup>69 Ohio St. 3d at 424, 633 N.E.2d at 512. The court had also referred to the "Equal Protection Clause of the Ohio Constitution" a year earlier in *Roseman v. Firemen & Policemen's Death Benefit Fund*, 66 Ohio St. 3d 443, 445, 613 N.E.2d 574, 576 (1993). The equal protection analysis in *Roseman* does not differ in any significant way from the analysis in *Sorrell*.

<sup>58</sup>69 Ohio St. 3d at 424, 633 N.E.2d at 512.

<sup>59</sup>*Id.* at 426, 633 N.E.2d at 513.

<sup>60</sup>A brief note about the notion of "independent" (or even "dependent") content might be useful here. A state constitutional provision, and a state court which interprets it, might be understood as lacking independence in at least two ways. First, there is the sense that the state provision means the same thing as the analogous federal constitutional provision because the state court, for whatever reasons, ties itself to the U.S. Supreme Court's prior (or perhaps anticipated) interpretation(s) of the latter. Here, in effect, the state court views itself as having

### 3. *Arnold v. City of Cleveland*<sup>62</sup>

In a number of ways, *Arnold* is one of the most interesting cases discussed in this Section. The case involved a challenge to a 1989 ordinance adopted by the Cleveland City Council that banned the possession and sale of so-called “assault weapons” in the City of Cleveland. The plaintiffs claimed that the ordinance violated Article I, Section 4 of the Ohio Constitution.<sup>63</sup> This provision bears a number of similarities to the Second Amendment to the U.S. Constitution.<sup>64</sup> It provides that:

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.<sup>65</sup>

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no real choice in the matter. The second sense of “dependence” is manifested by a state court that truly believes that its own constitutional provisions stand on their own bottom, and believes that it is free to interpret these provisions any way it chooses. Here, the court does not believe itself *bound* to follow the methods of analysis employed by the U.S. Supreme Court when it interprets analogous federal provisions; nor does it believe itself bound to replicate the doctrinal outcomes produced by the Supreme Court. In this situation, the state court might nonetheless choose to employ methodologies similar (or even identical) to the federal paradigm, and/or it might reach similar or even identical outcomes, but it does so for its own reasons. As I suggest later, I think these two different ideas of independence (or dependence) should be evaluated quite differently.

<sup>61</sup>The court does say that the Ohio and federal Equal Protection Clauses are “nearly” identical, 69 Ohio St. 3d at 424, 633 N.E.2d at 512. For this proposition, it cites *Kinney v. Kaiser Aluminum & Chemical Corp.*, 41 Ohio St. 2d 120, 123, 322 N.E.2d 880, 882 (1975), where the court had previously asserted that the two clauses were “essentially identical.” But however it qualifies the “identity,” nothing in the court’s opinion in *Sorrell* (or, for that matter, in *Kinney*) suggested a willingness to recognize a dime’s worth of difference between the two clauses.

To be fair, the court in *Sorrell* purported, at least in part, to be following the analysis contemplated by its own precedents. For example, in its due process analysis, it cited a 1941 Ohio Supreme Court decision for the equivalency of the federal and state due process provisions. 69 Ohio St. 3d at 422-23, 633 N.E.2d at 511 (citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 38 N.E.2d 70 (1941)). But to my knowledge, the Ohio Supreme Court has never denied its authority to modify or overrule its precedents. And, of course, the composition of the court changes over time. Thus, it is at least fair to assume that when a subsequent court follows reflexively the analysis laid down by its predecessors, it can be understood to approve of and embrace that analysis.

<sup>62</sup>67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

<sup>63</sup>The plaintiffs also alleged the ordinance violated Article I, Section 1 of the Ohio Constitution, and, because they claimed the ordinance violated certain federal statutes, the Supremacy Clause of Article VI of the U.S. Constitution.

<sup>64</sup>For reasons that I shall discuss, it is noteworthy that the plaintiffs did not assert a claim under the Second Amendment.

<sup>65</sup>OHIO CONST. art. I, § 4.

The court began its opinion by noting that Article I, Section 4 “has not been previously considered by this court.”<sup>66</sup> Prior to addressing directly the meaning of this provision, the court, in a section of its opinion entitled “State and Federal Constitutions,”<sup>67</sup> turned its attention to the federal Second Amendment. It discussed the development of U.S. Supreme Court doctrine under that Amendment, which it understood as withholding application of the Amendment to the states and refusing to create an individual right to possess or use arms.

The court then addressed directly the relationship between the federal and state constitutions. In what might well be its first, and certainly its most extensive, discussion of the “New Federalism,”<sup>68</sup> the court, initially citing language from U.S. Supreme Court decisions, noted that “[a] state court is entirely free to read its own state’s constitution more broadly than [the U.S. Supreme] Court reads the Federal Constitution, or to reject the mode of analysis used by [the U.S. Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.”<sup>69</sup> Then, in what might be understood as an act of self-deprecation, the court, in a footnote, cited the Porter and Tarr article for the proposition that it had, in the past, “been reluctant to use the Ohio Constitution to extend greater protection to the rights and civil liberties of Ohio citizens.”<sup>70</sup>

In what arguably was intended to be a manifesto for its own Ohio constitutional emancipation, the court announced that it would join “the growing trend in other states” in the belief “that the Ohio Constitution is a document of independent force”—and it went on to endorse the notion that, at least “in the areas of individual rights and civil liberties,” it would consider itself “unrestricted” by U.S. Supreme Court decisions interpreting the federal Constitution “in according greater civil liberties and protections to individuals and groups.”<sup>71</sup>

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<sup>66</sup>Ohio St. 3d at 39, 616 N.E.2d at 166.

<sup>67</sup>*Id.* at 39, 616 N.E.2d at 166.

<sup>68</sup>*Id.* at 41, 616 N.E.2d at 168. Section I-C of the court’s opinion is entitled “State Constitutionalism/New Federalism.”

<sup>69</sup>*Id.* at 41, 616 N.E.2d at 168 (quoting from *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982)).

<sup>70</sup>*Id.* at 42 n.8, 616 N.E.2d at 168 n.8 (citing *Anatomy of a Failure*, *supra* note 30). In that same footnote, the court went on to observe: “When presented with opportunities to do so, this court has not, on most occasions, used the Ohio Constitution as an independent source of constitutional rights.”

The self-deprecating tone of the court’s opinion was reinforced by its acknowledgment that what it called “‘state constitutionalism’ or ‘new federalism’” had been “met with considerable approval,” citing, among other things, Brennan, *State Constitutions*, *supra* note 5, and the fact that “[o]ne court has pointedly stated that ‘when a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.’” 67 Ohio St. 3d at 42, 616 N.E.2d at 169 (citing *Davenport v. Garcia*, 834 S.W.2d 4, 12 (Tex. 1992)).

<sup>71</sup>*Id.* at 42, 616 N.E.2d at 169. Indeed, perhaps to emphasize its emancipation, the court incorporated this language into the official syllabus of the case. *Id.* at 35, 616 N.E.2d at 164 (syllabus ¶ 1). At the time that *Arnold* was decided, the court’s syllabus was considered the law of the case in Ohio.

The court then turned to the task of interpreting Article I, Section 4. It construed the text of this provision to confer a “fundamental individual right to bear arms,”<sup>72</sup> a construction that it found supported by our national, and even pre-national, history: “Given the history of our nation and this state, the right of a person to possess certain firearms has indeed been a symbol of freedom.”<sup>73</sup> Citing Black’s Law Dictionary, the court found this right “fundamental” and even “sacred,” but, like a number of other state constitutional rights to which it referred, not “unlimited” or “absolute.” Then, in a section of its opinion entitled “Police Power,”<sup>74</sup> the court found that the Cleveland ordinance represented a reasonable, and thus constitutional, exercise of a municipality’s police power.<sup>75</sup>

*Brief Assessment:* It is tempting to suggest that *Arnold* represents the poster child for judicial federalism in Ohio.<sup>76</sup> Surely, Porter and Tarr had to be pleased. Not only did the court seem to adopt an independent stance toward Ohio constitutional interpretation, it devoted a whole section of its opinion to the premises and virtues of “state constitutionalism.” It went so far as to cite, with apparent agreement, the Porter and Tarr critique of its past failures.

To be sure, there is much in the court’s opinion that appears to embrace the need to revitalize (or is it “vitalize”?) the notion that the Ohio Constitution should be taken as a truly independent source of individual rights. Perhaps one might even see elements of boldness and imagination in the court’s analysis. But perhaps these reactions should be tempered by what might be seen as a paradox in the court’s analysis. Recall that the plaintiffs in *Arnold* did not assert an individual rights claim against the Cleveland ordinance under the Second Amendment to the United States Constitution;<sup>77</sup> they relied only on Article I, Section 4. Consequently, the Ohio Supreme Court, if it took its independence seriously, was free to interpret the Ohio Constitution on its own terms, completely free of any obligation to attend to federal

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<sup>72</sup>*Id.* at 43, 616 N.E.2d at 169. The court found no recorded material that might shed light on the original understanding of Article I, Section 4, a fact that it actually found to lend support to its sense of the constitutional importance of the right in question.

<sup>73</sup>*Id.* at 44, 616 N.E.2d at 170.

<sup>74</sup>*Id.* at 46, 616 N.E.2d at 171.

<sup>75</sup>*Id.* at 48, 616 N.E.2d at 173.

<sup>76</sup>Professor Bettman has referred to *Arnold* as the case in which “Ohio explicitly joined the new federalism movement.” Marianna Brown Bettman, *Comity and Federalism Through the Lens of School Vouchers*, 29 N. KY. L. REV. 455, 456 (2002).

<sup>77</sup>Given the state of Second Amendment jurisprudence at the time, the plaintiff’s apparent strategy was quite understandable. As the Ohio Supreme Court noted, the doctrinal and precedential support for such a claim was quite weak, and an Ohio Supreme Court decision based, even in part, on the Second Amendment potentially would have been subject to U.S. Supreme Court review. See *Michigan v. Long*, 463 U.S. 1032 (1983) (specifying the conditions under which a state court decision addressing both federal and state constitutional claims will be subject to appellate review in the Supreme Court). Parenthetically, more recent developments in understandings of the Second Amendment seem to have made its proper meaning more ambiguous than the *Arnold* court supposed. See, e.g., *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (adopting the “individual rights” understanding of Second Amendment), *cert. denied*, 536 U.S. 907 (2002). But see *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (rejecting individual rights approach).



constitutional doctrine and methodologies.<sup>78</sup> It is therefore odd that the court, as a prelude to directing its attention to Article I, Section 4, proceeded first to analyze and discuss the Second Amendment as interpreted by the U.S. Supreme Court.<sup>79</sup> In a world where state constitutional interpretation and interpreters are truly independent, analogous federal constitutional materials and interpretations are, or certainly can be, legally gratuitous. I do not mean to suggest that a robust judicial federalism necessarily precludes the relevance of analogous federal constitutional resources. Indeed, I shall soon suggest that it does not. But unless a state court provides at least some explanation for why it believes it must attend to the federal constitutional materials first, especially in a case where no federal constitutional claim is advanced by the parties, its assertion of true constitutional independence is at least suspect. And one searches the *Arnold* opinion in vain for such an explanation.

#### 4. *Ohio v. Robinette*<sup>80</sup>

No treatment of judicial federalism in Ohio constitutional interpretation would be complete without a discussion of *Ohio v. Robinette*.<sup>81</sup> The case involved a motion to suppress evidence under both Article I, Section 14 of the Ohio Constitution and the Fourth Amendment to the U.S. Constitution. Robinette was stopped by one of my home town (Dayton) sheriff's deputies for speeding in a construction zone on an interstate highway. The deputy decided not to issue a citation for the speeding, but asked Robinette whether he had any contraband in his possession. When Robinette said he did not, the deputy asked him whether he could search the vehicle. Robinette, apparently believing that he really had no choice in the matter, gave his consent, and the deputy found controlled substances in the car, for the possession of which Robinette was then criminally prosecuted.<sup>82</sup> Robinette's motion to suppress the results of the search under the Ohio and U.S. Constitutions was denied by the trial court, whose judgment was reversed by the intermediate state court of appeals.

The Ohio Supreme Court affirmed, concluding that, since the deputy failed to clearly state to Robinette that he was free to go after the initial purpose of the stop had been concluded,<sup>83</sup> the search of the vehicle was unconstitutional.<sup>84</sup> Although the

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<sup>78</sup>Of course, a state court, by virtue of the Supremacy Clause of Article VI of the United States Constitution, is not free to interpret its state constitution in a way that conflicts with the requirements of federal law, so it should never be completely oblivious to those requirements. But in *Arnold*, the court was asked to find that the Ohio Constitution was *more* protective of individual rights than was the Second Amendment, not less protective.

<sup>79</sup>Although the *Arnold* court discussed other court decisions concerning the Second Amendment, most of its attention was devoted to U.S. Supreme Court decisions. 67 Ohio St. 3d at 39-42, 616 N.E.2d at 166-68.

<sup>80</sup>80 Ohio St. 3d 234, 685 N.E.2d 762 (1997).

<sup>81</sup>My sense is that *Robinette* has attracted more attention from judicial federalists than any other recent Ohio Supreme Court decision. See, e.g., Bettman, *supra* note 76, at 457-60.

<sup>82</sup>For a parallel, but somewhat more extensive, discussion of the case, see *id.*

<sup>83</sup>As noted earlier (*supra* note 71), the court's syllabus, at least at the time of the decision, was considered to state the law of the case. See *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 24, 231 N.E.2d 64, 68 (1967).

<sup>84</sup>73 Ohio St. 3d 650, 653 N.E.2d 695 (1995) [hereinafter *Robinette I*].

syllabus of the court's opinion referred to "[t]he right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property,"<sup>85</sup> the court's reasoning was drawn almost exclusively from federal precedents.<sup>86</sup> The court concluded its opinion as follows: "The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty."<sup>87</sup>

The State of Ohio appealed this decision to the U.S. Supreme Court. Since Robinette argued that the Ohio Supreme Court's decision rested on both federal and state constitutional grounds, the Court first turned to the question whether, under *Michigan v. Long*,<sup>88</sup> it could exercise appellate jurisdiction. Since the Court could not discern from the Ohio Supreme Court's opinion whether that court actually intended to independently rest its decision on state law, it concluded that the requirements for federal appellate jurisdiction were satisfied.<sup>89</sup> It went on to conclude that the Ohio Supreme Court's understanding and application of Fourth Amendment principles were mistaken, and it reversed and remanded the case for further proceedings in the state courts, with an explicit invitation to the Ohio Supreme Court to clarify and reaffirm that its prior decision might "find adequate and independent support in state law."<sup>90</sup>

On remand, in what I shall refer to as *Robinette II*, the Ohio Supreme Court clearly reaffirmed its earlier decision on the merits. But whether, and to what extent, it took the U.S. Supreme Court's apparent invitation to assert state constitutional independence is another question.<sup>91</sup> It noted the "New Federalism" "movement" and the recent "trend for state courts to rely on their own constitutions to provide broader protection for individual rights, independent of protection afforded by the United

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<sup>85</sup>*Id.* at 650, 653 N.E.2d at 696 (syllabus ¶ 2).

<sup>86</sup>The opinion cited only one 1984 state court case. *Id.* at 652, 653 N.E.2d at 697 (citing *State v. Chatton*, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984)).

<sup>87</sup>Justice Sweeney dissented. He, too, reasoned almost exclusively from federal precedents. His only reference to Ohio law was in a footnote noting that the relevant Ohio and federal constitutional provisions were "analogous." *Id.* at 656 n.1, 653 N.E.2d at 699 n.1 (Sweeney, J., dissenting).

<sup>88</sup>463 U.S. 1032 (1983) (holding that U.S. Supreme Court's jurisdiction did not extend to state court decisions resting on independent and adequate state grounds, and specifying criteria for determining whether this condition was satisfied).

<sup>89</sup>519 U.S. 33, 36-37 (1996).

<sup>90</sup>*Id.* at 45. Justice Stevens wrote a dissenting opinion, in which he noted that "it is important to emphasize that nothing in the Federal Constitution, or in this Court's opinion, prevents a State from requiring its law enforcement officers to give detained motorists the advice mandated by the Ohio court." *Id.* at 45-46 (Stevens, J., dissenting). Justice Ginsburg wrote an opinion concurring in the judgment. *Id.* at 40. She noted the Ohio Supreme Court's assertion of state constitutional independence in *Arnold*, *id.* at 43 n.\*, and emphasized the Ohio Supreme Court's freedom to "impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Id.* at 42.

<sup>91</sup>The court noted that it had invited the parties to brief the question "[w]hether this court's prior holding should be reaffirmed under the adequate and independent ground of the Constitution of the State of Ohio." 80 Ohio St. 3d at 237, 685 N.E.2d at 765-66.

States Constitution.”<sup>92</sup> But, “[d]espite this wave of New Federalism,” it asserted that the U.S. Constitution was the “primary mechanism to safeguard an individual’s rights.”<sup>93</sup> From this assertion, the court drew the further proposition that “where the [state and federal constitutional] provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.”<sup>94</sup>

The court then noted that the language of the relevant state and federal search and seizure provisions was “virtually identical,” a fact that required the conclusion that they afforded the “same protection.”<sup>95</sup> Only where state constitutional guarantees “explicitly” and “clearly” transcend their federal counterparts—in this case, the Fourth Amendment—would the court construe them to “impose greater restrictions” on the state’s powers to regulate.<sup>96</sup> Since “persuasive reasons” for truly independent, or at least divergent, interpretations were found absent in the search and seizure context, the state provision’s meaning would be the same as its federal counterpart.<sup>97</sup>

*Brief Assessment:* More than one of my students has referred to *Robinette* (especially *Robinette II*) as “weird.” And from the perspective of judicial federalism, I’m not certain that I would disagree. From a Porter and Tarr point of view, *Robinette I* is a disappointment. The opinion is completely devoid of any boldness, imagination, and independence. The court mentioned the Ohio Constitution only twice, and only in passing, and it gave no indication at all that it viewed the Ohio search and seizure provision as representing anything other than a mirror image of the Fourth Amendment. When the case reached the U.S. Supreme Court, not a single Justice took the position that the Ohio Supreme Court had clearly decided the case based upon state constitutional law principles.<sup>98</sup>

*Robinette II* is more enigmatic. Recall that the U.S. Supreme Court had acknowledged that the Ohio courts could establish a state constitutional principle that is more protective of the individual’s freedoms than the federal rule upon which the

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<sup>92</sup>*Id.* at 238, 685 N.E.2d at 766.

<sup>93</sup>*Id.* at 237, 685 N.E.2d at 766. The court based this conclusion on a law review essay which claimed that the conclusion flowed from the federal “incorporation doctrine,” the legal vehicle employed by the U.S. Supreme Court to hold that the states are bound by most of the provisions of the federal Bill of Rights.

<sup>94</sup>*Id.* at 238, 685 N.E.2d at 766. The court cited two of its recent cases in support of this proposition: *State v. Gustafson*, 76 Ohio St. 3d 425, 432, 668 N.E.2d 435, 441 (1996); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 222-23, 626 N.E.2d 59, 60 (1994).

<sup>95</sup>80 Ohio St. 3d at 238, 685 N.E.2d at 766-67.

<sup>96</sup>*Id.* at 239, 685 N.E.2d at 767.

<sup>97</sup>*Id.* at 239, 685 N.E.2d at 767. The court then turned to an analysis of U.S. Supreme Court interpretations of the Fourth Amendment and, although for different reasons than it had offered in *Robinette I*, concluded that the search of *Robinette*’s car violated the Ohio Constitution. *Id.* at 246, 685 N.E.2d at 771-72.

<sup>98</sup>The only arguable exception to this is Justice Stevens, who suggested that the Ohio Supreme Court could, and therefore should, have been understood to have announced a state rule, supplementing federal requirements, to be applied in similar cases in the future. 519 U.S. at 51-53.

Court relied. Indeed, Justice Ginsburg's separate opinion offered a "virtual roadmap" of how the Ohio Supreme Court could do so.<sup>99</sup> And the opinion in *Robinette II* certainly genuflected to the "New Federalism." The court acknowledged that it had the *power* to depart from U.S. Supreme Court Fourth Amendment doctrine, and the methodologies that had produced that doctrine. Thus, if all judicial federalism entails is a recognition that a state court has a *choice* whether or not to mimic federal constitutional jurisprudence, I suppose that *Robinette II* can be viewed (in Porter's and Tarr's terms) as a "success."

But there are clear signs in *Robinette II* of a state court that is at best uneasy with the prospects of "setting sail" on its own.<sup>100</sup> The court's reference to "this wave of New Federalism" seems almost sarcastic; the "wave" is noted as if it is something to be resisted. And the court seems not just inclined, but determined, to resist. Not only does the court identify the federal Constitution as the "primary mechanism to safeguard an individual's rights,"<sup>101</sup> but as the presumptive template for determining state constitutional rights as well.<sup>102</sup> To be sure, the presumption may not be irrefutable. It apparently applies only, or at least especially, where the relevant federal and state constitutional provisions are textually "similar." And the presumption can be overcome where there are "persuasive" reasons for interpreting the state provision more broadly. But the only indication *Robinette II* provides for determining whether such reasons exist is that the state provision must "clearly transcend" its federal counterpart. Whether such a "transcendence" can be measured by reference to something other than explicit and obvious textual differences is a question left unanswered.

To avoid misunderstanding, let me emphasize something that I am not claiming. One might argue that judicial federalism can only be meaningful if a state court *never* looks to federal law in determining the meaning of its own constitution. One might further argue that judicial federalism should *always* result in state court interpretations of state constitutions that expand upon the protection afforded by the federal Constitution. If these are the requirements of judicial federalism, then *Robinette II* (and, of course, *Robinette I*) represent clear "failures." However, for reasons I will discuss later, I think neither of these conditions is inherent in a robust and vital judicial federalism. Indeed, I think they may be inconsistent with such an ideal.

What I do claim, however, is that if and when a state court chooses to emulate the federal standard, in either its doctrinal or methodological manifestations, it should demonstrate that it actually has made a real choice. One way it can do so is by offering persuasive reasons to support the choice it has made. Simply pointing to

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<sup>99</sup>Bettman, *supra* note 76, at 458.

<sup>100</sup>See George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor: Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

<sup>101</sup>80 Ohio St. 3d at 237, 685 N.E.2d at 766.

<sup>102</sup>The notion that the federal Constitution establishes a presumptive baseline for state constitutional interpretation has been forcefully, and in my judgment, persuasively criticized by a number of judges and academic commentators. For general discussion, see 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. 4 (1997). I shall return to this problem later.

textual similarities between state and federal constitutional provisions and asserting the “primacy” of the federal standard will not do.<sup>103</sup>

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<sup>103</sup> At this point, two further observations about *Robinette II* are in order. First, and to be fair, the court was not working from a blank slate. While its decision may have fallen short of the robust independence promised in *Arnold*, two post-*Arnold* decisions which the court cited arguably forecasted a more docile state constitutional philosophy. 80 Ohio St. 3d at 238, 685 N.E.2d at 766 (citing *State v. Gustafson*, 76 Ohio St. 3d 425, 668 N.E.2d 435 (1996) and *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994)). See also 80 Ohio St. 3d at 239, 685 N.E.2d at 767 (citing *State ex rel. Wright v. Ohio Adult Parole Authority*, 75 Ohio St. 3d 82, 661 N.E.2d 728 (1996)). Second, and as noted by Professor Bettman, changes on the Ohio Supreme Court after *Arnold* was decided might help explain *Robinette II*'s apparent diminished enthusiasm for taking the state constitution more seriously. Bettman, *supra* note 76, at 459.

After the manuscript for this essay was substantially completed, the Ohio Supreme Court decided *State v. Brown*, 99 Ohio St. 3d 323, 792 N.E.2d 175 (2003), which warrants at least a brief comment here. In *Brown*, the defendant-appellee had been arrested by the Dayton police for, and charged with, jaywalking, a minor misdemeanor under Ohio law. After the arrest, a custodial search produced crack cocaine, which led to a charge for possession of a controlled substance. *Brown* moved to suppress the fruits of the search under both the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution (the same provisions at issue in *Robinette*). The trial court ultimately granted the motion to suppress, relying on the Ohio Supreme Court's decision in *State v. Jones*, 88 Ohio St. 3d 430, 727 N.E.2d 886 (2000), in which the court had held, under both the U.S. and Ohio Constitutions, that, as a general rule, a full custodial arrest for a minor misdemeanor was impermissible. (The Ohio Supreme Court recognized some exceptions to this rule; in fact, its constitutional analysis tracked and essentially incorporated an Ohio statute, OHIO REVISED CODE § 2935.26, which contained a set of exceptions to a general prohibition against custodial arrests for misdemeanors.) The trial court rejected the state's argument that a post-*Jones* decision of the U.S. Supreme Court, *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (holding, under Fourth Amendment, that custodial arrests for even minor misdemeanors are permissible), undermined the state constitutional holding in *Jones*. The state court of appeals affirmed.

In the Ohio Supreme Court, the state's argument for reversal was based on the propositions that (1) in *Jones*, the state court had adopted a mirror-image approach to the state and federal constitutions; (2) *Atwater* undermined the federal constitutional foundation for the decision in *Jones*; and (3) since, in *Jones* (and, of course, *Robinette*), the Ohio Supreme Court has linked state and federal search and seizure requirements, the *Jones* state constitutional prohibition on custodial arrests for minor misdemeanors was no longer viable.

A 5-2 majority of the Ohio Supreme Court rejected this argument. And it did so in a way that suggests an important step forward for an independent Ohio constitutionalism. The court, citing extensively from *Arnold v. Cleveland*, *see supra* notes 62-75 and accompanying text, noted that, as a “document of independent force,” the Ohio Constitution can be construed more broadly than the U.S. Constitution as interpreted by the U.S. Supreme Court. 99 Ohio St. 3d at 326-27, 792 N.E.2d at 178. The question was whether, in the circumstance of this case, it should be so construed. The court answered in the affirmative. It concluded that the balancing test that it had applied in *Jones* struck a reasonable accommodation of the state and individual interests at stake in the law enforcement context raised by the facts of the case, and that this balancing test required greater-than-federal constitutional protection for the defendant. (In a dissenting opinion, newly elected Justice O'Connor, joined by Justice Lundberg-Stratton, argued that, given the “virtually identical” language of the state and federal constitutional provisions at issue, it would be “illogical to suggest” that the provisions should be interpreted differently. *Id.* at 329, 792 N.E.2d at 180 (O'Connor, J., dissenting).)

5. *Simmons-Harris v. Goff*<sup>104</sup>

Unlike most cases decided by the Ohio Supreme Court (or, for that matter, most state supreme courts), *Simmons-Harris v. Goff* is a case that captured a good deal of national attention. The reason has to do with the issue addressed in the case: the constitutionality of state programs that provide school vouchers that can be used at private, religious schools. In 1995, Ohio was one of the first states in the nation to enact a school voucher program—specifically creating a voucher system for the City of Cleveland.<sup>105</sup> The program was challenged in state court.<sup>106</sup> The plaintiffs claimed that the program violated the Establishment Clause of the First Amendment to the U.S. Constitution and Article I, Section 7 of the Ohio Constitution.<sup>107</sup> The state trial court granted the defendants' summary judgment motion. The court of appeals reversed, holding that the voucher program was unconstitutional under the federal Establishment Clause and Article I, Section 7 of the Ohio Constitution.<sup>108</sup>

The Ohio Supreme Court affirmed in part and reversed in part. The court first turned to the federal Establishment Clause claim. It applied the U.S. Supreme Court's test established in *Lemon v. Kurtzman*,<sup>109</sup> as elaborated in subsequent federal decisions, and found that all but one part of the Cleveland voucher program was constitutionally sound.

The court then turned to the claim brought under Article I, Section 7 of the Ohio Constitution. It noted that "this court has had little cause to examine the Establishment Clause of our own Constitution and has never enunciated a standard for determining whether a statute violates it."<sup>110</sup> Any prospects for a meaningfully independent approach to Article I, Section 7 were dashed immediately with the court's announcement that "[f]or purposes of the case before us, this section is the approximate equivalent of the Establishment Clause of the First Amendment to the

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<sup>104</sup>86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

<sup>105</sup>For a description of the scheme, see *id.* at 1-2, 711 N.E.2d at 205-06.

<sup>106</sup>The plan was later challenged in federal court, in a case that ultimately reached the U.S. Supreme Court, which upheld the federal constitutionality of the voucher program. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>107</sup>The plaintiffs also asserted claims under three other provisions of the Ohio Constitution, which claims I do not consider.

<sup>108</sup>86 Ohio St. 3d at 2, 711 N.E.2d at 206. The court of appeals accepted and rejected other state constitutional claims raised by the appellants/plaintiffs.

<sup>109</sup>403 U.S. 602 (1971).

<sup>110</sup>86 Ohio St. 3d at 10, 711 N.E.2d at 211. From a judicial federalism perspective, a statement like this suggests two things. First, it might be viewed as somewhat remarkable that, in 1999, the Ohio Supreme Court acknowledges that it had never before been called upon to interpret the "Establishment Clause" of its own constitution. Issues concerning church-state relations and the role of religion in public life have assumed an important role in political and legal discourse in recent decades. The fact that no one had previously brought cases to the Ohio Supreme Court implicating these issues, while flooding the federal courts with them, might be taken to indicate how little litigants and their lawyers have come to expect from the Ohio Constitution. Second, the fact that the court referred to Article I, Section 7 as the Ohio "Establishment Clause" suggests how thoroughly the federal model has taken hold as the baseline or template for state constitutional interpretation.

United States Constitution.”<sup>111</sup> In light of this “approximate equivalence,” the court once again turned to the *Lemon* standard, stating that “[w]e reiterate the reasoning discussed during our analysis of the federal constitutional standard, and although we now analyze pursuant to the Ohio Constitution, we not surprisingly reach the same conclusion.”<sup>112</sup>

*Brief Assessment:* “Not surprisingly” indeed! From the perspective of judicial federalism, *Goff*, at least at first glance, might appear disappointing. The court, noting that it had no previous experience interpreting Article I, Section 7, initially used “mirror image” language. The state and federal “Establishment Clauses” were understood to be “substantially equivalent.” And the guide for interpreting the state provision would be the same guide adopted by the U.S. Supreme Court for interpreting the federal provision: the “*Lemon* test.” The application of that test “not surprisingly” led to a state constitutional result that was identical to the federal outcome. This analysis suggests little in the way of the imagination, creativity, and independence contemplated by such judicial federalists as Porter and Tarr.

But there is an aspect of the *Goff* court’s analysis which seems more promising. In a number of its other recent cases, the court has decided to emulate federal constitutional interpretation without providing reasons for doing so. This is what it did, for example, in *Stow* and *Sorrell*. But in *Goff*, the court arguably made an effort to suggest that it was not making a general commitment to emulate federal Establishment Clause jurisprudence, but was doing so “[f]or purposes of the case before us.”<sup>113</sup> In addition, and more importantly, the court at least acknowledged that it was not *bound* to follow the federal example. It qualified its adoption of the *Lemon* test with the following language: “We do this not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method by which to determine whether a statutory scheme establishes religion.”<sup>114</sup>

And there was more: The court pointed to the fact that “the language of the Ohio provisions is quite different from the federal language,” and it noted that “there was

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<sup>111</sup>*Id.* at 10, 711 N.E.2d at 211.

<sup>112</sup>*Id.* at 10, 711 N.E.2d at 212. The court went on to examine the voucher program under Article VI, Section 2 of the Ohio Constitution, which prohibits “religious or other sects” from having “any exclusive right to control” school funds, a clause that the court, once again, acknowledged had “seldom been discussed by this court.” *Id.* at 11, 711 N.E.2d at 212. It quickly concluded that the voucher program did not violate this provision.

<sup>113</sup>*Id.* at 10, 711 N.E.2d at 211. In a recent case involving interpretation of the “free speech” provisions of Article I, Section 11 of the Ohio Constitution, the court, in essentially tracking federal First Amendment analysis, used similar language. *See Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 223, 626 N.E.2d 59, 61 (1994) (“Thus, under the facts of this case, we find that Section 11, Article I of the Ohio Constitution is no broader than the First Amendment.”). Justice Wright, who has been one of the strongest champions for Ohio constitutional independence on the court in recent years, was “heartened” at the prospect that this language was intended to leave open the possibility of broader interpretations of the provision in the future. *Id.* at 228, 626 N.E.2d at 65 (Wright, J., dissenting). Although one might well wonder whether the language in question, in both *Slanco* and *Goff*, was really intended to signal prospects for future interpretive freedom, I suppose it is not beyond the realm of possibility.

<sup>114</sup>68 Ohio St. 3d at 10, 711 N.E.2d at 211.

no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States Constitution.”<sup>115</sup> Consequently, while “on this day” it would not look beyond federal doctrine and methodology, “neither will we irreversibly tie ourselves to it.”<sup>116</sup> And in what might be taken as a somewhat odd and unnecessary affirmation of its independence, the court explicitly “reserve[d] the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason.”<sup>117</sup>

Thus, from the perspective of judicial federalism, *Goff* represents a mixed bag. But even those aspects of the opinion that most strongly suggest the possibility of meaningful state court independence raise problems. For example, we are told that the court adopts the *Lemon* test because it is “a logical and reasonable method” for doing Establishment Clause analysis, but we are not told why the court believes that to be the case. This is especially interesting in light of how much criticism the *Lemon* test has attracted within the U.S. Supreme Court and from the scholarly community, where its “logic” and “reasonableness” have been seriously questioned.<sup>118</sup> Moreover, it is more than a bit unclear why the *Goff* court felt compelled to state explicitly that it would not “irreversibly tie” itself to *Lemon* and that it “reserve[d] the right to adopt a different constitutional standard.” The notion that a supreme court is free to alter its doctrines and methodologies hardly needs a formal announcement—it is deeply grounded in our judicial and legal traditions, and that freedom is no less applicable to state supreme courts than it is to the federal Supreme Court.<sup>119</sup> Finally, the court seemed to tie its asserted freedom to deviate from the federal constitutional standard to the fact that the “language of the Ohio provision is quite different from the federal language.”<sup>120</sup> A difference between federal and state constitutional language might well qualify as *one* legitimate reason

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<sup>115</sup>*Id.* at 10, 711 N.E.2d at 211-12.

<sup>116</sup>*Id.* at 10, 711 N.E.2d at 212.

<sup>117</sup>*Id.* at 10, 711 N.E.2d at 212.

<sup>118</sup>*See, e.g.*, Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 721 (O'Connor, J., concurring) (noting criticisms of *Lemon*, acknowledging that “the slide away from *Lemon*’s unitary approach is well underway,” and that a “return to *Lemon*, even if possible, would likely be futile”); *id.* at 750-51 (Scalia, J., dissenting) (criticizing *Lemon* and elaborating reasons for abandoning it); *but see id.* at 710-11 (Blackmun, J., concurring) (defending *Lemon*). Indeed, *Lemon* has been analogized to a late-night horror movie “ghoul” that has been “repeatedly killed and buried.” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring). *See generally* CHEMERINSKY, *supra* note 26, at 1158-63.

<sup>119</sup>Although this is sheer speculation, there might have been a number of reasons for this apparently equivocal commitment to the *Lemon* analysis. One explanation that is hospitable to a spirit of true state constitutional independence—although one that I suspect is a bit far-fetched—is the possibility that a majority of the court had not had the opportunity to think through and develop a truly independent approach to Article 1, Section 7. On this view, the court might be understood to have agreed to adopt *Lemon* as a temporary or default position. After all, this may explain why *Lemon* persists as an aspect of U.S. Supreme Court doctrine despite its seriously contested status in that Court.

<sup>120</sup>86 Ohio St. 3d at 10, 711 N.E.2d at 212.



for departing from a federal interpretive paradigm, but it surely isn't the *only* defensible reason. And it is quite arguably not a *sufficient* reason. As others have noted, textual similarities, or even textual identities, have proven no obstacle to courts that take independent state constitutional interpretation seriously, nor should they be.<sup>121</sup>

6. *American Association of University Professors v. Central State University*<sup>122</sup>

This case, which I shall refer to as *AAUP I*, is one of my favorite modern Ohio Supreme Court decisions. In fact, it is the only decision of the court that I include in the materials for my course in constitutional law.<sup>123</sup> The case involved a challenge to state regulation of collective bargaining for certain state employees. In particular, the law removed the workload of state university professors, but not other public employees, from the scope of collective bargaining. The law was challenged by the Central State University Chapter of the AAUP on the basis of the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 2 of the Ohio Constitution. The plaintiff claimed that the classification that distinguished among groups of state employees could not be constitutionally justified. The trial court upheld the classifications, and the court of appeals reversed.<sup>124</sup>

The Ohio Supreme Court affirmed. The court noted, as it had in prior cases, that the federal Equal Protection Clause and Article I, Section 2 were “functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.”<sup>125</sup> It therefore considered the propriety of the challenged classification under the U.S. and Ohio Constitutions as “a

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<sup>121</sup>See, e.g., Brennan, *State Constitutions*, *supra* note 5, at 495; Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 639-40 (1994). For a good example of a state court's determination to take its constitutional language seriously, even language identical to federal counterparts, see *State v. Miller*, 614 A.2d 1229, 1235-37 (Conn. App. Ct. 1992), *aff'd*, 630 A.2d 1315 (Conn. 1993).

<sup>122</sup>83 Ohio St. 3d 229, 699 N.E.2d 463 (1998).

<sup>123</sup>As is true in most American law schools, my law school does not offer a separate course in state constitutional law. But we do have a two-semester constitutional law requirement, and early in the first semester, I make a point of advising my students of the fact that state constitutions are important sources of individual rights. (I almost said “reminding” my students, but I don't think most of them are very much aware of (1) the importance of state constitutions, or (2) the possibility that state constitutions have lives apart from their federal counterpart.) From time to time during the course, I contrast U.S. Supreme Court cases with the decisions of various state supreme courts, including the Ohio Supreme Court. After we examine the “rational basis” strands of due process and equal protection doctrine, we turn to a set of materials designated in my syllabus as “a brief interlude: considering state constitutions as independent constraints on regulation.” In addition to excerpts from state constitutional law scholarship, for the last two years my supplemental materials have included the decisions from the Ohio and U.S. Supreme Courts in *AAUP*. For further discussion of my efforts to address state constitutional law issues, see *infra* note 269.

<sup>124</sup>The court of appeals found that the right to bargain collectively was a fundamental right and it subjected the classification to intermediate scrutiny. 83 Ohio St. 3d at 232-33, 699 N.E.2d at 467.

<sup>125</sup>*Id.* at 233, 699 N.E.2d at 467.

single question.”<sup>126</sup> Finding that the classification implicated neither a fundamental interest nor a suspect classifying trait, the court held that the rational basis standard was applicable. Purporting to apply that standard—presumably in the same way for both state and federal equal protection analysis<sup>127</sup>—the court held that there was no “rational basis for singling out university faculty members as the only public employees . . . precluded from bargaining over their workload.”<sup>128</sup> Thus, the statute “violates the Equal Protection Clauses of the Ohio and United States Constitutions. . . .”<sup>129</sup>

The case was appealed to the U.S. Supreme Court, which granted review, and, in a per curiam opinion, reversed.<sup>130</sup> Addressing only the Ohio Supreme Court’s federal equal protection determination,<sup>131</sup> the Court found that the Ohio Supreme Court had misapplied federal rational basis review by not being sufficiently deferential, and that the Ohio law in question survived an appropriately deferential standard. It therefore remanded the case to the Ohio Supreme Court for further proceedings, which, although not explicitly stated in the per curiam opinion, might include a reconsideration of the matter under the Ohio Constitution.<sup>132</sup>

On remand, the Ohio Supreme Court reversed its own prior determination that the Ohio collective bargaining provisions at issue were unconstitutional. In *AAUP*

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<sup>126</sup>*Id.* at 233, 699 N.E.2d at 467.

<sup>127</sup>I say “presumably” because the court cited no U.S. Supreme Court cases in its application of the rational basis standard, and because, as we shall see, and as Justice Cook forcefully noted in dissent, *id.* at 238, 699 N.E.2d at 471 (Cook, J., dissenting), there was serious reason to doubt that the court was applying the standard as it would have been applied by the U.S. Supreme Court in the Fourteenth Amendment context. For discussion of the Ohio Supreme Court’s (mis)application of the federal standard, see Saphire, *Equal Protection*, *supra* note 13, at 632-34.

<sup>128</sup>83 Ohio St. 3d at 237, 699 N.E.2d at 470.

<sup>129</sup>*Id.* at 237, 699 N.E.2d at 470. In a dissent joined by two of her colleagues, Justice Cook did not disagree that the federal and state equal protection provisions and methodologies were identical. However, she argued that the majority had misapplied the federal standard. She cited only federal cases in support of her conclusion. *Id.* at 238-42, 699 N.E.2d at 471-73 (Cook, J., dissenting).

<sup>130</sup>*Central State University v. American Association of University Professors*, 526 U.S. 124 (1999).

<sup>131</sup>The per curiam opinion did not address the question of the Court’s jurisdiction. But even though the Ohio Supreme Court said that the statute violated the Ohio, as well as the U.S. Constitution, it seems quite clearly to have been the case that the Ohio Supreme Court’s decision failed to establish the Ohio Constitution as an independent and adequate state ground for decision as required by *Michigan v. Long*, 463 U.S. 1032 (1983). *See supra* note 77.

<sup>132</sup>526 U.S. at 129. Readers who have not read the case might well find an inspection of Justice Stevens’s dissenting opinion worth their time. In addition to arguing that the Court should not have granted review in the case, and raising some interesting questions about the proper operation of rational basis review, Stevens began his opinion with the following: “While surveying the flood of law reviews that cross my desk, I have sometimes wondered whether law professors have any time to spend teaching their students about the law.” *Id.* at 130 (Stevens, J., dissenting).

*II*,<sup>133</sup> the court identified the “sole issue” as follows: “whether [Ohio Revised Code §] 3345.45 rationally relates to a legitimate interest under our interpretation of Ohio’s Equal Protection Clause.”<sup>134</sup> It noted that Central State University had asked it “to apply federal rational basis analysis to this issue, while AAUP contends that rational-basis review requires a stricter analysis under our state’s Constitution.”<sup>135</sup> After reviewing prior developments in the case, as well as the requirements of federal rational basis review, the court declined AAUP’s request. The court noted that it had “never held Ohio’s equal protection standard to be different from that employed under the federal analysis.”<sup>136</sup> For reasons discussed below, it refused to abandon the federal model and apply a stricter state constitutional standard.

*Brief Assessment:* Both *AAUP I* and *AAUP II* provide an especially interesting and illuminating context for assessing judicial federalism in Ohio. In its first opinion, the Ohio Supreme Court made it quite clear that it viewed the federal and state equal protection provisions as mirror images of each other. Federal doctrine and methodology were adopted lock, stock, and barrel as guides for Ohio constitutional interpretation. The federal and state constitutional claims presented a “single question.” Apparently this view was shared by all of the justices. While Justice Cook wrote a dissent, joined by two of her colleagues, she expressed no disagreement that there was an identity between state and federal tests; her disagreement was with their application to the challenged classification.<sup>137</sup> Definitely a Porter and Tarr “failure” here.

In a number of ways, the result in *AAUP II* was more interesting. Although the U.S. Supreme Court did not explicitly invite the Ohio Supreme Court to reaffirm its prior holding on the basis of a more robust and expansive conception of the state equal protection guarantee, the AAUP clearly did. But it was an option that the court quite unequivocally rejected. The AAUP argued that the court should reject the extremely deferential federal rational basis standard by modifying “the application of the federal test to require factual evidence of a rational relationship to a legitimate governmental interest.”<sup>138</sup> The AAUP tried unsuccessfully to persuade the Court that, perhaps whether it realized it or not, it had in past cases already adopted a more

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<sup>133</sup>87 Ohio St. 3d 55, 717 N.E.2d 286 (1999).

<sup>134</sup>*Id.* at 58, 717 N.E.2d at 289.

<sup>135</sup>*Id.* at 58, 717 N.E.2d at 289-90. In other words, AAUP was explicitly asking the Ohio Supreme Court to take judicial federalism seriously and interpret the Ohio Constitution as a truly independent source of rights that were more extensive than those protected under the U.S. Constitution.

<sup>136</sup>*Id.* at 59, 717 N.E.2d at 291. AAUP had argued that several earlier Ohio Supreme Court cases had used language that suggested that the Ohio equal protection provision imposed stricter requirements than its federal counterpart.

<sup>137</sup>As I have noted elsewhere, I think that the *AAUP I* majority’s analysis represented a clear misapplication of the federal rational basis test. Saphire, *Equal Protection*, *supra* note 13, at 632-34. Indeed, I think the misapplication was so clear that it might have fairly been construed at the time as calculated, as perhaps representing a camouflaged effort to apply a more strict standard than actually called for under federal analysis. Of course, the outcome in *AAUP II* suggests that the court’s analysis in *AAUP I* was simply wrong.

<sup>138</sup>87 Ohio St. 3d at 59, 717 N.E.2d at 291.

rigorous standard. The court acknowledged that its recent precedents had created some “confusion,” but insisted that this “confusion concerning the federal standard of rational-basis review should not serve as support for its abandonment in Ohio.”<sup>139</sup>

The court’s reasons for refusing to deviate from the federal standard are worth considering. The court did not provide any serious or extended argument that the federal standard was appropriate for state equal protection purposes because that standard reflected or embodied values that were in any sense distinctly “Ohioan.” That is, there was no suggestion that the court considered the possibility that the Ohio Constitution’s equal protection guarantee has any meaning or content apart from its federal role model. Instead, the court refused to articulate an independent state rational basis standard because to do so risked disturbing the broader structure of federal equal protection methodology.<sup>140</sup>

If the court had stopped here, *AAUP II* could well be viewed as even a more serious disappointment for judicial federalism than *AAUP I*. But the court did make an effort to explain its unwillingness to “disturb” the overall structure of federal (and therefore state) equal protection methodology. That explanation was as follows: “We see no reason to create such a disturbance when the existing federal standard is *workable and exceedingly well reasoned.*”<sup>141</sup> At the very least, this suggests that the court’s determination to continue its emulation of federal constitutional analysis was based on its judgment that that analysis *deserved* emulation. The problem, however, is that it is difficult to know whether or to what extent this claim should be taken seriously.<sup>142</sup> Federal equal protection methodology and doctrine long have been criticized as poorly “reasoned” and not very workable at all,<sup>143</sup> and there has been little consensus in the U.S. Supreme Court and in the scholarly community about fundamental conceptual and doctrinal issues.<sup>144</sup> Why each of the seven members of the Ohio Supreme Court in *AAUP II* (or, for that matter, *AAUP I*) would uncritically

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<sup>139</sup>*Id.* at 60, 717 N.E.2d at 291. It is interesting here to note that the court apparently felt that the state standard was so fused into the federal that it was unnecessary to speak of past confusion in the “state standard of rational basis review.”

<sup>140</sup>*Id.* at 60, 717 N.E.2d at 291. The court referred to the federal rational basis test as “only one part of a carefully conceived structure of equal protection review, with each section occupying its own place in a larger scheme.” *Id.* at 60, 717 N.E.2d at 291. And it worried that “[w]ere we to modify this portion of the review in the manner suggested by *AAUP I* . . . and impose greater judicial scrutiny on classifications under rational-basis review, every other step in the analysis would likewise be disturbed.” *Id.* at 60, 717 N.E.2d at 291.

<sup>141</sup>*Id.* at 60, 717 N.E.2d at 291 (emphasis added).

<sup>142</sup>This is not the first time the court has provided this sort of reason for refusing to deviate from federal constitutional norms. As noted earlier, it took the same tack in *Goff*. See *supra* notes 104-21 and accompanying text.

<sup>143</sup>See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 n.\* (1976) (Powell, J., concurring) (noting “valid reasons for dissatisfaction” with the Court’s general equal protection analysis); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting) (criticizing the Court’s equal protection methodology).

<sup>144</sup>In *AAUP* itself, disagreement about basic methodological and doctrinal issues was expressed in Justice Stevens’s dissenting opinion, as well as implied in Justice Ginsburg’s concurrence.

accept federal methodology as fully accounting for Ohio constitutional meaning is left unexplained.

### 7. *Humphrey v. Lane*<sup>145</sup>

The final case I will consider is, in some ways, the most interesting from the perspective of judicial federalism. *Humphrey v. Lane* involved a state constitutional challenge to a prison regulation that dealt with the grooming of prison inmates. The regulation governed a number of aspects of personal appearance, including hair style and length. In particular, the regulation required male inmates to cut their hair “in such a style that it . . . is collar length or shorter in the back.”<sup>146</sup> The plaintiff, Wendall Humphrey, was a Native American who wore his hair at a longer length than that permitted by the policy, and did so “as part of his practice of Native American Spirituality.”<sup>147</sup> He argued that the application of the policy to him violated his rights under Article I, Section 7 of the Ohio Constitution, which guarantees the right of religious freedom.

Humphrey prevailed in the trial court, but the state court of appeals reversed, holding that the U.S. Supreme Court’s decision in *Oregon Department of Human Resources, Employment Division v. Smith*<sup>148</sup> provided the appropriate standard for both federal and state constitutional analysis. The Ohio Supreme Court reversed.

The court began its opinion by explicitly rejecting the federal standard established in *Smith*. It set out Article I, Section 7 of the Ohio Constitution in its entirety, and noted that the Ohio language contained a “more detailed description” of religious freedom than that found in the First Amendment to the U.S. Constitution. But the difference in language “does not by itself prove that Ohio’s framers created a broader freedom of religion than exists in the United States Constitution.”<sup>149</sup> Nonetheless, “the words of the Ohio framers do indicate their intent to make an independent statement on the meaning and extent of the freedom.”<sup>150</sup> The question was “[w]hether that statement creates a relevant difference.”<sup>151</sup>

The answer was that it did. A “comparison” of the Ohio and federal provisions required “more than a word count.”<sup>152</sup> For a difference between the two provisions

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<sup>145</sup>89 Ohio St. 3d 62, 728 N.E.2d 1039 (2000).

<sup>146</sup>*Id.* at 64, 728 N.E.2d at 1042.

<sup>147</sup>*Id.* at 62, 728 N.E.2d at 1041.

<sup>148</sup>494 U.S. 872 (1990). The Court held that, as a general matter, the Free Exercise Clause was not implicated by the application of religiously neutral laws of “general applicability.” In *Humphrey*, the warden of the prison had relied upon a recent federal court decision upholding the application of the grooming policy to a Native American against a challenge based upon federal statutory claims as well as the First Amendment. 89 Ohio St. 3d at 64, 728 N.E.2d at 1042 (citing *Blanken v. Ohio Dept. of Rehab. & Corr.*, 944 F. Supp. 1359 (S.D. Ohio 1996)).

<sup>149</sup>89 Ohio St. 3d at 66, 728 N.E.2d at 1044.

<sup>150</sup>*Id.* at 66-67, 728 N.E.2d at 1044.

<sup>151</sup>*Id.* at 67, 728 N.E.2d at 1044.

<sup>152</sup>*Id.* at 67, 728 N.E.2d at 1044. In referring earlier to the First Amendment, the court had asserted that “[v]erbiage does not indicate commitment to an ideal.” *Id.* at 66, 728 N.E.2d at 1043.

to matter in a way that would justify independent content for Article I, Section 7, it had to be “qualitative.” And what distinguished the Ohio provision was its inclusion of the following language that is absent from the First Amendment: “nor shall any interference with the rights of conscience be permitted.”<sup>153</sup> While the federal language “seems to target laws that specifically address the exercise of religion,” this “conscience clause” suggests that the state language makes laws that have even “tangential effects potentially unconstitutional.”<sup>154</sup> Given these qualitative differences, the court applied a more rigorous constitutional test than that established in *Smith* and upheld Humphrey’s right to make his hair-length decision.

*Brief Assessment:* It appears that we finally have a case that would make Professors Porter and Tarr quite happy. In *Humphrey*, the court reaffirmed (and restated) the declaration of judicial independence it had announced in *Arnold*,<sup>155</sup> noting that it “had made it clear that this court is not bound by federal court interpretations of the federal Constitution in interpreting our own Constitution.”<sup>156</sup> And as if it needed to provide even greater assurance that independent Ohio constitutional interpretation was a legitimate endeavor, the court also cited the language of independence from its opinion in *Goff*.<sup>157</sup>

And closer inspection reveals that there was real substance to the court’s independence. Not only did it find the state provision more protective than its federal counterpart, it offered reasons for its conclusion. It identified textual differences between the two provisions, but said that textual differences *per se* were not enough. Rather, these differences must be “qualitative.” To justify more expansive state constitutional protection, they must reveal that the “Ohio framers” meant to make an “independent statement” about religious freedom.<sup>158</sup> In addition, the court noted that while it had “traditionally mirrored federal jurisprudence as to protection of religious freedom,”<sup>159</sup> changed circumstances justified a different approach. In particular, it was the U.S. Supreme Court’s decision in *Smith* that made the “divergence of federal and Ohio protection of religious freedom” appropriate.<sup>160</sup>

On the other hand, even *Humphrey*’s relatively robust expression of judicial federalism might leave a purist a bit skeptical. For example, the court, as it had done

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<sup>153</sup>*Id.* at 67, 728 N.E.2d at 1044.

<sup>154</sup>*Id.* at 67, 728 N.E.2d at 1044.

<sup>155</sup>For discussion of *Arnold*, see *supra* notes 62-79.

<sup>156</sup>89 Ohio St. 3d at 68, 728 N.E.2d at 1044.

<sup>157</sup>*Id.* at 68, 728 N.E.2d at 1045. For a discussion of *Goff*, see *supra* notes 104-21. The court’s statement of independence was further highlighted by the fact that it did not go unchallenged. Justice Cook, in dissent, argued that the court’s Article I, Section 7 analysis should follow the federal standard established in *Smith*. *Id.* at 71, 728 N.E.2d at 1047 (Cook, J., dissenting).

<sup>158</sup>The court took the text itself as expressing its understanding of the intention of the “Ohio framers.” *Id.* at 66, 728 N.E.2d at 1044. It referred to no historical materials to support this assertion, a fact that might seem a bit curious in light of its unwillingness in other cases to view textual differences as supporting broader state constitutional protection.

<sup>159</sup>*Id.* at 67, 728 N.E.2d at 1044 (citing cases).

<sup>160</sup>*Id.* at 67, 728 N.E.2d at 1044.

in other cases surveyed in this essay, proceeds as if the federal standard is paradigmatic and presumptive. The structure of the court's opinion presumes that federal Free Exercise Clause jurisprudence is authoritative unless there are sufficient reasons to reject it. It is only where the text of the Ohio provision differs that a finding of distinctive content can be justified.<sup>161</sup> The court apparently is either unaware that its assertion of independence is, in this sense, "defensive," or it feels no need to offer reasons for its defensiveness.<sup>162</sup>

In addition, *Humphrey* suggests that state constitutional independence might be reserved for only those circumstances where the previously copied federal constitutional doctrine has changed. The court explained its willingness to move away from the federal paradigm because of the U.S. Supreme Court's alteration of federal doctrine in *Smith*.<sup>163</sup> From one perspective, of course, this determination is unproblematic. A state court is free to alter its constitutional doctrine and methodology for any reasons that seem to it sound, and a decision to ratchet up a provision's protection because of changed circumstances of any sort can well be

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<sup>161</sup>It is not clear from the court's opinion what it thought, or even *that* it thought, about the court of appeals' holding that the application of the prison policy in question was valid under *Smith*. Of course, if the policy is unconstitutional under the Ohio Constitution, its status under *Smith* becomes legally irrelevant.

Another point is worth noting here. A state court can hardly be criticized for acknowledging a parallel federal constitutional claim in a case where both federal and state claims have been asserted. (In this regard compare *Humphrey* with *Arnold*, where the court focuses on the federal Second Amendment even though a federal claim was never asserted. *See supra* notes 77-79.) If a federal claim is raised by the parties, a court quite properly can address it. But in a case like *Humphrey*, where the federal claim is not directly considered or resolved, the court's apparent preoccupation with the federal Constitution speaks volumes about its conception of state constitutional "independence."

<sup>162</sup>By "defensive," I mean the following: As others have forcefully argued, there is nothing apparent in either the logic or theory of state constitutionalism that requires a state court to justify its interpretation of its own constitution by reference to textual differences with federal constitutional provisions (except, of course, in the limited sense that a state cannot interpret its own constitution to be less protective of individual rights than the federal Constitution). *See, e.g.,* *People v. McCauly*, 645 N.E.2d 923, 1025 (Ill. 1995) (Heiple, J., dissenting) ("Regardless of the language employed in the two documents, they are separate and distinct."). While attention to federal constitutional language may not be inconsistent with a state court's "interpretive responsibility," it is not a necessary prerequisite to such responsibility. *See Morawetz, supra* note 121; Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1084 (1997) ("The right question is what the state provision says, what it means, and how it applies to the case at hand."). Thus, when a state court expresses a need to justify a distinctive interpretation of its state constitution by reference to a difference in state and federal constitutional language, it suggests a sense of presumptive dependence that is, at least in a theoretical sense, unwarranted.

<sup>163</sup>As noted by one commentator, the majority in *Humphrey* concluded that *Smith* "created a divergence," while Justice Cook's dissent viewed the *Humphrey* majority as representing a "departure" from *Smith*. Jeffrey D. Williams, Note, *Humphrey v. Lane: The Ohio Constitution's David Slays the Goliath of Employment Division, Department of Human Resources of Oregon v. Smith*, 34 AKRON L. REV. 919, 942 n.106 (2001). In this respect, Justice Cook's sense of the presumptive weight to be accorded federal doctrine is especially worth noting.

justifiable.<sup>164</sup> But if a state court views itself as free to revisit its copied federal doctrine *only* when the underlying federal standard has changed, its sense of independence is especially subject to question.<sup>165</sup>

### C. General Assessment of the Cases

As the cases examined above suggest, the Ohio Supreme Court's post-1984 commitment to judicial federalism has been, to put it generously, somewhat erratic.<sup>166</sup> In cases like *Stow* and *Sorrell*, the court treats the Ohio Constitution as if it really didn't matter. The fact that the lawyers included state constitutional claims in their lawsuits added nothing at all to their clients' prospects for success; indeed, one might have wondered why they even bothered to do so. Then, in 1993, along came *Arnold*, a case that might have made judicial federalists in Ohio feel vindicated.<sup>167</sup> The court devoted a whole section of its opinion to "State Constitutionalism/New Federalism"<sup>168</sup> and cited with apparent concern Porter and Tarr's criticisms of its past

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<sup>164</sup>If a state court has adopted federal doctrine *qua* federal doctrine (because it believes it has no choice in the matter), it can hardly be said to be acting independently. But if it does so because it finds the federal doctrine congenial—that the federal standard adequately expresses or captures the "essence" of the state guarantee—the fact that the doctrine is also "federal" does not make it less distinctive for that state. Thus, if in *Humphrey* the court had been satisfied with pre-*Smith* free exercise doctrine as adequately expressing state free exercise values, one would have expected it to adhere to that doctrine and thus refuse to follow the changes effectuated by *Smith*.

<sup>165</sup>Thus, even where federal doctrine is quite protective of individual interests, a state court is free to find that the state constitution grants even more protection.

<sup>166</sup>While I believe that the cases examined in the previous section are illustrative of the court's performance, I do not claim the examination is exhaustive. Since 1984, the Ohio Supreme Court has decided a number of other Ohio constitutional cases in which it has deviated from an analogous federal provision—*see, e.g., State ex rel. R.T.G., Inc. v. Ohio*, 98 Ohio St. 3d 1, 780 N.E.2d 998 (2002) (takings clause of Ohio Constitution interpreted as, in some respects, more protective of property rights than its federal counterpart); *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 649 N.E.2d 182 (1995) (Ohio free speech provision interpreted as broader than its federal counterpart)—and other cases in which it hasn't, *see, e.g., Fabrey v. McDonald Village Police Department*, 70 Ohio St. 3d 351, 639 N.E.2d 31 (1994) (equal protection and due process provisions of state and federal constitutions essentially identical); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994) (state and federal free speech provisions interpreted as mirror images of each other). Other cases are discussed elsewhere in this Symposium. *See, e.g., Michael E. Solimine, Recalibrating Justiciability in Ohio Courts*, 51 CLEVE. ST. L. REV. 531 (2003) (noting that the Ohio Supreme Court has generally applied federal justiciability guidelines to litigation in Ohio courts). Nothing in other cases of which I am aware suggests to me a more consistent approach to judicial federalism than that suggested in the cases which I have already examined.

<sup>167</sup>This, of course, assumes that there really were any "real judicial federalists" in Ohio at the time. By 1984, there had been calls for state court constitutional independence in a number of other states. *See, e.g., People v. Disbrow*, 545 P.2d 272 (Cal. 1976); *State v. Santiago*, 492 P.2d 657 (Haw. 1971). As far as I have been able to tell, however, there were no similar strong and prominent voices for such independence in Ohio.

<sup>168</sup>*Arnold*, 67 Ohio St. 3d at 41-42, 616 N.E.2d at 168.



performance. Finally, the court boldly anointed the “Ohio Constitution as a document of independent force.”<sup>169</sup>

When, in 1997, Robert Robinette’s lawyers acted on the apparent belief that the Ohio Constitution’s search and seizure provision added real value to their case, they might have been forgiven their mistake. Their confidence was no doubt bolstered by the U.S. Supreme Court. Reversing on the federal issue, that Court explicitly reminded its Ohio counterpart of its power to reaffirm its judgment based on a theory of state constitutional independence, perhaps even inviting it to do so.<sup>170</sup> To what might well have been the understandable disappointment of Robinette’s lawyers, the Ohio Supreme Court refused. Although it once again acknowledged the “New Federalism,” it expressed its determination to resist that movement’s “wave,” and adopted a stance of jurisprudential timidity.

The lawyers representing the AAUP in their challenge to the teachers’ collective bargaining provisions faced a similar predicament. Would the assertion of a state equal protection claim contribute anything to their cause?<sup>171</sup> *Arnold* signaled the possibility, and there had been suggestions in some of the court’s recent cases that independence in state equal protection analysis was a real possibility. Once again, of course, the court disappointed, foregoing a genuinely independent analysis and deferring to the federal standard.

*Goff* was to the same effect. Faced with perhaps its first encounter with a specific piece of state constitutional text, the court punted. Instead of viewing the case as an opportunity (or at least an occasion) to begin the development of a truly distinctive Ohio jurisprudence of church-state relationship, the court adopted the federal standard.<sup>172</sup> To be sure, judicial federalists might have been heartened when the court explicitly “reserved the right” to be different. But there was little in the court’s opinion that suggested it had given any (or at least much) thought to what such a difference might entail.

Finally, there is *Humphrey*. Aside from *Arnold*, *Humphrey* represents the clearest example of judicial federalism in the cases considered in this essay. The

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<sup>169</sup>*Id.* at 42, 616 N.E.2d at 168-69.

<sup>170</sup>*Robinette*, 519 U.S. at 45.

<sup>171</sup>I think that the erratic nature of Ohio constitutional interpretation raises a set of interesting and important ethical issues for Ohio’s lawyers. As a general matter, a lawyer is ethically bound to consider all available plausible legal claims available to a client, and to assert all claims for which there is a substantial basis in law. See JACK A. GUTTENBERG & LLOYD B. SNYDER, *THE LAW OF PROFESSIONAL RESPONSIBILITY IN OHIO 197-99* (1992). In a case where a lawyer intends to assert a federal constitutional claim, and there are grounds to believe that a state constitutional claim will provide the client additional protection, I believe that a lawyer may be obligated to raise the state claim. See, e.g., Phylis Skloot Bamberger, *Boosting Your Case with Your State Constitution*, A.B.A. J., Mar. 1, 1986, at 49, 52 (“effective representation of a client demands this dual analysis”). Conversely, if the state claim cannot reasonably be thought to add anything to the asserted federal claims, its assertion might well be ethically problematic. Thus, from the perspective of professional responsibility, lawyers and state courts alike have important interests in achieving clarity in this area.

<sup>172</sup>Whether or not *Lemon v. Kurtzman* actually constituted the appropriate standard might itself have been questioned. See CHEMERINSKY, *supra* note 26, at 1158-60 (noting that *Lemon* is just one of several tests applied by the Justices, and that “[t]he current and future role of the *Lemon* test is uncertain”).

court not only explicitly asserted the Ohio Constitution's and its own independence, but also practiced it. The court considered the federal Free Exercise Clause standard and rejected it. What's more, it offered substantive reasons for doing so.<sup>173</sup>

This review of recent Ohio Supreme Court decisions suggests a number of issues. The court has professed its endorsement of judicial federalism, but it appears to have been inconsistent in its commitment to that concept. What might explain that inconsistency? And perhaps even more fundamentally, what does a commitment to judicial federalism entail? Many so-called new judicial federalists have presented their theory as representing a normative ideal for state constitutional law.<sup>174</sup> Central to this ideal is the notion of constitutional independence—that state constitutions should be taken to have a juristic identity of their own. The problem with the “old” judicial federalism was that, at least with respect to individual rights, state constitutions didn't matter. They were considered virtual clones of their federal “big brother.”

But when the Ohio Supreme Court committed itself to the path of judicial federalism,<sup>175</sup> what did that commitment entail? Did it represent anything more than a formal acknowledgment of its interpretive freedom?<sup>176</sup> Did it represent a commitment to a more expansive jurisprudence of individual rights than federal constitutional jurisprudence allows? Any meaningful evaluation of the post-1984 record of Ohio constitutional interpretation requires answers to questions such as these.

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<sup>173</sup>Unlike, for example, in *Stow*, where the court adopted the federal right-to-privacy analysis with the unexplained assertion that it found the principal U.S. Supreme Court decision “dispositive.” 64 Ohio St. 3d at 163, 593 N.E.2d at 299.

As noted earlier, *see supra* note 103, *State v. Brown*, 99 Ohio St. 3d 323, 792 N.E.2d 175 (2003) provides a very recent suggestion of the court's willingness, at least in selective circumstances, to pursue the path of state constitutional independence reflected in *Arnold* and *Humphrey*. In *Brown*, the court untethered the Ohio Constitution's provision against unreasonable searches and seizures from its federal counterpart. Although the court still seemed to proceed from a presumption of a federal baseline (it assumed that it needed “ample reason” for departing from the federal standard, *id.* at 327, 792 N.E.2d at 178), it offered substantive reasons for its conclusion that the protections provided by the federal Constitution were not adequate for the citizens of Ohio.

<sup>174</sup>*See, e.g.*, TARR, *supra* note 4, at 208 (noting that early proponents of judicial federalism were inclined to “extol its virtues”). Of course, the supposed virtues of judicial federalism have not gone unchallenged. For one of the most prominent critiques, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

<sup>175</sup>At least as a formal matter, I think *Arnold* puts the Ohio Supreme Court on record as embracing judicial federalism. As the cases reviewed in this section suggest, however, whether this commitment has been translated into practice is very much open to question.

<sup>176</sup>And if a case like *Arnold* stands for a commitment to interpretive freedom, does such freedom entail a further commitment to a completely, and an invariably, distinctive Ohio constitutional jurisprudence of individual rights? Does a commitment to judicial federalism imply a complete *rejection* of federal standards?

## III. OHIO JUDICIAL FEDERALISM RECONSIDERED

A. *What is Judicial Federalism?*

When, in *Arnold*, the Ohio Supreme Court committed itself to follow the path of “state constitutionalism” or “new federalism,”<sup>177</sup> how might or should that commitment have been understood? The literature on judicial federalism is quite rich and quite vast, and this is not the place to attempt a comprehensive review.<sup>178</sup> But a number of assumptions seem to lie at judicial federalism’s core. Perhaps first and foremost is the assumption that state constitutions *matter*. In the federal system contemplated by our national tradition of constitutionalism, state governments exist as sovereign political juristic entities with the prerogative to structure their institutions as they choose.<sup>179</sup> State constitutions provide the framework for the allocation and limitation of the state’s domestic regulatory power,<sup>180</sup> a framework that is generally impervious to direct federal control. Thus, state constitutions can play, indeed one is tempted to say were designed to play, an essential role in shaping and administering the political communities of the states.<sup>181</sup>

If one were to suggest that the federal Constitution didn’t *matter* to the shaping and development of federal law, one’s intellectual acuity would be opened to question.<sup>182</sup> But this is precisely the claim that many judicial federalists have raised with respect to state constitutional interpretation. When state courts “borrow” doctrine and methodology from federal constitutional cases, there is a sense in which their own constitutions have become practically irrelevant. If the state constitution

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<sup>177</sup>67 Ohio St. 3d at 42, 616 N.E.2d at 168-69.

<sup>178</sup>For a sampling of the literature (in addition to the sources cited in this essay), see, e.g., ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (3d ed. 1999); TARR, *supra* note 4, at 211-35 (bibliography).

<sup>179</sup>Subject, of course, to limitations imposed by federal law. I believe that most of what is contained in this paragraph is so widely accepted that it needs no citations. And the available citations are so numerous that it is hard to know where to start. But nonetheless, see, e.g., Michael E. Solimine & James L. Walker, *Federalism, Liberty, and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457 (1997).

<sup>180</sup>State constitutions are normally understood to embody limits on, but not grants of, state regulatory authority—a fact that has often played an important role in discussions of state constitutional interpretive theory. See, e.g., Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998).

<sup>181</sup>It is, of course, quite problematic to generalize about the roles and functions of state constitutions. The precise role that each state’s constitution was intended to play, and in fact has played, in shaping or reflecting the political life and culture of its state is likely to vary depending on local context and experience.

<sup>182</sup>I refer here to the federal Constitution in a holistic sense. Debates about the proper sources of constitutional meaning continue to rage between “interpretivists” and “non-interpretivists,” and “originalists” and “non-originalists,” and claims that a court has “ignored” the Constitution in this or that case are still thrown about. But these debates reflect disagreement about what the Constitution *is*—of what materials it fairly consists—not about whether the Constitution *matters*. See, e.g., Richard B. Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, N.W. U. L. REV. 1435 (1984).

has been interpreted as identical to its federal counterpart, in what sense has its integrity been respected?<sup>183</sup>

Thus, judicial federalism requires documental independence.<sup>184</sup> The state constitution must have an identity separate from its federal counterpart.<sup>185</sup> If a state constitutional provision is construed as having no meaning beyond that of its federal counterpart, how has its “independence” been respected? And the judicial federalist’s insistence on independence is not limited to doctrinal outcomes. According to much modern hermeneutical and interpretive theory, textual meaning is dependent upon processes or methodologies of interpretation. Thus, for example, the meaning of a constitution’s requirement of equal treatment is likely to depend upon, and might well vary according to, the method of analysis applied in its interpretation.<sup>186</sup> Where a state court copies the methods of federal constitutional interpretation, it may well end up disrespecting state constitutional independence.<sup>187</sup>

Some commentators and judges have made a related but analytically different point. It has been suggested that judicial federalism not only requires that state constitutions be treated as independent, but as *distinctive* as well.<sup>188</sup> According to this suggestion, if state constitutions are genuinely to be respected, if they are to be treated as if they really matter, they must be taken to reflect the distinctive political,

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<sup>183</sup>As I will soon suggest, to say that the “lockstep” incorporation of federal analysis into state constitutional interpretation makes the state constitution *practically* irrelevant, is not necessarily to say that it has been rendered *theoretically* irrelevant.

<sup>184</sup>By “documental” independence, I mean that the state constitution must be respected as a separate juristic entity.

<sup>185</sup>Since no state’s constitution is identical in all respects to the federal Constitution, there is little danger that a state’s constitution will ever become completely assimilated. The danger exists only with respect to provisions—most commonly those pertaining to individual rights—which are textually similar or identical. On the question of the relationship between the structural aspects of state and federal constitutions, see, e.g., Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531 (2003); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

<sup>186</sup>See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160-61 (1993).

<sup>187</sup>Thus, as noted earlier, when the Ohio Supreme Court adopted federal constitutional methodology in cases like *Stow, Sorrell, and Goff*, the likelihood of identity in doctrinal outcomes was all but guaranteed. See *supra* Section II-B. Of course, if the state court misunderstands or misapplies the federal standards in question, the federal and state outcomes may vary. See *supra* note 137 (discussing the Ohio Supreme Court’s misapplication of the federal standard in *AAUP I*). But that hardly can be interpreted as an act of state constitutional independence! For a general discussion of the role of methodological freedom in judicial federalism, see Friesen, *supra* note 162.

Another important point is worth making here. When a state court copies the federal standards, it risks not only making its own *constitution* irrelevant; it also risks making *itself* irrelevant. I discuss this point below.

<sup>188</sup>For a discussion of a number of ways in which the state and federal constitutions are distinctive, see TARR, *supra* note 4, at 6-28.

legal, and social culture of the state which adopted them.<sup>189</sup> On this view, as Professor Gardner has put it, state constitutional discourse and interpretation become “a forum in which the members of a polity debate their own identity—their character and fundamental values.”<sup>190</sup> Although the notion of state constitutional distinctiveness has been contested on a number of grounds,<sup>191</sup> its potential significance for judicial federalism is clear: If a state court merely copies federal constitutional doctrine and methodology, the prospects that state constitutional law will reflect or embody any indigenous state constitutional values—and here I assume that there is at least *something* distinctive about the political values, mores, and history of each state—will be at best fortuitous.<sup>192</sup>

Judicial federalism is frequently thought to entail another vital ingredient. When Justice Brennan made his case for a “renaissance in state constitutionalism,”<sup>193</sup> his argument was both theoretical and strategic. That is, in addition to his claim that state constitutions should be taken seriously as a matter of political and constitutional theory, he also urged state courts to act aggressively in order to protect individual rights. In 1977, the U.S. Supreme Court had already begun at least a partial retrenchment of the Warren Court’s robust jurisprudence of individual rights, a retrenchment that Brennan was increasingly unable to prevent.<sup>194</sup> Brennan’s call for

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<sup>189</sup>See Gardner, *supra* note 174, at 815-22.

<sup>190</sup>*Id.* at 816. I have suggested a similar way of thinking about the federal Constitution. See Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599 (1997).

<sup>191</sup>See, e.g., Gardner, *supra* note 174, at 23-28 (arguing that states have no distinctive character on which a separate state constitutional jurisprudence could be premised); Solimine & Walker, *supra* note 179, at 1468 (“Whatever may have been true in the past, in this century it is unrealistic to contend that each state has a distinctive political or social culture, especially one that differs in important ways from national culture.”); Kahn, *supra* note 186 (arguing against a “unique state sources of law” conception of state constitutionalism).

<sup>192</sup>The notion that Ohio’s Constitution, or for that matter any state’s constitution, ought to be approached as if it were a “distinctive” document whose independent interpretation should lead to distinctively “Ohio” results might be appealing in the abstract. But as a practical matter, the distinctiveness of any state constitution, or any particular constitutional provision, can only be determined after careful consideration of the historical, social, political, and cultural context that informed its creation and subsequent development over time. Many state constitutions contain provisions that were borrowed from other states, and the subsequent judicial development of any state’s constitutional jurisprudence might have been influenced, perhaps substantially so, by constitutional interpretations in other states (not to mention by developments in federal constitutional interpretation in the federal courts). Thus, one of the objectives of a truly independent process of Ohio constitutional interpretation might be an exploration of whether and to what extent Ohio’s constitutional jurisprudence *ought* to be distinctive—an objective which quite obviously cannot be achieved if the Ohio courts routinely and reflexively mimic federal constitutional interpretation produced by the U.S. Supreme Court.

<sup>193</sup>Kahn, *supra* note 186, at 1147 (citing Brennan, *State Constitutions*, *supra* note 5, at 502-04).

<sup>194</sup>See HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 252-74 (1995) (describing Brennan as “fighting a rear-guard action” after Earl Warren’s death).

state court constitutional independence was one way of rallying the troops. By reminding state court judges that, acting under their own constitutions, they were free to expand individual rights beyond the federal constitutional floor, he hoped to persuade them to help salvage and extend the individual rights revolution that he had so fervently worked to create.<sup>195</sup> Thus, the success of a *Brennan-esque* judicial federalism is frequently measured in terms of the bottom line.<sup>196</sup> From this perspective, an interpretation of a state constitutional provision that is not more protective of the individual than a federal court's interpretation of an analogous federal constitutional provision would necessarily be a "failure."<sup>197</sup>

It is worth noting that this view has not gone unchallenged, and properly so. If judicial federalism entails, at its core, presumptions that state constitutions matter, that state judges should not reflexively view state constitutional provisions as carbon copies of their federal counterparts, and that state judges adopt an attitude of independence in terms of interpretive approaches and doctrinal outcomes, it is hard to see why its success should be judged in terms, or at least exclusively in terms, of whether state constitutional interpretation always yields greater-than-federal protection of rights.<sup>198</sup> Judges who take judicial federalism seriously can certainly be

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<sup>195</sup>Brennan, *State Constitutions*, *supra* note 5, at 503 (federalism "must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms"); Brennan, *Revival*, *supra* note 5, at 550 (calling upon state courts to "assume a leadership role in the protection of individual rights and liberties," at which time "the true colors of purported federalists will be revealed").

<sup>196</sup>See Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows the State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499 (2003) (state supreme court justice noting result-oriented justification for state constitutional independence). *But see* Maltz, *supra* note 5 (criticizing results-oriented rationale for state constitutional independence).

<sup>197</sup>In their 1984 assessment of judicial federalism in the Ohio Supreme Court, Professors Porter and Tarr never explicitly argued that judicial federalism required that state constitutional decisions must invariably be more protective. But their call for a "revitalization of state constitutional guarantees" and for state judicial "policymaking" clearly suggested that idea. *Anatomy of a Failure*, *supra* note 30, at 144, 150. Indeed, Professor Solimine has suggested that Porter and Tarr's "pro-state constitutional law bias is also a 'pro-rights' one." Michael E. Solimine, *Activism and Politics on State Supreme Courts*, 57 U. CIN. L. REV. 987, 1002 (1989) (reviewing A. TARR & M. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988)).

The notion that a state court must interpret its own constitution more broadly than the federal courts interpret the U.S. Constitution raises obvious tensions with the idea that state constitutions should be viewed as independent and distinctive. While it will no doubt be (and has been) the case that *some* state courts will exceed the floor of rights established through federal constitutional interpretation, the idea that *all* state courts should take a cookie-cutter view of their own constitutions—that is, the idea that all state courts would feel obliged to copy the interpretations of the more (or, indeed, most) protective states—can quite clearly undermine judicial federalism virtues.

<sup>198</sup>This is especially true if one believes that state constitutional interpretation should reflect the distinctiveness of a state's political and moral culture. For example, it does not seem obvious why a western state (say, Wyoming) and an eastern state (say, Massachusetts) should both have a greater-than-federal commitment to the protection of an individual right to

expected to support their decisions with reasons that make sense of their state constitutions in light of their text, structure, history, and the moral and political values that characterize the experiences and aspirations of the people of their states. But just as they should not always be expected to decide that their constitutions *never* provide more than federal protection, neither should they be expected to decide that they always do.<sup>199</sup> All judicial federalism should require is that state judges make a good faith effort to reach an understanding of what the state constitution requires in any given case, and to enforce that understanding.

Professors Porter and Tarr suggested another ingredient of judicial federalism, one which they found conspicuously lacking in pre-1984 Ohio Supreme Court decisions. They judged the Ohio Supreme Court's record a failure not only because of the court's "reluctance to consider state law as an independent source of rights," but also because it revealed "a reluctance to engage in a particular and historically unique form of policymaking."<sup>200</sup> Relatedly, they found that the court had demonstrated political timidity, having "gone out of its way to avoid conflict with the reigning political forces in this state," and having tended "to defer to the state legislature."<sup>201</sup>

Whether these factors do or should play an important role in state constitutionalism is, I believe, a good and important question. But I do not believe that the answer to this question is self-evident. Nor do I believe that the answer (or answers) can or should be built into the very definition of judicial federalism against which the work of the Ohio Supreme Court, or for that matter any state court, should be judged.

The question whether, and to what extent, courts do or should engage in policymaking is a deeply controversial question in the context of our political and legal traditions. It certainly has been deeply controversial in federal constitutional law,<sup>202</sup> and there is little reason to suppose that it ought not be controversial in state

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possess and use firearms. For general discussion of state constitutional approaches to this issue, see Robert Dowling & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982). For an interesting analysis of the extent to which state supreme courts have interpreted their constitutions to be more protective of individual rights than the federal minimum requires, see James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183 (2000) (suggesting that state courts generally choose to adopt federal analysis).

<sup>199</sup>See *Perspective*, *supra* note 30, at 1115-17. The assumption of some that judicial federalism must always lead to "progressive," rather than "conservative," results has led others to suggest that judicial federalism might be considered an unprincipled and purely results-oriented idea. Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996) ("State constitutionalism represented a kind of forum shopping for liberals.").

<sup>200</sup>*Anatomy of a Failure*, *supra* note 30, at 150.

<sup>201</sup>*Id.* at 152. Among other cases cited to demonstrate this claim was the *Walter* case, which was discussed earlier in this essay. *Id.* at 152 n.73.

<sup>202</sup>Among the most important contemporary discussions, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); RONALD DWORKIN, *FREEDOM'S LAW* (1996); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* (1994); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

constitutional law as well. It requires answers to such questions as: Of what does a “constitution” fairly consist?<sup>203</sup> What role or function does and should a constitution play in the life of a political community? What is the proper role of a judge or court in the governance and development of a community’s legal, political, and moral lives? How should conceptions of the judge’s proper role affect the ways that judges approach constitutional interpretation?

In the context of federal constitutional law, the importance of these questions, if not their answers, is well understood.<sup>204</sup> In fact, many regard these questions as central to any meaningful or coherent understanding of constitutional interpretation.<sup>205</sup> One would expect that they should also be important to an understanding of state constitutional interpretation.<sup>206</sup> Indeed, it is the very importance of these questions to state constitutionalism that makes a “lockstep” or even a presumptive approach<sup>207</sup> to state constitutional interpretation so troubling and so problematic.

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<sup>203</sup>The questions of whether a constitution ought to be conceived exclusively in terms of its text, or whether a constitution should also be understood in terms of non-textual or “extra” textual sources including its structure, its history, a political community’s traditions, values, and aspirations, are questions that are perennial, controversial, and deeply contested. For one of the best discussions of how these questions might bear on judicial federalism, see Kahn, *supra* note 186.

<sup>204</sup>*See, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (where the Justices explicitly acknowledged the importance of these questions and engaged in extensive debate about them). *See generally Symposium, Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443-831 (1983) (collection of essays).

<sup>205</sup>*See, e.g.*, MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

<sup>206</sup>Or, at least, I am not aware of anyone who has argued that these questions are not as important to state, as they are to federal, constitutional interpretation. Of course, this is not to suggest that answers that make sense in the federal context will be persuasive for the state context. Indeed, the possibility that at least some of the answers may be different is an important argument against lockstep interpretation. For a useful discussion of some of the issues presented by a more active state judicial role, see Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

<sup>207</sup>By a “presumptive” approach, I refer to the notion that federal doctrine and methodology should be followed unless there are “persuasive” reasons to reject them. This is the approach taken by the Ohio Supreme Court in *Robinette II*, where it found “no persuasive reason” for a differing interpretation. 80 Ohio St. 3d at 238, 685 N.E.2d at 766. It has not been uncommon for the courts of other states to adopt a similar presumption. *See, e.g.*, *People v. Washington*, 665 N.E.2d 1330, 1341-42 (Ill. 1996) (“Before adopting an interpretation [of the Illinois Constitution] that varies from one given by the United States Supreme Court, however, we should seek some legitimate, objective ground for distinguishing the language of the state constitution from that of the United States Constitution.”). For general discussion of this approach, see Williams, *supra* note 102, at 10-26.



Let me explain.<sup>208</sup> In the case of federal constitutional interpretation, judicial determinations of constitutional meanings have been influenced by a number of considerations. Among the most important of these is the perceived ambiguity and generality of many aspects of the constitutional text. In their efforts to ascertain the meaning of the text, judges commonly refer to other materials for clarification. These include constitutional structure, original understandings,<sup>209</sup> the nation's history and traditions,<sup>210</sup> the "evolving standards of decency" that characterize our society,<sup>211</sup> and so on. Complicating constitutional interpretation for federal judges is the so-called "counter-majoritarian difficulty,"<sup>212</sup> which generally has been understood to require life-tenured federal judges to justify the exercise of their power by reference to something more than their personal political and moral preferences or values. These concerns, in turn, have widely been supposed to influence both the methods of analysis that federal judges bring to bear in interpreting the federal Constitution and the ultimate content or shape of constitutional doctrine.<sup>213</sup>

Thus, federal constitutional doctrines are frequently borne out of often complicated interactions among a variety of theoretical, philosophical, and jurisprudential factors that may well be either uniquely or specially attributable to the nature, history, and political context of the U.S. Constitution. Moreover, the methods of analysis—for example, the *Lemon* test used in federal Establishment Clause cases, the tiered standards of review applied in federal Equal Protection cases, and the current *Smith* framework adopted for federal Free Exercise Clause cases—may express and embody important conceptions of the proper federal judicial role that are either inappropriate in the case of state constitutional interpretation,<sup>214</sup> or

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<sup>208</sup>The following is necessarily only suggestive of a much larger discussion in which I have engaged elsewhere. See, e.g., Richard B. Saphire, *Doris Day's Constitution*, 46 WAYNE L. REV. 1443 (2000); Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599 (1997); Richard B. Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513 (1988); Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745 (1983); Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782 (1983).

<sup>209</sup>See, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1013 (1981).

<sup>210</sup>See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

<sup>211</sup>*Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>212</sup>BICKEL, *supra* note 202, at 16.

<sup>213</sup>For a critical account of the influence of these political and philosophical considerations on the development of doctrine, see *What Price Purity?*, *supra* note 13. For discussions of how these concerns have affected particular constitutional doctrines, see Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991) (First Amendment's public forum doctrine); Saphire, *supra* note 29 (procedural due process).

<sup>214</sup>This may be especially true in states like Ohio, whose judges, unlike their federal counterparts, are elected by political majorities. For general discussion of the potential implications for constitutionalism, see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 690 (1995). Professor Tarr has suggested that legitimacy issues may be less significant with respect to state constitutional interpretation because state courts have been "less aggressive" than federal courts in invalidating state laws

whose appropriateness may not be axiomatic.<sup>215</sup> Thus, whether they realize it or not—and there is plenty of evidence from Ohio as well as elsewhere that they do not—when state judges either copy or otherwise emulate what the federal courts have produced as they interpret “their” constitution, they may be giving up a lot. When our judges fail to approach the Ohio Constitution as an independent, and perhaps even distinctive, expression of our fundamental law, “we the People” of Ohio lose much of our prerogative to help define our past and determine our future.

*B. What Judicial Federalism is Not*

I think there is fairly widespread agreement that any judicial federalism worthy of the name should incorporate many of the features just discussed. It should reflect a true spirit of documental independence that I believe should entail a presumption of documental autonomy. By documental autonomy, however, I do not mean that a state’s constitution should be approached as if it were hermetically sealed off from the rest of our constitutional landscape. There are a number of ways that Ohio constitutional interpretation might appropriately take account of federal constitutional developments, as well as the development of constitutional jurisprudence in other states.

It has been suggested that judicial federalism contemplates, if it does not require, that, at least where state and federal constitutional language is identical or quite similar, state courts begin with a presumption that state constitutional provisions mean the same thing as their federal counterparts (as construed by the U.S. Supreme Court).<sup>216</sup> Indeed, the Ohio Supreme Court has proceeded on the basis of just such a presumption.<sup>217</sup> But why such a presumption ought to apply is not clear; indeed,

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and because of the “relative ease of state constitutional amendment.” TARR, *supra* note 4, at 174.

<sup>215</sup>As a number of commentators have noted, federal constitutional doctrine and methodologies often incorporate concepts drawn from federal and state governmental relations that have no necessary relevance for state constitutional law. See, e.g., Rodriguez, *supra* note 180; Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO L. REV. 523 (2000).

<sup>216</sup>A clear example of this view can be found in the recent dissenting opinion of Ohio Supreme Court Justice O’Connor in *State v. Brown*, 99 Ohio St. 3d 323, 329, 792 N.E.2d 175, 180 (2003) (O’Connor, J., dissenting). In *Brown*, O’Connor rejected the majority’s decision to interpret Ohio’s constitutional provision concerning searches and seizures more broadly than the federal Fourth Amendment because the text of the federal and state provisions is “virtually identical,” thus making a different interpretation of the state provision “illogical.” *Id.* at 329, 792 N.E.2d at 180.

Professor Tarr has recently argued against the practice by state courts of attaching a presumptive authority to the relevant federal standard or precedent. I think it is telling, however, that even he treats this question as the major issue of legitimacy facing the practice of independent state constitutional interpretation. TARR, *supra* note 4, at 175. While I agree with Tarr’s observation that “the concern underlying the legitimacy controversy in both state and federal constitutional law is the same: to ensure that judgments are grounded in law rather than in the judges’ policy preferences,” *id.*, I do not believe that a state court’s refusal to follow federal interpretations necessarily implicates legitimacy concerns.

<sup>217</sup>See *Humphrey*, 89 Ohio St. 3d at 66-67, 728 N.E.2d at 1044 (establishing the federal Free Exercise Clause as a baseline for interpreting Ohio’s constitutional guarantee of religious freedom, and suggesting that there must be a “qualitative difference” between the state and

there are good reasons to suppose that such a presumption is inconsistent with judicial federalism.<sup>218</sup>

But to say that judicial federalism does not require, indeed that it precludes, the presumptive utilization of a federal baseline does not entail the further proposition that consideration of U.S. Supreme Court precedents is always inappropriate. The states play a major role in the development of the values and traditions of the American people that so often provide the backdrop or touchstone for federal constitutional interpretation. And just as the states' experiences provide relevant data for the U.S. Supreme Court's understanding of the meaning of the federal Constitution, it is difficult to see why the federal courts' explication of the meaning of federal constitutional materials might not be considered useful data for state courts in their efforts to find meaning in their own constitutions.<sup>219</sup> But a state court should not simply presume the relevance of federal interpretations just because they are produced by the U.S. Supreme Court—which, we must recall, has no portfolio to expound on the meaning of state law. Thus, the incorporation or assimilation of federal constitutional doctrine into state constitutional interpretation should not be viewed as a matter of deference, but as a matter of persuasion. Where a state court chooses to treat federal constitutional decisions rendered by federal courts—or, for that matter, by other state courts—as a relevant source for ascertaining the meaning of a state provision, it should provide reasons for doing so.<sup>220</sup>

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federal provisions for an interpretation of the state provision that goes beyond its federal counterpart).

<sup>218</sup>This is not the place for extensive discussion of these reasons. For a persuasive analysis, see Williams, *supra* note 102, at 1046-55.

In discussions at the conference at which this paper was presented, an attorney confessed to me that he was perplexed at the suggestion that state constitutional interpretation can and should proceed without the presumption of a federal baseline. I responded that his reaction was based on a sort of false consciousness about the primacy or hegemony of federal constitutional law, a false consciousness based on the notion, deeply embedded in our legal tradition and practice, that the entire domain of “constitutional law,” both federal and state, is within the authoritative sphere of the U.S. Supreme Court. While the notion that the Supreme Court is the dominant, if not the exclusive, repository of federal constitutional meaning may indeed be a major (even if controversial) theme of recent developments in federal constitutional interpretation—see generally Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001)—the Court itself has repeatedly rejected such a role with respect to state constitutional interpretation.

<sup>219</sup>Here, I note, but will not discuss, special considerations that might arise depending on the dates on which the state and federal constitutional provisions were adopted—for example, when the federal interpretations in question address constitutional provisions that might post-date the adoption of the relevant state constitutional texts.

<sup>220</sup>In this respect, I agree with Professor Williams's argument that the state court's attention should focus “on the meaning of the state constitution itself, rather than on comparing it with, or relating it to, the Federal Constitution.” Williams, *supra* note 102, at 1050.

Thus, the Ohio Supreme Court's determination to adopt a federal standard in *Goff* required an explanation the court failed to provide. See *supra* notes 110-21 and accompanying text. The court chose to adopt the three-part federal *Lemon* test to assess the validity of Cleveland's school voucher program under Article I, Section 7 of the Ohio Constitution. *Goff*, 86 Ohio St. 3d at 10, 711 N.E.2d at 212. But the only “reason” it provided was that it found the *Lemon* test to be a “logical and reasonable method by which to determine whether a statutory scheme

The same is true with respect to a state court's adoption of federal interpretive methodologies. Although generalizations here are problematic, the justices of the U.S. Supreme Court frequently consult a variety of sources in determining the meaning of the federal Constitution.<sup>221</sup> These include the text, the historical context from which that text emerged,<sup>222</sup> post-adoption and ratification history, concepts of "ordered liberty" and values that are "deeply rooted" in American traditions,<sup>223</sup> "evolving standards of decency that mark the progress of a maturing society,"<sup>224</sup> and even international treaties and conventions and the decisions of courts in other countries.<sup>225</sup> While the U.S. Supreme Court has not formally established a general protocol or taxonomy of sources that guide its own deliberations, customary practice has suggested a rough hierarchy of sources that many Justices consult, both in the generality of cases and with respect to the interpretation of specific constitutional provisions.<sup>226</sup>

Should a state court, including the Ohio Supreme Court, consider itself constrained to identify and then emulate the methodology (or methodologies) that the U.S. Supreme Court seems generally to apply to federal constitutional interpretation,

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establishes religion." *Id.* at 10, 711 N.E.2d at 211. Did the court believe that the application of *Lemon* in the federal domain has produced results that accord with its sense of the values that underlie the Ohio Constitution's commitment to religious freedom? Did the court believe that *Lemon*'s methodology furthers important process-related values? Why the court found *Lemon* a reasonable doctrinal template for Ohio constitutional interpretation is simply left unexplained. As noted earlier, this is especially curious and problematic given the widespread criticism that *Lemon* has attracted with respect to its application to federal First Amendment doctrine. *See supra* note 118.

The same observations are applicable to the Ohio Supreme Court's analysis in *AAUP II*. The AAUP explicitly called on the court to reject federal equal protection analysis in favor of an approach that was less deferential to legislative classifications. *See supra* notes 135-40 and accompanying text. The court's decision to follow federal equal protection analysis was based on its unexplained assertion that it found federal law "workable and exceedingly well reasoned." 87 Ohio St. 3d at 60, 717 N.E.2d at 291. Why it believed this to be true was left quite a mystery.

<sup>221</sup>Good discussions of the sources of federal constitutional decision-making can be found in PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); ELY, *supra* note 202, at 43-72.

<sup>222</sup>This historical context is often framed in terms of the framers' or ratifiers' intent or the original understanding. For general discussion, see Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745 (1983).

<sup>223</sup>*See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>224</sup>*See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>225</sup>*See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481, 2483 (2003) (citing the European Court of Human Rights). In *Lawrence*, the Court referred to "values we share with a wider civilization." *Id.* at 2483.

<sup>226</sup>For example, when interpreting the Due Process Clause of the Fourteenth Amendment, the Court's attention in recent years has focused on notions of "ordered liberty" and American history and traditions. *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). While not all Justices understand these notions in the same way—*see, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 505 (1989) (where several Justices disagreed on the proper conceptualization of historical tradition)—any lawyer who did not address them in argument would surely do so at her peril.

or to the interpretation of specific constitutional provisions with analogues in the state constitution? It is hard to see how such a practice would be any more required by, or consistent with, a genuine judicial federalism than would the reflexive adoption of federal constitutional precedents and doctrines. While it would be difficult to imagine a state court categorically rejecting its constitutional texts, history, and traditions as relevant interpretive materials,<sup>227</sup> state court judges should make independent determinations of the sources they believe most relevant and appropriate to consider in the course of state constitutional interpretation, and the weight or authoritative nature they believe should be attributed to such sources.<sup>228</sup>

This is true for at least two reasons. First, at least in some cases, methodological choices can have an influential, if not determinative, effect on doctrinal outcomes. For example, where historical materials are clear, an originalist judge might feel constrained to reach a decision that would seem inappropriate, or at least problematic, if other potential sources of interpretation were considered.<sup>229</sup> Thus, a state judge who reflexively adopts originalist methodology from U.S. Supreme Court opinions may have compromised her independence in deciding state constitutional cases.<sup>230</sup> Second, methodological choices will often, if they do not inevitably, reflect complicated and complex judgments about constitutionalism itself. As I have argued elsewhere,<sup>231</sup> methodological decisions represent choices about the nature of law, morality, and politics—decisions which are in no sense foreordained by any sort of settled consensus about the role of constitutions and judges in democratic

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<sup>227</sup>*Cf.* *State v. Miller*, 614 A.2d 1229, 1236 (Conn. App. Ct. 1992) (“[W]e have an independent duty to construe our state constitution in a manner that is consistent with that document’s history, its text, and the value that its framers intended it to protect.”), *aff’d*, 630 A.2d 1315 (Conn. 1993).

<sup>228</sup>Thus, even if one assumed, counter-factually, that the U.S. Supreme Court were consistently an originalist Court, a Court that consistently took the Constitution’s original understanding as authoritative and even dispositive, that fact alone should not be determinative of a state supreme court’s, or any individual state supreme court judge’s, calculation of the role that original understanding should play in state constitutional interpretation. Each judge should make his or her own determination of the relevance of original understandings, based (one would hope) on serious reflection about the nature of the state’s constitution and the proper function of a judge in its interpretation. The fact that these determinations may be complex and that they require serious and sustained reflection makes them no less a vital part of a state judge’s responsibility. For discussion of the sources available to state judges engaged in state constitutional interpretation, and the ways in which those sources might be approached, see Morawetz, *supra* note 121.

<sup>229</sup>Of course, different originalist judges might disagree about the proper lessons of history in ways that lead to different doctrinal outcomes. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), for example, two originalist Justices, Scalia and Thomas, disagreed about the original understanding of the status of anonymous political speech.

<sup>230</sup>Of course, a state judge’s reflexive importation of non-originalist methodology might also compromise genuine state constitutional independence. As noted earlier, the reflexive application of other sorts of federal constitutional standards—for example, the Ohio Supreme Court’s application of rational basis review in the *AAUP* case, *see supra* notes 135-36 and accompanying text—can also undermine meaningful state constitutional independence.

<sup>231</sup>Richard B. Saphire, *Constitutional Predispositions*, 23 U. DAYTON L. REV. 278 (1998). *See also* MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988).

governance. Consequently, these decisions are among the most important ones judges can make, and each judge should make his or her own. When a state judge defaults these decisions by deferring to those made by federal judges—whose methodological choices are likely to be influenced by quite different institutional and historical considerations<sup>232</sup>—she risks shirking one of her most important professional responsibilities.

This does not mean, as one commentator has put it, that state courts should “[p]retend that there are no federal constitutional opinions.”<sup>233</sup> As was true with respect to state court consideration of federal constitutional precedents and doctrines, the kinds of methodological judgments made in the course of state constitutional interpretation should not be conceived as a zero sum game.<sup>234</sup> Methodological determinations are likely to be affected by often complex theoretical considerations, and much of this theory has been developed in connection with scholarly and judicial examinations of judicial review in the federal courts. Thus, U.S. Supreme Court (and inferior federal court) opinions might provide fertile ground for state judges who seek useful insights.<sup>235</sup> But the views of federal judges on these matters should be taken as suggestive, not necessarily dispositive.<sup>236</sup>

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<sup>232</sup>Methodological choices by federal judges may well be influenced by the perceived counter-majoritarian nature of federal judicial review. See *supra* notes 212-13 and accompanying text. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (defending originalism based on its potential to limit the political role of federal judges). Since most state judges, including Ohio’s, are elected—see Michael Solimine & Richard B. Saphire, *The Selection of Judges in Ohio*, in *THE HISTORY OF OHIO LAW* (Michael Les Benedict & John F. Winkler eds., 2004)—their methodological choices might well be different from those of their federal counterparts. See Kahn, *supra* note 186 (noting important differences between the political positions of state and federal judges and some implications those differences might have for state constitutionalism); Hershkoff, *supra* note 206, at 1886-91 (same).

<sup>233</sup>Friesen, *supra* note 162, at 1084.

<sup>234</sup>Professor Williams has made a similar argument with respect to the role of federal precedents in state constitutional interpretation. Williams, *supra* note 102, at 1064 (“It does not make sense to advocate ‘zero-based’ state constitutional interpretation.”).

<sup>235</sup>One thinks, for example, about the extensive debates about methodology in such cases as *Atkins v. Virginia*, 536 U.S. 304 (2002) (capital punishment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy).

<sup>236</sup>Professor Williams’s observation about the general relevance of federal court precedents is applicable here as well: The views of the U.S. Supreme Court “deserve a respectful reading. But only when state judges are convinced by *their reasoning* should they adopt them.” Williams, *supra* note 102, at 1047. See also Kahn, *supra* note 186, at 1153 (arguing that state judges should consider federal constitutional interpretations because “state constitutional debate cannot close its eyes to the larger discursive context within which it finds itself”).

It has been suggested that state courts should take account of constitutional interpretations of federal courts in order to further a number of values. For example, Professor Kahn has suggested that we enhance our constitutional jurisprudence when we refuse to conceive of state constitutional rights as distinctive, and that a useful dialogue between state and federal courts about the nature and content of constitutional rights promotes the articulation of “a common aspiration for constitutional governance.” Kahn, *supra* note 186, at 1160. According

## IV. THE FUTURE OF OHIO JUDICIAL FEDERALISM

I have suggested that the record of judicial federalism in Ohio since 1984 is, to put it charitably, marked by inconsistency and ambivalence. While *Arnold's* embrace of state constitutionalism may have been rhetorically “bold,”<sup>237</sup> none of the other decisions reviewed in this essay stands as a ringing reaffirmation. What might explain this situation? A number of factors come to mind.

First, while it has been suggested that judicial federalism has been around long enough to have gone through several “stages,”<sup>238</sup> the fact remains that it is still a relatively new phenomenon on our jurisprudential landscape. Justice Brennan’s seminal articles were written within the last quarter century, and Brennan’s challenge was to a practice of state constitutional dependence that was deeply entrenched.<sup>239</sup> Many of the men and women who now sit on state courts, and perhaps especially state supreme courts, were either in, or had only recently graduated from, law school at the times Brennan wrote. And many of those same men and women are likely to have practiced law—or certainly to have begun their law practices—at a time when few Ohio lawyers were likely to have viewed the Ohio Constitution as an independent source of individual rights.<sup>240</sup> Old ways of doing things can die hard, and there is little reason to expect judicial federalism would take hold quickly in Ohio, whose supreme court has not been widely known for reformist initiatives.<sup>241</sup>

Second, for real reform to transform an institution, especially in the near term, a strong leader, or champion, is important. Putting Justice Brennan aside, strong leadership on the issue of judicial federalism has come from a small but prominent

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to this view, when state judges give careful consideration to what federal judges have to say about the content of constitutional rights, they facilitate a debate or dialogue that promotes a richer and more relevant vision of constitutionalism. Of course, the notion of dialogue connotes a process wherein both parties remain open to persuasion. For a recent suggestion that the U.S. Supreme Court has been influenced by the practice of a vigorous judicial federalism, see *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (noting, in the course of overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that five states had refused to follow it when interpreting their own constitutions).

<sup>237</sup>Bettman, *supra* note 76, at 457.

<sup>238</sup>See Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003).

<sup>239</sup>In his 1986 essay, Justice Brennan noted that “[m]ost Americans have come to think of the [federal] Bill of Rights as the source of their liberties.” Brennan, *Revival*, *supra* note 5, at 546. At the time, there was little to suggest that even state judges should have been excluded from the “most Americans” to whom Brennan referred.

<sup>240</sup>Here, I refer the reader to my own experiences as a lawyer in the early 1970s, described at the beginning of this essay. See also Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMPLE L. REV. 1153, 1155 (1992) (Washington Supreme Court justice noting that “[w]hen I graduated law school in 1954, there was no discussion of state constitutional law”).

<sup>241</sup>Which is not to deny that individual Ohio judges—Chief Justice Moyer and his leadership on the question of merit selection comes to mind here—have assumed national leadership on reform-oriented issues.

group of state court judges. Here, one thinks of Hans Linde, from Oregon,<sup>242</sup> Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court,<sup>243</sup> and Justice Robert Utter of the Washington Supreme Court.<sup>244</sup> In Ohio, strong and consistent leadership in this area has been lacking.<sup>245</sup>

A third explanation for the Ohio Supreme Court's failure to develop a serious and sustained commitment to judicial federalism is the court's failure to develop and explicate anything that might be fairly understood as a theory of Ohio constitutional interpretation. As I suggested earlier, the text of the Ohio Constitution, like all such texts, does not "tell" us what it means. Unlike a child's talking toy, it has no button which, when pressed, activates a voice explaining what its words, like "a thorough and efficient system of common schools throughout the State," actually mean, what those words require of the Ohio General Assembly.<sup>246</sup> Language like this requires interpretation, and interpretation requires a theory.<sup>247</sup> A theory would provide

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<sup>242</sup>See, e.g., Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). Linde's leadership in state constitutional law was recently celebrated in an issue of the *Albany Law Review*. See Vincent M. Bonventre, *Editor's Foreword*, 64 ALB. L. REV. 1133 (2001). See also Louis H. Pollak, *Judge-Professor Linde*, 70 OR. L. REV. 679, 682 (1991) (referring to Linde's leadership in the state constitutional law movement as "one of the century's most important judicial contributions").

<sup>243</sup>In addition to Chief Justice Abrahamson's contribution to this Symposium, see, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985). As Chief Justice Abrahamson noted in remarks at the conference at which this paper was presented, even the leadership of a judge committed to judicial federalism is no assurance that a court will consistently exercise its constitutional independence.

<sup>244</sup>See, e.g., Robert F. Utter, *Freedom and Diversity in the Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984).

<sup>245</sup>Which is not to say that individual justices of the Ohio Supreme Court have not, at least on occasion, exhibited strong inclinations toward state constitutional independence. Justice Craig Wright was a good example. See, e.g., *Vail v. The Plain Dealer Publishing Company*, 72 Ohio St. 3d 279, 284, 649 N.E.2d 182, 187 (1995) (Wright, J., concurring) (stressing that "the protections accorded opinion under the Ohio Constitution are broader than the First Amendment jurisprudence developed by the United States Supreme Court"); *State v. Evans*, 67 Ohio St. 3d 405, 424, 618 N.E.2d 162, 177 (1993) (Wright, J., dissenting) (arguing for an "independent analysis of the Ohio Constitution").

<sup>246</sup>OHIO CONST. art. VI, § 2. Indeed, the recent efforts of Ohio Supreme Court justices to determine the meaning of this language, and their stark disagreement about its meaning, produced some of the court's most notable and dramatic recent opinions. See *De Rolph v. Ohio*, 89 Ohio St. 3d 1, 728 N.E.2d 993 (2000); *id.* at 48, 728 N.E.2d at 1029 (Moyer, C.J., dissenting) (noting the "wide divergence of opinion between the majority and minority members of this court as to the meaning of the Thorough and Efficient Clause, as manifested in the various separate opinions in *DeRolph I*").

<sup>247</sup>See Saphire, *supra* note 182. For useful accounts of the important relationship between constitutional theory and interpretation, see David A. Strauss, *What is Constitutional Theory?*, 87 CAL. L. REV. 581 (1999); Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENT. 231 (1989); Douglas Laycock, *Constitutional Theory Matters*, 65 TEXAS L. REV. 767 (1987). For a more skeptical account, see Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).



answers to questions like: When is the text sufficiently ambiguous or uncertain so that one must look beyond (or perhaps behind) the words?<sup>248</sup> What role should historical sources play in ascertaining the proper, or best, meaning of the text? Should judges consider contemporary sources in determining the meaning of the text?<sup>249</sup> To what extent and in what ways should judges adopt approaches to interpretation that allow for greater or lesser degrees of judicial leeway or discretion, and to what extent can and should judges take account of policy considerations in their deliberations?<sup>250</sup>

Questions like these are not easy. They require serious and sustained reflection. Answers that might be sensible and persuasive to any judge are often elusive. Many are likely to find daunting or even tedious the deep intellectual commitment that the necessary reflection entails.<sup>251</sup>

In this regard, a contrast to federal constitutional interpretation by federal judges might be useful. I think it is the case that theorizing about the U.S. Constitution attracts a fair amount of concern on the part of federal judges, particularly at the Supreme Court level. Debates about judicial role and methods of interpretation do not invariably infuse the pages of the U.S. Reports, but neither are they uncommon

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<sup>248</sup>Looking “behind” the words might entail looking at things like the drafters’ purposes that led to the inclusion of particular words in the constitutional text. *See, e.g., De Rolph v. Ohio*, 89 Ohio St. 3d 1, 46, 728 N.E.2d 993, 1027-28 (Pfeifer, J., concurring) (considering what insights debates at constitutional convention provide “into the purpose” of Article VI of the Ohio Constitution). It might also entail consideration of the “values” that might be thought to underlie the text. *See, e.g., Due Process Values*, *supra* note 29.

<sup>249</sup>This question entails a number of parts. For example, where a constitutional provision clearly implicates questions of morality, should judges consider “contemporary” or “evolving” notions of morality, or should they look only to the moral standards of the generation(s) living at the time of the adoption of the text? And more broadly, should the Ohio Constitution generally, or at least some of its provisions, be understood in a “dynamic” or “organic” sense? While few would defend the notion of a “dead” Constitution—*see* William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976)—judges can and do reasonably disagree whether, and to what extent, the idea of a “living Constitution” entails a judicial responsibility to adopt constitutional meaning to effect societal change. *Compare, e.g., DeRolph*, 89 Ohio St. 3d at 9-10, 728 N.E.2d at 1001 (“The definition of ‘thorough and efficient’ is not static; it depends on one’s frame of reference. What was deemed thorough and efficient when the state’s Constitution was adopted certainly would not be considered thorough and efficient today.”), *with id.* at 51, 728 N.E.2d at 1032 (Moyer, C.J., dissenting) (arguing that the majority’s interpretation is “totally inconsistent with the history of education at the time the Thorough and Efficient Clause was adopted”).

<sup>250</sup>*See, e.g., DeRolph*, 89 Ohio St. 3d at 48, 728 N.E.2d at 1029 (Moyer, C.J., dissenting) (“I continue to believe that decisions regarding the level of educational quality to be made available to Ohio school children are dependent on policy decisions—political, budgetary, and value judgments—that require a balancing of interests that is not appropriately struck in the Supreme Court of Ohio.”).

<sup>251</sup>Early in my academic career, I described the often sobering experience of trying to get first-year law students to think seriously about these questions. *What Price Purity?*, *supra* note 13, at 370-72. I suspect that many lawyers will have given these questions little sustained consideration prior to being elected (or appointed) to the bench, and that it would take some time for them to feel comfortable struggling with them.

in Supreme Court opinions.<sup>252</sup> And frequently those debates seem to play a crucial role in the Justices' decisionmaking process.<sup>253</sup>

But the Justices of the U.S. Supreme Court are appointed, and they enjoy the life tenure and protection against diminution in salary provided by Article III.<sup>254</sup> While some Justices may come to the Court having given serious thought to the intricacies of constitutional interpretation,<sup>255</sup> it is more common for justices to develop their views over time, testing their ideas in the crucible of experience.<sup>256</sup> Unlike federal judges, of course, the justices of the Ohio Supreme Court are not likely to have the leisure of a lifetime of reflection to work out a fully developed philosophy of constitutional interpretation. They must run for re-election every six years, and they are subject to mandatory retirement.<sup>257</sup> In addition, the very fact that the Ohio Constitution historically has not been treated as an independent source of rights has no doubt led attorneys to bring fewer state constitutional claims to the court, thus providing the justices with fewer opportunities to work out a more sophisticated constitutional theory.<sup>258</sup>

These factors may well continue to work against real progress for judicial federalism in Ohio.<sup>259</sup> Given the challenges confronting a judge who might

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<sup>252</sup>*See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472 (2003); Washington v. Glucksberg, 521 U.S. 707 (1997); Romer v. Evans, 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting); United States v. Lopez, 514 U.S. 549 (1995); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Bowers v. Hardwick, 478 U.S. 186 (1986); Plyler v. Doe, 457 U.S. 202 (1982); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

<sup>253</sup>Some Justices have felt so strongly about these matters that they have carried on the debate off the Court. *See, e.g.*, SCALIA, *supra* note 202; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

<sup>254</sup>U.S. CONST. art. III.

<sup>255</sup>Here, Antonin Scalia and Felix Frankfurter come to mind.

<sup>256</sup>For an account of such a process, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (1994).

<sup>257</sup>Unpublished research conducted by my colleague, Charles Hallinan, reveals that in the Twentieth Century, the average tenure of a Justice of the U.S. Supreme Court is about fifteen years, compared to about nine years for the justices of the Ohio Supreme Court. Even more striking is the fact that, since 1970, there have been twenty-two new occupants of the seven seats on the Ohio Supreme Court while there have been only eleven new occupants for the nine seats on the U.S. Supreme Court. I thank Professor Hallinan for alerting me to this research.

<sup>258</sup>Advocates of a system of merit selection for Ohio judges have not, to my knowledge (and quite understandably), claimed that such a system might well lead to more sophisticated Ohio constitutional interpretation. But a more robust state constitutionalism might be a welcome by-product of such a change.

<sup>259</sup>I have heard it suggested that high expectations for a sophisticated judicial federalism in state courts are unrealistic given certain supposed qualitative differences between federal and state judges. This suggestion has, in part, been based upon the notion that state court judges—especially those who are elected—are unlikely to have the same high level of intellectual

otherwise be attracted to a genuine and robust form of state constitutional independence, a business-as-usual attitude might well seem appealing. As others have noted, a lockstep approach to state constitutional interpretation, or an approach which presumes that federal constitutional interpretations are authoritative, can be seen as the path of less resistance.<sup>260</sup> The federal model is available. It offers a set of established methodological frameworks, which might well be perceived as producing “reasonable” results.<sup>261</sup> And the importation of federal analysis helps deflect potential criticisms of result-orientation and “judicial activism” that might come with the exercise of real independence.<sup>262</sup>

#### V. CONCLUSION

In this essay, I have suggested that while judicial federalism has made modest inroads in Ohio, it has not seriously taken hold. The Ohio Supreme Court’s record of treating the Ohio Constitution as a meaningful and independent source of individual

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background and resources that many federal judges possess (especially at the Supreme Court level), and thus are less likely either to be interested in, or capable of, the kind of sustained theoretical reflection that sophisticated constitutional interpretation may require.

It is hard to know what to make of this sort of criticism. It has long been suggested that federal judges are more likely to be open to, and capable of, dealing with complex matters than are many of their state colleagues. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are a preferred forum for the vindication of individual rights). But see MICHAEL SOLIMINE & JAMES WALKER, *RESPECTING STATE COURTS* (1999) (challenging the notion that federal courts invariably provide a superior forum). But I think gross or wholesale assessments of the competence of state judges, whether elected or not, or even generalized comparisons between state and federal judges, are unlikely to be helpful here. See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 980 (2001) (“no system can claim a monopoly on producing good—or bad—judges”). Any suggestion that state judges, as a group, are not able to think seriously about their own constitutions is contradicted by the enormous respect that folks like Justices Linde, Abrahamson, and Moyer (not to mention such distinguished judges as Stanley Mosk of California, Judith Kaye of New York, and Randall Shephard of Indiana) have earned in the national legal community.

<sup>260</sup>Chief Justice Abrahamson offered a similar explanation in comments at the conference at which this paper was presented.

<sup>261</sup>Once again, the Ohio Supreme Court’s analysis in *Goff* is suggestive. *Goff*, 86 Ohio St. 3d at 10, 711 N.E.2d at 211 (applying the federal *Lemon* test on the basis of an unexplained assertion that it seemed to be a “logical and reasonable method” for resolving church-state problems).

<sup>262</sup>See Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 308 (2003) (noting that deference to federal constitutional interpretation can serve to insulate the state courts “from controversy attendant to constitutional law decisions by normalizing the practice of acquiescence”). As noted earlier, state judges who have interpreted state constitutional rights more expansively than their federal counterparts have been accused of result-oriented decision-making. In addition, state judges who simply adopt U.S. Supreme Court decisions can deflect any claims of judicial activism back onto the Supreme Court (i.e., “They did it; we didn’t. Blame them!”).

rights—judged a “failure” in 1984 by Professors Porter and Tarr<sup>263</sup>—has shown only intermittent, and quite tentative and equivocal, signs of life in recent years.

If judicial federalism provides a desirable model for Ohio constitutional interpretation—and I have suggested reasons for thinking that it does<sup>264</sup>—Ohio judges, especially members of the Ohio Supreme Court, must bear the responsibility to make it clear to Ohio attorneys that the U.S. Constitution is not the only source of individual rights that really counts.<sup>265</sup> In states noted for a commitment to judicial federalism, judges have not been shy in reminding lawyers that the state constitution should not be treated as an afterthought.<sup>266</sup>

Other steps can be helpful. It will be difficult for judicial federalism to make deeper inroads in Ohio unless the Ohio legal community stops thinking of the Ohio Constitution as the “poor cousin” of federal constitutional law. Earlier, I noted my experience of attending law school in Ohio without having the opportunity of taking a course on state constitutional law and without recalling the state’s constitution so much as mentioned in my basic constitutional law course.<sup>267</sup> Others around the country have written of similar experiences.<sup>268</sup> And even today, when many judges

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<sup>263</sup>Porter & Tarr, *supra* note 30.

<sup>264</sup>Of course, not everyone agrees that judicial federalism is an unmitigated good. *See, e.g.*, Gardner, *supra* note 174; Maltz, *supra* note 5. On the other hand, the Ohio Supreme Court’s 1993 endorsement of the concept of judicial federalism in *Arnold*, 67 Ohio St. 3d at 41-42, 616 N.E.2d at 168-69, has, to my knowledge, not been formally retracted.

<sup>265</sup>There are plenty of models already developed in other states, and advanced in the academic literature, that might provide Ohio judges and lawyers important resources for such a project. For example, where attorneys rely on federal constitutional claims with clear state analogues, Ohio courts might require that attorneys address potentially available state constitutional claims before presenting federal ones. In addition, where both state and federal claims *are* presented, the courts might address the state claim *before* taking up the federal claim, instead of afterwards. Similarly, where a court concludes that both federal and state constitutional claims yield identical outcomes, the court might base its decision on the latter and not the former. *But cf.* *City of Painesville Bldg. Dept. v. Dworken & Bernstein, L.P.A.*, 89 Ohio St. 3d 564, 733 N.E.2d 1152 (2000) (invalidating sign ordinance on basis of First Amendment and finding consideration of analogous state constitutional claim unnecessary). The Ohio Supreme Court might also clarify to attorneys the sorts of sources, or “criteria,” that it will take into account, and how, in determining the meaning of state constitutional provisions (although some of the “criteria” proposals are based on the problematic presumption that federal interpretations will be authoritative, *see, e.g.*, *Gunwall v. State*, 720 P.2d 808 (Wash. 1986)).

<sup>266</sup>*See* Thomas L. Hayes, *Clio in the Courtroom*, 56 VT. HIST. 147, 149 (1988), cited in Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 105 (2001) (Vermont Supreme Court Justice calling for lawyers to “[l]ook to your Vermont Constitution and, when you do, brief it adequately”).

<sup>267</sup>I graduated in 1971 from the Salmon P. Chase College of Law (which is now part of the Northern Kentucky State University). For my first year of law school, I attended the Ohio State University College of Law, where I took the basic course in Constitutional Law. I do not recall hearing the Ohio Constitution mentioned there, either.

<sup>268</sup>*See supra* note 240. Professor Robert Williams has noted that in 1980, when he first offered a course in state constitutional law at Rutgers University School of Law at Camden,

and scholars have begun to treat state constitutional law as a serious issue, state constitutional law courses do not abound at the nation's law schools. As far as I can tell, no Ohio law school currently offers a separate course in state constitutional law, and none offers a general course on the Ohio Constitution.<sup>269</sup> Until Ohio (and other) law schools, and others involved in the training of new lawyers,<sup>270</sup> make a significant effort to introduce new generations of lawyers to the world of state constitutional jurisprudence, it will remain difficult for judicial federalism to be treated with the seriousness it deserves.<sup>271</sup>

Of course, still other steps might be useful. For example, a sustained effort to incorporate components on Ohio constitutional interpretation in the training of new judges and in continuing legal education programs for the bar might, at the least, serve a consciousness-raising function. Nobody has suggested that the conceptual and analytical work required for the development of an independent Ohio constitutional jurisprudence will be easy.<sup>272</sup> Grappling with the challenges of judicial federalism will take a more serious commitment of the bench's considerable intellectual resources than has been evident in the recent past.

Finally, there is the role of the academy. While there have been sporadic efforts by scholars to explore the world of Ohio constitutional interpretation, such efforts

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“there was no course like it in the country, approaching the topic on a comparative, or all-states, basis.” WILLIAMS, *supra* note 178, at ix. The paucity of state constitutional law courses was noted in the 1989 report of the Advisory Commission on Intergovernmental Relations. *Id.* at xv (quoting report).

<sup>269</sup>The University of Dayton School of Law does not offer such a course. In recent years, I have integrated a component on state constitutional law into my basic, two-semester Constitutional Law course. My course materials include some general readings on the role and importance of state constitutions which I assign early in the first semester of the course after students are introduced to the concept of judicial review. (The casebook I use contains almost nothing on state constitutional law, a fact that I believe is also true of most other general constitutional law casebooks on the market.) I also talk directly about state constitutions in connection with *Bush v. Gore*, 531 U.S. 98 (2000) (also early in the semester), and then return to the topic after an initial set of assignments on the Fourteenth Amendment. In particular, I ask students to consider the prospects of pursuing state constitutional claims under circumstances where federal courts are likely to apply the deferential rational basis review to legislative classifications. For the last several years, I have asked students to read the Ohio and U.S. Supreme Court decisions in the *Central State University v. AAUP* controversy, described earlier in this essay. See *supra* notes 122-44 and accompanying text. At the very least, at the end of the course I expect my students to be aware of the availability and possibilities of state constitutional adjudication, although I suspect that most of my students continue to think of state constitutional claims as “second order” claims.

<sup>270</sup>State constitutional law is not treated as a distinct topic on the Ohio Bar Examination, and anecdotal evidence suggests that it is rarely incorporated into examination questions.

<sup>271</sup>Of course, many of these obstacles have long been understood. See WILLIAMS, *supra* note 178, at xiii-xvii (discussing longstanding obstacles confronting a more meaningful judicial federalism).

<sup>272</sup>See, e.g., Lynn M. Boughey, *A Judge's Guide to Constitutional Interpretation*, 66 TEMP. L. REV. 1269, 1269 (1993) (“Perhaps one of the most difficult functions of a judge, and especially a new judge, is to determine an appropriate analytical framework to employ when interpreting a state constitution.”).

have been no more sustained and systematic than those on the bench.<sup>273</sup> While the usefulness, or even the possibility, of a meaningful dialogue between the bench and the academy might easily be overrated,<sup>274</sup> Ohio scholars—who may well have more time than judges to explore the nuances of state constitutional interpretation—might play a constructive role. One can hope that this Symposium will provide an important impetus to such an enterprise.

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<sup>273</sup>At the risk of offending, I am unaware of any Ohio law professor who has—like, for example, Bob Williams from Rutgers—made a serious and sustained commitment to state constitutional law and theory. Nor, aside from the Symposium of which this essay is a part, am I aware of any major law review project on these topics.

<sup>274</sup>See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Mark V. Tushnet, *Judges and Constitutional Theory: A View From History*, 63 U. COLO. L. REV. 425 (1992) (providing an account of the interactions between academic theorists and judges).