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Essay

ARE STATE CONSTITUTIONS COMMON LAW?*

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I.

Ninety years ago, when Justice Holmes came to the United States Supreme Court, he brought to his constitutional decisions the same views of law and of adjudication that he had taught and practiced for twenty years as a common law judge on the Supreme Judicial Court of Massachusetts.[1] In Washington he found, then as he would now, colleagues with experience in government and public law, judges whose decisions would be described as statesmanlike if one agreed with them and political if one did not. Even when they shared the style of an era of federal common law[2] and few statutes, the premise of judicial review remained the legal force of the written Constitution on which John Marshall had founded it. The United States Constitution was not common law.

In recent years, many state courts have passed on claims of individual rights under their respective state constitutions. These, of course, also are written charters, documents whose provisions can be and often are amended. But unlike the Supreme Court, state courts function in a world of fifty equals, which often face similar issues at about the same time. Each court is responsible only for the law if its own state in constitutional law as in common law, yet each is accustomed to copying common law doctrines from the United

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1. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989).

2. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

States Supreme Court. The decisions that result from the pull between fidelity to the state's own charter and the sense of being engaged in a common enterprise raise the question whether state constitutions are common law.

Judges have learned to say that a decision in favor of a claim is independent of the United States Constitution when that is what they intend.[3] Often they have debated or declined to decide whether that indeed is what they intend. This has led to Supreme Court review and pronouncements about national rights that proved to be needless when the state court, on remand, reasserts its original position.

In another lecture, two years ago, I reviewed the cases of this kind that reached the Supreme Court during 1989-90.[4] We shall look at a few later examples. But this is not our main topic. In fact, there is new evidence that many state courts will take responsibility for individual rights under state law. Our topic, rather, is how this is to be done. Are state court decisions independent from federal case law in analysis, or only in result? How much do constitutional doctrines depend on a constitution? Do courts overuse constitutions? Do they, in fact, treat constitutional law as common law? These questions call for looking at a sampling of cases beyond their holdings.

II.

Several recent decisions dealt with issues of state law after the Supreme Court remanded decisions that were based on questionable federal grounds. The proper sequence of analysis continues to divide state courts.

In New York, a biomedical products company, Immuno AG., sued the editor of a scientific journal that published a letter criticizing the company's plans for a West African research facility using chimpanzees. The New York Court of Appeals affirmed a summary judgment for the editor, citing both federal and state guarantees of free expression.[5] In June, 1990, the Supreme Court, in *Milkovich v. Lorain Journal Co.*,[6] clarified the First Amendment status of "opinion" in public controversies, and it returned *Immuno AG.* to New York for reconsideration in the light of the new decision.[7]

The New York court split over how to respond to the remand.[8] A majority apparently felt an obligation to address the federal issue on which the Supreme Court had remanded the case, although one wonders why the Supreme Court would care or what it could do if the New York court shifted entirely to state grounds. So the majority first reconsidered the federal issue and reaffirmed its earlier conclusion.[9] It then proceeded to place the same holding explicitly on New York's constitution. But three concurring judges disagreed with the majority's use of dual state and federal grounds, though

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3. *Cf.* Michigan v. Long, 463 U.S. 1032 (1983).
4. Hans A. Linde, *Does the New Federalism Have a Future?*, 4 EMERGING ISSUES ST. CONST. LAW 251 (1991)
5. Immuno AG. v. J. Moor-Jankowski, 549 N.E.2d 129 (1989), *vacated* 110 S.Ct. 3266 (1989).
6. 110 S. Ct. 2695 (1990).
7. *Id.* at 2708.
8. 567 N.E.2d 1270 (1991).
9. *Id.* at 1272.

they reached different conclusions. Judge Simons objected that the court should allow the Supreme Court an opportunity to review New York's reading of *Milkovich* before turning to state grounds, and Judge Hancock also relied only on federal law.[10] Judge Titone would hold that New York's common law privilege of "fair comment" supported the holding without needing either the state or the federal constitution.[11]

Judge Kaye's majority opinion noted the New York court's prior use of the "dual method" in constitutional cases.[12] But she observed that the defendant did not argue a common law, sub-constitutional "opinion" privilege, and "[h]ad defendant initially presented the issue as one of independent state constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago."[13]

A similar split occurred when the California Supreme Court, in 1991, invalidated the practice of including religious invocations at public high school graduations.[14] Both the state and the federal constitutions were at issue. In an extensive opinion for three justices, Justice Kennard held that the practice amounted to an establishment of religion contrary to the federal and state constitutions.[15] Two concurring opinions passed over the state constitution and rested the result on the federal First Amendment. Chief Justice Lucas recognized that the state constitution might suffice, but preferred first to learn how the Supreme Court would analyze this issue, which he said "evokes great

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10. *Id.* at 1282.
11. *Id.* at 1286.
12. *Id.* at 1282 n.6.
13. *Id.* at 1278. *Compare* State v. Kennedy, 666 P.2d 1316 (Or. 1983) (raising state-based claim without explaining it puts opponent into a difficult position, but a court's failure to dispose of the claim before reaching federal issue is worse).

> [A] court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard when in fact the state's law, when properly invoked, meets or exceeds that standard.

Id. at 1320.

See also Cooper v. Eugene School District. No. 4J, 723 P.2d 298, n.12 (Or. 1986):

> In determining whether to reach a federal constitutional claim without first disposing of all issues of state law, including the state's constitution one must distinguish three questions: (1) whether an *issue* has been raised at all; (2) whether any state source has been *cited* in connection with the issue; (3) whether an *argument* has been made in support of the state claim ....
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> A court, however, is not confined to choosing only among the arguments and authorities cited by counsel for or against a properly identified claim. Courts can avoid taking parties by surprise by inviting additional memoranda on inadequately briefed questions, as this court frequently does. That course should be followed whenever a litigant asks a court to invalidate a state statute or rule under the federal constitution without briefing its validity, or a possible valid interpretation, under applicable state law.

Id.

14. Sands v. Morongo Unified School District, 809 P.2d 809 (Cal. 1991).
15. *Id.* at 821.

interest and strong feelings."[16] Justice Arabian took the same position. Justices Panelli and Baxter dissented.[17]

Justice Mosk, joined by Justice Broussard, concurred in an independent exposition of California's constitutional history. He objected to deferring the state issue:

> The Chief Justice virtually begs the Supreme Court to relieve us of our duty under the Constitution of California. Such a supplication is unprecedented. We are not a branch of the federal judiciary; we are a court created by the Constitution of California and we owe our primary obligation to that fundamental document.[18]

Reserving state issues until after federal review puts "the horse trailing the cart," and imposes extra costs on the parties and the courts. California, Mosk wrote, should learn from Minnesota's experience.[19]

In Minnesota, a law required slow-moving vehicles to display a bright red triangle. Members of the Old Order Amish religion refused on biblical grounds to put this sign on their horse-drawn buggies. Prosecuted for the violations, they invoked Minnesota's constitutional guarantee of freedom of conscience as well as the First Amendment.[20] In 1989, the Minnesota Supreme Court held for the Amish under the First Amendment, finding that the state's safety interest could be secured by a less restrictive alternative. The court wrote that it would not address the state constitutional claim but reserved that issue for another day.[21]

That day soon came. The state took the federal issue to the United States Supreme Court.[22] In its 1990 decision on the religious use of peyote, the Supreme Court redefined the First Amendment defense against neutral laws.[23] It then remanded the Amish case to the Minnesota court for reconsideration. That court now turned to the Minnesota Constitution, reaffirming its earlier decision for the Amish.[24]

So far, the Minnesota story repeated what often happens when state courts have decided federal issues ahead of state issues: delay, needless costs, and often Supreme Court pronouncements that prove to have been unnecessary. But Minnesota provided interesting sequels.

In 1991, the Minnesota court reexamined whether a person arrested for driving while intoxicated may consult a lawyer before deciding whether to consent to a breath test.[25] Earlier the court had found no such right, at first because license revocation is not a criminal prosecution and later because the

16. *Id.* at 821 (Lucas, C.J., concurring).
17. *Id.* at 844 (Panelli, J., dissenting).
18. *Id.* at 835 (Mosk, J., concurring).
19. *Id.* at 836 (Mosk, J., concurring).
20. State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989).
21. *Id.* at 289.
22. Minnesota v. Hershberger, 495 U.S. 901 (1989).
23. Employment Div., Dept. of Human Resources of Oregon v. Smith, 496 U.S. 913 (1990).
24. State v. Hershberger, 462 N.W. 2d 393, 399 (Minn. 1990).
25. Friedman v. Comm'r of Public Safety, 473 N.W.2d 828 (Minn. 1990).

breath test is not a "critical stage."[26] Now the court held that, under Minnesota's, as distinct from the federal constitution, a breath test indeed was a "critical stage" in license revocation proceedings.[27] Two justices dissented from both premises of this holding.[28] Whoever had the better argument on the merits, it seems that the Minnesota court's recent experience with religion converted it to applying its Bill of Rights without awaiting federal guidance, as Justice Mosk urged his California colleagues to do.

But state guarantees for secular expression still are overwhelmed by the First Amendment, with exceptions like the Arizona Supreme Court's 1989 decision that it would analyze Arizona's free speech guarantee before reaching a federal issue.[29] In a cross-burning case, now before the Supreme Court, the Minnesota court examined only First Amendment cases to test an ordinance for overbreadth.[30] In another 1991 case, the Minnesota court denied civil damages against two newspapers that identified plaintiff as the source of political information that he gave them in confidence.[31] The court held that their assurances did not give rise to a contract nor a promissory estoppel. An element in promissory estoppel was whether it would be unjust to enforce the promise, and the court concluded that enforcing it would violate the First Amendment. The opinion did not refer to freedom of the press under the Minnesota Constitution. Perhaps defendants' counsel, like New York's media lawyers, believed only in the First Amendment. This led to reversal by the Supreme Court, after which the state court reinstated plaintiff's judgment without further consideration of state issues.[32]

III.

Our present topic, however, is not that state courts apply their state constitutions but how they do it. A clearly stated independent holding does not equal independent analysis. In fact, most state courts do not free themselves from Supreme Court formulas but treat them as generic constitutional law.

Sometimes this is a deliberate choice. In its breath test opinion, the Minnesota court noted that it had approved use of the terms "compelling state interest" and "least restrictive alternative" for applying safety rules to Amish vehicles, and it now adopted the "critical stage" test for a suspect's right to counsel.[33] Moreover, the court wrote that an arrested person's right not to be held incommunicado without access to counsel "must be weighed against the

26. State v. Palmer, 191 N.W.2d 188 (Minn. 1971); Partideaux v. State Dept. of Public Safety, 247 N.W.2d 385 (Minn. 1976); Nyflot v. Comm'r of Public Safety, 369 N.W.2d 512 (Minn. 1985).

27. *Friedman*, 473 N.W.2d at 835.

28. *Id.* at 838 (Coyne, J., dissenting); *Id.* at 847 (Keith, C.J., dissenting).

29. Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission, 160 Ariz. 350, 773 P.2d 455 (1989).

30. Matter of Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991), *rev'd*, 1992 WL 135564 (U.S. 1992).

31. Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990).

32. Cohen v. Cowles Media Co., 479 N.W.2d 387, 392 (Minn. 1992).

33. *Friedman*, 473 N.W.2d at 833.

state's interests."[34] The court did not explain why. It used to be understood that constitutional guarantees exist to control how a state pursues what its government, including judges, considers to be the state's interests, not to be "weighed" against them.

But all verbal formulas are not alike. If one believes, as the Minnesota courts seems to believe, that the state can deny a person access to legal advice in dealing with its officers up to the point of impairing a defense against criminal charges, the phrase "critical stage" is as good as any other.[35] In contrast, the formula that constitutional guarantees are "weighed" against "compelling" state interests raises a complex of highly debatable questions, questions of legislative and judicial procedure as well as of constitutional theory.[36] Adopting timeworn verbiage in applying similar constitutional clauses is a venial sin, although stating a principle in one's own words is the best way to test whether the principle is sound or merely familiar. But the federal formulas take on a life of their own, copied by state courts regardless of whether the state's law has the same clause or perhaps offers a more direct and defensible route to the same result. New Jersey's famous *Mt. Laurel* case against exclusionary zoning is an example.[37]

Mt. Laurel adopted a zoning ordinance that limited land use to single-family detached homes and effectively excluded people with moderate incomes. The governing statute prescribed that such ordinances must serve the general welfare, and the New Jersey court held that the general welfare meant not only the welfare of the town's residents but also of the wider region. Under what once was an unquestioned judicial practice, the statutory holding sufficed, and Justice Mountain said so.[38] But this did not satisfy the majority. Instead, the court's opinion stated that "as a matter of policy" it gave "major questions of fundamental import" a constitutional dimension and that the statute added little.[39] The court thought it elementary that "police power enactments ... must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws."[40] True, New Jersey's Constitution has neither a due process nor an equal protection clause, but no matter; they were found "inherent" in the constitution's first paragraph.[41]

If the statute were not enough, or in the unlikely event that it were amended, the state constitution in fact offered two routes to the court's result. First, the section that, in 1929, authorized the legislature to delegate land use

34. *Id.* at 834 (quoting NYFLOT v. Comm'r of Public Safety, 369 N.W.2d 512, 521 (Minn. 1985) (Yerka, J., dissenting)).

35. United States v. Ash, 413 U.S. 300 (1973), which the Court cited as the federal baseline, in fact did not involve official dealings with the defendant but with a potential witness.

36. Hans A. Linde, *The Shell Game of "Interest" Scrutiny: Who Must Know What, When, and How?*, 55 ALBANY L. REV. 725 (1992).

37. Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975).

38. *Id.* at 735.

39. *Id.* at 725.

40. *Id.*

41. *Id.*

controls to municipalities implied the "general welfare" test.[42] More strikingly, the opening paragraph on which the court relied declares, in Jeffersonian terms not followed in the later national text, that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights," which include "acquiring, possessing, and protecting property and ... pursuing and obtaining safety and happiness."[43] Nothing there of process nor of equal protection, but who needed those for *Mt. Laurel*? Would not a natural right to acquire or possess property and to pursue safety and happiness speak far more directly and eloquently against legal exclusion from housing?

I do not criticize the *Mt. Laurel* decision, which indeed is important and farsighted. Nor would invoking the "natural right" to possess property avoid the problems of applying equal protection to inequalities of wealth. It would, however, start the court and the bar on a truly independent analysis. The decision gained nothing by inflicting on the innocent New Jersey Constitution the notoriously embarrassing phrase "substantive due process" and its known potential for misuse.

New Jersey is not untypical. My own court for some years spoke of due process under the state constitution without noticing that Oregon has no due process clause.[44] Decisions throughout the country routinely employ terms drawn from Supreme Court case law on their way to the opposite result. The many cases on school financing are illustrative.

In 1973, the Supreme Court's *Rodriguez* decision sustained unequal funding of a state's public schools under the Court's formula of equal protection for fundamental rights.[45] Thereafter challenges succeeded under the state constitutions, where they should have begun, but they still carried the Fourteenth Amendment baggage. For instance, a Connecticut opinion devoted pages to reaching the conclusion that education was a "fundamental right" for purposes of "strict scrutiny" under a state equal protection clause.[46] A dissenting opinion saw no difference in the "fundamentality" of education under state and federal equal protection.[47] But why should this matter at all?

Connecticut's constitution, like many others, mandates free public elementary and secondary schools and directs the legislature to "implement this principle by appropriate legislation."[48] A trial court determined that substantial disparities among schools resulted from the laws delegating the state's duty of funding schools to financially unequal municipalities.[49] That should suffice. If a court concludes that the constitution told the legislature to provide for substantially similar schools in the state, then the laws failed as "appropriate

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42. *Id.* Article IV, Section VI, Paragraph 2 of the New Jersey Constitution, adopted after Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), declared that the delegated authority "shall be deemed to be within the police power of the state," a phrase then referring to the objectives of health, safety, morals, and general welfare.

43. *Mt. Laurel*, 336 A.2d at 725 n.11.

44. Hans A. Linde, *Without "Due Process" — Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

45. San Antonio Independent School District v. Rodriguez, 411 U.S. 980 (1973).

46. Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

47. *Id.* at 377 (Loiselle, J., dissenting).

48. *Id.* at 362 n.2.

49. *Id.*

legislation." That conclusion does not depend upon the presence or absence of an equal protection clause. It does not depend on transmuting the state's duty into an undeclared "fundamental right" nor on categorizing degrees of "scrutiny." It would be equally correct without any of these. Earlier, in New Jersey, Chief Justice Weintraub, after similarly going through the familiar litany under the state's non-existent equal protection clause, had criticized the concept of "fundamental rights," but held that the legislature's duty to provide a "thorough and efficient system of free public schools" mandated equal expenditures per student regardless of the wealth of school districts.[50] Placing these decisions on specific provisions for schools directs them to the function at issue without theoretical generalizations. Later courts can disown those generalizations as dicta.

IV.

Our final examples come from abortion-funding decisions in the state courts. After the Supreme Court constitutionalized abortion law in *Roe v. Wade*,[51] the Court found no denial of a fundamental right or of equal protection if states excluded abortion from public medical services.[52] As happened with unequal school funding, this decision moved the issue of abortion rights for indigent women into the state courts. But the issue posed greater theoretical problems. Few state charters make the state affirmatively responsible for health care as they do for public schools. The parties and the court are left only with general assertions of liberty and equality, which are not easy to apply for one purpose and reject for another purpose in a principled way.

Equal protection of the laws or its state analogues have not required states to buy for impecunious people what others must buy for themselves. Total lack of a state program may be heartless and meanspirited, but it is not discrimination. The claim, rather, is discrimination within a publicly funded program: that a state may not provide medical care for most conditions, including pregnancy leading to birth, and deny funding for abortions. But to hold that the state must either cover all medical services or none strains the bounds of equal protection as well as state budgets. My own state of Oregon has struggled to devise a system of priorities for Medicaid, and others no doubt have the same need. So abortion must be identified as a special case.

Abortion, of course, became a special case because the Supreme Court declared it to be a fundamental constitutional right, unlike other procedures that states never outlawed in the first place. So, if a state's equality clause had been interpreted to distinguish between fundamental rights and other legal interests, one option was to hold that the state clause forced equal treatment for abortion because it was a federal fundamental right. This would contradict the Supreme Court's view of equal protection, but so what? Federal substantive rights, state equal treatment: nothing wrong with that when the Constitution makes federal rights supreme law for every state. But it also would depend on the survival of *Roe v. Wade*.

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50. Robinson v. Cahill, 303 A.2d 273 (1973), *cert.. denied* 414 U.S. 976 (1973).
51. 410 U.S. 113 (1973).
52. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

For whatever reason, state courts in these cases sought a right of abortion in their states' constitutions. It will not surprise you that they have phrased the question to be whether the state guarantees a "right of privacy." The Supreme Court introduced "privacy" to describe the use of contraceptives in the marital bedroom in terms that would avoid "substantive due process," but the Court soon dropped the element of seclusion and transformed "privacy" to cover reproductive and other personal conduct whether in private or not.[53] Looking for a "right of privacy" has not helped many state courts in search for an independent state ground for abortion funding.

In a 1991 case which, at this point, is pending before the Michigan Supreme Court, the appellate court explained at great length that Michigan may and does apply its equal protection clause differently from the identical federal clause.[54] That is the easy part.

The court had less to say about its other premise that, making medical care depend on the choice between an abortion and giving birth "impinges" on a "fundamental right" under Michigan's constitution. For this proposition, the court quoted an advisory opinion of the Michigan Supreme Court disapproving a requirement that public officials disclose financial data.[55] The advisory opinion noted that "no one has seriously challenged the existence of a right of privacy in the Michigan Constitution"[56] — a phrasing judges use to suggest that a missing and unexplained premise is self-evident but which also signals relief at escaping a hard question. The opinion cited a single Michigan precedent: an 1881 tort case holding a physician liable for letting a young man assist him with a patient in labor without explaining that he was not a professional assistant.[57] That holding, of course, was common law, which the legislature might change. But in Michigan, a common law claim for invasion of one's private quarters is said to show beyond serious challenge that the Michigan Constitution prevents a law to make public officials disclose their financial records, and this protection of private information in turn is said to show that the Michigan Constitution makes reproductive choice a fundamental right.

You can imagine the critique that this chain of reasons would face in an opinion of the United States Supreme Court, or in a brief presented to that Court. But state constitutional decisions are rarely judged for their reasoning. Nor is this recent Michigan opinion particularly novel. In a Connecticut abortion funding case, the judge similarly cited dicta in two entirely unrelated cases that referred in passing to federal "privacy" doctrine.[58] The California

53. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §11-3 (2d ed. 1988).

54. Doe v. Director, Dep't Social Services, 468 N.W.2d 862 (Mich. 1991).

55. Advisory Opinion on Constitutionality of 1975 PA 227, 242 N.W.2d 3 (Mich. 1976).

56. *Id.* at 19.

57. *Id.* (citing Demay v. Roberts, 9 N.W. 146 (Mich. 1881)).

58. Doe v. Maher, 515 A.2d 134 (Conn. 1986). In contrast, Florida in 1980 added a qualified "right to be left alone and free from governmental intrusion into his private life" under circumstances that supported, though they might not compel, its application to a statute requiring parental consent for a minor's abortion. *In re* T.W., 551 So. 2d 1186 (Fla. 1989). But the Florida court copied the federal formula that the guarantee yields to a "compelling state interest" pursued by "the least intrusive means." *Id.* at 1193.

Supreme Court twenty-five years earlier did not explain a state-based right to choose whether to bear children when it relied on a disclaimer much like Michigan's: "It is not surprising that none of the parties ... have disputed the existence of this fundamental right."[59] When the New Jersey legislature financed abortions to protect a woman's life but not to protect her health, the New Jersey Supreme Court held that this distinction failed the state "equal protection" that the court had discovered in its school funding and exclusionary zoning opinions.[60] The court referred to "the high priority accorded in this State to the rights of privacy and health" — neither of which is mentioned in New Jersey's constitution — and held that on balance "a woman's right to choose to protect her health outweighs the State's asserted interest in protecting a potential life at the expense of her health."[61] The Pennsylvania Supreme Court, on the other hand, found no denial of equal rights in refusing public funds for abortions.[62]

Our focus is not on these holdings but on the terms in which state courts explain them. New Jersey's constitution, as we have seen, does not refer to equal protection or to health or privacy; instead it asserts natural and unalienable rights to life and liberty, and to pursuing and obtaining safety and happiness. Do not these phrases speak more directly to the issue of medical care than the formulas that lawyers and judges substitute from federal case law? What does it mean in New Jersey to have "natural" rights, and what claim to obtaining safety and happiness do they give an indigent person? Would they lead to Justice Pashman's conclusion that state funding must extend to elec-

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Once the United States Supreme Court used the label "privacy" for claims of personal relationships and autonomy, any mention of "privacy" in a state constitution became talismanic, regardless of its origins, context, or evident purposes, even when its use could only detract from more relevant grounds in the same state or in other states without any mention of the word "privacy." Arizona and Washington have faced an unusual struggle with "private." Arizona's Constitution, Article II, section 8, which provides that "no person shall be disturbed in his private affairs, nor his home invaded without authority of law," was copied in 1912 from Article I, section 7, of the 1889 Washington Declaration of Rights. The caption, "Right of Privacy," was not enacted as part of the Constitution; its source is unknown. John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 82 n.504 (1988). The Washington constitutional convention in 1889 substituted the unprecedented text for a proposed duplicate of the Fourth Amendment. *See* State v. White, 640 P.2d 1061, 1071 (Wash. 1982). In Arizona, too, the text copied from Washington replaced a conventional search and seizure provision of the territorial code. *See* Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Rights Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 147 (1988).

On its face, the substituted text is an important separation-of-powers provision requiring police and other executive officers to have legislative (or perhaps judicial) authorization for such invasions, but substantive attacks on an authorizing law must rest on a different guarantee. Nevertheless, the Washington Supreme Court for a long time treated its clause as identical to the Fourth Amendment, the provision that the convention had rejected. The court later elaborated a link to preexisting common law rights, such as the right against search or seizure without a warrant, which the constitution preserved until "altered or repealed by the legislature." State v. Ringer, 674 P.2d 1240, 1243 (Wash. 1983). If the clause is extended to such private interests as refusing medical treatment (*see* Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987)), its proper effect is to require lawmakers to address that issue. Neither state's courts have followed the command to require legislative responsibility for search and seizure law.

59. People v. Belous, 458 P.2d 194 (Cal. 1969), *cert. denied* 397 U.S. 915 (1970).
60. Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1980).
61. *Id.* at 937.
62. Fischer v. Dep't Public Welfare, 502 A.2d 114 (Pa. 1985).

tive abortions, or would they support the majority's decision to stop at therapeutic ones? Why do judges in states like Connecticut and Michigan, which do have guarantees of equal protection, need to torture a common law concept of privacy in order to decide how to apply equal protection to public medical care?

V.

Of course state courts do not need to insert those federal detours into a state's constitutional roadmap. There are more direct ways to the goal if a court is persuaded to reach it. But replacing state constitutions with generic Supreme Court formulas is an old practice.

Chief Justice Marshall and his successors spoke of the states' "police regulations" to distinguish the federal power to regulate commerce.[63] The label serves no such function in the states. Courts continually recite that state constitutions only limit plenary lawmaking power, they do not grant power. Search your Arizona Constitution for a grant of the police power. Yet state courts persist in weighing a phantom "police power" against express constitutional guarantees.[64]

A nineteenth-century federal judge, interpreting the federal guarantee of equal treatment for citizens of other states, confined the guarantee to what he called "fundamental" privileges.[65] The Supreme Court later imported the word into the Fourteenth Amendment, and state courts copy it as an all-purpose concept. They gladly followed when the Supreme Court turned the clearly procedural guarantee of "due process of law" into a tool for striking down disfavored substantive policies, and, as we have seen, some courts speak of "substantive due process" even without a due process clause.

The Supreme Court developed its formula that a "compelling state interest" can upon "strict scrutiny" override a constitutional guarantee only during the present generation. State courts did not use those phrases before 1962. Now they are routine in opinions under state constitutions.

In short, state courts seem content to copy whatever judicial formulas are in fashion, especially elastic formulas that let the court reach its own decision on the merits, for which the Supreme Court's current formulas are eminently suited. Once adopted in an opinion, a formula is hard to dislodge. Lawyers rarely offer modes of analysis that are not drawn from prior opinions, partly because that is how lawyers are taught, and partly because even when existing doctrine is unfavorable, they fear the risk of implying that their case depends on a change. Amici curiae could be an independent source of doctrinal reform, but ordinarily they too are intent on the concrete problem more than on doctrine. So are the law reviews. Busy judges have few incentives to

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63. Gibbons v. Odgen, 22 U.S. (9 Wheat) 1 (1824); Mayor of the City of New York v. Miln, 11 Pet. 102 (1837).

64. An interesting recent example is Dano v. Collins, 166 Ariz. 322, 802 P.2d 1021 (Ct. App. 1991) (concealed weapons law). New Jersey's 1928 amendment authorizing delegation of land use controls to municipalities (*supra* note 42) refers to the "police power," no doubt following the terminology of the *Euclid* era. *See also* Hans A. Linde, *Without "Due Process" — Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

65. U.S. CONST. Art. IV, § 2; Corfield v. Coryell, 6 F. 546 (C.C.E.D. Pa. 1823).

scrutinize familiar formulas on their own, and even those who are privately critical feel constrained to wait for arguments from counsel that are never made.

There are further similarities to common law. Headnotes and digests provide contradictory platitudes for quotation. Periodic reports on new state constitutional cases understandably concentrate on holdings, not reasons, much like periodic reports on tort cases or other common law litigation. What matters to the interested groups is that another state court has or has not rejected sobriety checkpoints or unequal school funding or the exclusion of abortion from Medicaid, not how the court did it. If the Supreme Court throws abortion itself into the state courts, few people will care whether the state's constitution has a modern privacy clause or its court finds any other premise, or how that premise would apply beyond abortion. Courts, too, care more about citing precedents for their holdings than how the precedents were explained. Constitutional caselaw spreads by osmosis through the legal membranes separating the states, much like changes in products liability or intrafamily immunity.

What should we think of this common law pattern of constitutional opinions? The question takes us beyond a report on recent case law to the issues that divide constitutional theorists. One of these is constitutional interpretation. But why speak of interpretation if words are immaterial? If one court can override legislation in the name of an unwritten right to "privacy" or anything else, why cannot every other court do so? Why does judicial review depend on a written constitution at all?[66] Is misinterpreting a clause more legitimate than inventing one that is not there — or less legitimate? And if any court can discover a right such as "privacy," what is the point of political efforts to add it to a constitution — or the implication of a failed attempt?

The larger issue is the division between two models. One, the classic model, saw a written constitution as law for legitimate government and only in consequence as law for courts. The other, institutional, model derives constitutional law from the practice of judicial review rather than judicial review from constitutional law. It makes law, in Holmes's phrase, only the prediction of what judges will do in fact, and the Constitution, as Charles Evans Hughes wrote, whatever the judges say it is. In the classic model, courts assume that government intends to govern within constitutional bounds, and they interpret, pronounce, and apply ordinary law, including common law, to remain within those bounds. The institutional model, on the other hand, tempts courts to use the constitution to share directly in governance, much as they use common law and equity. The cases show which model comes more naturally to state courts.

State courts are accustomed to weighing competing claims to justice between private parties, in equity as well as in common law. They are not

66. Constitutions commonly provide that their enumerated rights do not exclude other "retained by the people." *See, e.g.*, ARIZ. CONST. Art. 2, § 33; U.S. CONST. amend. IX. The Oregon court has interpreted the phrase to require a showing that the claimed right is not covered by another guarantee, that it was recognized when the Bill of Rights was adopted, and that it was a right "of constitutional magnitude" between the people and the government. *See, e.g.*, State v. Williams, 828 P.2d 1006, 1023-24 (Or. 1992) (Unis, J., dissenting).

dependant on statutes or other external sources of law; to some advocates and judges these only seem to get in the way. To weigh competing claims between a private party and the government seems a short step, or sometimes no step at all. Cases like Michigan's on privacy, and others on terminating artificial life support, move from common law or equitable reasons to constitutional reasons or mix them without distinction.

In the course of deciding the merits, some opinions ignore the essential difference between constitutional law and common law: A constitutional issue presupposes that someone else has made a law. If no one has made a law, or the law is open to valid interpretation, there is no basis for resort to constitutional law to decide the case. Unlike the United States Supreme Court, a state court can decide the state's common law and interpret the authority of state and local regulatory agencies. If a court concludes that a published letter qualifies for a common law privilege of opinion, or that on balance justice does not require enforcing a promise of confidentiality against newspapers, the court need not and should not make this a constitutional case even if it "weigh[s] the same considerations."[67] The essential counterpart of the institution of judicial review is to leave lawmakers every opportunity to clarify, to amend, or to reject the court's understanding of the state's policy before freezing it into constitutional law.

Thoughtful judges have discussed these issues off the bench. Judge Kaye has used the phrase "constitutional common law" in stressing state court use of common law to respect sensitive rights, leaving actual constitutional decision until unambiguous action by lawmakers requires it.[68] Connecticut's Chief Justice Peters cites the common law tradition in support of waiting for the "right case" and postponing constitutional judgments to let an issue be considered by other branches of government, but her admiration of common law methods in constitutional law also leads her to defend copying questionable judge-made formulas that a court might not itself find in its state constitution.[69]

Many state courts adopted the Supreme Court's recent interest-balancing formulas, with their sliding scales of scrutiny based on sizing constitutional rights like eggs and governmental interests like olives, from medium to jumbo. This may seem unsurprising because the point of the formulas is to let courts decide ad hoc between competing values, but probably the explanation is nothing more cynical than the state courts' uncritical assumption that any Supreme Court doctrine is generic constitutional law. Yet, to put briefly what

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67. Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990), *rev'd*, 111 S.Ct. 2513 (1991).

68. Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. LAW 17 (1988).

69. Ellen A. Peters, Book Review, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1985). In a different context, Washington's Justice Utter defends state court discussion of federal constitutional claims in cases decided on state grounds because the state court's view of federal rights may be more congenial to other state courts and thus contribute to those rights. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

is debated at length elsewhere, the formulas do not deserve to be copied.[70] The Supreme Court's verbal calculus is not designed to advise government how to govern constitutionally. Instead, it relies on conclusory adjectives for use by judges.

We need not review here how the Supreme Court came to develop this calculus during the past thirty years. Whatever purpose it may serve for that Court's review of state laws under the nation-wide Fourteenth Amendment, state courts are in a very different position. Adjectives like "fundamental" and "compelling" invoke large philosophic values, too large to allow for the actual diversity among the fifty states. The words "fundamental" and "constitutional" are not synonyms. Not everything in a constitution is important, and much that people would call fundamental is found in laws, not in constitutions. State laws can and do differ on highly charged issues of life and death, of sexual and family relations, and courts also may divine different answers in state constitutions. That is the essence of federalism. Diversity on such issues may reflect past social differences or only be historical accidents, but once these are embedded in law, they can resist legislative change for generations. Yet our state boundaries do not follow ethnic, linguistic, or religious lines, leaving little basis to adjudge a social value either to be fundamental or compelling to some but not to other states.

What does it mean to call a goal "compelling" when other states do not pursue it and the legislature may abandon it tomorrow? What is "fundamental" about a right that other state courts reject and that a simple majority of voters can amend out of existence? Is the right then no longer, or was it never, fundamental? Faced with the diversity and the contingency of state laws, the better part of valor is the discretion to disclaim grandiose and universal labels in favor of more modest but more precise explanations of the state's law as the court sees it. But advocates and judges will not readily give up the heightened rhetoric of constitutional claims; somehow a right not preceded by "fundamental" (often redundantly by "basic and fundamental") as well as by "constitutional" sounds like no real right at all, as if one did not take it seriously.

VI.

I said at the outset that state courts find themselves pulled between fidelity to the state's own charter and the sense that constitutional law is a shared enterprise. Fidelity to a constitution need not mean narrow literalism. Most state bills of rights leave adequate room for modern applications, as well as for comparing similar guarantees elsewhere. But fidelity to a constitution means at least to identify what clause is said to invalidate the challenged law, to read what one interprets, and to explain it in terms that will apply beyond the case at issue, not to substitute phrases that have no analogue in the state's charter. It means to respect the ordinary lawmaking processes and withhold premature constitutional judgments, but it also means not to assume uncritically that government can overcome the limits set for it by a constitutional guarantee whenever a court believes that the government's purpose is more

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70. *See* Linde, *supra* note 36.

important, merely because this is how the Supreme Court has redefined federal doctrine.

One might think that it would simplify a court's task to free itself from the baroque structure of formulas erected by the Supreme Court. Does it not seem easier to work directly with the state's own constitution, to decide what limits it does or does not place on government, without searching for intermediate premises like a "right of privacy" or a "reasonable expectation of privacy" or a "police power" or "substantive due process" or squabbling over degrees of judicial scrutiny? Actually, judges as well as lawyers find it more difficult. The pull toward a common law of judicial review, toward a vortex of cliches, is strong. Counsel and courts find comfort and convenience in words that judges already have used. It does not much matter on which basis a precedent and its phrasing rest; outcomes are more important than explanations. Few now accept what was long taken for granted, that a constitution may not prevent many unreasonable, burdensome, or unjust laws. If one court finds a way to one's preferred constitutional holding, it seems that another court must surely be able to do the same if only it chooses; all else is mere technique.

Ultimately the question is whether we can face diversity in constitutional rights. Recognition that a right may be guaranteed in one state but not in another is an uncomfortable idea. It means that a court has to strike down a desirable law that is valid in other states, and that some courts may have to sustain a bad law that other courts have struck down. Lawyers and judges understand this, but it departs from the civic faith imparted by high school and college classes, by national organizations and media reports, and by our public rhetoric, that "constitutional rights" must mean rights shared by all Americans.

Yet of course the uncomfortable idea is true.[71] State constitutions have been and continue to be amended, sometimes to add new entitlements, sometimes, regrettably, to abandon a historic guarantee. A demand that each state's court reach whatever desired result courts in other states have reached, in the common law manner of generic judge-made formulas, denies significance to the lawmaking act of choosing and adopting the constitutional provisions on which claims of unconstitutionality rest. Such choices, we know, can be oppressive as well as liberating. Against impairment of a nationwide right by parochial state action, national protection, by the Supreme Court or by Congress, remains indispensable. Constitutional law indeed is a shared enterprise. But for state courts the enterprise is to apply and enforce the actual guarantees that a state's charter provides, not to substitute a homogenized rhetoric of judicial review. The task for counsel and for the state's academic and professional observers is to hold judges to that enterprise, and to help them in it.

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71. Arizona's constitution, for instance, requires just compensation for property "damaged," not only "taken," for public use. ARIZ. CONST. Art. 2, § 17. The Arizona constitution also forbids laws limiting damages for personal injuries. ARIZ. CONST. Art. 2, § 31.