SUPREME STATE COURTS: PROTECTING RIGHTS & LIBERTIES DESPITE THE SUPREME COURT

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INTRODUCTION

The Supreme Court of the United States is the "nation's highest court," and the Constitution—including the Supreme Court's rulings—is the "Law of the Land." In a narrow, technical, and formalistic sense, those assertions are accurate. But in a general, practical, and more realistic sense, they are misleading.

It is axiomatic in our federal system of government that states and their courts are free to pursue their own different priorities and render their own different rulings, as long as they don't actually *violate* federal law. Yet this bedrock principle seems lost on many attorneys arguing in state courts and the judges who sit on them. This Article explores the constitutional foundation and tradition of judicial federalism: the ability of state high courts to reject the

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Supreme Court's treatment of civil rights and liberties by providing greater or different protections on the basis of their own state constitutions or other independent and adequate state law grounds.[1]

By doing so, state high courts secure the fundamental rights of those within their respective borders when the Supreme Court declines to do so. It is imperative for state high courts to interpret their own state constitutions and laws independently to insure the protection of civil rights and liberties for their citizens, regardless of the dilution or denial of such protections in decisions of the Supreme Court.

"STATES' RIGHTS"

A quintessential example in which a state's highest court granted further protection for a fundamental right than the Supreme Court of the United States is the 1943 New York Court of Appeals decision in *People v. Barber*.[2] The Supreme Court and the New York Court of Appeals both faced the question of whether to allow a religious exemption for those impacted by facially neutral municipal ordinances which required individuals to obtain a permit prior to door-to-door solicitation.[3] In 1942, the Supreme Court upheld an Opelika, Alabama municipal ordinance requiring such a permit and refused to grant a religious exemption to the Jehovah's Witnesses.[4] The plaintiffs argued that door-to-door solicitation was an essential aspect of their religious practice and this entitled them to an exemption from the ordinance.[5] The Supreme Court was unpersuaded by the plaintiffs' argument that requiring a permit prior to solicitation was an invalid burden on their religious practice and found, instead, that the guarantee of free exercise of religion in the Federal Constitution did not entitle the plaintiffs to an exemption.[6]

In a markedly similar set of facts, the New York State Court of Appeals held exactly the opposite, citing the freedom of press and

[1] Indeed, judicial federalism has again come into sharp focus as a result of the Supreme Court's recent decision in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), overruling the *federal* constitutional right of a woman to choose an abortion, which had previously been recognized in Roe v. Wade, 410 U.S. 113 (1973) and reaffirmed in Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[2] People v. Barber, 46 N.E.2d 329, 386 (N.Y. 1943).

[3] *See id*. at 381; Jones v. Opelika, 316 U.S. 584, 586 (1942).

[4] *Jones*, 316 U.S. at 599.

[5] *Id.* at 588–89.

[6] *Id.* at 599.

worship provisions of the New York State Constitution.[7] In *People v. Barber*, the Court of Appeals granted the plaintiff, a Jehovah's Witness, a religious exemption similar to the one sought in *Jones v. Opelika*.[8] In perhaps one of the most instructive and poignant, yet simple passages in the history of the Court of Appeals, Chief Judge Irving Lehman wrote:

> Parenthetically we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.[9]

In one sentence, Chief Judge Lehman succinctly explained the principle of judicial federalism: state high courts have not just a prerogative, but the *duty* to use their own independent judgments to determine the protections afforded to fundamental rights by their own state constitutions and have no contrary obligation to follow decisions or rationales of the Supreme Court of the United States. Interestingly enough, only a few months later, the Supreme Court reversed its holding in *Jones v. Opelika*, when it held, citing *Barber*, that Jehovah's Witnesses are indeed entitled to a religious exemption from ordinances that required permitting prior to solicitation.[10]

These holdings illustrate an ancillary yet equally critical function of judicial federalism: state high courts can influence national law through their rulings to help protect fundamental rights throughout the country by providing the rationale for amenable justices on the Supreme Court in their concurring, dissenting, and even, ultimately, majority opinions.[11]

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[7] *Barber*, 46 N.E.2d at 386.; *see also* N.Y. CONST. art. I, § 3 (granting the free exercise of religious worship); N.Y. CONST. art. I, § 8 (granting the freedom of speech and press).

[8] *See Barber*, 46 N.E.2d at 386; *Jones*, 316 U.S. at 599.

[9] *Barber*, 46 N.E.2d at 386; *see* Vincent M. Bonventre, *Beyond the Reemergence—"Inverse Incorporation" and Other Prospects for State Constitutional Law*, 53 ALB. L. REV. 403, 406 (1989) (discussing how Lehman's "parenthetical" in *Barber* "is the point of state constitutional law, for New York and for every state").

[10] Murdock v. Pennsylvania, 319 U.S. 105, 105, 112 (1943).

[11] *See*, *e.g.*, *id.*; U.S. v. Jones 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (citing People v. Weaver, 909 N.E.2d, 1195, 1199–200 (N.Y. 2009)).

Twenty years later after *Barber*, in *People v. Donovan*,[12] the New York Court of Appeals again granted greater protections under its state constitution and law than the Supreme Court afforded in its interpretation of federal due process under the Fourteenth Amendment.[13] Prior to *Miranda v. Arizona*,[14] where the Supreme Court required that suspects being interrogated in custody be advised of their right to counsel,[15] the Court of Appeals was tasked with determining the admissibility of a written confession given by a suspect after he was refused the right to see or speak to an attorney.[16]

One of the truly great judges in American history, Stanley Fuld,[17] wrote the majority opinion in *People v. Donovan,* holding that a suspect is indeed entitled to have counsel present during an interrogation after requesting one. Any confession obtained after such a refusal, Fuld explained, denies the suspect effective assistance of counsel at a critical time in the criminal justice process, an essential aspect of the fundamental right to counsel.[18] Although the Supreme Court had not yet weighed on this issue, Justice Fuld presciently wrote:

> Since we have concluded that a confession obtained under the circumstances present here is inadmissible under New York law, we find it unnecessary to consider whether or not the Supreme Court of the United States would regard its use a violation of the defendant's rights under the Federal Constitution. In other words, we are of the opinion that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel, not to mention our own guarantee of due process, require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him.[19]

[12] People v. Donovan, 193 N.E.2d 628 (N.Y. 1963).

[13] *See id.* at 629–30; *see, e.g.*, Crooker v. California, 357 U.S. 433, 441 (1958) (holding that there was no violation of due process rights through the Fourteenth Amendment when a confession was given after a request for counsel was denied).

[14] Miranda v. Arizona, 384 U.S. 436 (1966).

[15] *See id.* at 471–72.

[16] *Donovan*, 193 N.E.2d at 628.

[17] *See* Dedication to Chief Judge Stanley H. Fuld, 71 COLUM. L. REV. 531–750 (1971).

[18] *Donovan*, 193 N.E.2d at 629–30.

[19] *Id.* at 629 (internal citations to the New York State Constitution and Criminal Procedure Law omitted).

Three years later, the Supreme Court of the United States, citing *People v. Donovan*, decided *Miranda v. Arizona*, finding in the Federal Constitution an identical right to counsel for a suspect during custodial interrogation.[20]

Continuing into the 1970s, the New York Court of Appeals further bolstered its reputation as arguably the state high court most protective of rights and liberties in the United States. In 1978, the Court of Appeals heard *Sharrock v. Dell Buick-Cadillac*,[21] a case that dealt with the relationship between a private enterprise and the Due Process Clause of the New York State Constitution.[22] Earlier that same year, the Supreme Court had held that a New York statute that allowed private entities to sell the property of individuals they had evicted, without notice or a hearing, did not violate the Fourteenth Amendment.[23] This ruling denied due process protection against private, as opposed to government, lienholders. In an opinion penned by Chief Judge Lawrence Cooke, the New York Court of Appeals rejected that proposition, stating in relevant part,

> [O]n innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution. This independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution as well as the long history of due process protections afforded the citizens of this State and, more generally, in fundamental principles of federalism.[24]

New York's high court held that sections 201, 202, and 204 of the State Lien Law, which authorized the foreclosure of a private mechanic's lien through a public sale *ex parte*, violated procedural due process under the state constitution.[25]

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[20] *Miranda*, 384 U.S. at 465 n.35.

[21] Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169 (N.Y. 1978).

[22] *See id.* at 1171.

[23] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978).

[24] *Sharrock*, 379 N.E.2d at 1173 (internal citations omitted).

[25] *Id.* at 1171; *see generally* Vincent M. Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31 (1989) (reviewing the long tradition of New York's high court in protecting rights and liberties through independent state-based adjudication).

To be clear, the New York Court of Appeals is hardly the *only* state high court to have utilized its independent authority and state constitution to determine the extent of civil liberties in their borders. The Oregon Supreme Court has regularly exercised its independence in its approach to constitutional questions. In *State v. Kennedy*,[26] for example, the Oregon Supreme Court was asked to decide whether a defendant could be retried after a mistrial due to prosecutorial misconduct.[27] In this case, following a mistrial due to "flagrant overreaching" by the prosecutor, the defendant was retried and convicted. That conviction was reversed on appeal and the Oregon Supreme Court denied the state's appeal. The United States Supreme Court, however, granted *certiorari* and held that neither federal constitutional double jeopardy nor due process precluded the second prosecution and the resulting conviction.[28] On remand, Oregon's intermediate court affirmed the conviction,[29] and the state's supreme court affirmed the conviction, however while rejecting the federal Supreme Court's rationale.

Oregon's high court, relying entirely on Oregon State's Constitution, reached a result opposite to that of the United States Supreme Court's interpretation of the Federal Constitution. The Oregon Supreme Court ruled that the Oregon Constitution bars a retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[30]

Oregon's high court emphasized that "a state's constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law," and that "[s]tate courts cannot abdicate their responsibility for these independent guarantees."[31] The decisional focus, the court asserted, should not be on whether a state's constitutional guarantees were either more or less protective than federal guarantees, but on whether they were

[26] State v. Kennedy, 666 P.2d 1316 (Or. 1983).
[27] *Id.* at 1318.
[28] Oregon v. Kennedy, 456 U.S. 667, 668 (1982).
[29] *Kennedy*, 666 P.2d at 1318.
[30] *Id.* at 1326. Though the Oregon Supreme Court ultimately upheld the conviction, this decision is significant in that the court utilized its own state Constitution, statutes, and precedent to formulate its own standard for determining whether an individual's rights against double jeopardy have been violated and did not simply accept the federal rationale. *See id.* at 1323–26.
[31] *Id.* at 1323.

effective guardrails against state governmental powers.[32] This decision made clear to the people of Oregon that state high courts ought not to rely simply on whether advocates raise state constitutional law and independent state grounds to protect rights and liberties. Instead, the courts of Oregon have an affirmative duty to raise such issues *sua sponte*.[33]

A similar expression of judicial federalism emerged from the Pennsylvania Supreme Court's discussion of the so-called "good-faith exception" to the exclusionary rule in *Commonwealth v. Edmunds*.[34] The United States Supreme Court's now-settled rule is that evidence need not be excluded if the police themselves were sincerely unaware that the search or seizure they were conducting was actually unconstitutional.[35] The Pennsylvania Supreme Court, relying on the Pennsylvania Constitution's strong right to privacy and the court's adherence to the probable cause requirement to justify searches and seizures, rejected the federal good-faith exception.[36] Following the same line of reasoning as in the New York and Oregon cases, the Pennsylvania court began its decision by reiterating the principle that state courts are free and, indeed, obligated to rely on state constitutional grounds independent of federal Supreme Court decisions:

> It is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated. Although we may accord weight to federal decisions where they are found to be logically persuasive and well reasoned . . . we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution. . . . It is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.[37]

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[32] *Id.*

[33] *See id.*

[34] Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991).

[35] U.S. v. Leon, 486 U.S. 897, 923–24 (1984).

[36] *Edmunds*, 586 A.2d at 896.

[37] *See id.* at 894–95; *supra* notes 10, 19, 24, 32–34 and accompanying text.

To be clear, independent state constitutional adjudication is not just a coastal state phenomenon. State high courts in America's Heartland also have a rich history of rejecting limited federal protections of civil rights and liberties thereby providing their own, more robust constitutional guarantees. A notable example is the Supreme Court of Iowa's expansion of equal protection in its 2017 decision in *Godfrey v. State*.[38] In that case, the Iowa court prohibited discrimination in hiring and firing on the basis of sexual orientation, despite the United States Supreme Court's failure to have issued such a ruling.[39]

The Iowa high court cited a New York Court of Appeals decision in which that court stated that the "concerns of federalism underlie much of the Supreme Court's reluctance to expand relief available . . . and thereby [to] unduly interfere with States' rights."[40] Stressing its own independence, the Iowa court underscored that "we do not march in lockstep with federal law,"[41] as "[t]he Iowa Supreme Court has a long and storied tradition of deciding cutting-edge cases well in advance of later decisions of the United State Supreme Court."[42] The court thereafter cited various decisions in which it had ruled in favor of protecting its citizens' civil rights and liberties prior to the Supreme Court's setting a national baseline standard.[43]

The Supreme Court itself has recognized the ability of state courts to expand rights and liberties beyond the minimum threshold the Court sets. Justice William Rehnquist explicitly reaffirmed this axiom of the United States federal constitutional system in *Pruneyard Shopping Center v. Robins*.[44] In this case, in which the Court overruled a California decision that constitutional free speech extended to private shopping malls, Justice Rehnquist made plain that "[o]ur reasoning . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[45]

[38] Godfrey v. State, 898 N.W.2d 844 (Iowa 2017).
[39] *See id.* at 872, 879–80.
[40] *Id.* at 845, 855 (quoting Brown v. State, 674 N.E.2d 1129, 1143 (N.Y. 1996)).
[41] *Id.* at 855.
[42] *Id.* at 862–63.
[43] *Id.*
[44] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).
[45] *Id.*

Similarly, in the death penalty case of *California v. Ramos*,[46] the Court again emphasized the constitutional sovereignty of states to provide further protection for the rights of their own citizens.[47] Writing for the majority, Justice Sandra Day O'Connor declared it an "elementary" principle "that States are free to provide greater protections in their criminal justice system than the federal constitution requires."[48]

As Rehnquist's and O'Connor's assertions make perfectly clear, it is not the role of the United States Supreme Court to be the sole legal authority on fundamental rights. Rather, the United States Supreme Court rules only on rights protected under *federal law* and in the *Federal* Constitution. It is up to state courts to decide whether rights and liberties for their own citizens, under their own state constitutions and laws, extend beyond what the United States Supreme Court decides the Federal Constitution provides. This understanding of an axiomatic principle of our federal system unfortunately seems to be lost on many attorneys and judges across the country today who largely ignore the ability, let alone the obligation of state high courts to adjudicate rights and liberties independent of the federal constitutional floor.

FEDERAL CONSTITUTIONAL BACKGROUND

The Bill of Rights & the States

Federal constitutional history illustrates the foundation and development of independent state-based rights from which the modern tendency departs. The Ninth Amendment insists that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" that are simply unmentioned in the document.[49] The omission of a right from the text of the Constitution, therefore, in no way suggests the nonexistence of such a right. To grasp the power of this provision, imagine American life without the truism of the Ninth Amendment. Most of the rights we enjoy in our free society—to marry, to be intimate with our spouses, to have children, to work to support our families, to have friends, etc.—are nowhere mentioned or even

[46] California. v. Ramos, 463 U.S. 992 (1983).
[47] *See id.* at 1013–14.
[48] *Id.*
[49] U.S. CONST. amend. IX.

insinuated in the Federal Constitution.[50] Though it is possible some judges may believe or some attorneys may attempt to argue that one cannot claim entitlement to a right not explicitly spelled out in the Bill of Rights, such a belief is demonstratively erroneous and, indeed, anti-constitutional.[51] The Ninth Amendment repudiates such a view, just as it assuaged the concerns of the Founders and Framers some 230 years ago who feared that codifying certain rights in a Bill of Rights would permit the trampling of those not similarly identified.[52]

Beyond that, the Tenth Amendment is a recognition that states retained the authority to protect rights beyond whatever protection was to be guaranteed under the Federal Constitution.[53] The Tenth Amendment reads in relevant parts, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively."[54] This language underscores that the Federal Constitution is a document vesting only certain powers in a limited federal government.[55]

All powers not enumerated or impliedly vested in that central government were meant to remain the province of the states.[56] States may exercise their reserved powers however they please—the only proviso being that the states may not run afoul of the Federal Constitution and the laws enacted thereunder.[57] States are free to provide more or different protections to their citizens than the Federal Constitution does. They simply may not violate the federal constitution by providing less.[58]

A key component of this state-forward constitutional scheme is the demarcation between federal and state spheres of governance. The Bill of Rights was written to restrain the nascent federal government

[50] *See* U.S. CONST. amends. I–XXVII.

[51] *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 334, 348 (1974) ("*New York Times* and the Court's decisions extending it were policy-driven decisions *masquerading as constitutional law*. Instead of simply applying the First Amendment *as it was understood by the people who ratified it*, the Court fashioned 'its own federal rule[s]' by balancing the 'competing values at stake in defamation suits.'") (emphasis added)).

[52] *See* U.S. CONST. amend. IX.; *see, e.g.*, *Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788)*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski et al. eds., digital ed. 2009), https://csac.history.wisc.edu/wp-content/uploads/sites/281/2017/07/Edmund_Pendleton_to_Richard_Henry_Lee.pdf [https://perma.cc/Q2XT-EGT9].

[53] *See* U.S. CONST. amend. X.

[54] U.S. CONST. amend. X.

[55] *See* U.S. CONST. amend. X.

[56] *See* U.S. CONST. amend. X.

[57] *See* U.S. CONST. art. VI, para. 2.

[58] *See* U.S. CONST. art. VI, para. 2.

from invoking its sovereignty to undercut already-existing colonial and state common law protections.[59] The first eight amendments to the Constitution (those concerning individual rights) were deliberately made inapplicable to the states when adopted, for "[s]tate governments were viewed as sufficiently close to their citizens so that state invasions of liberty were highly unlikely—or at least less likely than invasions by the federal government to which the Bill of Rights applied."[60]

The words and omissions of the Framers are informative on this point. Among the leading Bill of Rights drafters during this nation's constitutional infancy was James Madison, who presented his draft to the House of Representatives in 1789.[61] Madison's proposed Bill of Rights included an amendment forbidding states from violating "equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[62] The rejection of this amendment from the Bill of Rights that was ultimately adopted highlights a line in the sand between state and federal constitutional domains—a demarcation firmly asserted by the Supreme Court in the decades to follow.[63] Writing for the majority in *Barron v. Baltimore*, Chief Justice John Marshall educated the legal community on the federal nature of our legal system. As he put it, "[t]he Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of individual States. . . . These amendments contain no expression indicating an intention to apply them to state governments. This court cannot so apply them."[64]

Thus, from the earliest days of the Republic, it was evident that the Bill of Rights was restricted to the federal government, not the states. That does not, of course, mean that many of the rights enumerated in those amendments have remained binding on the federal government alone. Rather, most of them have now been asserted against the states by virtue of the Supreme Court's interpretation of the post-Civil War Fourteenth Amendment.[65]

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[59] *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503, 514 (1985).

[60] *See id.*

[61] *Five Items Congress Deleted from Madison's Bill of Rights*, NAT'L CONST. CTR.: CONST. DAILY (Dec. 15, 2021), https://constitutioncenter.org/blog/five-items-congress-deleted-from-madisons-original-bill-of-rights [https://perma.cc/3JCF-K2WN].

[62] *Id.*

[63] *See id.*; Barron v. Baltimore, 32 U.S. 243, 250 (1833).

[64] *Barron*, 32 U.S. at 247, 250.

[65] *See infra* notes 85–93 and accompanying text.

Today, a century since the dawn of so-called "incorporation" jurisprudence,[66] states are bound to respect those federal constitutional rights made applicable to them by Supreme Court decisions.[67] It still does remain inaccurate, however, to say that a state law or action can violate, for instance, the First Amendment freedom of speech. To be constitutionally precise, only the federal government can actually violate the First Amendment, because that is the only government to which that amendment actually still applies.

When the violator in question is a state rather than the federal government, it is—again to be constitutionally precise—the Fourteenth Amendment that has been violated.[68] It is through the Fourteenth Amendment, which explicitly applies to the states, that the Supreme Court has decided that certain fundamental rights are enforceable against the states.[69] Whenever it is said that a state has violated the First Amendment by restricting freedom of speech, that is simply shorthand—consciously or not—for saying that the state has violated the fundamental right to freedom of speech guaranteed against state infringement under the Fourteenth Amendment.[70]

In 1868, three years after the conclusion of the Civil War,[71] Congress ratified the Fourteenth Amendment.[72] Its text proclaims:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[73]

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[66] *See infra* notes 86–101.

[67] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[68] *See, e.g.*, *id.*

[69] *See, e.g.*, *id.*

[70] *See, e.g.*, *id.*

[71] *See The Surrender Meeting*, NAT'L PARK SERV., https://www.nps.gov/apco/learn/historyculture/the-surrender-meeting.htm [https://perma.cc/ERP8-GQEZ].

[72] U.S. CONST. amend. XIV.; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 97 (1993).

[73] U.S. CONST. amend. XIV.

Congressman John Bingham drafted the Fourteenth Amendment with *Barron*'s still-settled partition between state and federal constitutional domains in mind.[74] Bingham recognized that since the Bill of Rights was inapplicable to the states, the enforcement of constitutional protections rested precariously "upon the fidelity of the States."[75] Bingham therefore "intended to use the Privileges or Immunities Clause . . . to enforce the Bill of Rights against the states."[76]

In the twilight of Reconstruction, however, a series of three Supreme Court cases virtually eviscerated the Fourteenth Amendment. In the *Slaughterhouse Cases*,[77] the Court rejected the notion that the Fourteenth Amendment applied the rights contained in the Bill of Rights to the states.[78] Instead, the Court held, the core purpose of the Fourteenth Amendment was to establish the citizenship of the "slave race."[79] The Court thus left it to the states, as it had in *Barron*, to uphold whatever privileges or immunities—rights and liberties—they wished to respect, and by extension, disparage those they did not.[80]

The devastation wrought by the *Slaughterhouse Cases* was on full display in *United States v. Cruikshank*.[81] That case concerned the massacre of an estimated sixty to one-hundred-fifty Black people in Colfax, Louisiana by a white mob.[82] The Supreme Court reversed the civil rights convictions rendered against the perpetrators on the grounds that the Fourteenth Amendment did not authorize the federal government to provide the victims any protection against the mob of private persons.[83]

The Court persisted in its demolition of the Fourteenth Amendment with the 1883 *Civil Rights Cases*.[84] The Court erected

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[74] *See* Aynes, *supra* note 72, at 72.
[75] *Id.* at 67.
[76] *Id.* at 74.
[77] The Slaughterhouse Cases, 86 U.S. 36 (1872).
[78] *See id.* at 71–72, 77–78, 82.
[79] *See id.* at 71–72.
[80] *Compare id.* at 77–78, 82, *with* Barron v. Baltimore, 32 U.S. 243, 250 (1833).
[81] U.S. v. Cruikshank, 92 U.S. 542 (1875).
[82] Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, SMITHSONIAN MAG. (Apr. 13, 2016), https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/ [https://perma.cc/Z6H5-NQBZ]; Henry Louis Gates Jr., *What Was the Colfax Massacre?*, THE ROOT (Jul. 29, 2013), https://www.theroot.com/what-was-the-colfax-massacre-1790897517 [https://perma.cc/9ZR4-XEDJ].
[83] *Cruikshank*, 92 U.S. at 552–55, 559 ("The fourteenth amendment . . . does not . . . add any thing to the rights which one citizen has under the Constitution against another.").
[84] The Civil Rights Cases, 109 U.S. 3 (1883).

the doctrine of "state action"[85] and invalidated core provisions of the 1875 Civil Rights Act that had prohibited racial discrimination in hotels, motels, and transportation facilities.[86] According to the Court, the Fourteenth Amendment gave Congress no authority to ban private racial discrimination, even in public accommodations, but only official state discrimination.[87]

Taken together, these three cases effectively nullified the protection of individual rights under the Fourteenth Amendment. If the rights and liberties of Americans were to survive the threat of state predation post-Reconstruction, it would fall upon states themselves, and their courts, under their own laws.[88] A federal constitutional amendment crafted specifically to apply federal constitutional protections to the states was deemed to have done no such thing.[89]

A Turning Point

After the decades of constitutional deprivation that followed, the Supreme Court ushered in the modern era of Fourteenth Amendment jurisprudence with its 1937 decision in *Palko v. Connecticut*.[90] In *Palko*, the Court specifically considered whether the Fifth Amendment's prohibition of double jeopardy applied to the states.[91] Justice Benjamin Cardozo, writing for the majority, ruled that it did not.[92] However, Cardozo, in classic Cardozo fashion, used the narrow double jeopardy issue presented in the case as a vehicle for developing the jurisprudence of fundamental rights.[93]

Cardozo posited that those "immunities" that were "implicit in the concept of ordered liberty" were the ones that applied to the states through the Fourteenth Amendment.[94] An immunity was "of the very

[85] *See id.* at 11 ("State action of a particular character . . . is prohibited," whereas, "[i]ndividual invasion of individual rights is not the subject-matter of the [fourteenth] amendment.").
[86] *See id.* at 25–26.
[87] *See id.* at 11, 24–26.
[88] *See Cruikshank*, 92 U.S. at. 552. The fundamental rights protected by the Fourteenth Amendment against state violation did not, in the Court's estimation, include the First Amendment or other amendments enacted alongside it. *See id.* It was within the discretion of the states, in exercising their police powers, whether to provide citizens recourse for any non-federal interference with their individual rights. *See id.* at 553 (citing New York v. Miln, 36 U.S. 102, 139 (1837)).
[89] *See* Aynes, *supra* note 72, at 97.
[90] *See* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).
[91] *See id.* at 322.
[92] *See id.* at 323, 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
[93] *See Palko*, 302 U.S. at 323–25.
[94] *See id.* at 324–25.

essence of a scheme of ordered liberty," Cardozo explained,[95] if its denial would violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[96] Accordingly, the freedom of speech, the freedom of the press, the free exercise of religion, and the right to peaceable assembly were "absorbed" from the First Amendment into the Fourteenth Amendment's protection of liberty.[97] Critically, these immunities were not absorbed *because* they were identified in the Bill of Rights but, rather, Cardozo elaborated, because "neither liberty nor justice would exist" if they were sacrificed.[98]

Six years later, in *West Virginia State Board of Education v. Barnette*,[99] the Court expanded on the concepts of religious and expressive liberty as fundamental rights protected by the Fourteenth Amendment as well as the First.[100] *Barnette* involved religious objection by Jehovah's Witnesses to a public-school board requirement that students pledge allegiance to the American flag or face discipline.[101] Speaking through Justice Robert Jackson, the majority sided with the religious objectors, holding that they were entitled to an exemption. Jackson explained that the compelled pledge invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[102] Applying what would eventually be referred to as "strict scrutiny," Jackson stressed that the freedoms of speech, press, assembly, and worship could be infringed "only to prevent grave and immediate danger"—an effort to promote ideological cohesion was not enough.[103] Justice Jackson, perhaps the most beautiful stylist to have sat on the Supreme Court, underscored Cardozo's notion of fundamental rights in some of the most magnificent and oft-quoted lines penned in constitutional law history:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

[95] *Id.* at 325.
[96] *Id.* (quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936), Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *Hebert*, 272 U.S. at 316).
[97] *See Palko*, 302 U.S. at 324–26 (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908)).
[98] *See Palko*, 302 U.S. at 326 (citing *Twining*, 211 U.S. at 99).
[99] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[100] *See id.* at 639.
[101] *See id.* at 628–30.
[102] *Id.* at 641.
[103] *Id.* at 639.

> opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[104]

Jackson made plain that, while it was the Fourteenth Amendment that bore directly upon the states, the Court's stringent standard of review reflected that which was used to protect "the specific prohibitions of the First" from the federal government.[105]

It is worth noting that the term "incorporation"—the shorthand used to denote the recognition of fundamental rights protections against the states through the Fourteenth Amendment—is a misleading metaphor. The Court has held that some rights enumerated in the Bill of Rights are inapplicable to the states on the ground that they are not fundamental.[106] Even more to the point, some fundamental rights that have been held applicable against the states are nowhere mentioned in the text of the Bill of Rights.[107]

In *Griswold v. Connecticut*, for example, the Court recognized a constitutionally protected zone of privacy that protected the marital relationship.[108] The Court invalidated a Connecticut law that criminalized the use of contraception, notwithstanding silence in the Bill of Rights about marriage, contraception, or privacy.[109] In *Loving v. Virginia*, the Court similarly enshrined the right to marry itself as a liberty inherent in the protections of the Fourteenth Amendment—a right "fundamental to existence and survival."[110] The Virginia anti-miscegenation laws that made interracial marriage a crime were thus invalidated as contrary to fundamental constitutional rights and equal protection.[111]

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104 *See id.*

105 *Id.*

106 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 688 n.26 (1972) (citing Hurtado v. California, 110 U.S. 516 (1884)) (noting that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment").

107 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

108 *See Griswold*, 381 U.S. at 484–86 (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); then quoting Mapp v. Ohio, 367 U.S. 643, 656 (1961)).

109 *See Griswold*, 381 U.S. at 484–86.

110 *See Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

111 *See Loving*, 388 U.S. at 12.

Another Turn: Extending Jurisdiction & Retrenching Rights

Griswold and *Loving* belong to a long line of cases, stretching back to the early days of "absorption" or "incorporation," in which redress was sought for state infringements on rights and liberties.[112] In these cases, the Court recognized and enforced a wide variety of civil and criminal rights as effective against the states.[113] These were cases in which *individuals* sought to have their rights and liberties protected under the Federal Constitution. It was *individuals* seeking review to obtain the protection of the Supreme Court.

In the 1970s and 1980s, however, the Supreme Court reversed direction. It began more regularly to take appeals sought by *states* that were complaining that their own state courts were *overprotecting* constitutional rights.[114] The Court turned from generally recognizing or expanding rights to denying or narrowing them.[115] In this drastically altered posture, for example, the Court began to settle disputes that were plainly *intrastate*—e.g., disputes between state prosecutors and their own state courts.[116] Beyond that,

[112] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 146 (1968); Gideon v. Wainwright, 372 U.S. 335, 336–37 (1963); Robinson v. California, 370 U.S. 660, 660–61 (1962); *Mapp*, 367 U.S. at 643; Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940); Near v. Minnesota, 283 U.S. 697, 705 (1931); Gitlow v. New York, 268 U.S. 652, 654 (1925).

[113] *See, e.g.*, *Duncan*, 391 U.S. at 162 (holding the jury trial right of a defendant charged with a serious crime is applicable against the states); *Gideon*, 372 U.S. at 344–45 (holding an indigent criminal defendant's right to appointed counsel is applicable against the states in felony cases); *Robinson*, 370 U.S. at 667–68 (holding the prohibition of cruel and unusual punishment is applicable against the states); *Mapp*, 367 U.S. at 655–56 (applying the exclusionary rule to enforce the prohibition on unreasonable search and seizure against the states); *Everson*, 330 U.S. at 15, 18 (denying appellant relief, but recognizing the Establishment Clause is applicable against the states); *Cantwell*, 310 U.S. at 303 (holding the right to free exercise of religion is applicable against the states); *Near*, 283 U.S. at 722–23 (holding the right to liberty of the press is applicable against the states); Gitlow v. New York, 268 U.S. at 666, 672 (affirming appellant's conviction, but holding the right to freedom of speech is applicable against the states).

[114] *See* California v. Hodari D., 499 U.S. 621, 623 (1991); Arizona v. Fulminante, 499 U.S. 279, 284–85 (1991); Emp. Div. of Or. v. Smith, 499 U.S. 872, 874–75 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 21B); Massachusetts v. Sheppard, 468 U.S. 981, 987 (1984); New York v. Quarles, 467 U.S. 649, 651 (1984); Illinois v. Gates, 462 U.S. 213, 217 (1983); New York v. Belton, 453 U.S. 454, 457 (1981); Oregon v. Hass, 420 U.S. 714, 718 (1975).

[115] *See* Mary A. Crossley, Note, *Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693, 1699–700 (1986) (discussing the Burger Court's "rejection of the Warren Court's broad readings of Bill of Rights guarantees in the criminal procedure context, coupled with its practice of vacating, as misinterpretations of federal precedent, [and] state court decisions" that the Court felt gave "overbroad protections to individual liberties").

[116] *See* Vincent M. Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 851 (2005) (explaining how in these cases the

the Court was now typically siding with the prosecutors.[117] It was retrenching from the expansive protection of rights that were the hallmark of the preceding era.[118]

Oregon v. Hass is one of those typical illustrations. In that case, the defendant's conviction for burglary was reversed by Oregon's intermediate appellate court on the ground that his *Miranda* rights were violated. The defendant's inculpatory statements, made after he had already expressed his wish to call an attorney, were used at trial to impeach his testimony.[119] Oregon's Supreme Court affirmed,[120] but the United States Supreme Court granted *certiorari* to the *state* prosecution and reversed the ruling of the *state* courts. As it had previously ruled in a similar case, the Court held that inculpatory statements elicited in violation of *Miranda*—the *Miranda* right to counsel no less than the *Miranda* right to silence—were admissible for impeachment purposes.[121]

In *New York v. Belton*, the Court similarly overturned a New York Court of Appeals decision that had reversed a conviction obtained with evidence seized in a warrantless search of the defendant's vehicle incident to his arrest.[122] In doing so, the Court sided with the *state* prosecution against the *state* court, holding that the constitutionally searchable "grabbable area" of an arrested driver automatically includes the entire passenger compartment of an automobile and its contents.[123]

The Supreme Court's change in direction was, perhaps, most blatant when it broke with its prior "federal question" jurisdiction in

Supreme Court has been "injecting itself into an intrastate squabble—i.e., a squabble between two branches of a state's government").

117 *See Hodari*, 499 U.S. at 629; *Smith*, 499 U.S. at 890; *Sheppard*, 468 U.S. at 991; *Quarles*, 467 U.S. at 659; *Gates*, 462 U.S. at 246; *Belton*, 453 U.S. at 462–63; *Pacifica*, 438 U.S. at 750–51; *Hass*, 420 U.S. at 723–24.

118 State courts themselves were not immune from this reversal of direction. This was true even for a court such as the New York Court of Appeals which had a long tradition of independent protection of rights and liberties. It too began a period of cutting back. *See generally* Vincent M. Bonventre, *State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119 (1992); Peter Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role*, 4 EMERGING ISSUES ST. CONST. L. 225 (1991).

119 *Hass*, 420 U.S. at 717.

120 *Id.*

121 *Id.* at 723–24 (quoting Harris v. New York, 401 U.S. 222, 224 (1971)).

122 *See Belton*, 453 U.S. at 462–63.

123 *See id.* at 460–61 (first quoting Chimel v. California, 395 U.S. 752, 763 (1969); then citing United States v. Robinson, 414 U.S. 218, 228–29 (1973); then citing Draper v. United States, 358 U.S. 307, 314 (1959)).

its 1983 decision in *Michigan v. Long*.[124] Until *Long*, unless a state court's decision clearly rested upon federal law, the Court's customary presumption was that the decision was based on adequate and independent state grounds. Accordingly, the Court would deem itself to be without jurisdiction and avoid review.[125] In *Long*, the Court inverted that presumption. Henceforth, the Court would "merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground."[126]

The dissent by Justice Stevens expressed shock that the majority had turned the Court's traditional jurisdictional presumption on its head, and that it was doing so to review and overturn state court decisions that actually protected constitutional rights. As he reminded his colleagues, "in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[127] But the *Long* majority rejected such a limitation on its role and, instead, elevated "uniformity in federal law" as its priority,[128] enabling prosecutors and other state actors to obtain reversals of state decisions that had *protected* civil rights and liberties.

In accord with the rule of *Long*, the Supreme Court now presumes a federal question in every appeal from a state court decision. The Court now automatically treats the rulings of state judiciaries to be within its jurisdiction, unless a state court makes clear that it has relied solely on adequate and independent state grounds by, for example, including a plain statement to that effect in its decision.[129]

REVITALIZATION OF STATE COURT INDEPENDENCE

Responding to Long's Extended Reach

In the wake of *Long*, state courts woke up to the need to "turn to their state constitutions and give independent substance to the

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[124] *See* Michigan v. Long, 463 U.S. 1032, 1034 (1983).

[125] *Id.* at 1066 (Stevens, J., dissenting).

[126] *Id.* at 1042 (O'Connor, J., majority) (citing Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931)).

[127] *Id.* at 1068 (Stevens, J., dissenting).

[128] *See id.* at 1070.

[129] *See id.* at 1041 (O'Connor, J., majority); *see, e.g.*, Florida v. Powell, 559 U.S. 50, 58 n.4 (2010) (quoting *Long*, 463 U.S. at 1040) (stating that "'when . . . [the] state court decision fairly appears to . . . be interwoven with . . . federal law,' the only way to avoid the jurisdictional presumption is to provide a plain statement expressing independent reliance on state law").

guarantees contained therein."[130] In doing so, many state courts "rediscover[ed] their own constitutional jurisprudence."[131] The Supreme Court of New Hampshire's opinion in *State v. Ball*[132] was among the most pointed pronouncements of this freshly roused movement. In *Ball*, the state high court affirmed the independence of its constitutional decision-making and signaled its rejection of a need to provide a plain statement in every case it decided on state grounds:

> [O]ur citizens are entitled to an independent interpretation of State constitutional guarantees. . . . We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions.[133]

In *Ball*, the New Hampshire court adopted a narrower "plain view" exception to the warrant requirement than the Supreme Court version.[134] In *Texas v. Brown*,[135] the Supreme Court had held that an object inadvertently seen by police engaged in lawful activity may be seized, without a search warrant, upon mere suspicion that the object is contraband.[136] But the New Hampshire Supreme Court "ch[o]se not to follow" *Brown* "in interpreting [its] State Constitution."[137] Instead, that court held that police must have probable cause to believe that the object in plain view is contraband. Mere suspicion, according to the court in Ball, would not justify a warrantless seizure under the New Hampshire Constitution.[138]

The Supreme Court of South Dakota took a similar stand for state constitutional independence in its 1984 self-incrimination decision in *State v. Neville II*.[139] In *South Dakota v. Neville*,[140] the United States Supreme Court had reversed the state court's suppression of evidence

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[130] Crossley, *supra* note 115, at 1700.
[131] *Id.*
[132] State v. Ball, 471 A.2d 347 (N.H. 1983).
[133] *Id.* at 350, 352 (citing *Long*, 463 U.S. at 1040).
[134] *Ball*, 471 A.2d at 353–54.
[135] Texas v. Brown, 460 U.S. 730 (1983).
[136] *See id.* at 737–42.
[137] *Ball*, 471 A.2d at 353–54.
[138] *See id.*
[139] *See* State v. Neville (*Neville II*), 346 N.W.2d 425, 427, 431 (S.D. 1984), *overruled by* State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985).
[140] South Dakota v. Neville (*Neville I*), 459 U.S. 553 (1983).

that the defendant driver refused to submit to a blood-alcohol test.[141] On remand, the South Dakota Supreme Court made clear that the federal Supreme Court's decision was "not controlling."[142] The state high court emphasized that it was "the final authority on interpretation of [its] state constitution" and that "[it] alone determine[d] the extent of protection afforded" thereunder.[143]

Seemingly reminding the Supreme Court of constitutional fundamentals, the South Dakota court quoted Justice O'Connor's "elementary" principle, "that state courts are free to provide greater protections in their criminal justice system than the Federal Constitution requires."[144] The state court affirmed its earlier view, as a matter of state constitutional law, that the refusal to submit to a blood test fell within the scope of self-incrimination protection.[145] The court again suppressed the evidence, despite the Supreme Court's ruling that "evidence of an accused's refusal to take a blood test does not infringe upon Fifth Amendment rights."[146]

The post-*Long* emphasis on independent state constitutional law could not have been on clearer display than in the Vermont Supreme Court's 1985 ruling in *State v. Jewett*.[147] In that case, the parties had addressed only the federal constitutional law pertaining to the issues on appeal. The Vermont court ordered the parties to file supplemental briefs addressing the state constitutional concerns.[148] The court declared, in no uncertain terms, its "obligation . . . when state constitutional questions of possible merit have been raised, to address them or order that they be rebriefed when the briefs do not pass muster."[149] To breach this duty, the state high court emphasized, would be to "fail to live up to our oath to defend our [C]onstitution," and to "help to destroy the federalism that must be so carefully safeguarded by our people."[150]

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141 *See id.* at 556, 558, 566.

142 *See Neville II*, 346 N.W.2d at 427.

143 *Id.* at 427–28 (quoting California v. Ramos, 463 U.S. 992, 1013–14 (1983)).

144 *Neville II*, 346 N.W.2d at 428 (quoting *Ramos*, 463 U.S. at 1013–14). The South Dakota court's overruling of its specific decision in *Neville II* the next year, in State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985), does not undermine the strength of its assertions about the authority of independent state constitutional adjudication.

145 *See Neville II*, 346 N.W.2d at 429.

146 *See id.* at 427, 431.

147 State v. Jewett, 500 A.2d 233 (Vt. 1985).

148 *See id.* at 239.

149 *Id.* at 238.

150 *Id.* at 238 (quoting State v. Ball, 471 A.2d 347, 350 (N.H. 1983)).

The year following *Jewett*, the search and seizure case of *People v. Class II*[151] presented the New York Court of Appeals with a situation analogous to that which faced the South Dakota Supreme Court in *Neville II*.[152] As in *Neville II*, *Class II* saw a state court dealing with a case on remand from the United States Supreme Court which had just reversed, on federal constitutional grounds, the state court's previous ruling.[153] Moreover, the Supreme Court's reversal in each of those cases was despite the state court's clear reliance on state law in its initial decision.[154]

In *Class II*, once again, the state high court reached the same result it had in its original decision, this time around rejecting the Supreme Court's ruling as a matter of state constitutional law.[155] The New York Court of Appeals, in a unanimous opinion, stood its ground on state court independence and on its previous decision: "[w]here, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless [the prosecution] demonstrates that there are extraordinary or compelling circumstances."[156]

The Court of Appeals vacated the conviction in question and dismissed the indictment.[157] It refused to relinquish its independent state authority simply because the federal Supreme Court would have held differently under federal law. *Neville II* and *Class II* represented a worrying development in federal constitutional jurisprudence. Having dramatically expanded its jurisdictional reach in *Long*, the Supreme Court began to issue what were, in essence, advisory opinions. They did not decide the case or controversy between the parties involved. The state high courts reaffirmed their initial decisions on remand, regardless of the Supreme Court's presumption that the state grounds had been inadequate.[158] Ironically, the Supreme Court's decision to presume that the state courts had relied on Supreme Court decisions, rather than on the states' own laws, was based on the Supreme Court's

151 People v. Class (*Class II*), 494 N.E.2d 444, 445 (N.Y. 1986) (per curiam).

152 *Compare Class II*, 494 N.E.2d at 445 (featuring a criminal case on remand from the Supreme Court that was reversed on federal constitutional grounds), *with Neville II*, 346 N.W.2d at 427 (featuring the same).

153 *See Class II*, 494 N.E.2d at 445.

154 *See id.* at 445; *see Neville II*, 436 N.W.2d at 429.

155 *See Class II,* 494 N.E.2d at 445.

156 *Id.*

157 *See id.*

158 *See, e.g.*, *id.* at 445; *see Neville II*, 436 N.W.2d at 426, 431.

supposed "respect for state courts, and [a] desire to avoid advisory opinions."[159]

Outright Rejection of Supreme Court Rulings

Several free exercise, free expression, and religious establishment cases post-*Long* further highlight the Supreme Court's failure to resolve cases and controversies arising from state courts and, instead, to issue advisory opinions rejected by those state courts on remand. They also underscore the accelerated refusal of state courts to follow the Supreme Court.[160]

Among the most notable is the Minnesota Supreme Court's 1990 decision in *State v. Hershberger II*. In that case, the state court had granted a religious exemption from a law that required brightly colored safety signs on the rear of slow-moving vehicles.[161] The court had held that the state failed to satisfy the strict scrutiny because there were alternative safety measures which did not violate the Amish objectors' sincere religious beliefs.[162]

The Supreme Court reversed the Minnesota decision on the basis of its intervening holding in *Employment Division of Oregon v. Smith*.[163] In *Smith*, involving the criminalization of a centuries-old religious use of peyote in a Native American church, the Supreme Court held that "any otherwise valid law" defeats a free exercise of religion claim.[164] Elaborating on its upholding of the criminalization of the religious ritual, the Court majority insisted that its "decisions

[159] *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983).

[160] Prescott v. Oklahoma 373 P.3d 1032, 1033 (Okla. 2015) (per curiam) (citing Van Orden v. Perry, 545 U.S. 677, 690 (2005)) (holding that a monument of the Ten Commandments violated a state constitutional prohibition on use of public property for sectarian purposes, and characterizing any Ten Commandments monument as "obviously religious in nature" despite the federal Supreme Court's contrary holding in *Van Orden*); State v. Hershberger II, 462 N.W.2d 393, 399 (Minn. 1990) (seeing that the Supreme Court of Minnesota, on remand from the federal Supreme Court, apply strict scrutiny once again to a public safety law burdening religious exercise); O'Neil v. Oakgrove Constr., Inc., 523 N.E.2d 277, 277–78 (N.Y. 1988) (demonstrating that the New York Court of Appeals recognizes the New York State Constitution has created a qualified reporter's privilege guarding material prepared or collected in the course of newsgathering from discovery, albeit in a case not taken up by the Supreme Court); State v. Henry, 732 P.2d 9, 17–18 (Or. 1987) (citing Miller v. California, 413 U.S. 15, 24 (1973)) (holding that the Oregon State Constitution protects expression characterized as "obscenity," and characterizing the Supreme Court's "*Miller* test" as censorious under state constitutional standards).

[161] *See Hershberger II*, 462 N.W.2d at 395.

[162] *See id.*

[163] Emp. Div. of Or. v. Smith, 499 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 21B).

[164] *Smith*, 499 U.S. at 879.

have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[165]

On remand, the Minnesota high court simply reaffirmed what it had done in its original decision, once again applying strict scrutiny. This time the court did so emphatically on independent state constitutional grounds.[166] The Minnesota court dismissed the charges against the Amish objectors, because the state could have advanced its goal of public safety through less religiously burdensome alternatives.[167]

Similarly, in the domain of reproductive rights, the Tennessee Supreme Court, in its 2000 decision in *Planned Parenthood of Middle Tennessee v. Sundquist*,[168] categorically rejected the diluted "undue burden" standard that the United States Supreme Court had adopted in *Planned Parenthood v. Casey*.[169] The Tennessee court affirmed the right to terminate a pregnancy as "inherent in the concept of ordered liberty" and "fundamental."[170]

Sundquist concerned a group of Tennessee statutes requiring a woman to attend in-person physician counseling and then to wait several days before being allowed to obtain an abortion—thereby necessitating multiple hospital trips.[171] These statutes, restrictive as they were, nevertheless passed muster under the *Casey* "undue burden" standard which the Tennessee intermediate court applied.[172] Applying strict scrutiny, however, the Tennessee high court found that none of the statutory provisions were narrowly tailored toward advancing the state's asserted interests in maternal health or potential life at the stage of fetal viability.[173] The Tennessee court's rejection of the *Casey* standard takes on a new resonance in the wake

[165] *Id*. at 879. For an examination of the drastic change in constitutional religious freedom wrought by Justice Antonin Scalia's majority opinion in *Smith*, see Vincent Martin Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399 (2007).

[166] *See Hershberger*, 462 N.W.2d at 399.

[167] *See id.* Regarding the Supreme Court's checkered history of protecting free exercise of religion and the varied state court responses to *Smith*, see Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 U. ST. THOMAS L.J. 650 (2018).

[168] Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000).

[169] Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992), *overruled* by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[170] *Sundquist*, 38 S.W.3d at 25.

[171] *See id*. at 21. Women seeking a second-trimester abortion were also prohibited from undergoing the procedure outside a hospital setting. *See id.* at 17.

[172] *See id.* at 5–6.

[173] *See id.* at 17–18, 22, 24.

of the Supreme Court's overruling of a woman's right to choose in *Dobbs v. Jackson Women's Health Organization*. As the Tennessee Supreme Court explained in its decision in *Sundquist*:

> [T]he *Casey* test offers our judges no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned. This Court finds no justification for exchanging the long established constitutional doctrine of strict scrutiny for a test, not yet ten years old and applicable to a single, narrow area of the law, that would relegate a fundamental right of the citizens of Tennessee to the personal caprice of an individual judge.[174]

In a right to counsel decision, but this one in the context of a civil proceeding rather than the typical criminal setting, the Ohio Supreme Court, in *In re R.K.*,[175] adopted a parental right to counsel at all stages of the parental termination process.[176] Explaining that "the termination of one's parental rights [is] the family-law equivalent of the death penalty," the court reversed a juvenile court for allowing a mother's attorney to withdraw in the course of a custody hearing.[177] It is "critical," wrote the Ohio court, "that the rights of a parent who faces the permanent termination of parental rights are appropriately protected."[178] By contrast, in *Lassiter v. Department of Social Services*,[179] the Supreme Court declined to recognize any such right to representation, analogous to that of the criminally accused, for indigent parents in termination proceedings.[180] That Court had relied, among other reasons, on the "enlightened and wise" approaches of states which were free to afford greater protections.[181]

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[174] *See id.* at 17; *see also* Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461 (Kan. 2019) (protecting the right to choose an abortion as an aspect of the "right to personal autonomy . . . firmly embedded" within the state constitution's "natural rights guarantee and its included concepts of liberty and the pursuit of happiness").

[175] *In re* R.K., 95 N.E.3d 394 (Ohio 2018).

[176] *See id.* at 398.

[177] *See id.* at 396, 398 (citing *In re* D.A., 862 N.E.2d 829, 832 (Ohio 2007); *In re* Hayes, 679 N.E.2d 680, 682–83 (Ohio 1997)).

[178] *See In re R.K.*, 95 N.E.3d at 396.

[179] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[180] *See id.* at 31–32 (first citing Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973); then citing Wood v. Georgia, 450 U.S. 261 (1981)).

[181] *See Lassiter*, 452 U.S. at 34.

Turning to the rights of the criminally accused themselves, there is perhaps no area of law in which state courts have been more active in rejecting Supreme Court rulings. In countless decisions, state high courts have afforded protection to the accused, on the basis of "adequate and independent state ground[s],"[182] despite the denial or dilution of such rights under the Federal Constitution by the Supreme Court. Under independent state law, those accused of crime have often found state courts much more open to providing protection, for example, from unjustified searches and seizures of their private conversations, garbage, property, and phone calls—even where violations by law enforcement were in "good faith." The same is true regarding technological and aerial surveillance. Resort to state courts applying state law has similarly resulted in greater protection against illegal interrogation and *Miranda* violations. State high courts around the country have thus exerted their own sovereignty and heeded the admonition of Chief Judge Rehnquist, among others, to exercise their authority to adopt "individual liberties more expansive than those conferred by the Federal Constitution."[183]

The New York Court of Appeals, speaking through Judge Stewart F. Hancock, Jr., in its 1992 decision in *People v. Scott*,[184] condemned the lack of protection from warrantless searches afforded landowners under Supreme Court rulings as "repugnant."[185] In *Scott*, the New York court rejected the so-called "open fields" doctrine under which government agents may enter—and even trespass on—privately owned lands and search for evidence of criminality, without a warrant or probable cause, on the ground that such activity does not constitute a "search" under the Fourth Amendment.[186] The Supreme Court's explanation, in *Hester v. U.S.*, was that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,'" literally did not extend to "open fields."[187] The protection of "houses" includes only the residence itself and the "curtilage," or the area immediately adjacent to a residence.[188] In short, only the home and the area within a "peeping

[182] Michigan v. Long, 463 U.S. 1032, 1034 (1983).
[183] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).
[184] People v. Scott, 593 N.E.2d 1328 (N.Y. 1992).
[185] *See id.* at 1337.
[186] *See* Hester v. U.S., 265 U.S. 57, 59 (1924); *see also* Oliver v. U.S., 466 U.S. 170 (1984) (reaffirming the "open fields" doctrine articulated in *Hester*).
[187] *Hester*, 265 U.S. at 59.
[188] *Oliver*, 466 U.S. at 180–81.

distance" are protected from warrantless searches under the "open fields" doctrine. The implication of such a rule cannot be overstated: the Fourth Amendment mentions houses but not "open fields" and, therefore, the government does not need a warrant, probable cause, reasonable suspicion, *or even a hunch* to enter someone's yard, without permission, so long as they do not get too close to the house.

The majority in *Scott*, deciding the case as a matter of independent state constitutional law, emphatically rejected such a permissive and intrusive rule.[189] As Judge Hancock wrote, "[t]he rule that an owner can never have an expectation of privacy in open lands is repugnant to New York's acceptance of 'the right to be let alone' as a fundamental right deserving legal protection."[190] Stated otherwise, "the unbridled license given to agents of the State to roam at will without permission on private property in search of incriminating evidence is repugnant to the most basic notions of fairness in our criminal law."[191] The New York Court of Appeals, finding the federal protections from warrantless searches of property to be repugnant and lacking even the most basic notions of fairness, exercised its sovereignty and, under the state constitution, adopted greater privacy rights for its citizens on their own property.

Similarly, the Massachusetts high court chose to provide greater protection from government surveillance of private conversations.[192] According to Supreme Court Justice Byron White in *United States v. White*[193] (no relation, presumably), the Fourth Amendment provides no protection from warrantless surveillance of a private conversation by the government, as long as one party to that conversation consents to the recording.[194] Under the Supreme Court's Fourth Amendment jurisprudence, if one participant consents, police are permitted to engage in electronic transmission and recording of a private conversation without a warrant, probable cause, reasonable suspicion, *or even a hunch*.[195] Justice White's explanation for the Court? There can be no legitimate expectation of privacy in a conversation because there is always the possibility that a participant could later choose to disclose what was said to the police. According to Justice White and the Court. there is no legal distinction

189 *See Scott*, 593 N.E.2d at 1337–38.
190 *Id.* at 1337 (quoting Olmstead v. U.S. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
191 *Scott*, 593 N.E.2d at 1337.
192 Commonwealth v. Blood, 507 N.E.2d 1029, 1036 (Mass. 1987).
193 U.S. v. White, 401 U.S. 745 (1971).
194 *See id.*, at 752.
195 *See id.*

between such a disclosure and a participant agreeing with the police to electronically transmit the ongoing conversation to them. [196]

The Massachusetts Supreme Judicial Court, in its 1987 decision in *Commonwealth v. Blood*, rejected the Supreme Court's *White* rule under the state's Declaration of Rights, and it found Justice White's rationale to be absurd:[197]

> To gauge the likely impact of unfettered surveillance on the individual's sense of security, and to appreciate the absurdity of the *White* rationale, one need only imagine the kind of person who *does* think it reasonable that his every word is overheard and seized for use against him. "He easily becomes suspicious and distrustful. He finds it difficult to confide in others, and if he does confide . . . he expects to be betrayed. . . . [H]e is a person with lifelong tendencies toward secretiveness, seclusiveness, and solitary rumination, although these may be concealed behind a brittle facade of superficial social give and take. . . .[To him, people] are unpredictable as well as untrustworthy; they must be watched." . . . The world of the *White* thesis is a topsy-turvy one in which the paranoid's delusory watchfulness is the stance held "reasonable."[198]

The Vermont Supreme Court has similarly relied on its state constitution to protect privacy rights from invasions from the air[199] and at the curb.[200] In its 1996 decision in *State v. Morris*, the Vermont court held that warrantless searches of curbside garbage were illegal in the state,[201] despite the United States Supreme Court's deeming such a search permissible under the Federal Constitution.[202] According to the United States Supreme Court, because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals,

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196 *See id.* at 751–52.

197 *See Blood*, 507 N.E.2d at 1036.

198 *Id.* (quoting 1 N. CAMERON, *Paranoid Conditions and Paranoia*, *in* AMER. HANDBOOK OF PSYCHIATRY 512-513 (1959) (describing the paranoid personality disorder). Indeed, one might only consider that Justice White's rationale dismisses the notion that a conversation with one's parent or child or friend can ever be viewed as private under the Fourth Amendment and free from warrantless surveillance by the government.

199 State v. Bryant, 950 A.2d 467, 478 (Vt. 2008).

200 State v. Morris, 680 A.2d 90, 98 (Vt. 1996).

201 *Id.* at 94.

202 *See* California v. Greenwood, 486 U.S. 35, 40–41 (1988).

children, scavengers, snoops, and other members of the public," it is unreasonable to expect privacy in what one throws into their trash bins.[203] Consequently, the Supreme Court concluded, under the Fourth Amendment police officers are free to search what is in those trash bags and bins, even in the absence of any warrant, probable cause, reasonable suspicion, *or even a hunch*.[204]

Vermont's high court found the Supreme Court's logic thoroughly unconvincing. As the Vermont court explained, "[o]ne may accept the possibility that one's garbage is susceptible to invasion by raccoons or other scavengers, and yet at the same time reasonably expect that the government will not systematically examine one's trash bags in the hopes of finding evidence of criminal conduct,"[205] because the reality is that "[a]n individual's trash will often reveal intimate details of that person's financial obligations, medical concerns, personal relationships, political associations, religious beliefs, and numerous other confidential matters."[206] For that reason, as a matter of state constitutional search and seizure protection, police need a warrant supported by probable cause to search someone's garbage in Vermont.[207]

Under the same state constitutional protection, Vermont's high court rejected the Supreme Court's rulings regarding aerial surveillance.[208] Under Supreme Court caselaw, because private and commercial aircraft lawfully fly above private property on a routine basis, there can be no reasonable expectation of privacy in such airspace and, by logical extension, there is no constitutional protection from law enforcement engaged in aerial surveillance looking for evidence of crime.[209]

The Vermont court found the Supreme Court's logic dealing with aerial surveillance as entirely unpersuasive as that dealing with garbage searches. As the state's high court explained in its 2008 decision in *State v. Bryant*, [210] "it simply does not follow that whether a member of the public is abiding by the law in occupying a particular spot in the public airspace is an adequate test of whether government

[203] *Id.*
[204] *See id.*
[205] *Morris*, 680 A.2d at 98.
[206] *Id.* at 94.
[207] *Id.*
[208] State v. Bryant, 950 A.2d 467, 478 (Vt. 2008).
[209] *See* California. v. Ciraolo, 476 U.S. 207, 215 (1986).
[210] *Bryant*, 950 A.2d at 478.

surveillance from that same spot is constitutional."[211] Accordingly, warrantless aerial surveillance of private property, by law enforcement engaged in criminal investigation, is a "search forbidden by the Vermont Constitution."[212]

Across the country in Idaho, the Idaho Supreme Court, rejected the so-called "third-party doctrine" as a justification for government to use a "pen register" to conduct a warrantless search of an individual's call log.[213] Disagreeing with the Supreme Court's ruling on the issue in *Smith v. Maryland*,[214] the Idaho court insisted that there is indeed "a legitimate and reasonable expectation of privacy in the phone numbers that are dialed."[215] As a matter of its own state constitution, Idaho's high court adopted Justice Potter Stewart's reasoning in his dissenting opinion in *Smith*:

> It is simply not enough to say . . . that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police. . . . This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.[216]

State courts have not only rejected the Supreme Court's weakening of protections against warrantless searches—they have also refused to follow that Court's dilution of the standards for probable cause to support a warrant. New Mexico's high court is among those that have repudiated the Supreme Court's "totality of the circumstances" test, established in *Illinois v. Gates*,[217] to determine when information provided by an informant constitutes probable cause.[218] In its 1989 decision in *State v. Cordova*, the New Mexico Supreme Court retained the two-prong requirement, discarded in Gates: reliability of the informant and a basis for his information.

The state court questioned the United States Supreme Court's assumption that a credible informant has "gathered his information

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[211] *Id.*
[212] *Id.* at 482.
[213] State v. Thompson, 760 P.2d 1162 (Idaho 1988).
[214] Smith v. Maryland, 442 U.S. 735, 745 (1979).
[215] *Thompson*, 760 P.2d at 1165.
[216] *Id.* at 1167 (quoting *Smith*, 442 U.S. at 747–48 (Stewart, J., dissenting)).
[217] Illinois v. Gates, 462 U.S. 213, 230 (1983).
[218] State v. Cordova, 784 P.2d 30, 31 (N.M. 1989).

in a reliable fashion even though there has been an insufficient showing of the informant's basis of knowledge."[219] The New Mexico court held that the two-pronged reliability plus basis of knowledge test was necessary to protect against unjustified warrants based solely on a magistrate's supposed common sense:

> [O]ur rule encourages a magistrate in close cases to inquire further of the officer or to call the informant as a witness. Not only does such a procedure comport better with the constitutional duty of the issuing magistrate to make an independent evaluation, it eliminates the need to make that determination on the basis of assumptions which, in any given case, well may be incorrect.[220]

The Iowa Supreme Court is among the most emphatic of state courts in asserting that it "would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law."[221] Joining those state courts that have rejected the "good-faith exception" to the exclusionary rule,[222] the Iowa court dismissed the Supreme Court's argument that there was no good reason to exclude evidence when the police violated constitutional rights but didn't do so deliberately. The state court was blunt: "the [Supreme] Court's rationale in support of the good faith exception [is] suspect, [and] it also ignores the grave consequences of the significant limitation imposed on the exclusionary rule by the good faith exception."[223] Iowa's high court thus held that "[a]dopting a good faith exception would effectively defeat the purpose of the search and seizure clause" of the Iowa constitution."[224] The court added that, if such an exception were adopted under Iowa law, "so long as the police act in good faith, probable cause would not be required . . . [and] persons subjected to

[219] *Id.* at 35 n.8.
[220] *Id.*
[221] State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000).
[222] *See* U.S. v. Leon, 468 U.S. 897, 905 (1984). In *Leon*, the Supreme Court held that because the exclusionary rule is meant to be a deterrent to law enforcement from conducting unlawful searches, when an officer acts in good faith and conducts a search pursuant to a search warrant ultimately held to be defective, the contents of the search are admissible against the defendant. *Id.* at 925–26.
[223] *Cline*, 617 N.W.2d at 290.
[224] *Id.*

an unconstitutional search or seizure would generally be left with no remedy at all."[225]

Likewise, the Supreme Court of Oklahoma has refused to follow federal caselaw chipping away at the exclusionary rule.[226] The United States Supreme Court, in *U.S. v. Janis*,[227] held that unconstitutionally obtained evidence that must be excluded in a criminal proceeding may, nevertheless, be used by the government against the same individual in a civil proceeding.[228] Ten years later, in its 1986 decision in *Turner v. City of Lawton*, Oklahoma's high court reaffirmed its 65-year-old precedent dealing with evidence that had been secured illegally.[229] The court then, and more recently in *Turner*, held that "the use of evidence thus tainted, was not good law, nor even good morals, because the use of unlawful procedures to attain the goals of the state was not calculated to inspire respect for the courts."[230] That "logic," the Oklahoma court held in *Turner*, remained "more carefully tailored than any available federal decisional law to deter the official misconduct."[231]

A particularly stark contrast between federal and state jurisprudence involves the permissible procedures incident to a minor crime According to the Supreme Court's 2001 holding in *Atwater v. City of Lago Vista*,[232] the Fourth Amendment is not violated when a defendant is subjected to a full custodial arrest—handcuffed, searched, booked, and then jailed during "processing"—for even the most minor traffic infraction, such as failure to wear a seatbelt.[233] The Court has, in fact, doubled down on this rule since *Atwater* and applied it to even more extreme scenarios. Eleven years following *Atwater*, in a case involving a driver who was stopped for failure to pay a minor traffic ticket—which the driver, actually, had already paid—the Supreme Court held that no search and seizure rights were violated when the driver was arrested, booked, strip-searched, jailed, and then strip searched again when moved to a

[225] *Id.* at 290–91.
[226] Turner v. City of Lawton, 733 P.2d 375, 378 (Okla. 1986) (interpreting OKLA. CONST., art. 2, § 30).
[227] U.S. v. Janis, 428 U.S. 433, (1976).
[228] *Id.* at 459.
[229] Hess v. State, 202 P. 310, 314–16 (Okla. 1921).
[230] *Turner*, 733 P.2d at 378.
[231] *Id.* at 379.
[232] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[233] *Id.* at 326.

different cell, even though the police had no reason whatsoever to believe that the driver had committed some other offense.[234]

The Nevada Supreme Court, like some state courts many years before *Atwater*,[235] would have nothing to do with such a rule. In its 2003 decision in *State v. Bayard*, the Nevada court held that an arrest for a minor traffic infraction "violates a suspect's right to be free from unlawful searches and seizures under [the state's constitution], even though the arrest does not offend the Fourth Amendment."[236] The state high court explained that "[a]bsent special circumstances requiring immediate arrest, individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the state's interest" and, further, that "[t]his rule will help minimize arbitrary arrests based on race, religion, or other improper factors."[237]

Not only have the circumstances under which an arrest should be permissible, but also the very nature of an arrest—or seizure of a person—have been the subject of state court disapproval of federal Supreme Court doctrine. A good example is the Delaware Supreme Court's 1999 decision in *Jones v. State*.[238] That court unequivocally "decline[d] to adopt the restricted definition of a seizure" recently adopted by the United States Supreme Court."[239] That definition, spelled out by Justice Scalia for the majority in *California v. Hodari D.*, "requires *either* physical force" or "*submission* to the assertion of authority," without which no Fourth Amendment "seizure" has occurred and, thus, there is no need for the police to have probable cause or reasonable suspicion.[240] In sharp contrast, the state high court held that the "Delaware Constitution requires focusing upon the police officer's actions to determine when a reasonable person would have believed he or she was not free to ignore the police presence."[241] Applied to the facts of the case, the Delaware court held that the defendant was "seized" when the police officer ordered him to stop and take his hands out of his coat pockets, and, consequently, if "that seizure was not based upon reasonable and articulable

[234] Florence v. Bd. Of Chosen Freeholders, 566 U.S. 318, 339 (2012).
[235] *See, e.g.*, People v. Marsh, 228 N.E.2d 783, 786 (N.Y. 1967).
[236] State v. Bayard, 71 P.3d 498, 502 (Nev. 2003).
[237] *Id.*
[238] Jones v. State, 745 A.2d 856, 867 (Del. 1999).
[239] *Id.*
[240] California v. Hodari D., 499 U.S.621, 626 (1991).
[241] *Jones*, 745 A.2d at 869.

suspicion, anything recovered as a result of that seizure is inadmissible at trial."[242]

Regarding illegal interrogations and, more specifically, *Miranda* violations, several state courts, including the Massachusetts and Oregon high courts, have insisted on more robust protection for suspects taken into custody than federal caselaw requires.[243] According to the United States Supreme Court, physical evidence uncovered as a result of a *Miranda* violation need not be excluded,[244] and a defendant's statements gathered in violation of *Miranda* may be used to impeach him if he chooses to testify at his trial.[245]

However, deciding such issues independently, the Oregon Supreme Court has made clear that it "is concerned with interpreting the Oregon Constitution . . . and [is] not dependent on or restricted by federal law."[246] Rejecting the federal Supreme Court's ruling on permissible impeachment, the Oregon court, in its 1988 decision in *State v. Isom*, recognized the reality of *Miranda* rights: "[o]nce a suspect invokes the right to remain silent or the right to consult a lawyer, the police are unlikely to get anything further without counsel present unless they continue to interrogate the suspect."[247] The Supreme Court's rule, permitting the impeachment use of statements gained in violation of *Miranda*, "actually encourages unconstitutional interrogation."[248]

Similarly, the Massachusetts Supreme Judicial Court has held that the federal Supreme Court's *Miranda* jurisprudence, and specifically the permissible physical evidence rule, "is no longer adequate to safeguard the *parallel but broader* protections afforded Massachusetts citizens by" the Massachusetts Declaration of Rights.[249] The Massachusetts court, quoting the Supreme Court of New Hampshire, noted:

> Prosecutors and police officers understand that the consequence of failing to abide by *Miranda* is the suppression of the defendant's statements. *To allow the police the freedom*

[242] *Id.*
[243] *See* Commonwealth v. Martin, 827 N.E.2d 198, 200 (Mass. 2005); State v. Isom, 761 P.2d 524, 528 (Or. 1988).
[244] U.S. v. Patane, 542 U.S. 630, 641 (2004).
[245] Oregon v. Haas, 420 U.S. 714, 722 (1975).
[246] *See Isom*, 761 P.2d at 528.
[247] *Id.*
[248] *Id.*
[249] Commonwealth v. Martin, 827 N.E.2d 198, 200 (Mass. 2005) (emphasis added).

> *to disregard the requirements of Miranda and thereby risk losing only the direct product of such action, but not the evidence derived from it, would not only not deter future Miranda violations but might well tend to encourage them*. An officer more concerned with the physical fruits of an unlawfully obtained confession than with the confession itself might reasonably decide that the benefits of securing admissible derivative evidence outweighed the loss of the statements.[250]

Not surprisingly, the death penalty is another area of criminal law in which some state courts have diverged from Supreme Court decisions approving executions. In its 2018 decision in *State v. Gregory*, the Washington Supreme Court categorically banned the use of the death penalty in the state because it was being "imposed in an arbitrary and racially biased manner."[251] Without directly addressing the United States Supreme Court's holding in *McCleskey v. Kemp*[252]—upholding a death sentence because the defendant did not prove discrimination in his case specifically against him[253]—the Washington court's *Gregory* decision was an emphatic repudiation. The Washington high court, citing a study that found that Black defendants were upwards of 4.6 times more likely to be sentenced to death than a non-Black defendant,[254] refused to attribute this disparity to "random chance."[255] In the sharpest contrast to the Supreme Court's *McCleskey* decision, Washington's court held that "[w]hen the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended," and "capital punishment law lacks 'fundamental fairness' and thus violates" the Washington State Constitution.[256]

Returning full circle to New York,[257] the Court of Appeals has a long tradition—if not a uniformly consistent one[258]—of providing considerably more protection from government intrusion than the

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[250] *Id.* at 204 (quoting State v. Gravel, 601 A.2d 678, 685 (N.H. 1991)).
[251] State v. Gregory, 427 P.3d 621, 627 (Wash. 2018).
[252] McCleskey v. Kemp, 481 U.S. 279 (1987).
[253] *Id.* at 292.
[254] *Gregory*, 427 P.3d at 633.
[255] *Id.* at 635.
[256] *Id.* at 636 (quoting State v. Bartholomew, 683 P.2d 1079, 1085 (Wash. 1984)).
[257] We began with the "quintessential" statement of independent state constitutionalism in People v. Barber, 46 N.E.2d 329 (N.Y. 1943), *see supra* notes 3-11 and accompanying text.
[258] *See* Vincent M. Bonventre, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, 22 PERSP. POL. SCI. 149 (1993).

Supreme Court in various aspects of civil rights and liberties.[259] Representative of that long tradition are the opinions of Judge—and, later, Chief Judge—Lawrence H. Cooke,[260] which was a major reason why the New York court was considered a, if not *the* national leader in independent state constitutional adjudication during the immediate post-Warren retrenchment at the Supreme Court in the 1970s and 1980s.[261] The New York Court of Appeals' 1983 decision in *People v. Gokey*[262] is illustrative.

Cooke's opinion for the majority in *Gokey* readily dismissed the Supreme Court rule that "a custodial arrest will always provide sufficient justification for police to search any container within the 'immediate control' of the arrestee."[263] Instead, Cooke made plain that, "[u]nder the State Constitution, an individual's right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances."[264] Only necessities such as "the safety of the public and the arresting officer [or] the protection of evidence from destruction or concealment" would justify the failure to get a warrant.[265]

In a continuing divergence from Supreme Court rulings involving police encounters, the New York court again insisted on some genuine reasons to justify the asking of incriminatory questions or for consent to search in its 2001 ruling in *People v. McIntosh*.[266] Speaking through Judge Victoria Graffeo, the court analyzed a "bus sweep" under New York's *De Bour* rule, which requires that "the police were aware of or observed conduct which provided a particularized reason" to approach passengers and request information or consent to search.[267] Contrary to Supreme Court precedents that such police encounters require no prior suspicion or

[259] *See* Bonventre, *supra* note 25, at 31–36.
[260] *See* Jay C. II Carlisle & Anthony DiPietro, *The Life and Legacy of Chief Justice Lawrence H. Cooke: Truly an Exemplary Life. A Life Well Lived*, 80 ALB. L. REV. 1233, 1237, 1245–62 (2016).
[261] *See* Bonventre, *supra* note 25, at 48–51; Peter J. Galie, *State Constitutional Guarantees and the Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157, 174–92 (1979).
[262] People v. Gokey, 457 N.E.2d 723 (N.Y. 1983).
[263] *Id.* at 724 (citing N.Y. v. Belton, 453 U.S. 454, 461(1981)).
[264] *Gokey*, 457 N.E.2d at 724.
[265] *Id.* at 725.
[266] People v. McIntosh, 755 N.E.2d 329 (N.Y. 2001).
[267] *See id.* at 332.

other justification,[268] Graffeo wrote that the Court of Appeals' rule was quite different: "in New York, in the absence of any conduct by a passenger or other basis giving rise to a particularized reason for the encounter," the request for information "did not meet the *De Bour* standard."[269]

Curiously, New York's and the Supreme Court's rulings in the area of technological surveillance, specifically GPS trackers, were similar—at least they seem so on first blush.[270] The Supreme Court, speaking through Justice Scalia in its 2012 decision in *United States v. Jones*, held that monitoring a person's movements, through the use of a GPS device surreptitiously placed on his car, was a search requiring a warrant under the Fourth Amendment because government's conduct amounted to a *trespass* on the person's vehicle.[271] But Justice Sonia Sotomayor, in a concurring opinion, relied on a previous New York Court of Appeals decision to posit a different rationale: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[272]

Indeed, in his opinion for the New York court, three years earlier in *People v. Weaver*, Chief Judge Jonathan Lippman had emphasized the extent to which the "prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy."[273] In language that Sotomayor had quoted in her separate concurrence in *Jones*, Lippman in *Weaver* underscored the "indisputably private nature" of the movements that electronic monitoring would disclose: "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."[274] For that reason, regardless of whether there was any "trespass," electronic monitoring of a person's movements and location, particularly if prolonged, constituted a search requiring a

[268] *See* Fla. V. Bostick, 501 U.S. 429, 435 (1991) (holding that in a similar situation, where officers boarded and asked to search the defendant's belongings, the police officers needed "no basis for suspecting a particular individual").

[269] *McIntosh*, 755 N.E.2d at 322.

[270] *See* U.S. v. Jones, 565 U.S. 400, 405–06 (2012); People v. Weaver, 909 N.E.2d 1195, 1199–200 (N.Y. 2009).

[271] *See Jones*, 565 U.S. at 405–06.

[272] *Id.* at 415 (Sotomayor, J., concurring) (citing *Weaver*, 909 N.E.2d at 1199)).

[273] *Weaver*, 909 N.E.2d at 1201.

[274] *Id.* at 1199 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

warrant supported by probable cause as a matter of independent state constitutional law.[275]

Lippman's majority opinion in *Weaver* forcefully reiterated the principle that this Article is intended to elucidate. State high courts are not tied to decisions of the Supreme Court that have denied or narrowed federal constitutional protections. Rather, as a matter of independent state constitutional adjudication, state courts have the reserved authority in our federal system of government to ensure that civil rights and liberties in their respective jurisdictions are protected to a greater extent than the Supreme Court might interpret the Federal Constitution to require. Otherwise, as Chief Judge Lippman made clear in *Weaver*, to follow in lock-step with those Supreme Court doctrines that have narrowed search and seizure rights would permit "enormous unsupervised intrusion by the police agencies of government upon personal privacy and, in this modern age where criminal investigation will increasingly be conducted by sophisticated technological means, the consequent marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens."[276]

CONCLUDING OBSERVATIONS

Unfortunately, lawyers who argue before state courts, as well as judges who sit on those courts, sometimes forget or are simply unaware of the power of state law and the constitutional authority of state courts to protect civil rights and liberties, despite what the Supreme Court does to deny or narrow them under the Federal Constitution. This bias towards federal law and decisions has often been recognized.[277] Even amidst the supposed rediscovery of state

[275] *Id.* at 1202.

[276] *Id.*

[277] Aware of this problem, the Conference of Chief Justices, a section of the National Center for State Courts, whose membership includes the highest judicial officer of every state, unanimously adopted a resolution in 2010 that "being a competent and effective lawyer requires an understanding of both the federal Constitution and state constitutional law." PROFESSIONAL AND COMPETENCE OF THE BAR COMMITTEE, *Resolution:* ENCOURAGING THE TEACHING OF STATE CONSTITUTIONAL LAW COURSES (2010), https://ccj.ncsc.org/__data/assets/pdf_file/0011/23600/06012010-encouraging-the-teaching-of-state-constitutional-law-courses.pdf [https://perma.cc/DL4Z-ZBH4]; *See also* Ken Gormley, *The Forgotten Supreme Court Justices*, 68 ALB. L. REV. 295 (2005) (criticizing a related academic scholarship focus on the Supreme Court to the near exclusion of state courts); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980) (arguing that lawyers and judges should rely on state constitutional law to protect rights and liberties before resorting to federal decisions).

constitutional law, beginning in the 1970s during the Supreme Court's immediate post-Warren era,[278] the Vermont Supreme Court complained:

> The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from "federally" oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to "nationalize" the law and denigrate the state bench.[279]

This lack of familiarity with the role of state courts and of state constitutional adjudication has not been limited to law clerks, but has infected the jurisprudence of state judges who willingly or unknowingly relinquish their independent authority—and responsibility—to the Supreme Court. Justice John Paul Stevens, in his concurring opinion in the Supreme Court's 1984 decision in *Massachusetts v. Upton*,[280] firmly admonished the Massachusetts Supreme Judicial Court for basing its search and seizure decision on its view of Supreme Court caselaw—resulting in a reversal— rather than on the state's own constitution.[281] As Justice Stevens put it:

> [T]he judgment of the Supreme Judicial Court of Massachusetts reflects an error of a more fundamental character than the one this Court corrects today. It rested its decision on the Fourth Amendment to the United States

[278] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (encouraging resort to state constitutional law to protect rights and liberties despite the Supreme Court's post-Warren era retrenchment).

[279] State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (quoting Hon. Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978)). One of the authors has repeatedly registered the same complaint and blame; *see, e.g.*, Bonventre, *supra* note 116, at 853 ("[T]hose of us in legal education must take the blame. Most law schools and legal educators seem so paranoid about being labeled state-law schools and state-law scholars that, on the kinds of legal issues discussed here—those of constitutional law, criminal procedure, civil rights and liberties, and other areas of public law—they try to adopt a national posture, and they do this by emphasizing federal law and decisions of the United States—i.e., the Federal—Supreme Court. But, in truth, this is not a focus on national law. This is not a focus on American law. Most American law, most law in this nation, is decided in state courts. Most decisions on fundamental issues of public law—as well as on the fundamental issues of torts, contracts, and other areas of private law—are rendered by the supreme courts of this nation's states.").

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

[281] *See id.* at 737–39.

> Constitution without telling us whether the warrant was valid as a matter of Massachusetts law . . . Its judgment in this regard reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts . . . [and] disparage[s] the rights retained by the people of Massachusetts under . . . the Massachusetts Declaration of Rights. . . . The States in our federal system, however, remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise of our constitutional system of government.[282]

Chief Justice Burger, who led the Supreme Court in its retrenchment of the predecessor Warren Court's expansion of constitutional rights, had actually made the same point himself a few years earlier. In his annual report on the state of the judiciary in 1981, he felt it necessary to remind the entire legal community that "[s]tate courts are responsible for first resolving issues arising under their [C]onstitutions and statutes."[283]

Similarly, New York's Chief Judge Judith Kaye, in the Court of Appeals' *Scott* decision rejecting the "open fields" doctrine,[284] had felt compelled to remind her dissenting colleagues of these basic principles of judicial federalism:

> A State court decision that rejects Supreme Court precedent, and opts for greater safeguards as a matter of State law, does indeed establish higher constitutional standards locally. But that is a perfectly respectable and legitimate thing to do. . . . In those instances where we have gone beyond Supreme Court interpretations of Federal constitutional requirements, our objective has been the protection of fundamental rights, consistent with our Constitution, our precedents and own best human judgments in applying them.[285]

Especially with the current composition of the United States Supreme Court—a six-to-three politically conservative majority that

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[282] *Id.*

[283] CHIEF JUSTICE WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY 23 (1981).

[284] People v. Scott, 593 N.E.2d 1328 (N.Y. 1992); *see* discussion, *supra* notes 191–198 and accompanying text.

[285] *Scott*, 593 N.E.2d. at 1347 (Kaye, J., concurring).

is less inclined to vigorously protect the constitutional rights that a more politically liberal majority would—[286] it is crucial to understand the ramifications of state courts relying on Supreme Court caselaw,[287] rather than on independent interpretations of state constitutions and statutes. Whether the purpose be to provide greater protection for civil rights and liberties than the Supreme Court, to recognize rights the Supreme Court has denied, or, more fundamentally, to simply exercise the authority and duty of state high courts in our federal system of government, the core principle of all that has been discussed here is that state court judges, with the assistance of the attorneys who argue before them, must give effect to their own state constitutions and laws independent of federal rulings.

[286] *See* Vincent M. Bonventre, *Supremely Divided: Court's Conservative Bent Intensifies*, 93 N.Y. ST. B.J. 6 (Sept/Oct 2021); Vincent M. Bonventre, *Supreme Shift: What the 6-3 Conservative Majority Means Going Forward*, 93 N.Y. ST. B.J. 9 (Jan/Feb 2021); Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/CA3X-D5LD].

[287] *Compare e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling a woman's right to choose an abortion); *with* N.Y. State Rifle & Pistol Ass'n., Inc. et al. v. Buren, 142 S. Ct. 2111 (2022) (vigorously protecting of the individual right to bear arms).