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Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol28/iss2/3
STATE CONSTITUTIONAL INTERPRETATION AND METHODOLOGY

RACHEL A. VAN CLEAVE

I. INTRODUCTION

In 1977, former Justice Brennan presented his famous speech, State Constitutions and the Protection of Individual Rights, urging state judges to look to the constitutional guarantees set forth in their state charters rather than rely automatically on United States Supreme Court interpretation of the federal Bill of Rights. The former justice emphasized that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Twenty years after Brennan's call, we can evaluate the extent to which state courts have accepted the challenge and taken heed. Over the last two decades two phases of the state constitutional revolution emerge. First, are questions relating to what I will call “methods of interpretation” which center upon whether the state court will look to the state constitution first in its analysis and at what point, if at all, will the state court rely on the federal constitution and precedent. Essentially these questions focus on when a state court will engage in state constitutional analysis. Second, are questions concerning “theories of interpretation” which involve the more difficult inquiry of how the state court will go about interpreting the state document.

Scholarly commentary similarly corresponds to these phases. Initially, the debate centered on questions such as whether state courts should first examine their own charters, and then look to federal law, or whether state courts should first resolve an issue under federal law and then look for reasons to depart from federal interpretation, and whether states should interpret their own constitutions in a manner consistent with federal interpretation of similar provisions. Scholars currently seem to agree that state constitutional issues should be resolved first under the state's charter. However, there is still disagreement regarding when and if

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2. Id. at 491.
discussion of the federal constitution should enter the analysis. More recently scholars have pointed out the important role of state courts in the discourse and debate on constitutionalism and the need to focus on theory in the state courts to further this debate. Indeed, one commentator has suggested that state constitutional scholars begin to work with federal constitutional scholars to examine methods of interpretation that may be appropriate for state constitutions.

The question of constitutional theory in state courts often results in a comparative analysis of the state and federal constitutions. Typically where a comparative analysis is used, the purpose is to support the authority of the state court to interpret the state document independently and to justify an interpretation and result that diverge from federal precedent. While this approach may add to the persuasiveness of the opinion, it does little to advance the role of state courts in the dialogue of constitutionalism. The critical tension in state constitutionalism is between the need to persuade critics that the state court is justified when it diverges from federal precedent, and the goal of having a voice in constitutional discourse and debate. In seeking to persuade critics, state courts tend to rely extensively on differences between the federal and the state constitutions. However, it is precisely this “discourse of distinctness” which other critics claim results in isolationism of the state and irrelevance in constitutionalism generally.

This paper first discusses the significance of state constitutional law, which is important background and support for the rest of the paper. Second, the paper traces some of the history of state constitutional interpretation, centering on the question of when a state court should engage in independent analysis, and discussing some examples of courts stating expressly which method it will follow, and others illustrating a troubled history of attempting to answer this question. Next, the focus shifts to address the question of how independent interpretation has been carried out, and some of the problems involved and the pressures faced by state courts. In addition, this paper makes suggestions as to how to better enrich and enhance the process of independent interpretation by state courts in a way which furthers the development of constitutional jurisprudence of the state court and contributes to constitutionalism in general. For example, one practical suggestion calls for the amendment of a state’s Rules of Court to require counsel to raise and brief issues under the state constitution and to require courts to address the state constitutional questions before resolving any federal constitutional claims.


8. Gardner, supra note 4, at 777.

9. See Kahn, supra note 5, at 1152.
II. WHY INDEPENDENT INTERPRETATION?

Independent interpretation by state courts of their state constitutions is important because it returns states to their original role of protecting the rights of the people in their states, fulfills the role of state courts as interpreters of their state charters and has the potential for increasing the importance of state court contributions to constitutional discourse where state courts take approaches which differ from federal constitutional analysis.

The history of state constitutions as the only protectors of individual rights is well documented. During the period called “dual federalism,” the federal Bill of Rights served only to limit the federal government from infringing on individual rights, and was not a limitation on the states. Thus, states historically had the burden of serving as the primary protectors of individual rights. While, there are numerous examples of states failing in that role, this realm was, nonetheless, said to be of the states. The United States Supreme Court sought to bring states in line with federal protection of individual rights by incorporating nearly all of the provisions of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, applicable to the states. Now that individuals are afforded basic protection of certain rights, that is, the establishment of a federal floor, the dangers of state abuse are reduced, and minimum protections are ensured while state courts experiment with different theories of analysis.

As to the duty of state courts to interpret their constitutions, numerous state constitutions have express provisions setting out this duty, while the federal courts rely on Marbury v. Madison. To the extent that state courts do not examine the state constitution, or defer to federal precedent, they shirk their judicial duties. As former California Supreme Court Justice Tobriner stated:

Just as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our responsibilities.

14. See Brennan, supra note 1, at 493-94.
15. See, e.g., COLO. CONST. art. II, § 15 (“[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question ... ”); N.D. CONST. art VI, § 4 (“A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.”).
16. 5 U.S. (1 Cranch) 137 (1803).
personal obligation to exercise independent legal judgment in ascertaining the
meaning and application of state constitutional provisions.\textsuperscript{17}

The issue of the duty of state courts raises an important point of comparison between state supreme courts and the United States Supreme Court. As one scholar has noted, the United States Supreme Court “is ever mindful that its ruling apply throughout the land, and accordingly they must be sensitive to the disparities in local needs and local conditions from state to state and respectful of the need for and the virtues of diversity.”\textsuperscript{18} Due to the national application of Supreme Court decisions, one commentator has pointed out the different roles played by the national and state supreme courts. The “United States Supreme Court, in reading the federal constitution, must lay out a minimal rule for a diverse nation, with due concern for principles of federalism. State courts, . . . , have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations.”\textsuperscript{19} Given these differences between the federal and state courts, it is not surprising that the federal floor established by the United States Supreme Court is simply a bare minimum of standards, and that differences under state constitutions will usually result in greater protection. Most importantly, independent state constitutional interpretation aids in the development of state constitutional law, thus fulfilling a state court’s duty under its state constitution, regardless of the results reached.

In their historic role as primary protectors of rights, state courts have contributed to constitutional analysis. Many of the examples of state courts leading the way in constitutionalism are from the California Supreme Court, once regarded as “the birthplace of th[e] new judicial independence.”\textsuperscript{20} For example, in \textit{Weeks v. United States}\textsuperscript{21} the United States Supreme Court adopted the exclusionary rule relying, in part, on the fact that some states had adopted such a rule. When the United States Supreme Court later decided to apply the exclusionary rule to the states through the due process clause of the Fourteenth Amendment in \textit{Mapp v. Ohio},\textsuperscript{22} the Court again considered state precedents. The Court relied on the determination by the California Supreme Court in \textit{People v. Cahan},\textsuperscript{23} that no other remedy had succeeded in securing compliance with constitutional provisions.\textsuperscript{24}

With respect to discrimination in the selection of petit juries, the California Supreme Court decided in 1978 to no longer follow the United States Supreme Court decision in \textit{Swain v. Alabama},\textsuperscript{25} which imposed a tremendous burden of proof

\begin{itemize}
\item \textsuperscript{17.} People v. Chavez, 605 P.2d 401 (Cal. 1980) (emphasis added) (citations omitted).
\item \textsuperscript{21.} 232 U.S. 383 (1914).
\item \textsuperscript{22.} 367 U.S. 643 (1961).
\item \textsuperscript{23.} 282 P.2d 905 (Cal. 1955).
\item \textsuperscript{24.} See \textit{Mapp}, 367 U.S. at 651-52.
\item \textsuperscript{25.} 380 U.S. 202 (1965).
\end{itemize}
on a defendant challenging a prosecutor’s use of peremptory strikes as racially
motivated. Instead, in People v. Wheeler, the California Supreme Court, dispens-
ing with the requirement of showing a discriminatory use of peremptory strikes over
a series of cases, set out a procedure by which one could challenge an opponent’s
use of strikes in an individual case. The burden-shifting procedure adopted by the
California Supreme Court closely parallels the procedure ultimately adopted by the
United States Supreme Court in Batson v. Kentucky, six years later.

Such instances of state recognition and protection of rights before consideration
by the United States Supreme Court further contribute to federal analysis by
providing the Supreme Court with examples from which to draw on in interpreting
the federal constitution. The right to privacy is an example. In 1948, the California
Supreme Court, in Perez v. Lippold, declared invalid statutes forbidding “mixed
race” marriages. In 1967, the United States Supreme Court held invalid a similar
law in Loving v. Virginia. In 1966, the California Supreme Court recognized an
individual’s right to privately possess obscene materials in one’s home. Three
years later, in Stanley v. Georgia, the United States Supreme Court recognized
such a right. In 1969, the California Supreme Court recognized “[t]he fundamental
right of the woman to choose whether to bear children” as following “from the
Supreme Court’s and this court’s repeated acknowledgment of a ‘right of privacy’
or ‘liberty’ in matters related to marriage, family, and sex.” The United States
Supreme Court recognized such a right under the federal constitution four years
later in Roe v. Wade. While the California Supreme Court was not as clear as it
could have been with respect to which constitution it was relying on, by citing to
cases such as Griswold v. Connecticut, the court appears to have adopted the cited
federal cases as part of California Constitutional law.

By becoming accustomed to independently examining their state’s charter, even
when language is substantially similar to language found in the federal Bill of
Rights, state courts can become more familiar with their state’s constitutional
history and become more adept at developing theories of constitutional
interpretation. This is especially important where a state constitution contains rights
not expressly provided for in the federal constitution and not protected by United
States Supreme Court interpretation of the federal constitution. For example, the
North Carolina Constitution states that “[t]he people have a right to the privilege of

28. While the procedures employed by the two courts are very similar, Batson was decided on equal
protection grounds, while Wheeler was based on the California Constitutional protection of a fair trial by a
representative cross-section, a basis expressly rejected by the Court in Batson. 476 U.S. at 84 n.4.
29. 198 P.2d 17 (Cal. 1948).
33. People v. Belous, 458 P.2d 194, 199 (Cal. 1969) (emphasis added). Belous involved the conviction of
a doctor who provided a patient with the name of another doctor who performed abortions. The appeal was
primarily concerned with the question of whether the exception to the statutory prohibition of abortion, “necessary
to preserve the life of the woman,” was unconstitutionally vague. The court found that it was too vague on its face.
34. 410 U.S. 113 (1973).
35. 381 U.S. 479 (1965) (right to privacy prohibits state from proscribing use of contraceptives).
36. See Belous, 458 P.2d at 199.
education, and it is the duty of the State to guard and maintain that right."37 Such a provision allows for a very different kind of analysis than available under the federal constitution, which does not expressly guarantee such a right.38

The California Constitution expressly guarantees an “inalienable right . . . [in] pursuing and obtaining . . . privacy.”39 This express right allows for a different analysis of privacy rights, than under the “penumbral” analysis of the United States Supreme Court.40 The California Constitution also provides that “[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”41 An earlier version42 of this provision provided the basis for the California Supreme Court’s decision in *Sail’er Inn, Inc. v. Kirby*,43 to strike down a law which prohibited most women from bartending. The point of listing these textual differences between the state and federal constitutions is to illustrate that in the absence of independent interpretation, courts and litigators may overlook important textual differences.44 For example, some states, including California,45 guarantee equal “privileges” and “immunities”46 which, one commentator argues, provides for a very different type of analysis than the federal Equal Protection Clause.47 Despite this textual difference, state courts have simply assumed that the state guarantee paralleled the federal equal protection clause, without considering the reasons for such textual differences.48 The federal equal protection provision was a result of the Civil War, and grew out of a concern to protect blacks from oppression.49 While the California Constitution contains language similar to the equal protection clause of the Fourteenth Amendment, it also contains a provision which states that “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”50 Similar provisions in other state

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40. *See, e.g.*, *Griswold*, 381 U.S. at 484.


42. “No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation or profession.” CAL. CONST. art. XX, § 18 (1879). For a thorough history of this provision, see Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991).

43. 485 P.2d 529 (Cal. 1971).


45. *See CAL. CONST. art. I, § 7(b) (providing that “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens”).

46. OR. CONST. art. I, § 20.


49. *See Tarr, supra* note 6, at 859.

50. CAL. CONST. art. I, § 7(b).
constitutions\textsuperscript{51} were "usually intended to protect the majority against legislative creation of special privileges or exemptions that destroy equality."\textsuperscript{52}

When state courts are in the habit of examining their own constitutional heritages, even where the federal constitution includes a parallel right, state courts will be better equipped to analyze language in their charters which is not present in the federal constitution.\textsuperscript{53} Therefore, independent interpretation is essential to the development of state constitutional law because it requires state courts to learn more about their state's constitutional beginnings and subsequent constitutional changes. In addition to the above considerations, lack of independent state constitutional interpretation is likely to stagnate constitutional analysis. Where a state court is in the habit of deferring to federal interpretation of constitutional rights, it is in the position of having to guess how the United States Supreme Court is likely to rule on a similar issue in the future. To avoid the risk of later reversal, such a state court is likely to apply extremely narrow interpretations of federal precedent rather than venture into uncharted analysis. For example, in 1992, an appellate court in Maryland\textsuperscript{54} faced the question of whether the procedure set out in \textit{Batson v. Kentucky},\textsuperscript{55} to preclude the exercise of peremptory challenges in a racially discriminatory manner, applied to gender-based peremptory challenges. Rather than analyze the arguments relevant to this question, the court concluded that since the United States Supreme Court had not yet extended \textit{Batson} to gender-based strikes, it "would be presumptuous on our part" to extend \textit{Batson}.\textsuperscript{56} Similarly, in a recent California case involving the constitutionality of religious invocations and benedictions at high school graduation ceremonies a concurring justice stated that the state court would "do well to invite and await [the United States Supreme Court's] views before giving final and definitive answers to complex and difficult questions of constitutional law. In this way, we can give appropriate deference to its views . . . ."\textsuperscript{57} When state courts take the position that they should not embark on federal constitutional interpretation until the United States Supreme Court has been presented with the issue, they deprive the state constitution of its independent force. In addition, such a stance also deprives the United States Supreme Court of the brain power and creativity of state judges, which can provide the Supreme Court with alternative modes of analysis for resolving the particular issue.

\textsuperscript{51} See, e.g., \textit{ARIZ. CONST.} art. II, § 13 ("No Law shall be enacted granting to any citizens, class of citizens, or corporation . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations"). See also Schumann, supra note 47, at 222.

\textsuperscript{52} Tarr, supra note 6, at 860.

\textsuperscript{53} See id. at 855 (suggesting analysis of state constitutional provisions in light of the character of state constitutions as compared to the character of the federal constitution).


\textsuperscript{55} 476 U.S. 79 (1986).

\textsuperscript{56} Eiland, 607 A.2d at 59. The Maryland Court of Appeals reversed the court of special appeals, finding that gender-based peremptory strikes violated the state constitution. See Tyler, 623 A.2d at 653. The United States Supreme Court recently determined that gender-based strikes violate the Equal Protection Clause of the Fourteenth Amendment, and extended the \textit{Batson} procedures to such strikes. See \textit{J.E.B. v. Alabama ex rel. T.B.}, 511 U.S. 127 (1994).

To remedy this reluctance to engage in federal constitutional analysis, state courts should engage in analysis of their own constitutional charters.\textsuperscript{58} Where a state court’s decision rests on that state’s constitution, a state court need not worry that the United States Supreme Court might disagree with its constitutional interpretation.\textsuperscript{59} Furthermore, independent state constitutional interpretation would result in greater experimentation in the area of constitutional analysis.\textsuperscript{60} This, in turn, is important to the development of federal constitutional law. In the \textit{Batson} opinion itself, the Supreme Court relied a great deal on how the state courts had been handling problems of racial discrimination in the selection of juries.\textsuperscript{61} By allowing the issue to “percolate”\textsuperscript{62} in the state courts, the United States Supreme Court was able to draw from a broad body of law before revisiting its decision in \textit{Swain v. Alabama}.\textsuperscript{63} Notably, California\textsuperscript{64} and Massachusetts\textsuperscript{65} adopted an approach under their state constitutions rather than interpret the federal constitution or try to predict whether the United States Supreme Court would revisit its prior decision. Though the Court did not adopt the reasoning of these opinions completely, it nonetheless benefited from state constitutional analyses. Thus, independent state constitutional interpretation is important both for the state itself, as well as for the development of national law.

\section*{III. METHODS OF STATE CONSTITUTIONAL INTERPRETATION}

The ways in which state courts approach the threshold question of when to rely on the state constitution and at what point to consider federal precedent, if at all, break down into roughly four, well-recognized categories:\textsuperscript{66} dependent, supplemental, dual sovereignty, and primacy. In each jurisdiction studied by this author it is possible to find at least one example of more than one method, indicating the degree of confusion, indecisiveness or disagreement within state courts as to which method is best.

\textsuperscript{58} The United States Supreme Court will not review a state court decision if the decision contains a “plain statement” of the state law basis of the decision. \textit{See} Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). \textit{See also} Donald E. Wilkes, Jr., \textit{First Things Last: Amendomania and State Bills of Rights}, 54 Miss. L.J. 223, 229-30 n.25 (1984).

\textsuperscript{59} \textit{See} Long, 463 U.S. at 1041 (requiring state courts to issue a “plain statement” that its decision rests on “independent and adequate” state law grounds to preclude United States Supreme Court review).

\textsuperscript{60} In addition to potential reversal by the United States Supreme Court, state court constitutional decisions might also be subject to voter review. Approximately 24 states have some form of direct democracy, and most of these permit the voters to amend the state constitution by means of the voter initiative. For a discussion of California’s experience in this respect, see Rachel A. Van Cleave, \textit{A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California}, 21 Hastings Const. L.Q. 95 (1993).

\textsuperscript{61} \textit{See} Batson v. Kentucky, 476 U.S. 70, 82 n.1, 83, 99 n.23 (1986).

\textsuperscript{62} Kaye, \textit{supra} note 19, at 56-57.

\textsuperscript{63} 380 U.S. 202 (1965).

\textsuperscript{64} \textit{See} People v. Wheeler, 583 P.2d 748, 757-59 (Cal. 1978).


A. Dependent Interpretation

The first method has been labeled “parallelism,”67 “lock-step,”68 “clone,”69 and “absolute harmony.”70 This method is essentially dependent interpretation. That is, state courts simply assume that rights declared in the state charter are equal or parallel to federal precedent interpreting the federal Bill of Rights. While this method can come in different forms,71 the result is the same; the court fails to engage in independent analysis of the state constitutional provision.

California’s constitutional history provides examples of the dependent approach. In Blair v. Pritchess,72 the California Supreme Court confronted the question of whether the constitutional protection against illegal “seizures and searches” extended to civil matters, specifically a “claim and delivery” law which allowed officers to enter and search homes and seize property without a warrant.73 The court began its analysis with a discussion of Camara v. Municipal Court,74 in which the United States Supreme Court held that inspections for building code violations are subject to the restrictions of the Fourth Amendment.75 In reaching its conclusion as to what the Federal Constitution required, the California court stated that

[s]ince sections 19 and 13 of article I of the California Constitution are substantially equivalent to the Fourth Amendment and to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution respectively, our analysis of the validity of the claim and delivery law in respect to the above provisions of the federal Constitution is applicable in respect to the above sections of the state Constitution.76

Thus, the state constitution was but a mere after-thought.77 Similarly, Texas courts of last resort have deferred to federal interpretation of analogous rights. In Brown v. State,78 on remand from the United States Supreme Court, the Texas Court of Criminal Appeals stated that it would continue to adhere to federal Fourth Amendment interpretation until “statutorily or constitutionally

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70. Utter & Pitler, supra note 66, at 645.
71. See Tinkle, supra note 67, at 74 n.67, for examples of the Maine Supreme Court’s application of the parallel method of state constitutional law analysis.
72. 486 P.2d 1242 (Cal. 1971).
73. See id. at 1246.
74. 387 U.S. 523 (1967).
75. See id. at 540.
76. Blair, 486 P.2d at 1251 n.6 (emphasis added). See also Gray v. Hall, 265 P. 246, 252 (Cal. 1928) (“[d]ue course of law under the state Constitution and due process of law under the Federal Constitution mean the same thing”).
77. Other examples of the dependent approach are also present in the area of illegal seizures and searches, and equal protection. See, e.g., People v. Bradley, 460 P.2d 129, 131 (Cal. 1969) (search and seizure guarantees are “essentially identical”); Department of Mental Hygiene v. McGilvery, 329 P.2d 689, 695 (Cal. 1958) (the state and federal equal protection guarantees have been “similarly construed”).
mandated to do otherwise;” thus assuming that federal and state interpretations are or should be the same. Likewise, the New Mexico Supreme Court in State v. Gomez last year acknowledged a history of adhering to United States Supreme Court precedent not only when that high court has recognized a particular right, but also where the Court has declined to recognize an asserted right.

The problems with the dependent approach echo the reasoning that supports independent interpretation discussed in Part II of this paper. Namely, such an approach assumes that interpretation of state and federal constitutions is or should be identical. On the contrary, state constitutions such as Texas, New Mexico and California were products of different periods of history, different areas of the country, with different concerns in mind, as compared to the circumstances surrounding the drafting of the National Constitution. Rather than abdicate their “judicial duties and responsibilities,” state courts should engage in a study of their state’s constitutional heritage.

Furthermore, textual differences between state and federal constitutions contradict the assumption that state constitutional law was intended to parallel federal constitutional law. One commentator has suggested that

[i]the sparse language of the [federal] Bill of Rights suggests that federal delegates, representing a diverse and widely dispersed population and wielding the power to dispute every word in the document, found it difficult to agree on details or a greater number of specific rights. By contrast, delegates to individual state constitutional conventions, who represented more homogeneous local populations, may have found the going somewhat easier.

Generally speaking, state declarations and bills of rights contain a longer list of rights, using language that is “richer, more detailed and more specific.” Most state constitutions use positive language to declare rights, while the federal constitution uses “negative,” or prohibitory language. As discussed earlier, state constitutions often contain language and rights simply not provided for in the federal constitution. These types of differences between state and federal guarantees support the argument that state courts err when they assume without, or with very little analysis, that the state right equals or parallels the federal guarantee. However, the point here is not that there must be a textual difference before state courts may diverge from

79. Id. at 799.
83. Exum, supra note 37, at 1746. While it is not likely that all state constitutional conventions were conducted without debate, in California, the provision that stated “[n]o person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession,” was adopted without amendment or debate. See Babcock, supra note 42, at 853 (quoting The Lady Lawyers, San Francisco Chron., Feb. 15, 1879, at 2).
84. Exum, supra note 37, at 1746.
86. See Exum, supra note 37, at 1746.
87. See Neubome, supra note 85, at 893-94, for language found in state constitutions which Professor Neubome argues could provide the basis for rights for the poor.
federal interpretation. Rather, the significance of textual differences is that they indicate that state constitutions were not intended to mimic the federal constitution.

B. Supplemental Interpretation

Another problematic approach to state constitutional law involves an analysis of the state constitution only once a state court has determined that the asserted claim fails under the federal constitution.\(^8\) This approach has been labeled “supplemental,”\(^9\) “interstitial,”\(^10\) and “second-look.”\(^11\) As the dependent approach assumes that state and federal constitutions are the same, the supplemental approach assumes that if the federal constitution recognizes and protects the asserted right, the state constitution must as well. However, where the United States Supreme Court has declined to recognize an asserted right the state court following this method turns to the state constitution in this instance only.

An early example of this method and one relied upon by other state courts is the New Jersey Supreme Court case, *State v. Hunt.*\(^12\) In a concurring opinion in *Hunt,* Justice Handler listed several criteria for the New Jersey courts to consider in deciding whether to analyze the state constitution independently.\(^13\) The criteria appear to be broad enough to allow for frequent departure from United States Supreme Court precedent: textual differences, legislative history differences, state cases predating federal changes, state structural differences, a subject of “unique local interest,” a countervailing state or local issue exists, or public attitudes on the issue differ.\(^14\) Despite the breadth of these criteria and the court’s insistence that they are not exclusive, this approach relegates the state constitution to a position of diminished importance because it mandates independent interpretation only when the court can point to something different or unique about the state or its constitution. However, even more troubling is the fact that under this approach a state court examines the state constitution only if the asserted claim fails under the federal constitution. This highlights the fact that the state court is relying on the state constitution to reach a result different from that determined by the United States Supreme Court, placing the state court in a defensive position. The state court must point to satisfactory reasons for departing from federal precedent. Furthermore, since the state charter is relevant only when the federal constitution does not recognize the asserted right, under this approach state court departure will nearly always result in a broader definition or protection of the asserted right, in express disagreement with the United States Supreme Court. Such decisions are easily criticized as “result-oriented.”\(^15\)

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89. Id.
90. Id.
92. 450 A.2d 952 (N.J. 1982).
94. See *Hunt,* 450 A.2d at 964-67 (Handler, J., concurring).
Finally, by not requiring state courts to examine their state constitution regardless of the result under the federal constitution, this approach hinders the consistent and principled development of state constitutional analysis. That is, the state court engages in independent interpretation only in some instances. Lack of frequent consideration and analysis of the state constitution distances a state court from its own charter, thus making it more difficult for a state court to know where to begin and how to conduct its analysis of the state constitution in those instances requiring independent analysis.

The Supreme Court of New Mexico announced earlier this year that it would follow this approach, in State v. Gomez. Acknowledging recent efforts of New Mexico to step out of lock-step, the court stated that “[w]e today specifically adopt the interstitial in preference to the primacy approach” relying on prior recent cases following this method without referring to it expressly. In Campos v. State, New Mexico’s high court examined the constitutionality of warrantless searches made in the absence of exigent circumstances. Although the court did not specifically indicate a method of interpretation, the court first determined that federal precedent upholds such arrests, and then went on to analyze the state constitution, holding that the state constitution required the existence of exigent circumstances, based on state court precedent recognizing only limited exceptions to the warrant requirement.

Similarly, in State v. Gutierrez the New Mexico Supreme Court declined to incorporate as a matter of state constitutional law the United States Supreme Court holding in United States v. Leon which created a good faith exception to the exclusionary rule. The court first considered federal precedent and then analyzed the history and precedent of the state provision in concluding that such a good faith exception was incompatible with the state constitution. As discussed in part IV of this paper these New Mexico cases, though following a method I believe is flawed, have nonetheless made an important contribution to the second question of how to go about state constitutional interpretation.

While this approach has resulted in independent state interpretation as to some portions of the state constitution, it does not, however, develop a consistent body of state constitutional jurisprudence because the state court does not always consider the state constitution. Furthermore, this approach does not simply assume that both constitutions require the same result, but that they also require the same analysis and rationale for the result, unless one of the “difference criteria” exists.

On a more practical level, the “supplemental” approach provides very little guidance to state trial courts as to when the state constitution may protect broader law did not protect the right asserted, it turned to enforcing the right, resulting in the suppression of illegally obtained evidence.

97. Id. at 783, 932 P.2d at 7.
99. See id. at 158-59, 870 P.2d at 120-21.
102. See Gutierrez, 116 N.M. at 432, 863 P.2d at 1053. See also State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989) (court declined to follow the “totality of circumstances” test of Illinois v. Gates, 462 U.S. 213 (1983), and decided, instead, to adhere to the Aguilar-Spinelli test previously applied in New Mexico courts).
103. See infra text accompanying notes 159-71.
rights, and it inadequately advises litigants as to when they should rely on the state constitution in their arguments. This can have an effect on a state court’s willingness to reach a state constitutional issue. Where litigants have failed to assert a right under the state charter, state courts have refused to consider the claim and instead rely solely on federal precedent.104 This issue arose in the New Mexico case, State v. Gomez, a case in which the court had to engage in detailed analysis as to whether the defendant had sufficiently preserved an argument based on the state constitution, in addition to the analogous federal claim.105 State courts must provide litigants with guidance as to when the state constitution applies. This will further the development of state constitutional law by allowing state courts to benefit from advocacy based on state constitutional research and argument.

C. Dual Sovereignty

A third approach, which is recommended by a number of commentators is called the “dual sovereignty” method.106 Under this approach a state court is required to analyze the relevant state and federal constitutional provisions in every case presenting federal and state constitutional claims. The argument in support of this method is that it “accommodates, rather than evades, the relationship of state and federal constitutional rights.”107 Unlike the above “supplemental” approach under which state courts only examine their own constitutions if the federal constitution does not recognize or protect the particular right asserted, state courts applying the “dual sovereignty” approach can avoid criticisms that they are using the state constitution merely as a means of avoiding a particular federal precedent with which they disagree. Commentators acknowledge that “once a court affords protection under the constitution analyzed first, discussion of the other constitution is unnecessary dicta.”108 This criticism is relevant if both constitutions protect the asserted right. However, if after analyzing a claim under both constitutions, the state court determines that the state constitution provides broader protection than its federal counterpart, the state court will once again be in the position of having to justify its “departure” from federal analysis and precedent. Certainly, anytime a state court interprets its own state’s charter it will have to explain its reasons for reaching its result. But where the state court, on the same facts, determines that the two constitutions require different results, the state court must do more than simply explain why the state charter requires a particular result, it will have to explain why the state charter requires a result different than the federal constitution requires. This perpetuates the view that state constitutional guarantees are merely secondary to federal guarantees. Additionally, as with the supplemental approach, where a state court presents analysis of the federal claim and then interprets the state

104. See City of Mandan v. Fern, 501 N.W.2d 739, 744 (N.D. 1993), where the appellant urged the court to determine as a matter of state constitutional law that Batson extended to gender-based peremptory strikes, but merely cited to the relevant state constitutional provision, the court stated that this was insufficient to raise the issue for their consideration.


106. See Utter & Pitler, supra note 66, at 651. See also William C. Hill & Michael Marks, Forward: Toward a Federalist System of Rights, 1984 ANN. SURV. AM. L. 1, 11.


108. Utter & Pitler, supra note 66, at 652.
new federalism, critics will charge the state court with engaging in
“result-oriented” interpretation.109

A related problem with this approach is that it permits United States Supreme
Court review of a state court’s analysis of a federal constitutional claim. Where a
state court conducts analysis of both the state and federal constitutions, it subjects
its decision to United States Supreme Court review.

According to Michigan v. Long,110 if a state court decision is ambiguous as to
which constitution it is applying, the United States Supreme Court may review the
decision with the assumption that the state court “decided the case the way it did
because it believed that federal law required it to do so.”111 A state court could
avoid such review by including a “plain statement” that the court determined that
state law dictated the result. If, under the dual sovereignty approach, a state court
determines that both constitutions require the same result, its analysis may be
subject to Supreme Court review. If the Supreme Court disagrees with the state
court’s analysis of federal law, it will reverse. The state court will then have to
explicitly state that its result was required under the state constitution if it wishes
to preserve its earlier ruling. This will highlight the differences between the two
courts and once again put the state court on the defensive to explain its reasons for
initially reaching the same result under both constitutions, and then later relying
exclusively on the state constitution to reach a result contrary to that required under
the federal constitution.

Additionally, this situation could raise doubts as to the constitutional analytical
abilities of the state supreme court; if they interpreted the federal constitution
incorrectly, perhaps they also misinterpreted the state constitution. One example of
this is People v. Class.112 The New York Court of Appeals held that an officer’s
nonconsensual entry into the defendant’s vehicle to acquire the vehicle
identification number violated both the federal and state constitutions.113 The United
States Supreme Court reversed as to the federal constitution and then remanded.114
On remand the state court had to reiterate its reliance on the state constitution and
refused to alter its initial state constitutional analysis merely because the United
State Supreme Court disagreed with the interpretation of the federal constitution.115

A state court can avoid review by the United States Supreme Court by complying
with the requirements of Long, but it then becomes subject to another type of
criticism, that of evading Supreme Court precedent. Several examples of state court
“evasion” of Supreme Court review exist from the early days of “New Federalism.”
For example, in People v. Krivda,116 the California Supreme Court determined that

109. See, e.g., George Deukmejian & Clifford K. Thompson, All Sail and No Anchor—Judicial Review
Under the California Constitution, 6 HASTINGS Const. L.Q. 975 (1979); Earl M. Maltz, The Dark Side of State
Court Activism, 63 TEX. L. REV. 995 (1985) (criticizing “activism” of state courts under the banner of new
federalism).
111. Id. at 1041.
112. 494 N.E.2d 444 (N.Y. 1986).
113. See id. at 445.
115. See Class, 494 N.E.2d at 446.
116. 486 P.2d 1262 (Cal. 1971), vacated and remanded, 409 U.S. 33 (1972), aff’d, 504 P.2d 457 (Cal.
1973).
a warrantless search of a garbage can placed on the curb for collection was unlawful. 117 Upon Supreme Court remand for a determination of which constitution required this result, the California Supreme Court, without explanation, asserted reliance on both the federal and state constitutions. 118 Such a statement by a state court precluded United States Supreme Court review, further supporting the criticism that independent interpretation was merely a way of avoiding federal precedent. 119

While stated reliance on both constitutions is no longer sufficient to avoid Supreme Court review, under Long the required “plain statement” similarly precludes Supreme Court review without requiring much depth of analysis. One commentator argues that this “trivializes the role of judging in both the state courts and in the United States Supreme Court if the outcome turns not on an appreciation of the logic of decision but rather upon the incantation vel non of magic words.” 120 Certainly, the advocates of the “dual sovereignty” approach would not condone such empty reliance on state constitutions. Nonetheless, this approach does not adequately protect against results such as those described above.

Another argument offered for the “dual sovereignty” method is that state courts have an important role in interpreting the federal constitution and this approach allows state courts continued participation in the shaping of federal constitutional law. 121 Indeed, state courts have an important role to play in constitutionalism generally. 122 However, it is not clear that the “dual sovereignty” method of state constitutional analysis is necessary to further this interest. Where a state court engages in thoughtful and in-depth analysis, its opinion can have an influence on the development of federal law, or on the law of other states, even if the decision rests solely on the state’s constitution rather than on the federal charter. For example, as discussed earlier, the California Supreme Court’s decision in People v. Wheeler, 123 was one of several state court opinions 124 which the United States Supreme Court looked to when reconsidering its decision in Swain v. Alabama. 125 The California Supreme Court, however, did not base its opinion on the federal equal protection clause, but rather relied on the state right to trial by jury. 126 In evaluating the use of peremptory challenges based on a prospective juror’s race, the California Supreme Court examined federal precedent regarding a right to a jury drawn from a representative cross-section of the community. 127 The court also looked at California precedent to hold that such a practice violated the California

117. See id. at 1268.
118. See Krioda, 504 P.2d at 457. See also People v. Edwards, 458 P.2d 713 (Cal. 1969) (warrantless search of garbage can in an open back yard violated both the state and federal constitutions).
119. See, e.g., Deukmejian & Thompson, supra note 109, at 983.
121. See Utter & Pitler, supra note 66, at 652.
122. See supra notes 20-36 and accompanying discussion.
123. 583 P.2d 748 (Cal. 1978).
126. “Trial by jury is an inviolate right and shall be secured to all, ...” CAL. CONST. art. I, § 16.
guarantee of a jury trial. However, the court did follow the Swain requirement that a defendant demonstrate “systematic exclusion” of a group of jurors from the venire. The court framed the issue as pertaining to the right to a jury trial, rather than as an equal protection issue. The court then declined to follow Swain, stating that “[b]ecause a fundamental safeguard of the California Declaration of Rights is at issue, . . . ‘our first referent is California Law’ and divergent decisions of the United States Supreme Court ‘are to be followed by California courts only when they provide no less protection than is guaranteed by California law.” The purpose of discussing Wheeler is to illustrate that although a state court might rely on its own constitution, and on a different right—jury trial rather than equal protection—its reasoning can nonetheless be useful and influential in the development of federal law. In Batson, the United States Supreme Court did not alter its precedent regarding fair cross-section, but did reconsider and change its holding under Swain using a rationale similar to that employed by the California Supreme Court and that of other state courts. It would certainly be unfortunate if a result of the “state constitutional revolution,” were that state courts lost their role in the development of federal law. However, this potential danger is not very great, nor is it necessarily remedied by the “dual sovereignty” method of constitutional analysis.

D. Primacy

The final method is called the “primacy approach.” This method of interpretation requires a state court to always analyze a state constitutional claim first. Where the state constitution provides recognition and protection of the asserted right, the state court’s analysis ends. Under the primacy approach a state court analyzes the federal constitution only to determine that the interpretation under the state constitution has not gone below the “federal floor” when the state court declines to enforce the asserted right under the state constitution. This approach assumes that state constitutions serve as the primary sources for the protection of individual rights, with the federal Bill of Rights providing a safety net

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128. See id. at 757-60.
129. See id. at 767.
130. See id. at 754.
131. Id. at 767 (quoting People v. Pettingill, 578 P.2d 108 (Cal. 1978)) (court refused to follow Michigan v. Mosley, 423 U.S. 96 (1975), and held that the California Constitutional privilege against self-incrimination precludes the use of illegally obtained statements even for the purposes of impeachment).
132. More recently, in deciding that the procedure set out in Batson applies to gender-based peremptory strikes, the United States Supreme Court once again looked to how such an issue had played out in the state courts. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).
133. LAZER, supra note 10, at 1.
134. Utter & Pitler, supra note 66, at 647; Shaw, supra note 10, at 1025-28.
135. See Utter & Pitler, supra note 66, at 647.
136. See LAZER, supra note 10, at 5, explaining the difference between the interpretation of a right and its enforcement. Where a state constitution requires a narrower interpretation of a right than under the federal constitution, a state court must nonetheless, enforce the broader federal right in order to avoid violating the Supremacy Clause. See U.S. CONST. art. VI, § 2.
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of minimum protections.\textsuperscript{137} The arguments supporting this approach parallel some of the reasons for independent state constitutional analysis discussed earlier.\textsuperscript{138}

Early on in the period of "New Federalism,"\textsuperscript{139} Justice Linde argued that state constitutions came first as a matter of history and should therefore come first as a matter of analysis when state courts consider constitutional protections.\textsuperscript{140} This argument is premised on the fact that before the days of "incorporation," when the United States Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to bind states to most protections in the federal Bill of Rights,\textsuperscript{141} individuals looked exclusively to their state charters for protection of their rights. Whether this analysis is relevant to states, which adopted constitutions long after the federal convention, is not very important. Rather, the significance is that since before, and for a long time after, the adoption of the federal Bill of Rights, those rights were understood to bind only the federal government.\textsuperscript{142}

In addition to the historical primacy of state constitutional guarantees, the primacy approach furthers the interest of aiding in the development of state constitutional law by requiring state courts and litigants to study the constitutional heritages of their states, as well as the state's prior caselaw. The primacy approach also accords state constitutions a greater degree of prominence. The more accustomed the public becomes to hearing of the protections under their state's constitution, the more likely individuals are to turn to their state constitutions first for protection of their rights.\textsuperscript{143} Independent evaluation of state constitutional guarantees may lead individuals "to face closer to home some fundamental values that the public has become accustomed to having decided for them by the faraway oracles in the marble temple."\textsuperscript{144} Finally, such an approach is less susceptible to criticisms of being result-oriented. Simply because a state court examines the state charter first does not necessarily mean that the result will always be a broader interpretation of a particular right than federal court interpretation of the similar federal right.

Commentators have argued that the primacy approach is not necessary due to the incorporation of nearly all provisions of the federal Bill of Rights by the United

\textsuperscript{137} See Brennan, supra note 1, at 503 ("one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens"); Exum, supra note 37, at 1748 ("federal and state constitutional rights stand side-by-side . . . a double-edged sword in the service of freedom"); Shaw, supra note 10, at 1025 ("the U.S. Constitution providing a second layer of protection").

\textsuperscript{138} See supra notes 10-65 and accompanying text.

\textsuperscript{139} This term has been used to describe the period dating from the early 1970s during which the United States Supreme Court began to narrow individual rights, while state courts relied on their own charters to continue prior protections or expand such protections. See Peter J. Galie, State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981, 18 GONZ. L. REV. 221 (1982); Slobogin, supra note 11 at 657; Donald E. Wilkes Jr., The New Federalism in Criminal Procedure in 1984: Death of a Phoenix?, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (1985); Robin B. Johanson, Note, The New Federalism: Toward a Principled Interpretation of the State Constitution, 29 STAN. L. REV. 297 (1997).

\textsuperscript{140} See Linde, supra note 3, at 380-84.

\textsuperscript{141} Before the adoption of the Fourteenth Amendment, the Bill of Rights was understood as a restraint on the federal government only. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

\textsuperscript{142} See id. (rejecting the argument that the Fifth Amendment protection against the taking of property without compensation restrained states as well as the federal government).

\textsuperscript{143} See Linde, supra note 3, at 394.

\textsuperscript{144} Linde, supra note 3, at 395.
States Supreme Court.\footnote{145} This criticism appears to be more directed at the idea of independent interpretation itself, rather than at this particular method of interpretation. Thus, this criticism ignores the benefits of independent interpretation discussed earlier.\footnote{146} The second criticism of the primacy approach is that in certain areas of law, primarily the criminal justice area, uniformity of laws is necessary.\footnote{147} Therefore, state courts should adhere to federal precedent in order to avoid development of separate rules with respect to criminal rules. This is essentially an argument for the “dependent” approach.\footnote{148} While specific concerns for uniformity may constitute a principled reason for adopting federal precedent in a particular case, this concern is insufficient to justify complete dependence upon federal precedent by state courts, stifling experimentation and constitutional discourse.

Critics also argue that “unless conditions peculiar to [the state] support a different meaning,” state courts should follow federal precedent.\footnote{149} Once again, this argument assumes that the United States Supreme Court has not only come up with the best result and analysis of the issue, but also the best resolution of the issue for all of the fifty states. Even characterizing this criticism more narrowly, it is inadequate to advance the independent development of state constitutional law. In one sense, the “dependent unless good reasons exist” approach acknowledges the differences among the states, and the possibility that each state constitution might include textual differences in their constitutions, as a result of different constitutional heritages. The requirement that state courts be able to point to some good reason for departure is often used in jurisdictions that employ the supplemental approach described above, and accommodates differences among states and between states and the federal constitution.\footnote{150} However, this approach results in independent constitutional analysis for some guarantees set forth in the state charter, but dependent interpretation for others. For example in State v. Hunt,\footnote{151} where Justice Handler set out the “nonexclusive criteria,” he claims that these are not intended to require adherence to federal precedent; yet in his framing of each criterion his perspective is always in reference to the federal constitution.\footnote{152} For example, in referring the state court to the text of the state constitution, Handler states, “[a] state constitution’s language may itself provide a basis for reaching a result different from that which could be obtained under federal law.”\footnote{153} Thus

\begin{itemize}
  \item \footnote{145}{See Utter \& Piter, \textit{supra} note 66, at 648.}
  \item \footnote{146}{See \textit{supra} notes 10-65 and accompanying text.}
  \item \footnote{148}{See \textit{supra} notes 67-82 and accompanying text.}
  \item \footnote{149}{See People v. Norman, 538 P.2d 237, 246 (Cal. 1975) (Clark, J., dissenting). See also People v. Maher, 550 P.2d 1044, 1050 (Cal. 1976) (Clark, J., dissenting) (“[u]nless its text, history or function supports a broader construction, a state constitutional provision affords no greater right than the parallel provisions of the federal Constitution”).}
  \item \footnote{150}{See supra notes 88-92 and accompanying text.}
  \item \footnote{151}{450 A.2d 952 (N.J. 1982).}
  \item \footnote{152}{See \textit{id.} at 965 (Handler, J., concurring).}
  \item \footnote{153}{\textit{Id.} (emphasis added).}
\end{itemize}
indicating that without such a textual difference, a different interpretation or result would not be principled.

The notion of interpreting some state constitutional provisions in a dependent manner, and others in an independent manner is similar to the problems which arise when voters pass voter initiated constitutional amendments forcing state courts to adhere to United States Supreme Court precedent. One commentator calls this “the problem of the divided constitution.” Such partial “forced linkage” raises the same types of issues discussed above with respect to dependent interpretation. Additionally, the effect of a divided state constitution is to minimize a state court’s opportunity to become more familiar with its state constitutional heritage, thus limiting the potential for reasoned independent interpretation when differences exist.

The better approach is for state courts to begin with their own state charters whenever a constitutional claim is asserted. Instead of looking for reasons to decide a particular issue in a manner contrary to federal precedent, state courts should examine their own charters to determine whether reasons exist to follow the federal interpretation. This is similar to the way in which a state court might look to the decisions of other state courts for guidance. Certainly, adherence to the primacy approach does not mean that state courts may never refer to federal precedent. Rather, state courts should consider every possible source for analysis including precedent of the United States Supreme Court, but consider it the same way a state court considers jurisprudence from other states in deciding whether to adopt such an approach for the state’s law.

A number of state courts purport to follow the “primacy” approach to state constitutional law. Unfortunately, these states do not apply this approach on a consistent basis. California had begun to apply the primacy approach on a somewhat consistent basis during the early part of the New Federalism period. However, the California Supreme Court has undergone personnel changes and has

154. See, e.g., CAL. CONST. art. I, § 28(d) (“[E]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, . . .”), People v. May, 748 P.2d 307 (Cal. 1988) and In re Lance W., 694 P.2d 744 (Cal. 1985) (both interpreting the above provision as mandating California courts not to apply the exclusionary rule more broadly than it is applied by the United States Supreme Court). See also FLA. CONST. art I, § 12.

This right [prohibiting search and seizures] shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.


156. This term “describe[s] the impact of electoral decisions . . . requiring state courts to equate state constitutional law with federal constitutional law.” Slobogin, supra note 11, at 657.

157. See supra notes 67-77 and accompanying text.

158. See Utter & Pitler, supra note 66, at 647.

159. See James A. Gardner, The Failed Discourse of State Constitutionalisr, 90 MICH. L. REV. 761, 801-04 (1992) (criticizing the New Hampshire Supreme Court’s inconsistent application of the primacy approach); Shaw, supra note 10, at 1043-45 (criticizing the Oregon Supreme Court’s inconsistent application of the primacy approach).

160. See Van Cleave, supra note 60, at 112-15.
had a rather rocky history in developing its state guarantees, especially in the area of criminal justice rights. One reason for this is that during the days of incorporation when the United States Supreme Court began to rapidly apply most of the federal rights to the states through the Due Process Clause of the Fourteenth Amendment, California and other states, automatically looked to the federal precedent to avoid violating federal law. During this time of “co-option” it was “easy for the state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law” and not consider what their state charter might require. Even where a state supreme court had been analyzing its own declaration or bill of rights independently, having ignored state charters for a number of years made it difficult to return to independent analysis without evoking criticisms of being result-oriented—simply desiring to disagree with a United States Supreme Court pronouncement. A second explanation for California’s troubled history of independent constitutional analysis may be that the California Supreme Court did not provide litigants with any criteria under which the court would analyze the state constitution independently. The California Supreme Court did not expressly state that they would always look to the state declaration of rights first. If the court had made such a pronouncement, litigants would have then been on notice that they should always consider possible interpretations and arguments based on the state guarantee. This would have provided the court with more information on the state guarantees to consider in their analysis.

In the criminal justice area, this lack of guidelines for applying the state constitution resulted in a voter backlash. One such initiative amended the constitution to prohibit use of the exclusionary rule in criminal cases unless required by federal constitutional law. Another initiative adopted by the voters would have required the state courts to adhere to federal precedent when interpreting the rights of criminal defendants. This fluctuation by the California

161. See id. at 122-29.
163. Slobogin, supra note 11, at 657.
164. Howard, supra note 162, at 878.
165. See sources cited supra note 147.
166. See Van Cleave, supra note 60, at 122-29.
167. See id.
168. See id.
169. Proposition 8 was passed by the voters in June 1982. See CAL. CONST., art. I, § 28 credits (West 1983).
170. The relevant section of Proposition 115 added the following language to the California Declaration of Rights:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in
Supreme Court as to the independent nature of the California Constitution may explain why the court has not expressed the extent to which it will examine the state declaration of rights independently.

IV. STATE CONSTITUTIONAL THEORIES OF INTERPRETATION

The bulk of this article has focused on the “when” of state constitutional interpretation, that is the method used by state courts to determine when the court will rely on the state charter, and at what point federal precedent will enter the analysis. The second question relates to the “how” of state constitutional interpretation. Upon deciding to examine the state charter, courts face the formidable task of figuring out what to do with the state constitution. The task is formidable because state courts embarking on independent analysis must face several potential constraints that can box-in the court’s ability to independently analyze the state charter. For example, where the result of independent interpretation is one that diverges from federal precedent, state courts are subject to the criticism of being “result-oriented.” Typically, state courts attempt to overcome or preempt this criticism by pointing to something “unique” or “peculiar” about their state constitution or history. This type of analysis can subject the court to the criticism that they are really not engaging in independent constitutional theorizing, but instead beginning from the presumption that the federal constitution applies “unless.” Certainly, the theories of constitutionalism employed by the United States Supreme Court are also criticized. However, given the extreme difficulty of amending the federal constitution, criticisms of the Supreme Court’s decisions result primarily in a plethora of law review articles. Criticisms of interpretational theories of state supreme courts can and often do result in amendments to the state charter, or even in the recall of judges, as the State of California has painfully discovered.¹⁷¹ This section describes some examples of theories state courts have used to interpret their constitutions, as well as how these other aspects of state constitutions can operate to constrain interpretation.

Although for organizational purposes it is useful to separate the two questions of when and how, they do overlap. For example, where courts follow the “criteria approach” as described by the New Jersey Supreme Court in *State v. Hunt*,¹⁷² those courts answer both questions at the same time. First, if they follow the criteria as set out by Justice Handler, state courts answer the question of “when” with the supplemental approach, which means that if the asserted right is not recognized under the national constitution, and the court is able to point to a difference between the two constitutions, the court will interpret the state charter. At the same time, however, such courts also answer the question of “how” by relying on the difference

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discovered, whether it be textual, historical, or otherwise, in order to justify a different rationale and perhaps a different result. In State v. Hunt, the New Jersey Supreme Court determined that the warrantless search and seizure of the defendant’s telephone toll billing records violated the New Jersey Constitution. The court relied on a state statute that made it a misdemeanor to tap a telephone line as well as state precedent supporting a stronger protection of privacy. Justice Handler in coming up with criteria for independent analysis did so based on the desire to avoid criticisms that “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.” Justice Handler apparently had in mind the danger of unprincipled analysis when he cited to the, then recent, voter initiative in California which purported to bind that state’s supreme court to federal interpretation, after that court had been praised as “the birthplace of th[e] new judicial independence.” This analysis served to support the legitimacy of the result and rationale reached by the court, to promote an in-depth examination of the state’s constitutional history which in turn adds to the richness of state constitutionalism, and was an important first step in more principled analysis of a state constitution.

Despite the laudable goal of engaging in principled decision-making to avoid the criticism of being merely result-oriented, this approach is subject to criticisms similar to those of the supplemental approach. This theory assumes that state constitutionalism is the same as federal constitutionalism unless the state court is able to point to a uniqueness in the state charter. By relying on some unique aspect of the state constitution in answering the question of how it will interpret the state constitution, the state court ends up isolating itself from the national discourse and debate on constitutionalism. The idea is that where the reasoning and result are due to something unique to that state or its constitution, other jurisdictions may be reluctant to rely on the precedent unless the same unique aspect is present in the jurisdiction, whether federal or state. This raises yet another criticism of the criteria approach as a theory of interpretation—skepticism that any state truly has a unique aspect of constitutional dimensions. As one scholar has put it,

Americans are now a people who are so much alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.

174. See id. at 957. But see Smith v. Maryland, 442 U.S. 735 (1979), which the court in Hunt “surmised” supported a conclusion that the search did not violate the federal constitution.
175. See Hunt, 450 A.2d at 955.
176. Id. at 967 (Handler, J., concurring).
177. Id. at 964, (quoting Note, State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism, 13 AM. CRIM. L. REV. 737, 740 (1976)).
178. Similarly, the Washington Supreme Court has adopted these criteria for interpreting its state constitution, and answers the question of when by using the supplemental method. See State v. Gunwall, 720 P.2d 808 (Wash. 1986).
179. See Gardner, supra note 4, at 777.
180. Gardner, supra note 4, at 819.
Where the criteria approach has resulted in an interpretivist theory, relying on text and history, state courts have been criticized for employing a theory long considered fraught with problems as to the federal constitution. A recent example of a state court struggling with the answer to the “original intent” question is seen in the California case, Sands v. Morongo Unified School District. The substantive issue in Sands involved the constitutionality of religious invocations and benedictions at public high school graduation ceremonies. Aside from the lack of any consensus as to the “method of interpretation,” that is when the California Supreme Court will turn to the state charter, the justices disagreed as to the history surrounding the adoption of the provisions at issue, thus supporting the view that original intent jurisprudence is problematic.

The criticisms of state courts examining state constitutional history may be valid if the goal of examining such history is to discern an “original intent.” However, examination of history by a state court can serve the purely educative function of informing the court, lawyers and the people generally of that state’s constitutional history, perhaps promoting either pride or shame, but at a minimum, awareness. In addition, given the fact that state constitutions, especially those of western states were adopted long after the Federal Constitution, consideration of history provides context in which a court can understand what the prevailing issues of the day were and how the constitution reflected this. Such a consideration of historical circumstances also furthers understanding of the many amendments to state constitutions. Used in this way, the history of the state constitution or of a particular provision is valid and reasonable.

Some relatively recent state supreme court opinions appear to take steps beyond the criteria approach by not emphasizing difference. By not relying on differences between the state and federal constitutions, such opinions further the state court’s participation in constitutionalism generally. For example, the New Mexico Supreme Court recently declared that it would follow the supplemental approach in State v. Gomez. Under this approach, the court determined that it would examine the state constitution only if after analysis of the federal constitution and precedent the court determines that the right asserted is not protected. Upon turning to the New Mexico Constitution, the court stated that it would diverge from federal precedent in one of three instances. First, where “distinctive state characteristics [are present],” the

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181. See Maltz, supra note 109, at 995.
184. See id. at 867.
185. Of the five justice majority, three justices, Kennard, Mosk and Broussard, held that the practice violated both the state and federal constitutions, adopting the dual sovereignty method and two justices, Lucas and Arabian, agreed that the practice violated the federal constitution, but found it unnecessary to examine the state constitution, following the dependent method. See id. at 810-44.
186. See Stephen E. Gottlieb, Forward: Symposium on State Constitutional History: In Search of a Usable Past, 53 Alb. L. Rev. 255, 258 (1989)(asserting that “constitutional history is valuable whether or not one subscribes to a jurisprudence of original intent”).
188. 122 N.M. 777, 783, 932 P.2d 1, 7 (1997).
189. See id.
The court will look to its own state charter. The existence of distinctive state characteristics seems to embrace aspects of the criteria approach, thus adding little to a consideration of theories of state constitutionalism. Second, the court stated that it would resort to the state constitution when "federal analogs" were undeveloped. The consideration of the lack of controlling federal jurisprudence answers the concern discussed previously of state court attempts to forecast United States Supreme Court jurisprudence by imposing upon the court a duty to analyze the issue without deferring the question and waiting for the United State Supreme Court to take up the issue, as one justice in the California Sands case argued for. Finally, and most significantly, if the state court determines that the federal analysis is flawed the state court will not rely on it. The New Mexico Supreme Court's express decision to critically examine federal jurisprudence and diverge from it where that court finds it to be flawed is an example of a state court exercising "independent judgment" and thus an important step. This theory of interpretation moves beyond a "discourse of distinctness" and engages the state court in constitutional discourse, as long as the examination of federal precedent amounts to more than mere "unprincipled rejectionism."

In State v. Gomez, the New Mexico Supreme Court decided not to follow United States Supreme Court precedent establishing a bright line exception to the Fourth Amendment permitting a warrantless search of a lawfully stopped car and of any closed containers in the car. Despite prior adherence to federal precedent, the court in Gomez declared "[w]e no longer follow United States Supreme Court interpretation of the Fourth Amendment in our interpretation of Article II, Section 10 [of the New Mexico Constitution]." In Gomez, the court examined state precedent supporting a "strong preference for warrants," and the reasons warrants are important. The court then concluded that the requirement could be dispensed with only where there is a showing of exigent circumstances.

The New Mexico Supreme Court in State v. Cordova refused to follow the United States Supreme Court precedent of Illinois v. Gates finding that the reasons the Supreme Court gave for departing from the Aguilar-Spinelli test had not

190. Id. (citing Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1359 (1982)).
191. See id.
192. See Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 834 (Cal. 1991)(Lucas, C.J., concurring) (stating that the California Supreme Court would "do well to invite and await [the United States Supreme Court's] views before giving final and definitive answers to complex and difficult questions of constitutional law. In this way we can give appropriate deference to its views ... and proceed in a fashion that is 'informed but untrammeled' by federal constitutional principles"). See also discussion of Eiland v. State, 607 A.2d 648 (Md. Ct. Spec. App. 1992), rev'd sub nom Tyler v. State, 623 A.2d 648 (Md. 1993) supra, note 56 and corresponding text.
193. See Gomez, 122 N.M. at 783, 932 P.2d at 7.
194. Gardner, supra note 4 at 777.
197. Id.
198. Id.
199. See id. at 788, 932 P.2d at 12.
occurred in New Mexico precedent. Specifically, the rigid application of the two-prong test evident in some courts had not been a problem in New Mexico courts. Although the New Mexico Supreme Court had previously relied on United States Supreme Court precedent, in Cordova the court exercised independent judgment when considering whether to follow the most recent federal precedent on the subject.

In considering whether to adopt the good faith exception to the exclusionary rule announced in United States v. Leon, the New Mexico Supreme Court in State v. Gutierrez, engaged in a detailed analysis of the purposes of the exclusionary rule and how the United States Supreme Court had moved to greater reliance on the deterrent aspect of the rule. The court considered its own precedent as well as precedent of other state supreme courts analyzing the exclusionary rule to decide that the more important purpose of the exclusionary rule is to protect the right to be free from unreasonable searches and seizures, and that this could not be furthered by adopting a good faith exception. Again, this is an important example of principled disagreement with the United States Supreme Court which more than adequately supports independent interpretation.

Principled independent interpretation is extremely important in states like New Mexico where state court judges may be voted out of office similar to the way in which members of the legislature may. Thus the cautious approach evidenced by recent opinions is necessary. In addition, these examples start to engage a court in greater consideration of and reflection on the charter of their state, thus adding to the richness of analysis. Furthermore, where state courts engage in principled analysis, different from United States precedent, they contribute in an important way to constitutionalism generally. Where the United States Supreme Court sees that its reasons for adopting the holding in Gates, for example, do not accurately reflect reality in some states, the federal court might reconsider its analysis. In this way state courts can be loyal to their state charters yet at the same time contribute important voices to constitutionalism.

V. CONCLUSION

While it is inevitable that some state judges will seek to apply independent interpretation with an eye to reaching a result which provides greater protection of individual rights than under the federal constitution, the “neutral” goal should be that of developing a body of state constitutional law which does not rely on the fluctuations of United States Supreme Court precedent and which might eventually contribute to the analysis of federal constitutional law. The examples discussed in Part IV are reflective of the current state of the evolution of state constitutional interpretation, and indicate that state courts are giving greater consideration to both the question of when and how to interpret their state charters. Increased focus on the question of how has led state courts to move beyond both the “criteria” approach

202. See Cordova, 109 N.M. at 216, 784 P.2d at 35.
205. See id. at 445, 863 P.2d at 1066.
and the “unprincipled rejection” approach. Nonetheless, the movement is slow and cautious due to the limitations peculiar to state courts—ease of constitutional amendment and voter participation in the election or retention of state judges. These considerations are not faced by federal judges, and yet can make the job of state judges extremely difficult, sometimes putting state courts in a no win situation, with real and tangible consequences such as being voted out of office. Nonetheless, state courts must do the best that they can taking into account these aspects while cautiously exploring the possible modes of analysis available to them. As mentioned at the beginning, if state Rules of Court were to require litigants to raise and brief state constitutional issues as well as the federal issues, state courts might be aided in their interpretation of the state constitution, and avoid questions as to whether litigants properly preserved a state constitutional claim at trial. This was an issue to which the New Mexico Supreme Court had to devote a great deal of analysis in \textit{State v. Gomez}.  

Justice Handler in the \textit{Hunt} case, strongly cautioned against a state constitutional theory which amounts to “pure intuition” because such a theory would be unprincipled. Yet, there are examples of state courts engaging in a much more fluid, but nonetheless principled analysis of their constitutions. These have an even greater potential for contributing to constitutional discourse. The best example of state judges exercising independent judgment relying on “moral intuition” involve interpretations of state constitutional protections against cruel and unusual punishment, or cruel or unusual punishment. One classic example is \textit{Sterling v. Cupp} in which former Oregon Supreme Court Justice Hans Linde examined not only traditional sources of persuasive authority such as decisions of sister state courts, but also Eighteenth Century treatises on penology and the Universal Declaration of Human Rights. Another good example of this is the concurring opinion of Justice Liacos in the Massachusetts case, \textit{District Attorney for Suffolk District v. Watson}. In this case the Massachusetts Supreme Court was presented with the question of whether the state constitutional provision prohibiting “cruel or unusual punishment” had the same meaning as the Eighth Amendment’s prohibition of “cruel and unusual punishment.” In his concurrence, Justice Liacos referred to a range of authorities to inform his analysis of the unconstitutionally cruel nature of the death penalty. For example, he cited descriptions and

\begin{itemize}
  \item \textit{State v. Gomez}, 206 N.M. 777, 781-87, 932 P.2d 1, 5-11 (1997)(this analysis of preservation was combined with the court’s indication of the method it decided to apply, stating that Gomez preserved his state constitutional claim by simply referring to the relevant provision because the New Mexico Supreme Court had previously stated that it would interpret search and seizure rights more expansively than the United States Supreme Court).
  \item \textit{Supra} notes 92-94 and accompanying text.
  \item See Kahn, \textit{supra} note 5, at 1161.
  \item See, e.g., CAL. CONST. art. I, § 17. I credit the idea of using state court interpretations of cruel or unusual punishment provisions as excellent examples of Kahn’s notion of “moral intuition” to a student in my fall, 1997 State Constitutional Law Seminar, Patrick A. Bowser, Class of 1998.
  \item 625 P.2d 123 (Or. 1981).
  \item MASS. CONST. art. 26.
  \item U.S. CONST. amend. VIII.
\end{itemize}
characterizations of death and humans’ fear of death in the Bible, Aristotle’s Nicomachean Ethics, Shakespeare, and Fyodor Dostoyevsky. Cases like this illustrate how a state court’s willingness to consider a variety of sources can add to the richness of constitutional debate and discourse, and the analysis contained in cases like *Sterling v. Cupp* and *Watson* are legitimate and valuable for this very reason.

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215. See *Watson*, 411 N.E.2d at 1291 (Liacos, J., concurring) (citing Job 18:14), at 1292 (citing Corinthians 15:20, 26).
216. See id. at 1291.
217. See id. at 1291-92 nn.10, 11 & 13.
218. See id. at 1294.