Address: State Constitutional Law Interpretation: Out of "Lock Step" and beyond "Reactive" Decisionmaking

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ADDRESS: STATE CONSTITUTIONAL LAW
INTERPRETATION: OUT OF "LOCK-STEP" AND
BEYOND "REACTIVE" DECISIONMAKING*

David M. Skover**

One of the central objectives of former President Reagan’s Administration was “decentralization:” dismantling the federal regulatory agencies and entrusting the state governments with control over economic and social relations. Yet, it must be remembered that decentralization was not an idea invented by the Reagan Administration. At least since 1970, the United States Supreme Court, led by Chief Justices Burger and Rehnquist, has done its share to move American law out of federal courtrooms.

In the 1970s, the Supreme Court’s trend of “judicial decentralization” was most apparent in its constitutional doctrines of jurisdiction and justiciability,1 which effectively closed the federal courthouse doors to many individual rights plaintiffs. In the Court’s past two terms, however, “judicial decentralization” has taken a different tack. In major substantive areas—civil rights and affirmative action, privacy and abortion, criminal justice, constitutional taking and religious establishment—the Rehnquist Court has engineered a conservative retrenchment in individual rights

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doctrines. The "gang of five" has closed the federal Constitution to numerous individual rights claims. As Reagan judicial appointees account for more than half of all sitting federal district and appellate court judges, and command a majority in all but four of the twelve federal courts of appeals, there is every reason to believe that the conservative counterrevolution will continue and intensify.

Without access to the federal courts and Constitution, rights claimants increasingly have turned to the state judiciary for protection of fundamental liberties under state law. As a result, "judicial decentralization" has sparked the revitalization of state constitutional law as an independent source of authority for checking state government abuses. The early period of the state constitutional renaissance (1970-1977) was largely confined to the Northwest and Northeast state high courts; moreover, independent reliance on state law was reserved typically for criminal justice cases in which unique state constitutional guarantees were applicable or definitive federal constitutional rulings were lacking. By the close of 1989, however, state high courts will have invoked their own constitutional law in some 600 cases in which the relief granted would have been unavailable under the federal Constitution. More than twenty different state high courts will have rested on their own state constitutions to go beyond federal law minimums. And, state law rulings will have touched a full spectrum of constitutional concerns—including rights to abortion and abortion funding, privacy rights to die and to be free from compulsory drug testing, equality of treatment cases involving school financing and gender discrimination, freedom of expression on property accessed by the public, gun control, zoning restrictions, caps on damages actions


and attorneys fees, and various forms of economic liberty.\(^5\) Justice William Brennan has referred to the state constitutional law movement as "the most significant development in American constitutional jurisprudence today."\(^6\) And, as evidenced by the more than 300 law review articles on state constitutional law topics published between 1970 and 1986, the phenomenon has caught the attention and imaginations of legal academics.\(^7\)

Yet, vast territories of state constitutional law remain to be explored—by state legislatures shaping economic and civil liberty policies, by state courts deciding civil rights issues, by attorneys litigating individual rights claims, and by interest groups and informed citizens lobbying for liberty protections. These players will not fully appreciate their potential for state constitutional involvement, however, without a well-informed understanding of the various approaches available for the evolution of state constitutional law. My comments today focus on the three most prevalent approaches for state constitutional law interpretation: "lock-step," "reactive," and "beyond the reactive." To a great degree, these three approaches represent consecutive stages in a state high court's liberation from the influence of federal constitutional doctrines established by the United States Supreme Court. As I examine the three approaches in turn, I will suggest how each minimizes or maximizes the capacity of state constitutional law to provide independent, innovative, and intellectually powerful rights guarantees. My views in this regard are still somewhat preliminary and fluid. At the least, I would hope that these suggestions spark further consideration and debate within and outside of the state constitutional law community.

I. THE "LOCK-STEP" PHENOMENON

The first approach for state constitutional law interpretation is the "lock-step." A state high court that adopts this approach will look automatically to the decisions of the United States Supreme Court for the rules and standards to apply in the enforcement of a

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7. See supra note 5.
state constitutional provision. Essentially, the doctrine and the theory of state constitutional law will march along in step with federal constitutional developments.

The strong version of "lock-step" requires that a state rights guarantee provide no more and no less protection than the corresponding federal constitutional liberty. For example, Article I, § 12 of the Florida Constitution commands that the individual right to be secure against unreasonable searches and seizures will "be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court." 8

The weak version of "lock-step" does not dictate that the state constitution incorporate jot-for-jot the United States Supreme Court's federal law rulings. Rather, the state high court will rely on a standard used for a federal constitutional claim to resolve a similar liberty issue under the state constitution. The Montana Supreme Court's 1986 decision in State v. Crain 9 illustrates the weak version of "lock-step." The court confirmed its dependence on the lenient standard for probable cause to issue search warrants that currently governs in the fourth amendment. 10 It explicitly refused the open opportunity to impose a more stringent test for the sufficiency of evidence under the Montana search and seizure guarantee, an opportunity that had been taken by several states, including Alaska, 11 Connecticut, 12 Massachusetts, 13 New York, 14 Washington, 15 and, most recently in October of 1989, Tennessee. 16

The "lock-step" approach comes with certain advantages. Because state constitutional interpretation is grounded entirely upon federal law rulings, "lock-step" offers a "free rider" effect: state judges and attorneys need not exert their own personal efforts or expend institutional resources to create "ground up" theories of state constitutional law provisions. Furthermore, "lock-step" may serve a particular political or ideological perspective: if a state con-

stitution is not to fall out-of-step with federal rights protections, it can never be used as a sword against the conservative attack on the federal bill of rights.

Nevertheless, "lock-step" suffers from several serious and objectionable shortcomings. First, ambiguous federal law precedents will introduce a large degree of indeterminacy and uncertainty into state constitutional interpretation. Typically, state constitutional decisionmaking involves individual rights issues that have not been determined by the United States Supreme Court in similar factual contexts or that have not been resolved in any authoritative fashion. In such cases, the "lock-step" approach leaves two options: either the state high court must hypothesize the rationales and results that the federal Supreme Court would likely have reached, or the state high court must openly engage in independent state constitutional law analysis. The former option is "lock-step" in name only, because the state high court invokes the authority of the federal Constitution to rationalize its own speculations on federal and state constitutional law extensions. The latter option, of course, highlights the deficiencies of the "lock-step" approach and essentially abandons it in the case at hand.

A second shortcoming of "lock-step" can be identified as "textual devaluation." By this, I mean that a "lock-step" approach is likely to disregard significant differences in the texts of state and federal constitutional liberty guarantees; if these textual differences might warrant a dissimilarity in treatment, "lock-step" would devalue or depreciate the state constitutional text. For example, the first amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." In contrast, the Washington Constitution's guarantee of free expression states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Quite obviously, the text of the Washington free speech clause is not explicitly limited to violations by state officials and reasonably could be enforced against private persons who interfere unduly with another's expressive activities. In the face of an earlier decision in which a plurality of the court read the Washington guarantee more generously than the first amendment on this basis exactly, the Washington high court recently depreci-

17. WASH. CONST. art. I, § 5.
ated the independent text of the Washington Constitution and chose to remain in "lock-step" with "well understood and accepted [federal] constitutional doctrine" that "the Bill of Rights . . . was directed at rights against governmental authority, not other individuals."20

The "textual devaluation" problem of the "lock-step" approach might be overcome if a state high court borrowed federal law standards only to enforce the clauses of the state constitution that are textually identical or virtually identical to their federal counterparts. This practice would culminate in a third shortcoming of "lock-step," which Professor Ronald Collins has termed "the problem of the divided Constitution."21 A state constitution will be divided between the class of textually similar provisions tied to federal constitutional interpretation and the class of textually dissimilar provisions open to independent interpretation by the state high court. For example, in the Montana bill of rights, seventeen provisions are without analogues in the federal Constitution, but at least nine sections may be considered textually indistinguishable from federal rights guarantees—including freedom of religion, self-incrimination, search and seizure, due process of law, and excessive bail and cruel and unusual punishments, among others.

The "lock-step" approach would treat these nine sections, at least, as functionally meaningless for purposes of state constitutional interpretation. Why should the Montana Constitution, or any state constitution, be a house divided? Why should certain individual rights be liberated from any federal constitutional link and others be held in bondage, given no independent state constitutional value? It is hardly likely that state constitutional framers and ratifiers intended to deprive their state courts from breathing life into a portion of their bill of rights, to consign that portion effectively to the United States Supreme Court for enforcement. It cannot be that textually similar guarantees are any less significant in-

20. Id. at 423, 780 P.2d at 1287 n.21 (citing United States v. Guest, 383 U.S. 745, 771 (1966) (Harlan, J., concurring in part, dissenting in part)).
22. Id. at 1119-20.
dividual rights than textually dissimilar guarantees. More than the mere fact of textual similarity or dissimilarity is required to justify such a stark difference in treatment of classes of liberties in a unitary state bill of rights.

Three more shortcomings of the “lock-step” approach deserve brief mention, because they may undermine the very federalist structure that the U.S. Constitution is designed to preserve.

If interpretations of state constitutional law remain in “lock-step” with federal constitutional standards, a state high court automatically subjects its state law decisions to review and possible reversal by the United States Supreme Court. Why? The resurgence of state constitutional law in the 1970s and 1980s to extend protection to individual rights beyond federal constitutional minimums did not go unnoticed by the conservative wing of the Burger and Rehnquist Courts. In 1983, the Supreme Court modified its jurisdictional doctrines to ensure that it might monitor the growing trend of rights-expansion in the high state courts. In *Michigan v. Long*, 28 the Court established its presumptive power to review any state high court decision granting greater protection to individual rights than would be available under federal constitutional law. Under the *Michigan v. Long* standards, the Supreme Court will determine whether a state high court ruling truly rests on “independent and adequate” state law grounds. If the state high court issues a “plain statement” of reliance on state constitutional law, the decision is not likely to be reviewed; in the absence of a “plain statement,” if the state law decision appears to be grounded on federal law principles, the Supreme Court may review it to determine whether federal law was wrongly interpreted and applied to decide the case. 29 “Lock-step,” of course, denies state high court judges the power to make independent judgments about the substantive guarantees of state constitutions. Essentially, “lock-step” sacrifices state judicial immunity from perpetual supervision by the federal judiciary.

Additionally, “lock-step” turns the entire state judiciary, when it is interpreting the most fundamental law of the state, into a “quasi-federal” court system. Because state constitutional deci-


sions are the equivalent of federal constitutional law interpretations under "lock-step," the state judges are acting, in effect, as members of the inferior federal courts. Although a state high court's adoption of the "lock-step" approach may not itself be inconsistent with principles of federalism, it is clearly a weak version of federalism theory that would allocate the vertical division of powers between the federal and state courts so as to discourage the independent development of state constitutionalism.

Finally, the United States Supreme Court's rulings under the federal Constitution may serve national objectives and values that are inappropriate or irrelevant to state constitutional law decision-making. The Supreme Court's analysis may turn on the history surrounding the adoption of the 1787 Constitution, the 1791 Bill of Rights, the Civil War Amendments or others. Also, Supreme Court decisions are likely to reflect national common consensus values; to that degree, the level of individual rights protection under the federal Constitution will be geared to the ideology of the median of the American people. Moreover, the Supreme Court may craft its federal constitutional interpretations with an eye to the institutional limitations of the federal courts. To avoid the criticism that an appointed, life-tenured, and electorally unaccountable branch of the federal government is too actively involved in policy decisionmaking, the Court may defer to the authority of both Congress and of the states to define the economic liberties and civil rights of their citizens.  

State constitutional decisionmaking, however, should not be tailored to account for these particular concerns. The legislative history underpinning state rights' provisions is almost certain to differ significantly from the historical purposes that characterized the federal Constitution and Bill of Rights. Furthermore, although protection of state liberties need only respond to the consensus morality of the state's citizens, "lock-step" would tie state rights' guarantees to the nation's median norms, possibly resulting in the


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“underenforcement” of the values expressed in the states’ bills of rights. Finally, the election of state judges and the more accessible amendment process under most state constitutions should provide political checks against excessive activism or usurpation of legislative policymaking when a state court independently interprets its state’s rights guarantees.

Considering the many shortcomings of the “lock-step” approach, the Montana Supreme Court’s history with “lock-step” should be of special interest to you. Although vacillating considerably over time in its interpretations of the Montana bill of rights, the Montana Supreme Court has chosen to remain all too frequently in “lock-step.” To all appearances, the court’s preference for “lock-step” was most strongly declared in its 1983 decision in State v. Jackson, when it determined that a criminal defendant’s refusal to take a breathalyzer test was “non-testimonial” evidence that might be introduced at trial without violating the defendant’s state constitutional privileges against self-incrimination. Former Chief Justice Frank Haswell established that, because the language of the state provision is virtually identical to that of the fifth amendment protection in the United States Constitution, it “affords no basis for interpreting Montana’s prohibition against self-incrimination more broadly than its federal counterpart.”

31. I borrow this term from Professor Sager who insightfully articulated the concept of “underenforced” constitutional values in the related context of federal constitutional guarantees. See Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1242-63 (1978).

32. See, e.g., Mont. Const. art. XIV, §§ 1, 2, 3, 8, 9 (amendment processes by state constitutional convention, legislative referendum, and initiative).

33. The divergence between the institutional limitations of the federal and state judiciaries in constitutional decisionmaking is discussed more fully in State Action, supra note 18, at 256-59.


35. 206 Mont. 338, 672 P.2d 255 (1983). The most exhaustive account of the litigation leading up to and including the Montana Supreme Court’s 1983 decision in State v. Jackson, and a devastating critique of the “lock-step” approach adopted by the court in that case, is provided in Montana Disaster, supra note 21.

36. Id. at 348, 672 P.2d at 260. In his concurring opinion, Justice Frank Morrison argued for the strong version of “lock-step” in maintaining: “[W]here language in the Montana State Constitution is identical [or nearly so] to language in the United States Constitution, we should feel bound by determinations made by the United States Supreme Court in interpreting that language.” Id. at 349, 672 P.2d at 260 (Morrison, J., concurring).
Since *State v. Jackson*, Montana's high court has broken "lock-step" occasionally, generally by conceding to the "divided constitution" problem. For example, it has interpreted the Montana privacy provision to afford protections against unreasonable searches and seizures beyond those that are available under the United States Supreme Court's doctrines, and it has found a fundamental right to "physical liberty" in the Montana equal protection clause sufficient to invalidate a law that subjected only one class of juvenile delinquents to civil detention, a law which may well have survived federal constitutional restraints. Interestingly, one of the Montana Supreme Court's most recent applications of the state constitution's right to counsel and self-incrimination provisions explicitly denounced the "lock-step" approach and held, nevertheless, that breathalyzer tests may be admitted into evidence even though obtained without an attorney present, a result which could have been reached by the "lock-step" approach of *State v. Jackson*.

These decisions may be the overture to a judicial consciousness in Montana that eventually will retreat from "lock step." Nothing could be more auspicious for the state constitutional law movement. For, "lock-step" is particularly suspect in the context of the Montana Constitution: ironically, the text of the Montana bill of rights is unquestionably the most generous of any to be found in the constitutions of the fifty American states.

Consider only a few of Montana's many expansive individual rights provisions:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on ac-

37. *See supra* text accompanying notes 21-27.
40. *See State v. Johnson*, 221 Mont. 503, 719 P.2d 1248 (1986). What this case highlights is that a state high court's willingness to march out of "lock-step" does not inevitably mean that a state constitutional provision will be independently interpreted so as to guarantee more protection to individual rights than its federal analogue would. Although "lock-step" ensures uniformity of federal and state constitutional standards and case results, a court's retreat from "lock-step" does not necessarily ensure a difference in federal and state standards or case results.
count of race, color, sex, culture, social origin or condition, or po-
itical or religious ideas.\textsuperscript{41} Every person shall be free to speak or publish whatever he [or 
she] will on any subject, being responsible for all abuse of that 
liberty.\textsuperscript{42} The right of individual privacy is essential to the well-being of a 
free society and shall not be infringed without the showing of a 
compelling state interest.\textsuperscript{43} The rights of persons under 18 years of age shall include, but not 
be limited to, all the fundamental rights of this Article unless 
specifically precluded by laws which enhance the protection of 
such persons.\textsuperscript{44} The state, counties, cities, towns, and all other local governmental 
entities shall have no immunity from suit for injury to a person or 
property, except as may be specifically provided by law by a \textfrac{2}{3} 
vote of each house of the legislature.\textsuperscript{45} It is the goal of the people to establish a system of education 
which will develop the full educational potential of each person. 
Equality of educational opportunity is guaranteed to each person 
of the state. . . . The legislature shall provide a basic system of 
free quality public elementary and secondary schools. . . . It shall 
fund and distribute in an equitable manner to the school districts 
the state's share of the cost of the basic elementary and second-
ary school system.\textsuperscript{46} 

In the face of such a bill of rights, the Montana Supreme 
Court's preference for "lock-step" might well be depicted in the 
terms of Professor Ronald Collins as "the Montana Disaster."\textsuperscript{47} By 
contrast, this state's judges and lawyers should contemplate "the 
Montana Dream:" a bold and new experiment in state constitu-
tional democracy. The potential for realizing the benefits of such 
an experiment in state constitutionalism is greater in Montana 
than in any other place in the country.

II. OUT OF "LOCK-STEP" AND INTO A REACTIVE POSTURE

Should the Montana Supreme Court abandon "lock-step" in a 
clear and definitive manner, there will be a great temptation to fall 
into a "reactive" posture. This is the second approach for state 
constitutional law interpretation, characterizing the vast majority

\textsuperscript{41} MONT. CONST. art. II, § 4. 
\textsuperscript{42} MONT. CONST. art. II, § 7. 
\textsuperscript{43} MONT. CONST. art. II, § 10. 
\textsuperscript{44} MONT. CONST. art. II, § 15. 
\textsuperscript{45} MONT. CONST. art. II, § 18. 
\textsuperscript{46} MONT. CONST. art. X, § 1(1), (3). \textit{See infra} text accompanying note 65. 
\textsuperscript{47} \textit{See generally Montana Disaster, supra note 21.}
of state constitutional law cases to date. A state high court that takes the "reactive" posture assumes that most state constitutional provisions will remain in sync with federal law doctrines. In isolated cases, however, the state court will interpret state rights guarantees to extend more protection than the federal minimums. Typically, the "reactive" court treats the state bill of rights as a depository for far-reaching, progressive and controversial federal constitutional doctrines that have been discarded by the increasingly conservative federal judiciary.

Examples of "reactive" rulings are legion, but two should suffice to illustrate the posture. The New York and Michigan high courts, among others, have relied on their state due process clauses to strike municipal zoning ordinances restricting the occupancy of single family housing to persons related by blood, even though these ordinances would be valid under the federal Constitution. And, in contrast to the earlier example of "lock-step" in Washington's free speech doctrine, several states have found their constitutional rights of free expression and association to protect against purely private interferences as well as government violations. Refusing to follow the lead of the United States Supreme Court in restricting first amendment rights on public access property, these states have protected opportunities for effective political advocacy in private shopping centers, private auditoriums, and private university grounds.

A state high court may prefer the "reactive" approach to state constitutional interpretation for two reasons. First, the court may consider the "reactive" posture to be a compromise position between systematic reliance on federal constitutional standards

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51. See supra note 19.
52. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (labor picketing in business in private shopping center cannot constitutionally be restricted); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (restricting the "state action" analysis of Logan Valley Plaza and prohibiting the distribution of anti-war handbills in private shopping center) and Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling Logan Valley Plaza).
under "lock-step" and systematic development of independent state constitutional doctrines. Fortuitously, this compromise is cost-effective, convenient and extremely flexible: the state judiciary may enjoy the "free ride" on federal court rulings until dissimilarities in federal and state constitutional texts, in legislative histories, or in fundamental policy objectives argue for a more sweeping scope for state liberty guarantees.

Second, and even more significantly, the "reactive" posture is the byproduct of the exclusive focus on federal constitutional law that has dominated the legal profession since the Warren Court years. State judges and attorneys practicing before them had no realistic incentive to resort to state constitutional law as long as the United States Supreme Court championed liberal fundamental rights causes. Despite the conservative counterrevolution in federal liberties, however, well-ingrained habits die hard. The legal mindset remains largely wedded to a federal law perspective, and recourse to state rights provisions is still the exception rather than the rule.54

Understandable as these reasons for the "reactive" posture may be, the phenomenon is regrettable. A sporadic and selective appeal to the state bill of rights is vulnerable to criticisms that state constitutional interpretation is result-oriented and unprincipled. Furthermore, if the "reactive" approach merely picks up discarded federal rights doctrines and enforces them through state law guarantees, state constitutional claims and arguments will be advanced within an analytic framework that was not designed particularly for the concerns and values of the state's citizens.55 Currently, the trend of "judicial decentralization" fosters a "new federalism" in which state constitutional law may be revitalized.

III. "BEYOND THE REACTIVE"

Such a revitalization can only be realized fully if, in their approach to state constitutional interpretation, judges, lawyers and scholars move "beyond the reactive." What does it mean for state constitutionalism to move "beyond the reactive?" It means no less than a systematic and exclusive reliance on state law. It means that a state court need not take into account the individual rights decisions of the United States Supreme Court, except to establish that an interpretation of state law will not fall below minimum federal protection. It means the creation of novel and innovative

54. See Liberal Legal Scholarship, supra note 4, at 195-98, 216-18.
55. See supra text accompanying notes at 30-31.
state law theories of the freedoms of expression and religious exercise, of the principles of anti-discrimination and procedural fairness, of economic and privacy liberties.

Striking proposals are emerging in state constitutional decisionmaking that demonstrate that it is, indeed, possible to build new theories of state individual rights "from the ground up." Consider only a few examples of the many exciting experiments in state constitutionalism being conducted throughout the nation.

As early as 1977, the California Supreme Court recognized that its state equal protection guarantees possess "an independent vitality that, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." Under these equality provisions, the court invalidated the California public school financing system for discriminating on the basis of a school district’s property wealth. Rejecting the United States Supreme Court’s fourteenth amendment jurisprudence, the California court established an independent “fundamental” interest analysis that elevates liberties “which lie at the core of our free and representative form of government.” The high courts of five other states—Kansas, New Jersey, West Virginia, Wisconsin, and Wyoming—have relied on the California Supreme Court’s reasoning to find “foundational” public school financing schemes unconstitutional under their state equal protection provisions. Although invoking similar equality concerns, the Montana Supreme Court recently held that the state’s public school funding plan violated the Montana Constitution’s education maintenance provision. Rendering its decision on February 1,

57. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (under federal equal protection doctrine, wealth is not a suspect classifying trait and education is not a “fundamental” interest explicitly or implicitly protected by the terms of the Constitution).
58. Serrano, 18 Cal. 3d at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.
62. See Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).
64. A “foundational” public school financing plan guarantees each school district within the state a basic level, or “foundation,” of educational funding, regardless of disparities in district property tax bases. The state constitutional public school financing cases have all challenged some form of “foundational” funding. For an excellent analysis of state constitutional protections of rights to public education, see Katz, State Constitutional Law and State Educational Policy, in ACIR, supra note 5, at 109-17.
1989, Montana is among the most recent to join six other states in using express guarantees of public educational opportunities to strike "foundational" financing systems.

In 1982, the Oregon Supreme Court invalidated a state statute that created and defined the crime of "coercion" on the basis that, as written, the statute penalized communications that are protected by the Oregon free speech clause. In an impressive majority opinion by Justice Hans Linde, the court developed a coherent and comprehensive theory of freedom of expression, forbidding any prohibition on speech or writing on any subject whatsoever unless the prohibition falls within an historically established exception to the state guarantee. The court's theory led it, in 1987, to extend free speech protections to obscene materials.

In the wake of the United States Supreme Court's recent Webster decision, which undercut the strength of federal abortion rights, the Florida Supreme Court declared invalid the state's statutory requirement for parental consent before an unmarried minor might obtain an abortion. In a bold and decisive opinion issued on October 5, 1989, the court established a broad concept of constitutional privacy under the Florida Constitution. Following in Florida's footsteps only seven days later, the California Court of Appeals for the First District preliminarily enjoined the enforcement of its state statute that prohibits therapeutic abortions for unemancipated minors without parental consent. Construing California's express privacy clause to guarantee the same fundamental rights of abortion to all women, whether adults or minors, the court held that the state's interference with a minor's choice of abortion would likely be invalid.

For a last and important example, in 1986, the Washington Supreme Court announced its adoption of the philosophy of "state


68. Id. at 407-13, 649 P.2d at 573-77.


70. See supra note 2.

71. See In re T.W., 551 So. 2d 1186 (Fla. 1989).

law first” for constitutional litigation and decisionmaking. Ruling that the Washington search and seizure clause prevents the installation of a pen register on telephone connections without a warrant, the court articulated six criteria for Washington judges to use in state constitutional analysis. At a minimum, Washington courts are to examine: 1) the textual language of the state constitution; 2) the differences in the texts of parallel provisions of the state and federal constitutions; 3) state constitutional and common law history; 4) preexisting state law; 5) structural differences between the federal and state constitutions; and, 6) matters of particular state interest or concern. Although these factors are neither dispositive nor exclusive, they provide a theoretical framework by which the development of Washington constitutional law may progress. Encompassed in all six criteria, perhaps, is a single preeminent criterion: the analytical soundness of any claim or argument based on state law, quite apart from what the United States Supreme Court may or may not have decided with respect to a similar claim or argument under federal law.

As these examples suggest, the legal profession must pay a price to move state constitutional law “beyond the reactive.” Self-reliant state rights doctrines require the ingenious thought, stylistic craftsmanship and plain hard work of the entire state bench and bar. These efforts cannot be limited, however, to the judge’s chamber or the attorney’s office. Innovative state law theory will depend upon substantial reform in law school curricula, as well. Incredible as it may seem, constitutional law courses at most of the nation’s law schools focus entirely on the federal Constitution. Today’s leading constitutional law textbooks totally ignore the burgeoning developments in state constitutional law and individual rights. This federal law bias in our classrooms fosters a distorted vision of American constitutionalism and reinforces counterproductive litigation habits. State judges are not apt to resolve state constitutional claims in the future unless the coming generations of young lawyers raise them and present them effectively.


76. The Washington high court’s six-point program for state constitutional analysis is discussed more fully in Uter, Interpreting State Constitutions: An Independent Path, 15 Intergovernmental Persp. 23 (Summer 1989) (Advisory Commission on Intergovernmental Relations).
Yet, even now, America’s law schools are not training their students to do so.

Certainly, the price cannot outweigh the substantial advantages of moving state law “beyond the reactive.” First, state judges no longer act as members of the federal judiciary when they construct state law theories of individual rights from the “ground up.” If their rationales are based squarely on state constitutional law, their decisions will be final and typically immune from United States Supreme Court review.77

Second, state judges will no longer look solely for textual dissimilarities to justify independent interpretation of state rights guarantees. This ensures that a state constitution will be a unitary document, not a “house divided” between provisions that owe their vitality to the federal Constitution and those that do not.78

Third, as Oregon Supreme Court Justice Linde explained with great insight,79 a judicial philosophy of “state law first” is fully consistent with fourteenth amendment theory. For, if state constitutional law provides an adequate remedy for an individual rights claim that itself will not violate the federal Constitution, and state judges look first to the state law for relief in a constitutional challenge, there will be no cognizable federal constitutional action for state deprivation of individual rights.

Fourth, and most significantly, by breaking out of “lock-step” and moving “beyond the reactive,” state judges breathe new life into the federalist system on which this United States was founded. Independent reliance on the state constitution vindicates the traditional creed of Justice Louis Brandeis that, in a union of separate and sovereign states, each state may act as a “laboratory of experimentation.”80

Ultimately, for Montana, moving “beyond the reactive” means that its politicians, its jurists and its lawyers will live up to the promises in the state declaration of rights that “[t]he people have the exclusive right of governing themselves as a free, sovereign, and independent state”81 and that “[a]ll persons are born free and have certain inalienable rights.”82

77. See supra text accompanying notes at 28-29.
78. See supra text accompanying notes at 21.
79. See E Pluribus, supra note 73, at 193-200.
81. MONT. CONST. art. II, § 2.
82. MONT. CONST. art. II, § 3.