The Constitutional Value of Dialogue and the New Judicial Federalism

BY LAWRENCE FRIEDMAN*

Introduction

The story of the modern state constitutionalism movement begins with a 1977 *Harvard Law Review* article by United States Supreme Court Justice William J. Brennan, Jr. In that short essay, Justice Brennan canvassed the federalization of constitutional law through the Fourteenth Amendment to the United States Constitution and concluded that this doctrinal evolution had altered the work of state courts, a development "both necessary and desirable under our federal system."[1] Significantly, Brennan also urged state courts not to regard the Fourteenth Amendment as an analytical endpoint in cases involving individual rights and liberties; rather, he advised that state constitutions, too, should be viewed as a source of rights and liberties whose protection may extend "beyond those required by the Supreme Court's interpretation of federal law."[2]

Justice Brennan's appeal to state courts to protect individual rights and liberties under state constitutions has suffered criticism for

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. *Id.* Justice Brennan notably did not limit his state constitutional advocacy to the pages of law reviews. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting) (observing that "[e]ach state has power to impose higher standards governing police practices under state law than is required by the Federal Constitution").

its programmatic, result-oriented cast.[3] Notwithstanding such criticism, state supreme courts have answered Justice Brennan's call,[4] embracing the "new judicial federalism" as a vehicle for independently interpreting state constitutional provisions protecting individual rights and liberties that parallel provisions of the Bill of Rights.[5] To this end, state courts have employed one of three

3. This criticism reflects a belief that Brennan advanced the cause of state constitutionalism from fear that the United States Supreme Court would retrench its individual rights jurisprudence following the succession of Chief Justice Warren Burger to the Court. *See* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 423 (1996) (referring to Brennan's "outcome-based motivation"); Earl M. Maltz, *The Political Dynamism of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233, 235 (1989) (observing that "the revival of interest in state constitutionalism is generally conceded to be a reaction to the Burger Court's perceived hostility to Warren Court activism and its extension"); Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432 (1988) (criticizing Brennan's "message" that "state courts should vindicate personal liberties along the lines undertaken by the Warren Court"). *But see* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763 (1998) (arguing that Brennan's attention to state constitutions was not simply a results-oriented reaction to the Burger and Rehnquist courts).

4. *See* James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1509 (1998) (observing that since Brennan's essay appeared, "[s]tate courts have now rendered hundreds of decisions which grant greater protection to individual rights . . . than the Supreme Court has been willing to afford under the Federal Constitution"); John D. Boutwell, *The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina*, 70 N.C. L. REV. 1899, 1910 n.70 (1992) (noting that Brennan "is primarily responsible for this revamping of federalism"); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (declaring Justice Brennan's *Harvard Law Review* article the "Magna Carta of state constitutional law"). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986) (observing that "state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority"). As Justice Randall T. Shepard has rightly noted, see Shepard, *supra* note 3, at 422, Oregon's Justice Hans Linde also contributed significantly to the development of the new judicial federalism. *See, e.g.*, Hans Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980) [hereinafter, *First Things First*]; Hans Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

5. *See, e.g.*, State v. Schmid, 423 A.2d 615, 624 (N.J. 1980) (asserting that "state constitutions exist as a cognate source of individual freedoms and . . . state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution"). Note that the term "new judicial federalism" specifically refers to "decisions by state high courts based on provisions of state constitutions that have served either as independent and adequate bases, or as the only bases, for ruling on questions of individual rights and liberties." John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 913 n.1 (1995). As Robert F. Williams

interpretive methodologies in construing cognate provisions: the "lockstep" approach, by which the court tracks the U.S. Supreme Court's prior interpretation of the federal constitutional text; the "criteria" approach, by which the state court determines whether one or more factors unique to the state constitution militates in favor of a departure from the federal interpretation; and the "primacy" approach, by which the state court undertakes an independent constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance.[6]

In cases in which a state supreme court employs the primacy approach, the court may well interpret its state constitutional provisions protecting individual rights and liberties more expansively than the U.S. Supreme Court in the same circumstances.[7] Indeed, state courts employing the primacy approach typically assume that they validly may regard the U.S. Supreme Court's reasoning on, say, the proper application of the Fourth Amendment to automobile searches, as having no determinative weight in the interpretation of the parallel state constitutional protection.[8] Such rulings, unsurprisingly, have attracted the attention of commentators and

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and others have observed, the "new" judicial federalism is no longer so new. *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1017 (1997); Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5 (1989). Nonetheless, for purposes of this paper I refer to the movement as "new judicial federalism," because that is the term by which it is commonly known, and because the term signifies that the movement is in significant ways a discrete aspect of the practice of law before state courts. Further, I shall continue to refer to the specific subject of new judicial federalism as the interpretation of "parallel" or "cognate" provisions of the state and federal constitutions, though at least one commentator has suggested that the term "potentially applicable state constitutional provisions" is preferable because "parallel" implies a "subordinate status for the state constitution." Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMPLE L. REV. 1003, 1004 n.5 (1994). To the contrary, I believe that "parallel" and "cognate" imply, correctly, a sense of structural equality as between a state constitutional provision and its federal counterpart.

6. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 180-85 (1998) (discussing methodological approaches to state constitutional interpretation); Williams, *supra* note 5, at 1018-19.

7. *See, e.g*, New Jersey Coalition v. J.M.B., 650 A.2d 757 (N.J. 1994) (holding that state constitutional equivalent of the First Amendment requires that private shopping center allow non-commercial leafletting, subject to reasonable regulation); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981) (holding that state constitutional right of speech applies to private property used as forum for public debate).

8. *See, e.g.*, State v. Sterndale, 656 A.2d 409, 411 (N.H. 1995) (finding unconvincing the United States Supreme Court's justifications for an "automobile exception" to the warrant requirement under part I, article 19 of the state constitution).

jurists who maintain that independent state court interpretations of textual provisions previously addressed by the Supreme Court lack legitimacy.[9]

The legitimacy issue in the context of cognate constitutional provisions, as G. Alan Tarr has explained, "is whether a presumption of validity should be given to the nonauthoritative constitutional judgment of a prior interpreter and, if so, how strong that presumption should be."[10] In essence, critics argue that expansive state constitutional interpretation of cognate provisions may reflect nothing more than disagreement with the Supreme Court's reasoning or adoption of Justice Brennan's programmatic aims, and amounts to simple result-oriented rejection of the U.S. Supreme Court's narrower interpretations of federal constitutional provisions protecting individual rights and liberties.[11] At bottom, of course,

9. In this context, "legitimacy" refers "to the debated propriety of state courts reaching results under their constitutions which are contrary to prior Supreme Court decisions rendered under similar or identical federal constitutional provisions." Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 355 n.3 (1984). Such state court rulings should be distinguished from those cases that concern state constitutional provisions that have no federal counterpart. *See, e.g.*, Claremont School District v. Governor, 635 A.2d 1375 (N.H. 1993) (holding that state constitution's "education" clause imposes duty on state to provide adequate education to all educable children). *See generally* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMPLE L. REV. 1325, 1343-48 (1992) (surveying state constitutional education clauses). State supreme courts have unquestioned authority to interpret unique provisions of their own constitutions, though these rulings, too, may attract criticism, albeit of a different character. *See* TARR, *supra* note 6, at 176 n.10; Williams, *In the Supreme Court's Shadow*, *supra*, at 355.

10. TARR, *supra* note 6, at 175; *See also* Williams, *supra* note 5, at 1055 (primary legitimacy concern in state constitutional law involves "the relation between state courts and the U.S. Supreme Court: when can a state court interpret its state guarantees to reach a result different from that obtained by the Supreme Court interpreting the Federal Constitution?").

11. *See, e.g.*, People v. Scott & People v. Keta, 593 N.E.2d 1328, 1350-51 (N.Y. 1992) (Bellacosa, J., dissenting) (criticizing majority for acting upon "ideological disagreement . . . with the definitive decisions of the highest Court in the land"); State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (warning that "[i]t would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court"); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) (expressing misgivings about the assumption "that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory"); George Deukmejian & Clifford Thompson, *All Sail and No Anchor – Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 1009 (1979) (criticizing California Supreme Court for being "result-oriented"). *See also* TARR, *supra* note 6, at 176 (suggesting that when interpretations diverge, "it may be that one of the interpreters has interpreted the pertinent constitutional provision wrongly by mistake or by design in order to promote the interpreter's own value preferences").

these critics likely would reject primacy itself as a legitimate methodological approach to constitutional interpretation.[12]

Contrary to this view, I argue in this paper that independent state court interpretation of cognate state constitutional provisions using the primacy approach is institutionally legitimate and, indeed, normatively desirable within the framework of federalism—desirable because, like the system of constitutional checks and balances in the context of horizontal federalism, independent state constitutionalism may serve to balance the actions of another institutional entity: the U.S. Supreme Court.[13] I contend, moreover, that, insofar as the new judicial federalism reflects attempts by state courts independently to interpret the meaning of cognate textual provisions, its legitimacy is buoyed by the federal constitutional value of dialogue – that is, the value that attaches to discourse about law and governance that occurs between and among the different organs of the federal and state governments.

In other words, though a state court's authority to interpret its own constitution flows most immediately from that constitution, the legitimacy of its independent interpretation of a cognate provision derives support from a value enshrined in the *federal* constitution. A fuller understanding of this value suggests that state courts should eschew the lockstep and criteria approaches to the interpretation of cognate provisions. For in acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in constitutional provisions that "do not establish and divide fields of black and white."[14] Given the Supreme Court's relatively isolated institutional

12. *See* State v. Canelo, 653 A.2d 1097, 1112 (N.H. 1995) (Thayer, J., dissenting) (criticizing analysis that did not rely upon federal precedent, and accusing majority of "invent[ing] new constitutional protections"); State v. Hunt, 450 A.2d 952, 963 (N.J. 1982) (Handler, J., concurring) (warning of the danger in court in turning uncritically to state constitution "for convenient solutions to problems not readily or obviously found elsewhere"). *Cf.* Guiney v. Police Commissioner of Boston, 582 N.E.2d 523, 527-28 (Mass. 1991) (Nolan, J., dissenting) (criticizing majority's deviation from U.S. Supreme Court precedent absent a "compelling reason" to do so).

13. *See* Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1134-37 (2000) (discussing the inter-branch checking and balancing functions of horizontal federalism).

14. Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., concurring) (describing the "great ordinances of the Constitution," and noting that "[e]ven the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other"). As Joseph R. Grodin has stated, "neither logic nor history requires that [state courts] accord state constitutional language the same meaning as the

position,[15] such engagement can inform interpretive debates among judges, scholars, and citizens about the meaning of constitutional text, and thereby balance the interpretational judgment of the Supreme Court.

To be clear, my concern in this paper is not to advocate for, or to justify, the outcomes reached by state courts in particular cases. Rather, I seek to enrich the story of modern state constitutionalism by suggesting that state high courts can, and should, take seriously the project of constitutionalism, broadly conceived, by embracing the constitutional value of dialogue. In this regard, I aim to provide theoretical support for the view that, regardless of the outcome, state courts should engage the U.S. Supreme Court on its own terms in respect to issues of constitutional interpretation.

This paper thus compliments the work of such scholars as Jennifer Friesen, who has rightly noted that arguments in support of a truly independent set of constitutional rules at the state level should "not necessarily [respond] to the call of any ideological agenda, whether of the left or the right," for "no test for judicial review of constitutional rights, whether of the balancing, multi-factor, or categorical variety, should be embraced without first testing it against criteria of good governance."[16] Friesen maintains that a state court's primary obligation vis-à-vis the state constitution should not be to create a jurisprudence that reflects the state's unique constitutional heritage, but "to make good constitutional law."[17] To this end, state courts should strive "to produce, to the extent possible within institutional constraints, intelligible rules of conduct for future use as well as proper results in the immediate case."[18] An appreciation for the constitutional value of dialogue can further this end by supporting

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United States Supreme Court has accorded a comparable provision of the federal Constitution." Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 400 (1988). *See also* Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 731 (1991) (suggesting that differences in the interpretation of state and federal constitutions reflect the "difficulties of interpreting language").

15. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (discussing U.S. Supreme Court's "primary authority" to interpret the federal constitution).

16. Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1069 (1997). *See also* Heiple & Powell, *supra* note 4, at 1510 (noting that "[a] state court can interpret its constitution to protect the economic and property rights traditionally favored by conservatives as easily as it can protect the civil rights and liberties customarily championed by liberals").

17. Friesen, *supra* note 16, at 1071.

18. *Id.*

state court efforts to refine and, potentially, improve upon federal constitutional doctrine.

This paper also compliments the work of Professor Paul Kahn. In his seminal essay on state constitutional law, *Interpretation and Authority in State Constitutionalism*,[19] Kahn suggested that

> constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order. At both the state and national levels, this debate focuses upon the ideas of liberty, equality, and due process, as well as upon the structures of representative government necessary to realize these values.[20]

In Kahn's view, state constitutionalism should be appreciated as a means to enhance national understanding of the most important aspects of American democracy. I am sympathetic to this goal, and seek in this paper to sketch the foundational basis for state courts to approach state constitutional interpretation as an aspect of the "ongoing debate about the meaning of the rule of law."[21]

I proceed by reviewing in Part I the three dominant methodologies employed in state constitutional interpretation and the current criticism in the courts and in the academy of state constitutional interpretation advanced pursuant to the criteria and primacy approaches. In Part II, I turn to a discussion of the architecture, purposes, and goals of "dialogue" between persons and between entities. This part explores the significance of dialogue, so understood, as a tacit expectation of a federal constitutional scheme that serves as an important check on the potential excesses of branches and organs of the state and federal governments. In Part III, I argue that the constitutional value of dialogue adds legitimacy to independent state constitutional interpretation of correlative state and federal individual provisions, to the extent that the state court engages the U.S. Supreme Court by either challenging or confirming the Supreme Court's reasoning. Given the potential benefits of such engagement, I contend that, as a normative matter, state courts should favor the primacy approach to state constitutional interpretation.

The paper moves from these points to a discussion in Part IV of the New Hampshire Supreme Court's decision in a case involving the validity of the good faith exception to the exclusionary rule as a

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

20. *Id.* at 1147-48.

21. *Id.* at 1148.

matter of state law — *State v. Canelo*[22] — and the constitutional dialogue with the United States Supreme Court that ensued regarding the relative scope of the state and federal constitutional protections against unreasonable searches and seizures. I suggest that this case begins to realize the constitutional expectation of dialogue, and to highlight the salutary effects of such dialogue. The paper concludes with a discussion of the continued importance of constitutional dialogue between state and federal courts to the functioning of the federal system and the larger project of American constitutionalism.

I. Authority, Legitimacy and Methods of State Constitutional Interpretation

We begin with an unexceptional point: state supreme courts have the unquestioned, final authority to interpret their state constitutions. This authority finds its source in a federal constitutional structure that divides sovereignty between the state and federal governments.[23] This system presumes state governments to be supreme within their realms, and the federal government to be supreme within its realm.[24] Regardless, then, of the U.S. Supreme Court's pronouncements concerning the breadth and scope of the federal constitution, the highest court of each state remains the final arbiter of the meaning of state law including the state constitution. Indeed, "in a situation where a state supreme court interprets a state constitutional provision — even one textually indistinguishable from the federal provision — the [U.S.] Supreme Court, far from being final, has nothing at all to say."[25] As Oregon Court of Appeals Judge Rex Armstrong succinctly explained:

> When I became a judge on the Oregon Court of Appeals, I took an oath to support the Oregon Constitution. That means, in a case before our court involving a challenge to the validity of a state statute under the Oregon Constitution, I am obliged to

22. 653 A.2d at 1097.

23. *See* THE FEDERALIST NO. 46, at 262 (James Madison) (stating that "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes").

24. *See* THE FEDERALIST NO. 39, at 213 (James Madison) (arguing that under the U.S. Constitution, states retain "residuary and inviolable sovereignty over all . . . objects" not within the power of the federal government).

25. Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK L. REV. 681, 710-11 (1997). *See also* Friesen, *supra* note 16, at 1073 (discussing power of state supreme courts "to interpret state law, including constitutional law, in any way they deem sound"); Williams, *supra* note 9, at 381 ("A state court decision interpreting the state constitution is insulated from vertical, federal judicial review.").

> uphold the constitution. To do that, I have to decide what the constitution means. That is the task assigned to me as a state judge.[26]

The United States Supreme Court has long recognized that the task of interpreting state constitutions lies within the province of the state courts. In 1980, the Court observed, in *PruneYard Shopping Center v. Robins*,[27] that each state has a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[28] The Court refined this understanding in a 1983 case, *Michigan v. Long*.[29] In *Michigan v. Long*, the Court instructed state supreme courts on how properly to insulate their state law decisions from federal court scrutiny, holding that it would not review a state court decision, even when that decision refers to federal law, so long as the state court opinion "indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent [state] grounds."[30] *Michigan v. Long* thus confirms that a state court has the authority under its constitution to interpret state law and, when the state court explicitly bases its determination upon an interpretation of the state constitution, the federal courts may not revisit that determination.

But the fact that a state court has final authority vis-à-vis the federal courts to interpret the state constitution does not necessarily resolve the legitimacy issues that constitutional litigation naturally implicates.[31] Indeed, notwithstanding a state court's authority to

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26. Rex Armstrong, *State Court Federalism*, 30 VAL. U.L. REV. 493, 495 (1996) (footnote omitted).

27. 447 U.S. 74 (1980).

28. *Id.* at 81. *See also* California v. Greenwood, 486 U.S. 35, 43 (1988) (noting that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution").

29. 463 U.S. 1032 (1983).

30. *Id.* at 1041.

31. State constitutional interpretation, for example, inevitably raises a traditional counter-majoritarian concern – namely, the fear that judges will read the state constitution without reference to any interpretive aid other than their own political and personal predilections. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45-46 (1997) (criticizing the notion of an interpretive theory based upon a "living" constitution, which would allow each Supreme Court justice to decide for him – or herself what the federal constitution means); Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341, 344 (1996) (arguing that we must restrict judges from reading "their own notions of the propriety of . . . legislative act[s]" into the federal constitution); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that the judicial process "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite

interpret its state's constitution, legitimacy questions will continue to arise in connection with the interpretation of constitutional provisions whose federal cognate the U.S. Supreme Court has already interpreted — that is, when the meaning of a textual provision has already been addressed by a court competent to make such determinations. Thus,

> [j]ust as advocates of judicial restraint at the national level have argued that judges should defer to the judgments of the people's representatives, so their counterparts at the state level have insisted that state judges should defer to the interpretations . . . that the Supreme Court has given to analogous provisions of the federal constitution.[32]

The problem has been stated more pointedly by Charles Fried, writing as a justice of the Massachusetts Supreme Judicial Court: "[w]hen a state supreme court reasons that the same or similar words constrain the democratic processes . . . more tightly than the Supreme Court has found, there is at least a tension and a question to answer."[33]

In the more than twenty years since Brennan's call to action in the pages of the *Harvard Law Review*, state courts have generally sought to address these legitimacy concerns *ex ante*, as a constitutional matter and as a normative matter, by employing one of three methodological approaches to state constitutional interpretation: the lockstep approach, the criteria approach, and the primacy approach. I review each approach in turn.

A. The Lockstep Approach

Under the lockstep approach, the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court's interpretation of the textual provision at issue. On this approach, federal rulings are regarded as having attained "a presumption of correctness" from which the state court should be loathe to part.[34] In

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transcending the immediate result that is achieved"). *But see* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 428-30 (1998) (arguing that judicial review "under state constitutions appears more firmly grounded in the democratic processes of the state").

32. TARR, *supra* note 6, at 175.

33. Fried, *supra* note 25, at 711. *See also Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982) [hereinafter *Developments*] (contending that, "[w]hen a state court diverges from the federal view, a reasoned explanation of the divergence may be necessary if the decision is to command respect").

34. Williams, *supra* note 9, at 356. *See also* Charles G. Douglas, III, *The Unique Role*

other words, congruence with federal decisional law is assumed to be the norm, and deviation is for all intents and purposes impossible.[35] Such an approach is justified, at least in regard to the enforcement of the criminal law, by an interest in uniformity, which urges the development of identical state and federal rules to control government conduct in regard to procedural issues.[36]

To illustrate, consider *State v. Jackson*,[37] a 1983 decision of the Supreme Court of Montana. *Jackson* concerned the question whether the trial court properly found that under the state and federal guarantees against self-incrimination the defendant's refusal to submit to a Breathalyzer sobriety test should be suppressed. The Supreme Court of Montana affirmed the trial court, but the U.S. Supreme Court vacated the judgment and remanded to the Montana court "to consider whether its judgment [was] based upon federal or state constitutional grounds . . . ."[38] The Supreme Court of Montana concluded that, in its original opinion, it had inappropriately ignored its prior rulings, which held

> the Montana constitutional guarantee of the privilege against self-incrimination affords no broader protection to an accused than does the Fifth Amendment and that the opinion of the United States Supreme Court delineates the maximum breadth of the privilege against self-incrimination in Montana.[39]

And so the court fixed the meaning of Montana's constitutional parallel to the Fifth Amendment at the same point at which the United States Supreme Court fixed the Fifth Amendment itself. As Professor Tarr has accurately noted, this is "one way to banish legitimacy concerns."[40]

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of State Constitutions: Raising State Issues in New Hampshire, 28 N.H. BAR J. 309, 316-17 (1987) (discussing "lockstep" approach as the "judicial clone approach").

35. *See* Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 638 (1994).

36. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982) (observing that "[d]ivergent interpretations [may be] unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same").

37. 672 P.2d 255 (Mont. 1983).

38. *Id.* at 256 (citations omitted).

39. *Id.* at 258 (citations omitted).

40. TARR, *supra* note 6, at 180. In Florida such constitutional congruence has been imposed through a 1982 constitutional amendment requiring that the state cognate of the Fourth Amendment "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST, art. 1, § 12.

B. The Criteria Approach

A second approach to state constitutional interpretation utilizes a set of interpretive criteria for determining whether deviation from U.S. Supreme Court precedent is warranted in a particular case. This approach advises that state courts assume "the dominance of federal law and focus directly on the gap-filling potential of state constitutions."[41] Accordingly, in a given case the state court should look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion — for example, unique state history or state experience — justifies departure from federal precedent.[42]

In his concurring opinion in *State v. Hunt*,[43] New Jersey Supreme Court Justice Alan Handler endorsed the criteria approach and endeavored to develop a list of factors to steer the state court's determination whether to deviate from U.S. Supreme Court precedent in a given case.[44] *Hunt* concerned the question of whether individuals had a constitutionally protected privacy interest in personal telephone records, an interest that the U.S. Supreme Court had concluded in *Smith v. Maryland*[45] was not protected under the federal constitution.[46] The New Jersey court, interpreting the state constitution, reached the contrary conclusion. The majority did not elaborate the basis upon which it declined to adopt the U.S. Supreme Court's reasoning in addressing the state constitutional issue; in response, Justice Handler noted that, while "there is no mandate that a state court explain itself when it invokes the state charter to achieve a result unavailable under federal law,"[47] the court should rely upon opinions of the U.S. Supreme Court as "important guides on the subjects which they squarely address."[48]

Thus implicitly acknowledging that the state court should first review the protections available under the federal constitution in a given case, Justice Handler enumerated the criteria to be considered in determining whether the state constitution provides more expansive protection. These criteria include: (1) textual language —

41. *Developments*, *supra* note 33, at 1357.
42. TARR, *supra* note 6, at 182.
43. 450 A.2d 952 (N.J. 1982).
44. *See id.* at 965-67.
45. 442 U.S. 735 (1979).
46. *Id.* at 745.
47. *Hunt*, 450 A.2d at 964 (Handler, J., concurring).
48. *Id.*

whether the phrasing of the state constitutional provision significantly differs from its federal counterpart; (2) legislative history of the state constitutional provision; (3) preexisting state law, which may suggest "distinctive state constitutional rights;" (4) state traditions, which may emphasize greater protections for individual rights; and (5) public attitudes, which may inform the state constitutional inquiry.[49] Justice Handler reasoned that "[t]he explication of standards such as these demonstrates that the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."[50]

Other state courts have adopted similar criteria to govern the process of state constitutional interpretation of cognate provisions. The Connecticut Supreme Court, for example, has looked to whether there is some reason to depart from U.S. Supreme Court precedent by reference to a variety of factors, similar to those enumerated by Justice Handler, including text and history of the state constitutional provision.[51] And in Washington, the state supreme court has used like factors as interpretive benchmarks, "to the end that [the court's] decision will be made for well founded legal reasons and not by merely substituting [the court's] notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[52] Note, however, that the criteria need not be uniform from jurisdiction to jurisdiction; in Illinois, for example, the Supreme Court will construe similar constitutional provisions differently only when "the language of the State constitution, or where debates and committee reports of the constitutional convention show that the Framers intended a different construction . . . ."[53]

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49. *Id.* at 965-67.

50. *Id.* at 967. Applying these standards to the case at hand, Justice Handler concluded that the New Jersey Constitution did provide greater privacy rights in regard to telephonic communication:

> The protection we now accord telephone billing records follows the course long set under New Jersey law . . . . [O]ur State has been a strong proponent in the area of protecting telephonic communications. We have safeguarded the privacy of such communications to the broadest extent possible. Consistent with this longstanding statutory and legal tradition of extending the utmost solicitude to telephonic communications, I am satisfied that the New Jersey Constitution protects the privacy of all aspects of telephone use, including toll billing records.

Id. at 969.

51. *See* State v. Miller, 630 A.2d 1315, 1324 (Conn. 1993).

52. State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986).

53. People v. DiGuida, 604 N.E.2d 336, 342 (Ill. 1992).

C. The Primacy Approach

The primacy approach entails at least two commitments on the part of the state court: first, to begin its constitutional analysis with the text of the state constitution and second, to rely upon federal decisional law only for guidance in illuminating the issues presented by analysis of the state constitutional text. Hans Linde, formerly of the Oregon Supreme Court and an originator of the primacy approach, suggests that principles of judicial restraint mandate the first commitment: the state appellate court should begin its analysis in a criminal case with the state constitution, when the issue has been raised, because there is no deprivation of a defendant's Fourteenth Amendment rights when the relief she seeks may be found in the state constitution.[54] Only if relief is not found in the state charter should the court then examine [the] conviction from a standpoint of federal constitutional law.[55] The primacy approach thus alleviates legitimacy concerns by making "[r]ecurrence to state law... an obligation, not a choice."[56]

A commitment to the primacy approach also requires the state court to regard the state constitution as the U.S. Supreme Court regards the federal constitution — that is, as a text with a particular and significant meaning for the state's citizens.[57] The second commitment to the primacy approach accordingly mandates that state courts employ the familiar tools of constitutional interpretation in determining the meaning of a state constitutional provision in light of the facts of the case; those tools include reference to textual language, constitutional structure, original intent, the history of the provision at issue, and previous interpretations of similar textual provisions by

54. *See* Linde, *supra* note 4, at 383; John W. Shaw, *Principled Interpretations of State Constitutional Law – Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1025-26 (1993). *See also* Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim."). As the Maine Supreme Judicial Court has stated:

> Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution.

State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984) (citation omitted).

55. *See* Linde, *supra* note 4, at 383.

56. TARR, *supra* note 6, at 184.

57. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 774 (1992).

other courts.[58] On this approach, then, any congruence between state and federal standards in a given case reflects, at best, coincidence.[59]

In practice, few state supreme courts routinely undertake a state constitutional analysis prior to a federal constitutional analysis, or rely upon federal precedent only for guidance.[60] Concurring in *State v. Hunt*, discussed above,[61] New Jersey Supreme Court Justice Pashman urged his colleagues to adopt this approach, arguing that, "[a]s a general rule, this Court should construe the New Jersey Constitution as it considers appropriate, taking into account the various factors that constitute sound constitutional analysis."[62] The court instead adopted the criteria approach, as elaborated by Justice Handler.[63]

Still, certain state courts have endeavored consistently to employ the primacy approach.[64] In *State v. Ball*,[65] for example, the New Hampshire Supreme Court addressed the question whether the warrantless seizure of an object from an ashtray in the defendant's car violated the New Hampshire and the United States Constitutions. Mindful of the U.S. Supreme Court's decision in *Michigan v. Long*, the New Hampshire court declared that it would first consider the state constitutional issue:

> Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims. Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.[66]

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58. *See* Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75, 79-105 (1993) (cataloguing state constitutional arguments, including the following: arguments from text, history, logic, academia, structure, policy, foreign courts, doctrine, legislative and social facts, and practical arguments); Linde, *First Things First*, *supra* note 4, at 380, 392 (discussing forms of state constitutional argument).

59. *See* Morawetz, *supra* note 35, at 639.

60. The task of developing a truly independent state constitutional jurisprudence demands "heroic efforts" on the part of state courts. *See* TARR, *supra* note 6, at 185.

61. *See supra* notes 43-50 and accompanying text.

62. State v. Hunt, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring).

63. *See* State v. Williams, 459 A.2d 641, 650-51 (N.J. 1983) (opinion of Handler, J.). *See also* Williams, *supra* note 5, at 1022-23.

64. *See* Shaw, *supra* note 54, at 1026.

65. 471 A.2d 347 (N.H. 1983).

66. *Id.* at 351.

As a matter of constitutional interpretation, the court emphasized that its citation to federal or other state court opinions in construing the New Hampshire Constitution should not be construed as an intent by the court to be bound by those decisions.[67] True to its word, the court analyzed the issue by addressing the text and historical interpretation of New Hampshire's prohibition against unreasonable searches and seizures, and concluded there was no need to reach the federal constitutional issue.[68]

D. A Choice of Method

None of these approaches to state constitutional interpretation has escaped criticism. Some of the criticism is based upon sovereignty concerns. Recall that in *State v. Jackson*, a majority of the Supreme Court of Montana determined that the limit of the state constitutional cognate of the Fifth Amendment should be defined by reference to the U.S. Supreme Court's Fifth Amendment jurisprudence.[69] In dissent, Justice John Sheehy challenged the lockstep approach and accused the majority of allowing the U.S. Supreme Court to intrude "upon the rights of the judiciary of this sovereign state."[70] Pursuing the sovereignty issue, the justice continued: "the United States Supreme Court has no business contravening the final decisions of a state judiciary where no federal right guaranteed to all citizens has been offended."[71] In response to a similar ruling by the Texas Court of Criminal Appeals, one judge called upon his brethren "to reaffirm that this Court and all appellate courts of this great State of Texas constitute an independent appellate judiciary, and do not exist, when it comes to interpreting the Constitution and laws of this State, solely to mimic decisions of the Supreme Court of the United States."[72]

Apart from the issue of state sovereignty, the interest in uniformity that animates the lockstep approach has also received criticism. Professor Tarr has questioned the claim that uniformity

67. *See id.* at 352.

68. *See id.* at 353-354.

69. *Supra* notes 37-40 and accompanying text.

70. State v. Jackson, 672 P.2d 255, 260 (Mont. 1983) (Sheehy, J., dissenting).

71. *Id.* at 261.

72. Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (Teague, J., dissenting). The Texas Court of Criminal Appeals has since ruled that, when analyzing search and seizure questions under the state constitution, it "will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue." Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). *See also* Burnett & McCabe, *supra* note 58, at 105-06.

would simplify the task of government officials. First, state officials need to respect only one standard, the most rights-protective; in a given case, this standard may derive from the state or the federal constitution, but it remains, nonetheless, a single standard.[73] Second, the wholesale adoption of a federal standard does not necessarily produce greater clarity in the law: given the U.S. Supreme Court's struggle to articulate coherent principles in such areas as search and seizure, there is no reason to believe in theory or expect in practice that federal standards will be inherently easier to comprehend and apply.[74]

Nor is the criteria approach immune from criticism. Robert Williams has argued that the criteria approach is based upon a mistaken notion — namely, "that interpretations of the Federal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions."[75] An advocate of the primacy approach, Professor Williams maintains that while the criteria identified by Justice Handler in *Hunt* and the Washington Supreme Court in *Gunwall*[76] should serve "as important guides for scholars, courts, and advocates" these criteria should not limit "state court authority to disagree with Supreme Court constitutional analysis even if none of the factors are present."[77] At bottom, Williams objects to blind adherence to U.S. Supreme Court reasoning by state courts "merely because of the United States Supreme Court's institutional position as the highest court in the land for the resolution of federal constitutional claims."[78]

The primacy approach, too, has its critics. Indeed, notwithstanding the state court's independent authority in respect to its own constitution, commentators and jurists contend that state courts should defer to U.S. Supreme Court interpretations absent some principled basis for distinguishing otherwise textually indistinguishable constitutional provisions. James Gardner, for example, has criticized courts that purport to employ a primacy approach, like the New Hampshire Supreme Court, for failing to develop their state constitutional decision-making through a "discourse of distinctness" — that is, through "a language and set of

73. *See* TARR, *supra* note 6, at 181 n.32.

74. *See id.*

75. Williams, *supra* note 5, at 1046.

76. *See supra* notes 43-52 and accompanying text.

77. Williams, *supra* note 5, at 1048.

78. *Id.* at 1054.

conventions enabling participants in the legal system to argue that provisions in the state constitution mean something different from their federal counterparts."[79]

The opinions of numerous state court judges reflect these criticisms, particularly Gardner's view. New Hampshire Supreme Court Justice Stephen Thayer, for instance, criticized his brethren for failing to cleave to U.S. Supreme Court precedent in the absence of a distinctive ground upon which to conclude that broader protections inhere in the New Hampshire Constitution:

> Having the power to interpret some provisions as providing greater protection . . . does not mandate that we must interpret our constitution more broadly, nor does it give us permission to invent new constitutional protections that some may argue are based on the whim of the majority.
>
> .... Reactive rulings, utterly lacking in analysis or sound historical basis, are not a sound manner of creating constitutional jurisprudence.[80]

Similarly, Massachusetts Supreme Judicial Court Justice Charles Fried, questioning the commitment of the Massachusetts court to establishing a jurisprudence of distinctness, suggested that his fellow justices pause before interpreting identical textual provisions differently, and ask themselves: "Is this decision wise, and — far more to the point — is there something in our Constitution that authorizes us to announce this anomalous rule and, by styling it a constitutional judgment, to put it beyond the reach of the ordinary processes of government?"[81]

At a basic level, of course, criticism of each interpretive approach is concerned, overtly and covertly, not simply with the legitimacy concerns unique to the interpretation of cognate provisions, but with the traditional counter-majoritarian concerns about judicial review that such interpretation implicates[82] — particularly the potential for independent state constitutional interpretation to confer broad rights upon individuals at the expense of a state's democratic processes.[83]

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79. Gardner, *supra* note 57, at 778.

80. Canelo, 653 A.2d at 1112 (Thayer, J., dissenting).

81. Commonwealth v. Gonsalves, 711 N.E.2d 108, 123 (Mass. 1999) (Fried, J., dissenting). *See also* Commonwealth v. Guiney, 582 N.E.2d 523, 527 (Mass. 1991) (Nolan, J., dissenting) (criticizing majority for failing to articulate "any standard used to deviate from the position of the Supreme Court").

82. *See supra* note 31 (discussing traditional counter-majoritarian concerns).

83. *See, e.g.*, Gonsalves, 711 N.E.2d at 123 (Fried, J., dissenting). *See also* People v. Scott & People v. Keta, 593 N.E.2d 1328, 1356 (N.Y. 1992) (Bellacosa, J., dissenting) (criticizing majority in search and seizure case for elevating "subjective expectations of

With this potential in mind, lockstep advocates seek to prevent its occurrence by urging state courts to decline to exercise their authority to interpret the state constitution differently from the U.S. Constitution, just as critics of the primacy approach, like Justice Thayer, sound the alarm when state court judges appear to rule differently because they dislike the U.S. Supreme Court's (typically narrower) interpretations of federal law. At the same time, primacy advocates continue to exult the power of state courts "to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution."[84]

At another level, a deeper concern with independent state constitutionalism emerges. This criticism focuses upon a perceived fatal shortcoming of state constitutional interpretation pursuant to the criteria and primacy approaches: that there is no real reason for a state court, under either approach, not to respect a prior interpretive position of the U.S. Supreme Court. In Gardner's view, for instance, the development of an independent state constitutional "discourse" may well be impossible, given the increasing lack of diversity of citizens among the states.[85] He argues that state courts should defer to the U.S. Supreme Court's interpretation of correlative provisions because the state constitutions do not, in fact, represent the fundamental values of a state's citizenry; rather, correlative provisions appear to reflect shared national values, the meaning of which the U.S. Supreme Court has authoritatively determined.[86] And so, in his

privacy to sovereign status by judicial fiat"); Commonwealth v. Blood, 507 N.E.2d 1029, 1040 (Mass. 1987) (Nolan, J., dissenting) (complaining about the majority's "liberal interpretation" of state constitutional parallel to the Fourth Amendment); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENVER U. L. REV. 85, 98 (1985) (urging state court judges to exercise restraint because "[t]he line between judicial functions and legislative functions is a thin one, and activist state courts must avoid stepping into the legislature's shoes"). *But see* Tarr, *supra* note 6, at 174 (arguing that the "'counter-majoritarian difficulty' has been a less significant consideration in state constitutional law [than in federal constitutional law]").

84. Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991). *See also* Brennan, *supra* note 1, at 491.

85. *See* Gardner, *supra* note 57, at 828-30 (arguing that the view that state constitutions reflect the fundamental values of the state is "contradictory, counterfactual, and potentially dangerous"). *See also* Kahn, *supra* note 19, at 1160 (describing the perception of the state as a defined political community as "[nothing] more than an anachronism or romantic myth").

86. *See* Gardner, *supra* note 57, at 823-32. Gardner writes: "The tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level." *Id.* at 828.

estimation, "it is simply implausible that [different state and federal] constitutional doctrines can be attributed to differences in the fundamental character and values of the people of the states."[87] What Gardner seems to suggest is this: notwithstanding that state courts have the authority to interpret parallel provisions differently, that is not reason enough, or justification enough, to do so when those provisions simply "shadow" their federal counterparts.[88]

And so the question remains: taken together, do these criticisms suggest that state courts should adopt the lockstep approach as a jurisprudential norm, or reserve deviation from that norm under the criteria approach for those rare cases in which, say, a particularly compelling historical reason militates in favor of independent review of the state constitution? Answering this question requires that we take a step back — back from the sovereign independence of the states, back from the political implications of the new judicial federalism that so clearly occupy the minds of many state court judges and critics, and back from the state and federal bills of rights themselves. We must revisit the structural provisions of the federal constitution, and the implications of those provisions. For implicit in the constitutional design of the federal system lies a respect for the importance of dialogue that should inform the choice of interpretive methodology in the state constitutional context. It is to that constitutional value of dialogue that I now turn.

II. The Constitutional Value of Dialogue

Nearly a decade after his seminal *Harvard Law Review* essay, Justice Brennan delivered the James Madison Lecture at New York University School of Law. His subject was "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights."[89] In his lecture, Justice Brennan recounted tales of the incorporation battles, noting that the application of the Bill of Rights to the states through the Fourteenth Amendment necessarily involves determinations as to the content of the rights contained

87. *Id.* at 826. *But see* Shapiro, *supra* note 31, at 393 (arguing, contrary to Gardner, that "[t]he state identity that is important for constitutional interpretation... is constituted not by the beliefs of the population of the state, but rather by the ideals defined by the constitution itself").

88. *See* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. L. REV. 475, 488-89 (1996) [hereinafter *States-as-Laboratories*]; James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1054 (1993).

89. Brennan, *supra* note 4.

therein.[90] He lamented the "unmistakable trend in the Court to read the guarantees of individual liberty restrictively,"[91] and he reaffirmed his conviction that states should, in his words, "step into the breach."[92] Viewing the federal Bill of Rights as the "floor of protection," Brennan envisioned a "growing dialogue between the Supreme Court and the state courts on the topic of fundamental rights."[93]

Justice Brennan did not elaborate on the nature of this "growing dialogue," or offer evidentiary support for its existence. In this Part, I seek to define dialogue as an expectation of our constitutional order and as a necessary implication of federalism, a complement to the complex system of checks and balances. An exploration of the constitutional value of dialogue requires, first, some understanding of the architecture of "dialogue." Next comes discussion of how the structural relationships between and among the organs and branches of the state and federal governments, as established by the U.S. Constitution, reflect an appreciation for the beneficial effects of dialogue.

A. The Architecture of Dialogue

As a foundational matter, we must define "dialogue" outside the context of legal argument. "In certain quarters," John Durham Peters has observed, "dialogue has attained something of a holy status. It is held up as the summit of human encounter, the essence of liberal education, and the medium of participatory democracy."[94] I am interested here in examining the architecture of this most revered form of communication, particularly its "regulating lines" — "the guiding thoughts, the connections, the happy coincidences, that make up its design."[95] As the regulating lines of a building reflect the geometry of its form, so, too, the structure of dialogue reflects its value as a means, mode, and style of communication.

At its most basic level, the term "dialogue" refers to an exchange of meaning across space. As Robert Grudin has explained in his thoughtful essay on the subject, dialogue has three conditions:

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90. *See id.* at 546-47.

91. *Id.* at 547.

92. *Id.* at 548.

93. *Id.* at 550.

94. JOHN DURHAM PETERS, SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION 33 (1999).

95. JONATHAN HALE, THE OLD WAY OF SEEING 45 (1994). Hale notes that a building's regulating lines "are usually, but not always, hidden . . . ." *Id.*

- two or more entities capable of discourse,
- a physical or mental space between these entities, separating them, distinguishing them from each other, and
- a reciprocal exchange of meaning (*logos*) by these entities across this space.[96]

In Grudin's view, the critical ingredients to dialogue are reciprocity and strangeness. "Reciprocity" refers to an open-ended "give and take" between two or more minds, while "strangeness" implicates what Grudin calls "the shock of new information—divergent opinion, unpredictable data, sudden emotions, etc. — on those to whom it is expressed."[97]

To illustrate the architecture of dialogue, let us consider one of Grudin's examples, Shakespeare's *Hamlet* — with apologies to both Grudin and Shakespeare in adapting this example to the purposes of this paper. Grudin reviews unrelated scenes from *Hamlet* to explicate the nature of dialogue.[98] These passages include the scene in which Hamlet, feigning madness, discusses theater with Polonius:

> HAMLET. My lord, you played once i' the university, you say?
>
> POLONIUS. That did I, my lord, and was accounted a good actor.
>
> HAMLET. What did you enact?
>
> POLONIUS. I did enact Julius Caesar. I was killed i' the Capitol; Brutus killed me.
>
> HAMLET. It was a brute part of him to kill so capital a calf there.[99]

Grudin includes a later scene, in which the Gravedigger (the First Clown) attempts to explain a legal point to his companion: "For here lies the point: if I drown myself wittingly, it argues an act; and an act hath three branches: it is, to act, to do, and to perform . . . ."[100] As Grudin explains, in these passages, "each character becomes part of a large yet subtle dialogue, engaged in by most of the main characters, on the subject of human action."[101]

Breaking these passages down using Grudin's taxonomy, in each scene there occurs an exchange that satisfies the definition of "dialogue." Each scene features two entities separated by mental and

96. ROBERT GRUDIN, ON DIALOGUE: AN ESSAY IN FREE THOUGHT 11 (1996).

97. *Id.* at 12.

98. *See id.* at 42.

99. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2. (Cambridge ed. 1936).

100. *Id.*, act 5, sc. 1.

101. Grudin, *supra* note 96, at 43 (footnote omitted).

physical space exchanging meaning through language: Hamlet and Polonius exchange different meanings on the nature of Polonius' theater career, while the gravedigger counters his companion by grasping toward a workable definition of "action." Each scene also contains the requisite elements of strangeness and reciprocity: the strangeness that causes Hamlet to reflect on the meaning, not of Polonius' fictional death scene, but the actual death and perfidy that has come to Elsinore — and to throw it back to Polonius by commenting on his "brute part;" and the strangeness of the notion that causes the gravedigger to reconsider his views on the meaning of action and attempt again to define its meaning for his companion.

These smaller dialogues reflect a larger, interior dialogue about the meaning of action that the author is having with himself, and also a still larger dialogue, external to the play, that the author is having with the audience or the reader on the same subject. As Grudin puts it, Shakespeare's *Hamlet* embodies the author's fascination with the idea of action in all its permutations: "he wants us to see it from all its sides, pagan, Christian, psychological, sexual, ethical, political, artistic.... Shakespeare's intention in this copious display is not to simplify and conclude but rather to open up the subject in its living complexity: to realize artistically its latent issues."[102]

To return to the subject of new judicial federalism: it would seem that the purpose of dialogue, on Grudin's understanding, is at odds with the judicial function. For the concern of the courts, in many respects, *is* to simplify and conclude — to determine conclusively a dispute of facts or a dispute of law between persons or entities who share relationships external to the judicial process. This is too superficial an analysis, however, because elemental dialogue also appears in the relationships between and among the institutional entities that may appear before the court, and dialogue, at another level, serves an important functional end in respect to the judicial process as well. Indeed, the dialogic process animates the regulating lines of relationships established by the U.S. Constitution itself, as we shall next see.

B. Dialogue and the Constitution

The United States Constitution is replete with dialogic implications. Like *Hamlet*, for instance, the U.S. Constitution is a text that speaks to its audience, albeit through a singular voice. That

102. *Id.* at 44.

voice, as the writer E.L. Doctorow has observed, "is a quiet voice. It does not rally us; it does not call on self-evident truths; it does not arm itself with philosophy or political principle; it does not argue, explain, condemn, excuse or justify."[103] Inspired by Sanford Levinson,[104] Doctorow likens the Constitution to a "sacred text of secular humanism," and suggests that the reader interacts with the text accordingly — with an understanding that the text challenges the reader to appreciate political arrangements that are grand in design and broad in scope, the details of which compel still further dialogue among citizens on the meaning and continued relevance of those arrangements.[105]

This informal dialogue among citizens is also a tacit expectation of the American constitutional order. Dialogue among citizens leads to deliberative discourse in the proverbial public square, that "arena in which our public moral and political battles are fought."[106] In this way, informal dialogue among citizens lies at the foundation of the democratic process, as such dialogue on public policy concerns, influenced by the moral, pragmatic, and philosophical arguments of citizens and citizen groups, ultimately leads to lawmaking — or not to lawmaking, as the case may be. The Framers, contemplated that deliberative discourse, through dialogue and discussion, would serve as a necessary predicate to the operation of the machinery of government.[107]

That machinery is the primary subject of the Constitution of 1789. As discussed above, the starting point in debates about the new judicial federalism has been the state and federal bills of rights, with passing reference to notions of federalism. To appreciate the value of dialogue in the American constitutional order, we must attend to those provisions of the federal constitution that limn the machinery and institutional relationships of government, bearing in mind that the structure of the Constitution should serve as an important

103. E.L. Doctorow, *A Citizen Reads the Constitution*, in JACK LONDON, HEMINGWAY AND THE CONSTITUTION: SELECTED ESSAYS 1977-1992, at 125 (1993).

104. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

105. Doctorow, *supra* note 103, at 126.

106. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 51 (1993).

107. *See* CASS SUNSTEIN, THE PARTIAL CONSTITUTION 134-35 (1993) (discussing principles of deliberative democracy). *See also* Lawrence Friedman & Neals-Erik William Delker, *Preserving the Republic: The Essence of Constitutionalism*, 76 B.U. L. REV. 1019, 1049 (1996) (book review) (arguing that the mediating effect of deliberative discourse "ensures that fickleness and selfishness are not the bellwethers of American governance").

touchstone in matters of constitutional interpretation.[108]

Notwithstanding their familiarity, it is worth reviewing some of the essential constitutional provisions that establish horizontal federalism in the form of a tripartite federal government, and that illuminate the federal-state relationship. Following the Preamble, Article I fixes the legislative power in the Congress, a bicameral legislature composed of the Senate and the House of Representatives.[109] Article I also addresses the specific powers of the Congress,[110] and details the procedure for enacting laws. That section states, in part:

> [1] All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.
>
> [2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.[111]

Article II locates the executive power of the federal government in the Office of the President,[112] while Article III covers the judicial branch, vesting the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[113] In Article VI, the Constitution refines the horizontal relationship between the federal government and the states, mandating that, where federal and state law conflict, federal law shall be supreme:

This Constitution, and the Laws of the United States which

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108. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 11 (1968) (advocating constitutional interpretation that sounds "in the structure of the federal union, and in the relation of federal to state governments"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 752 (1999) (discussing the use of structural argument in constitutional interpretation).

109. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

110. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

111. U.S. CONST. art. I, § 7, cl. 1-2.

112. *See* U.S. CONST. art. II, § 1, cl. 1 ("The Executive Power shall be vested in a President of the United States of America.").

113. U.S. CONST. art. III, § 1.

> shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[114]

Notably, this constitutional provision evinces an understanding that state judges will be expected to take account of federal law.

The provisions of Articles I, II, and III establish specific institutional relationships within the federal government and, with Article VI, inform the relationship that flows from the horizontal federalism that distinguishes the authoritative spheres of the state and federal governments. Within these constitutional provisions, and others, lies an expectation of dialogue more immediate than the dialogic relationship between author and reader, and more definite than the inherent deliberative expectations that animate American democracy. Let us call this the formal expectation of dialogue, which can be illustrated by examining some of the relationships established by the Constitution in view of Grudin's definition of dialogue; these examples demonstrate that dialogue is a necessary implication of the structural relationships fixed by the Constitution and, therefore, a constitutional value of some weight.

Consider, first, the procedures for enacting law at the federal level. The Congress and the President are the institutional entities in the lawmaking relationship — setting aside, for the moment, the judiciary's role in reviewing the laws that result from the lawmaking process. Deliberative discourse results in pressure to enact into law some social policy — say, a law expanding the scope of the Environmental Protection Agency's (EPA) enforcement powers under the Clean Water Act.[115] Pursuant to Article I, this legislation originates with a member of the House of Representatives and, after committee action, is ultimately approved by a majority of the membership of the House. It then moves to the Senate, where changes are made that require the attention of a conference committee to resolve the differences of the chambers. When the final bill is deemed satisfactory by both Houses, it goes back to both chambers for approval and is then presented to the President for his signature. The President, believing that the additional regulatory power the new law would give to the EPA is unnecessary, vetoes the

114. U.S. CONST. art. VI, cl. 2.

115. *See* Federal Water Pollution Control Act of 1972, §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994) (commonly referred to as the Clean Water Act).

bill and returns it to the House of Representatives.

This is a crude illustration of lawmaking,[116] but sufficient for our purposes to show that the procedures established by Article I necessarily contemplate dialogue among federal institutional actors. For the lawmaking process to function, discussion must occur about the meaning of a text — in this case, the proposed law amending the Clean Water Act. First, there must be dialogue among members of the House in committee and the full chamber; second, there must be dialogue between the House and members of the Senate; third, there must be dialogue between the Senate and the House; fourth, there must be dialogue between the Congress and the President; and, finally, there must be dialogue between the President and the House.[117]

At each level, then, we have at least two institutional actors separated by a mental space (perhaps conservative versus liberal, Republican versus Democrat), and an exchange of considered opinion about the meaning of an evolving text, the proposed legislation. At each level, the requisite elements of reciprocity are also present — for example, the back and forth between Congress and the President — as well as the "shock" of new information — namely, the amendments and proposed revisions to the substance of the new law as embodied by the texts at each successive and recurrent level. The participants in the dialogue are, at each level, able to speak to one another because they draw from a universe of shared terms — in the case of lawmaking, those terms may reflect the languages and grammar of social policy, economics, and political choice.[118]

Next, consider the dialogic expectations that follow from judicial review. Returning to the lawmaking hypothetical sketched above, suppose that Congress passes the proposed amendment to the Clean Water Act, which the President then signs into law. The EPA, following its mandate, in the course of time brings an enforcement action against a large chemical manufacturing concern for allegedly polluting "waters of the United States."[119] The EPA asserts that the

116. I base this description of hypothetical lawmaking upon James Q. Wilson's excellent textbook summary. *See* JAMES Q. WILSON, AMERICAN GOVERNMENT: INSTITUTIONS & POLICIES 294-302 (3d ed. 1986).

117. And, of course, there will be sub-dialogues among individuals, constituencies, and interest groups before, after, and during the formal dialogues contemplated by the constitutional lawmaking process.

118. This is not to say, of course, that all the participants in the dialogue will appreciate one another's contributions to the dialogue.

119. 33 U.S.C. § 1362(7) (1986) (defining "navigable water" for purposes of the Clean

water in question, in this case a wetlands area removed from any navigable stream or waterway, is within the contemplation of the Clean Water Act. The manufacturing concern decides to challenge the new law on Commerce Clause grounds,[120] and a U.S. District Court sustains the challenge. The case eventually works its way to the U.S. Supreme Court, which must address the constitutional question: does Congress have the authority under the Commerce Clause to regulate the wetlands in question?

At this point — admittedly, a relatively high level of abstraction — a dialogue occurs between the political branches and the Supreme Court on the meaning and application of constitutional text — namely, the Commerce Clause — in a specific situation. The political branches of the federal government initiated this dialogue by passing the new law; the case at hand presented the Supreme Court with an opportunity to respond, to join the dialogue.[121] The Court will review the law and determine whether it complies with the Constitution; in other words, the Court will reply to the political branches, one way or the other, with its determination as to the meaning of the constitutional text.

Thus, in the process of constitutional litigation there occurs between these institutional actors an exchange of meaning across physical and mental space and, therein, the reciprocity that qualifies the exchange as dialogue. The necessary strangeness is also present, in the assertion by the attorneys for the government that the Constitution allows this instance of lawmaking; and in the Court's reply, that it does or does not. If, in the Court's opinion, the Constitution does not allow for such a law, the political branches may react to this shock of new information and continue the dialogue by proposing new legislation to avoid the constitutional difficulty, and so on.[122] As in the example of lawmaking, the parties to this dialogue —

Water Act).

120. *See* U.S. CONST. art. I, § 8, cl. 3.

121. *See* U.S. CONST. art. III, § 2, cl. 1 (allowing federal courts to hear only "cases" or "controversies").

122. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 261 (1962) (observing that the court "often provokes consideration of the most intricate issues of principle by the other branches, engaging them in dialogues and 'responsive readings'"); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655-59 (1993) (discussing the "interactive," dialogic process of interpreting the Constitution). Just as lawmaking will inspire new dialogues, so, too, new exchanges will spin from the Supreme Court's opinion – between the government and the lower courts; between lower courts and higher courts; between courts and commentators; between commentators and each other; between professors and students; and so on, a bounty of forking thoughts and

the government through its attorneys on one side, the justices on the other — draw from a shared universe of terms to shape and frame their contributions to the exchange — here, the language of constitutional argument.[123]

Finally, consider the state-federal dialogue as an expectation of Article VI. Suppose, to remain in the context of environmental regulation, that a state and not the federal government passed a clean water law, and that the state counterpart to the EPA sought to enforce this law against a manufacturing concern by way of an action in state superior court. And suppose the manufacturing concern defended itself on the argument that the state law is at odds with the Clean Water Act to the extent it would impede enforcement of the latter and, therefore, should be deemed preempted under Article VI. The case works its way through the state courts, which deny the preemption challenge, to the U.S. Supreme Court, which must resolve the Supremacy Clause issue. Thus, in the Supreme Court, a dialogue about the meaning of constitutional text is joined between the state, via its attorneys, and the justices of the Supreme Court — a dialogue whose structure parallels that of the dialogue between the federal government and the court in the case of judicial review of federal legislation, and whose participants draw from the same universe of shared terms in articulating their contributions to the dialogue.

In none of these examples should dialogue be regarded as a constitutional mandate. Bills, after all, do not have to be submitted in Congress — though if they are, the constitutional procedures must be followed; and constitutional challenges to federal and state legislation do not have to be brought — though if they are, a dialogue ensues. And when in each instance a dialogue is joined between institutional actors, such as Congress and the President, the Supreme Court and the political branches of the federal government, or the Supreme Court and a state, the dialogue serves important mediating functions: to test the validity of federal or state governmental action, and so to prevent the enforcement of invalid laws; to explore the ramifications of federal or state governmental actions, and so to assess the integrity of governmental actors; and, as a result of these inquiries, potentially to influence debate about future actions of the federal and state

reflections. *Cf.* Jorge Luis Borges, *The Garden of Forking Paths*, in JORGE LUIS BORGES, COLLECTED FICTIONS at 119 (Andrew Hurley trans. 1998).

123. For discussion and examples of dialogue between the judiciary and the legislature about the scope of constitutional mandates, see LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 247-51 (1988).

governments.

So understood, dialogue between and among institutional federal and state governmental actors about government is not so different from dialogue between persons about affairs more personal than the quiddities of democracy. As Grudin observed in regard to dialogue between individuals, the dialogic requisites of reciprocity and strangeness foster "an evolutionary process in which the parties are changed as they proceed."[124] Like individuals, institutional actors may be changed in their views as a result of dialogue, and react accordingly: Congress or a state legislature might consider revising proposed legislation, or seek an alternative route to achieving its public ends; the Court might consider the new statute in resolving another case before it, or deny its application, and in either case create a precedent that has interpretive potential as a subject or term of argument in yet another, incipient dialogue.

Viewed as a mediating influence, moreover, dialogue functions as a corollary to the constitutional regime of checks and balances between and among the branches and departments of the state and federal governments. By virtue of its give and take structure, dialogue, once joined, serves to curb institutional actions and ambitions, for it naturally pushes participants in the dialogue — and perhaps observers as well — to reconsider closely held positions. As David Shapiro has remarked, dialogue emphasizes the need "for continuing accommodation of competing, and in many instances, equally compelling, considerations."[125]

This understanding of dialogue — as an adjunct to federalist principles — finds support in the views of the Framers. Alexander Hamilton saw the system of inter-institutional checks, which necessarily would require dialogue between and among the branches of the federal government, as "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."[126] James Madison advised that,

> [i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is, no doubt, the primary controul on the government; but experience

124. Grudin, *supra* note 96, at 12.

125. DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 108 n.4 (1995).

126. THE FEDERALIST NO. 9 (Alexander Hamilton).

has taught mankind the necessity of auxiliary precautions.[127]

In light of Madison's warning, the necessity for dialogue as a predicate to acts of lawmaking and governance may be viewed as an auxiliary precaution, another mechanism by which institutional ambitions are checked and government is itself controlled. It is in this respect that dialogue both flows from and reinforces the regulating lines of the Constitution's structural arrangements. And it is in this respect that dialogue may similarly influence constitutional discourse in the relationship between the U.S. Supreme Court and the state courts — the relationship to which we next turn.

III. State-Federal Constitutional Discourse

Justice Brennan was mistaken in his James Madison lecture about the potential limits of the dialogue he espoused, believing that it would comprehend only "experimentation" above the federal floor.[128] In this Part, I seek to explain that the end of dialogue in the state court-federal court relationship need not be the justification of state experimentation above the constitutional floor, as Justice Brennan urged. Rather, the constitutional value of dialogue supports the notion of state constitutionalism as a legitimate interpretive exercise that may potentially strengthen the fabric of constitutionalism generally, by liberating the new judicial federalism from provincialism — regardless of the outcome in a particular case. In other words, state constitutionalism, when viewed through the prism of dialogue, need not necessarily support expansive interpretation of provisions protecting individual rights and liberties. As an initial matter, we must appreciate the avenue by which state courts may embrace the constitutional value of dialogue, and the reasons why they should do so.

A. Invitation to Dialogue: *Michigan v. Long*

State supreme courts, of course, play a role similar to that of the U.S. Supreme Court within the context of the state governmental systems, exercising judicial review in appropriate cases to assess the validity of state executive and legislative actions under the state constitution. In those cases involving claims of individual rights and liberties under parallel provisions of the federal and state constitutions, the state courts also have an opportunity to engage in a

127. THE FEDERALIST NO. 51, at 290 (James Madison).

128. *See* Brennan, *supra* note 4.

dialogue with the U.S. Supreme Court — an opportunity occasioned by the U.S. Supreme Court's invitation in *Michigan v. Long*.[129]

Michigan v. Long concerned the U.S. Supreme Court's jurisdiction to review a Michigan Supreme Court judgment that a *Terry*-type search of an automobile's passenger compartment was unconstitutional.[130] The defendant claimed that the U.S. Supreme Court lacked jurisdiction to hear the case because the Michigan court's judgment rested on an independent and adequate state ground.[131] The U.S. Supreme Court's jurisdictional reach is a function of Article III, which, by the case-or-controversy requirement, precludes the Court from deciding "abstract, hypothetical or contingent questions."[132] Given this constitutional requirement, "if the same judgment would be rendered by the state court" after the U.S. Supreme Court "corrected its views of Federal laws, [Supreme Court] review could amount to nothing more than an advisory opinion."[133]

To avoid this problem, and to resolve the issue for the future, the *Michigan v. Long* Court determined that:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[134]

The Court then instructed state courts to indicate that a judgment rests on an independent and adequate state ground:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[135]

As noted above, state courts have embraced the *Michigan v. Long*

129. 463 U.S. at 1032.

130. *See id.* at 1037.

131. *See id.* at 1037-38.

132. Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). *See also* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-9 (3d ed. 1999) (discussing ban on advisory opinions by the U.S. Supreme Court).

133. Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

134. 463 U.S. at 1040-41.

135. *Id.* at 1041.

requirement to insulate their state constitutional decisions from federal review. The New Hampshire Supreme Court, for example, has stated that when it "cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes," it relies "on those precedents merely for guidance and do[es] not consider [its] results bound by those decisions."[136]

Employing the definition of dialogue with which we have been working, the Supreme Court's opinion in *Michigan v. Long* can be viewed as the beginning of an indeterminate dialogue between the U.S. Supreme Court and the state supreme courts. The U.S. Supreme Court spoke in *Michigan v. Long* to the state courts, indicating its view of the constitutional jurisdictional issues. The state courts responded, and continue to respond, with statements like that of the New Hampshire Supreme Court. There is thus a continuing exchange of opinion between distinct entities about the meaning of text — in this case, the Supreme Court's Article III jurisdiction and the scope of the state court's jurisdiction in a given case. There is the requisite reciprocity in the state court's response clarifying its interpretive position. There is strangeness as well, as the state court must consider the jurisdictional issue in each case in which it faces arguments by counsel raising claims under both constitutions. And, if the case is appealed to the U.S. Supreme Court, that Court must confront this new information in determining whether the state court adequately addressed the jurisdictional issue.

The dialogic implications of *Michigan v. Long* relate to more than just exchanges about this jurisdictional issue. *Michigan v. Long* enables constitutional dialogue between the federal and state courts in a larger sense. It invites state courts to participate in the development of constitutional law by interpreting parallel state constitutional provisions as they will, and not simply by paying blind obeisance to interpretations put forward by the U.S. Supreme Court. This invitation to dialogue supports the legitimacy of state constitutionalism by emphasizing the state court's independent authority to interpret its state constitution.[137] And it expressly connects the state court's state constitutional interpretation to the U.S. Supreme Court's interpretation of the cognate provision of the federal constitution, by creating an opportunity, at an interpretational

136. State v. Ball, 471 A.2d 347, 352 (N.H. 1983). *See also* Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (making a "plain statement" of the adequate and independent state grounds).

137. *See supra* notes 23-24 and accompanying text.

decision point, for the state court to engage in discourse with its federal counterpart about the meaning of shared constitutional text — discourse about such aspects of law and governance as the meaning of liberty, equality, and due process, and "the structures of representative government necessary to achieve these values."[138] Such discourse offers a means by which the U.S. Supreme Court's actions may be assessed, evaluated, and balanced.

This higher-level discourse also fits our definition of dialogue, albeit a dialogue conceived as occurring over greater mental — and temporal — distances. To illustrate, consider *Commonwealth v. LaFrance*,[139] a 1988 case in which the Massachusetts Supreme Judicial Court reviewed the constitutionality of special conditions of probation which required that the probationer "submit to a search of herself, her possessions, any place where she may be, with or without a search warrant, on request of a probation officer."[140] The defendant challenged these conditions under both the Fourth Amendment to the U.S. Constitution and part I, article 14 of the Massachusetts Declaration of Rights.[141] The Supreme Judicial Court indicated that it would resolve the case under the state constitution,[142] and began its discussion with a U.S. Supreme Court case, *Griffin v. Wisconsin*,[143] in which the court had upheld a probation regulation that authorized warrantless searches of probationers if "reasonable grounds" existed to believe contraband was present.[144]

In *LaFrance*, the Supreme Judicial Court accepted, for purposes of article 14, that a reduced level of suspicion could justify a search of a probationer and her premises: "[t]here is a need to supervise such an offender both to aid in the probationer's rehabilitation and to ensure her compliance with the conditions of probation."[145] But, unlike its federal counterpart, the Massachusetts court did not obviate the warrant requirement; persuaded that a warrantless search could not be justified under article 14, the Supreme Judicial Court expressly rejected the U.S. Supreme Court's reasoning that the warrant

138. Kahn, *supra* note 19, at 1148.

139. 525 N.E.2d 379, 380 (Mass. 1988).

140. *Id.*

141. *See id.*

142. *See id.* at 380, 383.

143. 483 U.S. 868 (1987).

144. *Id.* at 876-77 (concluding that "the special needs of Wisconsin's probation system make the warrant requirement impracticable").

145. 525 N.E.2d at 381.

requirement would unduly interfere with the execution of the probation officer's charge. The court, citing Justice Shirley Abrahamson's dissent from the Wisconsin Supreme Court's decision in *Griffin*, stated:

> [T]he issuance of a search warrant on a proper showing of reasonable cause "is not an undue burden on the probation officer and provides the protection for the probationer guaranteed by the constitutions [State and Federal]. Requiring an officer to articulate reasons for the search is a deterrent to impulsive or arbitrary governmental conduct – and that is what the fourth amendment is about."[146]

The Massachusetts court concluded that article 14 "bars the imposition on probationers of a blanket threat of warrantless searches."[147]

The shape of this dialogue follows the familiar pattern. It begins with the U.S. Supreme Court's opinion in *Griffin*; by virtue of *Michigan v. Long*, *Griffin* becomes a starting point for a discussion of the extent of constitutional privacy protections of probationers under the Fourth Amendment — the starting point, in other words, for an exchange of meaning about the text of the Fourth Amendment. Presented with an opportunity to respond in *LaFrance*, the Supreme Judicial Court indicates, pursuant to *Michigan v. Long*, that it will consider the issue as a matter of state law, and the court then analyzes the correlative provision of the Massachusetts state constitution, which contains language virtually identical to the Fourth Amendment in all respects relevant to the probation search issue.[148]

The exchange has the necessary reciprocity, as the Supreme Judicial Court engages the U.S. Supreme Court on its own terms. The exchange also displays the requisite element of strangeness on each side — strangeness from the Supreme Judicial Court's perspective, in the initial interpretation in *Griffin* with which it had to contend, and from the perspective of the federal Court, in the Massachusetts court's differing view as to the meaning and requirements of the same text. The exchange encourages the evolutionary development of constitutional interpretation on the part of each of the participants, to a greater extent in the state court. But

146. *Id.* at 382-83 (quoting State v. Griffin, 388 N.W.2d 535, 545 (Wis. 1986) (Abrahamson, J., dissenting)).

147. *Id.* at 383.

148. *See* MASS. CONST. pt. I, art. 14 (providing, in part, that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions").

this need not be the case: no jurisprudential rule requires the U.S. Supreme Court to ignore state court interpretations of cognate provisions as respectable authority, and the Supreme Court has on occasion relied upon state constitutional decisions for guidance in characterizing federal constitutional obligations.[149] As a theoretical matter, then, the U.S. Supreme Court could continue the *Griffin-LaFrance* dialogue in the next case involving probation searches.

B. Why Dialogue?

Unlike the expectation of dialogue that attends the relationships of federal lawmaking and judicial review of federal and state legislation, *Griffin-LaFrance*-like exchange is entirely at the option of the state court. There is no expectation of dialogue *per se*, because the state court is under no obligation to accept the invitation in *Michigan v. Long*. As a practical matter, state courts may be inclined to respond to *Michigan v. Long* to clarify that they are resolving an issue under the state constitution in order to further the development of state constitutional law for its own sake, consistent with the state supreme court's obligations as the final arbiter of state law.[150] This is a justification for the new judicial federalism that underlies much of the advocacy in its favor.

But, as suggested above, there is another reason why state courts should choose to accept the *Michigan v. Long* invitation and join a dialogue about constitutional text: to fulfill the foundational premise of the constitutional expectation of dialogue as it exists in the context of horizontal federalism — that is, to engage institutional actors in the process of continually expanding and deepening discussion about the meaning of the Constitution and, in particular, its provisions governing civil rights and liberties, thereby potentially checking unmediated institutional action.[151] As the *Griffin-LaFrance* dialogue

149. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (relying upon New Hampshire Supreme Court analysis of state constitutional takings provision in J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12 (N.H. 1981), to differentiate between permissible regulation and unconstitutional taking under the federal constitution). *See also* EDWARD F. HENNESSEY, JUDGES MAKING LAW 58 (1994) (discussing state precursors to Batson v. Kentucky, 476 U.S. 79 (1996)); Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 28 n.12 (1993) (discussing instances in which the U.S. Supreme Court has followed the lead of state courts in expanding the scope of federal constitutional guarantees).

150. *See, e.g.*, Armstrong, *supra* note 26, at 495 (discussing state supreme court judge's obligation to say what state constitution means).

151. *See* McGreal, *supra* note 13, at 1144 (discussing system of checks and balances

illustrates, state courts can contribute to state and federal constitutional discourse by providing an interpretive counterpoint to the U.S. Supreme Court.[152] In the spirit of enabling government to control itself, and of promoting a broader understanding of constitutional rights and responsibilities, state court interpretations of cognate provisions can be beneficially appreciated, analyzed, and contrasted with federal precedent by federal and state court judges, legislators, executive branch personnel, and so on, all to the end of inspiring new informal and formal dialogues about the nature of constitutional mandates and obligations, and the effects of those mandates and obligations in such policy-driven areas as law enforcement.[153]

To be sure, dialogue is not the only value that may guide the discretion of the state court in determining whether to embrace the new judicial federalism, either as a general policy in cases involving cognate provisions or for the purposes of a specific case. Prudential interests in predictability and stability may also influence such determinations. By "predictability and stability," I refer to the value that inheres in constitutional decisionmaking that follows from the reasoned elaboration of principles and concepts articulated in prior cases and is within the comprehension of practitioners and citizens.[154] An interest in predictability and stability may manifest itself in a preference for uniformity in the interpretation of cognate constitutional provisions, particularly in respect to provisions

against faction and ambition in context of horizontal federalism).

152. *Cf.* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (discussing the importance of the "dialectical federalism" that may emerge when the U.S. Supreme Court's silence or broad pronouncements allow an opportunity for federal-state dialogue, as in the habeas corpus context).

153. *See, e.g.*, John T. Broderick, Jr., *Constitutional Criminal Procedure and the New Federalism: Whose Law Applies?*, Address Before the FBI Academy (Sept. 10, 1999) (transcript available with author) (suggesting that federal law enforcement personnel should be aware of state constitutional criminal procedure); *cf.* Renée M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 44 DEPAUL L. REV. 811, 822-24 (1995) (discussing strengths of system of shared responsibilities between federal and state governments in respect to law enforcement).

154. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 110 (1990) (reasoning that "[s]tability, in its many different aspects, is... especially important: individuals and institutions use prior decisional law in their efforts to organize the future"). *See also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-49 (1988) (discussing importance of stability and continuity in constitutional adjudication).

governing law enforcement; such a preference results in state and federal rules controlling the conduct of government officials that are identical in scope and breadth.[155]

Such uniformity has a chimerical quality, based as it is upon the assumption that U.S. Supreme Court doctrine provides some reasonable measure of predictability and stability in a particular area of constitutional law. As Professor Tarr has explained, "given the Supreme Court's well documented difficulties in such fields as religious liberty and search-and-seizure," there may be little reason to expect either predictability or stability to flow from its decisions.[156] That state and federal law may provide different constitutional standards in regard to cognate provisions should not be cause for great alarm, moreover, as there already is significant variation in laws among the fifty states and the federal government.

More importantly, a preference for uniformity effectively denies a state court's sovereign obligation to say what its state constitution means.[157] Recall once again *State v. Jackson*,[158] in which the Supreme Court of Montana declined to undertake *any* independent state constitutional analysis, preferring instead to defer, in the interest of uniformity, to the U.S. Supreme Court's prudential concerns about the privilege against self-incrimination.[159] Such deference for the sake of uniformity is fundamentally inconsistent with the nation's commitment to dual constitutionalism, pursuant to which state courts have a duty to interpret their constitutions that they cannot legitimately delegate to the Supreme Court "by binding themselves to its rulings."[160]

The most profound effect of a preference for uniformity over dialogic considerations in state constitutional decisionmaking would be to further sanctify the interpretational influence of the U.S. Supreme Court vis-à-vis its institutional position as the final arbiter of the meaning of the constitutional provisions relating to individual

155. *See supra* note 36 and accompanying text.

156. TARR, *supra* note 6, at 181 n.32. As a practical matter, the consistent independent interpretation of cognate constitutional provisions should result in the development of state decisional law that is no less predictable or stable than its federal counterpart. Of course, it may be no *more* predictable and stable, either.

157. *See* HENNESSEY, *supra* note 149, at 61 (when uniformity is preferred, the question arises "whether the state court is in default of its duty to construe the state law independently").

158. 672 P.2d 255 (Mont. 1983).

159. *See id.* at 258.

160. TARR, *supra* note 6, at 181.

rights and civil liberties. The Supreme Court addressed that position in the 1958 case *Cooper v. Aaron*,[161] stating that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[162] The Court reasserted this principle in the 1962 case *Baker v. Carr*:[163]

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[164]

More recently, in the 1997 case *City of Boerne v. Flores*,[165] the Court overturned the Religious Freedom Restoration Act and emphasized its "primary authority" to interpret the federal constitution.[166]

Such broad assertions by the U.S. Supreme Court do not prove true in every instance;[167] the Supreme Court's so-called "final authority" is, in many ways, case-specific.[168] Accordingly, a vibrant

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161. 358 U.S. 1 (1958).

162. *Id.* at 18.

163. 369 U.S. 186 (1962).

164. *Id.* at 211.

165. 521 U.S. 507 (1997).

166. *Id.* at 524; *See also* Dickerson v. United States, 120 S. Ct. 2326, 2333 (2000) (noting that "Congress may not legislatively supersede [U.S. Supreme Court] decisions interpreting and applying the Constitution").

167. Indeed, *Cooper v. Aaron* has been criticized as "an overstatement, politically necessary in its context but indefensible as a general claim of judicial interpretive authority." Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

168. *See* Kahn, *supra* note 19, at 1163-64 (remarking that "[o]nly occasionally does a court speak authoritatively to a constitutional controversy"). I should clarify here that in cases in which the U.S. Supreme Court has resolved an issue under the U.S. Constitution, its determination is entitled to deference as a matter of federal constitutional law. The constitutional value of dialogue *informs* the processes that lead to binding legal determinations by institutional actors; it does not *authorize* such determinations. Thus, while the expectation of dialogue validates sustained discourse about the U.S. Supreme Court's textual interpretation in a particular case, it does not support the view of Edwin Meese that a competing nonjudicial constitutional interpretation should be entitled to equivalent authoritative weight. *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983-86 (1987). In other words, when the U.S. Supreme Court has ruled, the dialogic principle does not justify the failure of the other branches and organs of government to defer to its case-specific determination as final arbiter of the U.S. Constitution. *See* Alexander & Schauer, *supra* note 167, at 1387 (under the institutional design of the federal constitution, decisionmakers must "defer to the judgments of others with which they disagree"). Dialogue is an expectation and a value that serves to encourage discourse about democratic governance, not a structural provision that defines or creates institutional authority in specific cases.

federal court-state court dialogue can work to counter somewhat the U.S. Supreme Court's dominating influence on constitutional discourse. The process of "judicial exegesis" of the U.S. Constitution, as Justice Frankfurter put it,[169] is in a real sense ongoing:

> Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable. Otherwise, the debate on constitutional principles will continue.
>
> . . .
>
> What is "final" at one stage of our political development may be reopened at some later date, leading to fresh interpretation and overrulings of past judicial doctrines.[170]

The federal court-state court dialogue thus can inform the "debate on constitutional principles," serving as a resource for those who seek alternative interpretive possibilities.

As Justice Jackson famously remarked, the U.S. Supreme Court is not final because it is infallible, but infallible only because it is final.[171] To the extent state courts decline the invitation in *Michigan v. Long* to join a dialogue with the U.S. Supreme Court and, thereby, to contribute to the larger debate on the meaning of constitutional principles, the Supreme Court's presumed "infallibility" may not be seriously challenged — and constitutional discourse will be poorer as a result.

C. Dialogue and the Primacy Approach

Assuming a state court accepts the *Michigan v. Long* invitation, still the question with which we ended Part I persists, albeit in a somewhat refined form: which interpretive approach — lockstep, criteria, or primacy — should the state court employ so as to best realize the benefits of constitutional dialogue? Aside from the advocacy of Justice Brennan, both in judicial opinions and in law review articles, the U.S. Supreme Court has not opined on the quality

169. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491 (1939).

170. FISHER, *supra* note 123, at 244-45. *See also* Alexander & Schauer, *supra* note 167, at 1387 (the finality of U.S. Supreme Court decisions "does not mean that a critique against a standard external to the decision is impossible," for "even final Supreme Court decisions can be subject to criticism from the perspective of whatever the observer believes the proper standards for constitutional decisionmaking to be").

171. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). As one commentator has noted, Justice Jackson intended by this comment to criticize "the cult of the robe," but "an observation presented as institutionally self effacing has come to describe the contemporary character of the institution." JOHN BRIGHAM, THE CULT OF THE COURT 230 (1987).

of state constitutional interpretation. By this, I mean that the Court has not suggested — and there is no reason why it should — that state constitutional interpretation should track a particular interpretive model.[172]

If a state court accepts the invitation in *Michigan v. Long* to join in a federal court-state court dialogue, true participation in that dialogue can be accomplished only when the state court adopts the primacy approach as its interpretive methodology. For to follow the lockstep approach would be, in effect, to decline the *Michigan v. Long* invitation. And to follow the criteria approach would be to miss the dialogic mark: reliance upon unique state sources as the means of deviation from the U.S. Supreme Court's interpretation, assuming the existence of such sources, would fail to accomplish the goals of the constitutional dialogue, because such sources have no relevance to the interpretation of the federal constitution. Under the criteria approach, in other words, the state court would be talking to the Supreme Court about the same text, but not in a way that the latter could appreciate, for the participants in the exchange would not be working from the same lexical sources. Only when the federal and state courts discuss the same text, working from a shared universe of terms, does a true dialogue ensue.

And only the primacy approach allows the federal and state courts to rely upon the same universe of considerations. As discussed above, the primacy approach supposes that the state court will treat its constitution as constitutional, in the sense that the court will employ the full gamut of "constitutional arguments" in determining the reach of the document's requirements.[173] By "constitutional arguments," I refer to the "kinds of argument that now are almost universally accepted as legitimate in constitutional debate and interpretation" of the federal constitution.[174] These modes of argument include arguments from and about constitutional text, structure, original intent, history, prudence, precedent, and policy.[175] Using these arguments, the state court can speak to the U.S. Supreme

172. *But see* Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring) (noting that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have to power to amend state law to ensure rational law enforcement").

173. *See supra* note 58 and accompanying text.

174. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987).

175. *See id.* at 1194-1209. *See also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982) (discussing modalities of constitutional argument).

Court on its own terms, and any ensuing debate on the meaning of shared constitutional text can resonate across borders.

A reliance upon the primacy approach returns us to the concern of jurists and commentators who question the grounds for state courts to "ratchet up" individual protections under the state constitution. On this view, if a constitutional text has already been authoritatively interpreted by the U.S. Supreme Court, the state court should decline to look at this text anew. The fear lies in the possibility that state court judges will simply seize upon the availability of the state constitution merely to further "liberal" — that is, rights-protective — interpretations of the text.[176] It also reflects a belief that the federal constitution establishes the minimum standards for rights protection and, therefore, "up" is the only direction rights protection can go under the new judicial federalism.[177]

The problem with the argument is that it assumes there can be only *one* legitimate interpretation of a particular constitutional text. But, as Wisconsin Supreme Court Justice Shirley Abrahamson has observed, "the broad phrases of a bill of rights" exemplify the "difficulties of interpreting language."[178] These interpretive difficulties are susceptible to a number of means of clarification and explanation using the accepted modes of constitutional argument. Because interpreting language *is* difficult, the legitimacy of a particular interpretation depends not upon which appellate court, federal or state, is doing the interpreting, but upon the extent to which the interpretation at issue is sound and plausible. And a particular interpretation of constitutional text typically will be considered sound and plausible when it is based upon an accepted mode of constitutional argument, correctly applied in the case at hand.

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176. *See supra* notes 80-81 and accompanying text.

177. *See, e.g., States-as-Laboratories, supra* note 88, at 488. As noted above, Justice Brennan assumed this to be the case as well. *See* Brennan, *supra* note 4, at 550 (discussing the Bill of Rights as the "floor of protection").

178. Abrahamson, *supra* note 14, at 732. Consider the reflections of Justice Benjamin Cardozo on the subject of the "broad phrases":

> No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts en bloc. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes.

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76-77 (1921).

Using the accepted modes of constitutional argument described above, multiple sound and plausible interpretations of the same text are possible. The modern U.S. Supreme Court regularly releases fractured opinions in which the justices each offer an explanation of a result upon which they all agree, but which each justice has reached by a different mode of argument. In *United States v. Lopez*,[179] for example, Chief Justice Rehnquist relied primarily upon structural, textual, and precedential arguments to support the Court's determination that the Gun-Free School Zones Act of 1990 exceeded Congressional authority under the Commerce Clause.[180] In a concurring opinion, Justice Thomas relied upon arguments from original intent and history to reach the same conclusion.[181]

Interpretations that do not rely upon accepted modes of constitutional argument are of course possible, but these interpretations will be regarded as unsound or implausible to the extent they cannot otherwise be justified under one or another of the accepted arguments. One could frame an argument that the First Amendment's speech protections should be interpreted to extend to all expression, including defamation, obscenity, and fighting words, because the First Amendment comes *first* in the Bill of Rights, but this argument would be based upon numerical ordering, which is not, by the measure of logic, history, or custom, an accepted mode of constitutional argument. Though such an interpretation is possible, the First Amendment absolutist pressing this position would have to locate an alternative justification in an accepted mode of constitutional argument lest the "numerical ordering interpretation" be deemed unsound or implausible and, therefore, illegitimate.

Thus, constitutional interpretations may fall, as a general matter, into one of two broad categories: possible and sound/plausible, or possible and unsound/implausible.[182] The U.S. Supreme Court holds no monopoly on determinations in the former category; there is nothing about the Court's institutional position that immunizes it

179. 514 U.S. 549 (1995).

180. *See id.* at 552-58.

181. *Id.* at 590-93 (Thomas, J., concurring).

182. Naturally, there may be arguments that result in interpretations that are not possible and, therefore, are necessarily unsound and implausible. Within the category of "possible and sound/plausible" arguments, moreover, there often will exist plausible interpretations that are more *persuasive* than others. *See* Fallon, *supra* note 174, at 1244-46 (suggesting that there is a hierarchy of constitutional argument, with arguments from the text and based upon historical intent at the top).

from the hazards of interpretive difficulties.[183] To the extent it relies upon an accepted mode of constitutional argument, correctly applied, the Supreme Court's interpretation of the Fourth Amendment is certainly legitimate in the federal and state realms, but it can be regarded as finally authoritative only in the former.[184] There is no reason, on the level of pure interpretation, for the state court to consider the U.S. Supreme Court's determinations as anything more than decisional guidance: the state court may rightly view the federal determination as reliable, but only to the extent that the federal court employed an accepted mode or modes of constitutional argument in reaching its determination, and then only to the extent that the federal court correctly applied that particular mode of constitutional argument in the circumstances of the case.[185]

There is, in addition, a practical response to the concern that the primacy approach will be employed by state courts simply to "ratchet up" individual rights protections. While the Supremacy Clause would block the enforcement of state constitutional provisions that provide less protection than their federal counterparts, state courts are still free to *interpret* state constitutional cognates as providing less protection, or as ultimately providing the same protection, as provided under the federal constitution, albeit for different reasons.[186]

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183. *See* Williams, *supra* note 9, at 388. As noted above, this is not to say that the U.S. Supreme Court's case-specific determinations are not entitled to deference as binding interpretations of the federal constitution. *See supra* note 158. It is to say that the U.S. Supreme Court is not always right simply because it is final.

184. And there are numerous interpretations by the U.S. Supreme Court that state court judges and commentators view as unsound or implausible, a fact the state court may consider in determining how much weight to accord a particular decision – and a point the state court may make in the constitutional dialogue. *See, e.g.*, State v. Cline, 617 N.W.2d 277, 288-93 (Iowa 2000) (discussing scholarly and judicial criticism of the U.S. Supreme Court's opinion in United States v. Leon, 468 U.S. 897 (1984)); Commonwealth v. Edmunds, 586 A.2d 887, 904 (Pa. 1991) (same). As Paul Kahn has observed, court decisions are simply another text subject to interpretive analysis. *See* Kahn, *supra* note 19, at 1164.

185. *Cf.* Kahn, *supra* note 19, at 1168 (observing that *Michigan v. Long* "effectively frees a state court to build its interpretation upon the best sources of argument, wherever it might find them").

186. *See* Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CINN. L. REV. 317, 336 (1986) (discussing arguments by Oregon Attorney General in briefs before state supreme court urging court not to adopt *Miranda* precedent under state law); Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1127 (1992) (explaining that "nothing in federal constitutional law prevents state courts from interpreting state law more narrowly than federal, despite the fact that they are barred [by the Supremacy Clause] from enforcing the less-protective state law").

This means that final state court interpretation of the state's cognates to the "broad phrases of . . . bills of rights," reached through modes of constitutional argument different than those employed by the U.S. Supreme Court, or the same mode of argument applied differently, need not necessarily be more liberal than the federal interpretations of the parallel provision; it need not even be at odds with the federal decision.[187]

In the end, even Professor Gardner's criticism of independent state constitutionalism and the primacy approach loses much of its force when viewed through the prism of constitutional dialogue. Recall Gardner's skepticism about the depth of state constitutionalism as a reflection of state, as opposed to national, values, and his contention that this lack of depth militates against independent interpretation.[188] Because the value of dialogue reflects a *federal* constitutional concern, its vindication vis-à-vis state constitutionalism does not necessarily depend upon "differences in the fundamental character and values of the people of the states."[189] In other words, assuming Gardner is correct that state constitutions may reflect variations of a *national* identity, a state court still would not be disabled or precluded from contributing to the larger project of interpreting shared constitutional text, for the dialogic approach (to paraphrase Jennifer Friesen) encourages state courts to make *good* constitutional law, using accepted constitutional argument; it does not mandate that state courts make *unique* constitutional law.[190]

IV. The Constitutional Expectation of Dialogue and the New Judicial Federalism: Search and Seizure Discourse

Having located support for the practice of new judicial federalism in the constitutional value of dialogue, and explained why state courts should utilize the primacy approach when interpreting cognate provisions, I will turn in this part to an illustration of state court-federal court dialogue. *Commonwealth v. LaFrance*, discussed above, offers a glimpse of such a dialogue.[191] In this Part, I examine the New Hampshire Supreme Court's opinion in *State v. Canelo*.[192] I

187. Latzer, *supra* note 186, at 1128-30.

188. *See supra* notes 85-88 and accompanying text.

189. Gardner, *supra* note 57, at 826.

190. Friesen, *supra* note 16, at 1071 (contending that "a state court's duty is not to make unique constitutional law, but to make good constitutional law").

191. *Supra* notes 138-146 and accompanying text.

192. 653 A.2d at 1097.

choose this opinion because it comes from a state supreme court committed to the project of the new judicial federalism and the primacy approach. It accordingly offers a particularly relevant example of a state court's acceptance of the invitation to dialogue, and the promise that such a dialogue may hold.

A. The Decision

Canelo concerns the question whether the trial court erred in suppressing evidence seized when the police acted in good faith in obtaining and executing a search issued in violation of New Hampshire's counterpart to the Fourth Amendment.[193] That provision — part I, article 19 of the New Hampshire Constitution — states:

> Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places . . . are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order . . . to make search in suspected places . . . or to seize their property, be not accompanied with a special designation of the persons or objects of search . . . or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.[194]

In the circumstances of the case, a magistrate had issued an anticipatory search warrant which could be executed only upon a police informant's observation of contraband at a given time and location.[195] The trial court later concluded that such an anticipatory warrant was invalid, and the supreme court affirmed that ruling "because the detached magistrate inappropriately delegated [her] constitutional function to the prosecuting authority . . . in violation of part I, article 19."[196]

The State argued that the court should adopt a good faith exception to the exclusionary rule under the state constitution. The court began its analysis under the state constitution by tracing the

193. *Id.* at 1099. *Canelo* also concerned the validity of anticipatory search warrants under the state constitution. *See id.* Subsequent to briefing and oral argument before the New Hampshire Supreme Court, the defendant died, and the State filed a motion requesting that the court proceed with the appeal; determining that the case presented "significant constitutional issues of public interest and are likely to occur again," the court agreed. *Id.* (quotation omitted).

194. N.H. CONST. pt. I, art. 19.

195. *See Canelo*, 653 A.2d at 1100.

196. *Id.* at 1102 (quotation omitted).

evolution of the exclusionary rule in New Hampshire. The court noted that the U.S. Supreme Court had adopted the federal exclusionary rule in *Weeks v. United States*, in 1914.[197] The *Weeks* Court established the rule "as a necessary corollary to the prohibition against unreasonable searches and seizures, concluding that fourth amendment guarantees would be meaningless unless courts prohibited the government from using unlawfully seized evidence."[198] New Hampshire declined to adopt such a rule, and in the seminal 1961 case *Mapp v. Ohio*,[199] the U.S. Supreme Court required the state courts to apply the federal exclusionary rule in state prosecutions pursuant to the Fourteenth Amendment.[200]

The *Canelo* court noted that the U.S. Supreme Court had, since *Mapp*, retreated from its original justification for the exclusionary rule, stating in *United States v. Calandra*[201] that "the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim .... Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[202] The U.S. Supreme Court further modified the exclusionary rule in *United States v. Leon*,[203] in which the Court concluded that the Fourth Amendment does not require the exclusion of evidence obtained pursuant to an invalid warrant, so long as the police acted in good faith reliance upon the warrant issued by a neutral and detached magistrate.[204] In *Leon*, the U.S. Supreme Court reaffirmed that the sole purpose of the federal exclusionary rule is to deter police misconduct.[205]

Because *Mapp* required application of the federal exclusionary rule whenever a Fourth Amendment violation occurred, "there was little reason to employ a State exclusionary rule."[206] Nonetheless, the New Hampshire court continued, "since at least 1983," it had

197. 232 U.S. 383 (1914).

198. *Canelo*, 653 A.2d at 1103.

199. 367 U.S. 643 (1961).

200. *See id.* at 658-59 (concluding that the exclusionary rule was necessary to provide a remedy to those individuals whose Fourth Amendment rights had been violated).

201. 414 U.S. 338 (1974).

202. *Id.* at 347-48.

203. 468 U.S. 897 (1984).

204. *See id.* at 913.

205. *See id.* at 916.

206. *Canelo*, 653 A.2d at 1104.

recognized the existence of a state exclusionary rule; during this time, moreover, the court had "repeatedly emphasized the importance of undertaking independent interpretation of... State constitutional guarantees."[207] In a series of cases beginning in 1983, the court tacitly acknowledged that a state exclusionary rule prohibited the state from using at trial any evidence obtained in violation of part I, article 19.[208]

After reviewing its precedents on the issue, the *Canelo* court moved on to consider the history of the constitutional protection against unreasonable searches and seizures. Like the Fourth Amendment, the origins of part I, article 19 can be traced to the equivalent provision of the Massachusetts Declaration of Rights.[209] That provision was intended "to abolish general warrants and writs of assistance which had been used by the British to conduct sweeping searches based upon generalized suspicions and without specifying the places to be searches or things to be seized."[210] The New Hampshire court also reviewed the policies animating its search and seizure jurisprudence. The court recognized that part I, article 19 "safeguards privacy and protection from government intrusion,"[211] and "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization."[212]

In view of the text of part I, article 19, its history, the precedents establishing the exclusionary rule, and the policies underlying the constitutional protection against unreasonable searches and seizures, as well as the development of the federal exclusionary rule, the *Canelo* court concluded that the exclusionary rule is "a logical and necessary corollary to achieve the purposes for which prohibitions against unreasonable searches and seizures were

207. *Id.* (citing, *inter alia*, State v. Ball, 471 A.2d 347 (N.H. 1983)).

208. *See, e.g.*, State v. Chaisson, 486 A.2d 297, 304 (N.H. 1983) (holding that when defendant's right to be free from unreasonable seizure has been violated, "evidence obtained in violation of this right cannot be used at trial").

209. New Hampshire adopted part I, article 19 in 1784, copying part I, article 14 of the Massachusetts Declaration of Rights, which had been adopted in 1780. "As a source of the Fourth Amendment, the Massachusetts provision on search and seizure was the most important of all the state models, because it was the one the Fourth Amendment most resembles." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 170 (1999).

210. *Canelo*, 653 A.2d at 1104.

211. *Id.*

212. *Id.* at 1104-05.

constitutionalized."[213] The court specifically disagreed with the U.S. Supreme Court's determination in *Leon* that the deterrence of police misconduct is the sole aim of the exclusionary rule:

> The exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement of part I, article 19. Enforcement of the rule places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process.[214]

The court accordingly held that a good faith exception to the exclusionary rule would be "incompatible with and detrimental to our citizens' strong right of privacy inherent in part I, article 19 and the prohibition against the issuance of warrants without probable cause."[215]

B. *State v. Canelo* as Dialogic Artifact

The exchange on the good faith exception to the exclusionary rule began with the U.S. Supreme Court's opinion in *United States v. Leon*. In *Leon*, the U.S. Supreme Court determined that the exclusionary rule, as a creature of judicial crafting, rather than a mandate of the Fourth Amendment itself, is concerned exclusively with deterrence of future misconduct; accordingly, when that purpose cannot be served — for example, when police officers rely upon a search they in good faith believe to be valid — the rule should not apply. Through the *Michigan v. Long* invitation, the New Hampshire Supreme Court responded in *State v. Canelo* to the U.S. Supreme Court's reasoning, concluding that the exclusionary rule is a "logical and necessary" corollary to part I, article 19 — the New Hampshire cognate of the Fourth Amendment — which necessarily precludes the adoption of a good faith exception.

This exchange has all the elements necessary to qualify as a constitutional dialogue. The exchange features two distinct entities separated by mental and temporal space. The first entity, the U.S. Supreme Court, transmits information to the second, the New Hampshire Supreme Court, which has the shock of the new: in a case in which a magistrate has issued a defective warrant, the U.S.

213. *Id.* at 1105.

214. *Id.* (citations and quotations omitted).

215. *Id.*

Supreme Court rules that the federal exclusionary rule does not require that evidence obtained in a good faith belief in the warrant's validity be suppressed. In making this determination, the U.S. Supreme Court employs the traditional modes of constitutional argument: attention to text, history, precedent and the underlying policy considerations at issue in the circumstances of the case.

The New Hampshire Supreme Court, in a case involving a constitutional provision in all important respects identical to the Fourth Amendment, responds to its federal counterpart's opinion in *Leon*. For its part, the New Hampshire Supreme Court draws from the same universe of terms to explain its different, and equally plausible, conclusion — that is, that the exclusionary rule is not devoted exclusively to the deterrence of future police misconduct but, rather, has a constitutional basis as a means of effectuating the personal privacy protections secured by part I, article 19. The New Hampshire court uses text, history, precedent and policy concerns to support its determination. The case so decided, the court releases its opinion and *this* strange information is communicated to, among other governmental actors and individuals, the present and future justices of the U.S. Supreme Court.

The New Hampshire Supreme Court was neither the first nor the last state court to visit the issue of the good faith exception to the exclusionary rule.[216] Each court that visits the issue, regardless of its ultimate determination, engages the U.S. Supreme Court in a similar dialogue. These dialogues are observed by other state courts, as well as by commentators and other governmental actors, and become part of still other dialogues; indeed, the *Canelo* court specifically noted that it found support for its view in the decisions of other state courts that have held "that the good faith exception is inconsistent with the state constitutional requirements of probable cause."[217]

As the dialogue between the New Hampshire and U.S. Supreme Courts inspires other dialogues, so the evolutionary development of the issues explored therein continues. While the New Hampshire Supreme Court's analysis of the good faith issue may not have been particularly rigorous, it is an example of a state court fulfilling the expectation of dialogue using the primacy approach. Having other

216. *See* State v. Cline, 617 N.W.2d 277, 289 (Iowa 2000) (discussing cases in which state courts have rejected Leon and the good faith exception to the exclusionary rule); Leigh A. Morrissey, Note, *State Courts Reject* Leon *on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND.L. REV. 917, 934-37 (1994).

217. *Canelo*, 653 A.2d at 1105.

judges, equally competent in the task of constitutional interpretation, bring their skills to bear on shared constitutional text serves the end of enhancing constitutionalism, by providing an authoritative counterpoint to the U.S. Supreme Court's interpretation of the constitutional rights of citizens and the correlative restrictions upon government. In other words, the new judicial federalism serves to enliven what Paul Kahn calls "the debate over the meaning of the rule of law within a democratic polity,"[218] as state courts join dialogues with the U.S. Supreme Court, and with each other, as part of a continuing discourse about a common enterprise: the unfolding development of American constitutionalism.

It scarcely needs mention at this point that, had the New Hampshire Supreme Court deferred to the U.S. Supreme Court in *Canelo* by using the lockstep approach, or based its decision upon some unique state source without application in the context of the federal constitution, no true dialogue between the courts would have been joined. Under the criteria approach, the U.S. Supreme Court and the New Hampshire Supreme Court simply would have been talking at each other in *Leon* and *Canelo*, thus diminishing the significance of the exchange to other courts and to other dialogues about the scope of the exclusionary rule and, more generally, about the meaning of the constitutional protection against unreasonable searches and seizures.

Conclusion

The expectation of dialogue in the context of horizontal federalism supposes dialogue as a constitutional value that complements the federalist regime of checks and balances. In the context of the new judicial federalism, the value of dialogue promotes federalist principles by validating the initiative of state supreme courts to speak to the U.S. Supreme Court about interpretations of shared constitutional text — that is, to engage the U.S. Supreme Court in discourse about the meaning of parallel provisions state and federal constitutions and, thereby, to balance the Court's perceived interpretational supremacy.

The promise of such dialogue is realized when state courts use the primacy approach to interpret cognate provisions of the state constitution, turning first to the state constitution when a litigant raises claims under both constitutions and relying upon federal

218. Kahn, *supra* note 19, at 1168.

decisions only for guidance in interpreting the cognate provision. In so doing, state courts speak to the U.S. Supreme Court on its own terms, with reference to a common universe of constitutional argument. Such engagement allows state courts to provide an antidote to the U.S. Supreme Court, and to make a meaningful contribution to a larger, national discourse about individual rights, governmental obligations, and the rule of law — matters of no small moment in our constitutional democracy.