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STATE CONSTITUTIONALISM: STATE-COURT DEFERENCE OR DISSONANCE?

ARTHUR LEAVENS*

INTRODUCTION

Some twenty-five years ago Lawrence Sager asked “the inevitable question” concerning state constitutionalism, a question that even then was beginning to sound old; that is, “to what extent, if any, should state judges faced with claims under provisions of their state constitutions feel themselves bound to defer to Supreme Court interpretations of equivalent federal constitutional provisions?”¹ Purely as a matter of positive law, Dean Sager’s answer to this question was, almost never.² This potential for state-court dissonance owed to what Dean Sager described as “vast” spaces in our federal constitutional law that remain “untiled,” leaving ample latitude for state-court judges to fill in these spaces with state-constitutional law.³ But just because state courts can disagree with the Supreme Court does not mean that they should. As Dean Sager noted, the argument for state-court deference to Supreme Court interpretations of what are fundamental norms common to both the nation and its fifty states does not rest on the lack of positive state-law authority for such independent interpretations “but [rather] on

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1. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985).

2. *Id.* at 960. Dean Sager qualified his answer with what he characterized as two “rather minor” conditions, i.e., first, that the state-constitutional decisions be clearly ones of state, not federal, law, see *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), and second, that the decisions be ones that do not conflict with what he termed “extant federal constitutional norms,” presumably including the Fourteenth Amendment’s doctrine of incorporation. Sager, *supra* note 1, at 959.

3. Sager, *supra* note 1, at 960. By “untiled” constitutional space, Dean Sager was referring to potential constitutional protection of individual rights that either had not yet been decided by the Supreme Court under the Constitution or was more protective than that which the Supreme Court had interpreted the Constitution to provide, in either case leaving room for state-constitutional authority. *Id.*

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notions” of decisional legitimacy and “judicial responsibility.”⁴ If some deference is called for, what, as Dean Sager reframes the question, is its “operational content”?⁵

None of this was new even a quarter century ago; yet, though the scholarship has been rich,⁶ the question still remains. This Article will focus on one area of the debate, that concerning state constitutional expansion of criminal-procedure protections. This Article will examine two such rights: (1) the protection against unreasonable searches and seizures;⁷ and (2) the right to the assistance of counsel in defending a criminal case.⁸ Each of these rights is embodied in both the federal and most, if not all, state constitutions. Each right is thus doubly applicable to the states, first, through the federal version by virtue of its incorporation into the Fourteenth Amendment’s due process protection and, second, through the state constitution’s version of the cognate right. So focused, the question is, what deference if any does a state court owe the Supreme Court in interpreting state constitutional provisions protecting against unreasonable searches and seizures and affording the criminally accused the right to counsel?

This Article will explore this question of deference in the context of a particular state, Massachusetts, employing that focus for three reasons. First, the Commonwealth’s Declaration of Rights—which has remained virtually unchanged since its adoption in 1780—served as a principal model for the federal Bill of Rights,⁹

4. *Id.*

5. *Id.* at 961.

6. A sample of the literature includes JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* (2005) [hereinafter *INTERPRETING STATE CONSTITUTIONS*]; G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 *TEX. L. REV.* 1141(1985); Symposium, *Dual Enforcement of Constitutional Norms*, 46 *WM. & MARY L. REV.* 1219 (2005); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 *MISS. L.J.* 265 (2007); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 *OR. L. REV.* 793 (2000); Hans Linde, *First Things First: Rediscovering the State’s Bill of Rights*, 9 *U. BALT. L. REV.* 379 (1980); Symposium, *Independent State Grounds: Should State Courts Depart from the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court’s Result?*, 77 *MISS. L.J.* 1 (2007); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 *NOTRE DAME L. REV.* 1015 (1997) [hereinafter *In the Glare of the Supreme Court*].

7. See *infra* notes 128-169 and accompanying text.

8. See *infra* notes 95-127 and accompanying text.

9. See *Harris v. United States*, 331 U.S. 145, 157-58 (1947) (reviewing this historical linkage); see also Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of*

leaving no doubt but that textually and historically the federal and state provisions at issue here are essentially the same. This poses the interpretive question most starkly; in each case, we are considering federal and state versions of what was to their respective framers the same normative protection. Second, unlike most state court judges, the justices of the Massachusetts Supreme Judicial Court are appointed and have lifetime tenure, putting them in the same, politically-insulated position as their federal counterparts.¹⁰ This poses the issue of decisional legitimacy in bold relief, forcing consideration of the counter-majoritarian aspects of judicial review. Finally, the Supreme Judicial Court has been quite active over the past three decades in this area of state constitutionalism, much of this activity in the area of criminal procedure.¹¹ Its jurisprudence in state constitutionalism is thus well rehearsed and provides a good backdrop for this discussion of such state-court decision making.

To begin, my answer to Dean Sager's question, which I will briefly outline below and then develop in the balance of this piece, is that state courts should presumptively defer to the judgment of the Supreme Court concerning the meaning and scope of a cognate constitutional norm. The normative protections at issue, both the two I have selected as well as the others imposed on the states through the incorporation doctrine, are limited to fundamental values that lie at the core of our justice system. Because in our federal construct states are neither fully independent nor politically autonomous, the national meaning of such norms should, at least presumptively, prevail.

But that presumed deference is only an analytic starting point, and it may give way depending on the nature of the constitutional norm in question. The two constitutional norms I will examine, search and seizure and right to counsel, offer not just different protections, but different kinds of protection. The protection against

Assistance, 30 SUFFOLK U. L. REV. 53, 67-68 (1996) (tracking the historical connection between Article 14 and the Fourth Amendment); Joseph A. Grasso, Jr., "John Adams Made Me Do It": *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts' Declaration of Rights*, 77 MISS. L.J. 315, 319-20 (2007) (reviewing this historical linkage); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 928 (1980) [hereinafter *Judicial Treatment of the Massachusetts Declaration of Rights*] (noting "the common source of the principles expressed in [the federal Bill of Rights and the Massachusetts Declaration of Rights]").

10. See Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 371 (1988).

11. See Grasso, *supra* note 9 *passim* (cataloging and discussing this phenomenon).

unreasonable search and seizures marks off an area of substantive protection against governmental, mostly investigative, intrusions;¹² that is, the norm itself constitutes a particular liberty interest, understanding “liberty” is understood to mean a personal freedom that the government may not restrain.¹³ In contrast, the right to be represented by counsel in a criminal trial, along with similar rights such as the right to confront adverse witnesses and the right to a jury trial, does not stake out and protect a particular area of freedom from governmental interference.¹⁴ Rather, it provides procedural protection against the government when it seeks to convict an individual of a crime and thus to deprive that person of personal freedom, typically through imprisonment.¹⁵ Such a procedural

12. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Article 14 of the Declaration of Rights provides:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. art. XIV.

13. See Ronald Dworkin, *Keynote Address: Justice for Hedgehogs*, 90 B.U. L. REV. 469, 471 (2010) (symposium issue devoted to a conference on Dworkin’s forthcoming book, JUSTICE FOR HEDGEHOGS); see also INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 84 (conceptualizing liberty more broadly, as encompassing affirmative governmental powers as well as particular restraints on those powers necessary to promote “public welfare” or “public good”). Building on this broader concept of liberty, I will suggest that the Fourth Amendment and its state cognate, Article 14, can be seen as providing and protecting two liberty interests—individual protections against law-enforcement authority and collective protections promoting public safety—balancing one against the other. See *infra* note 151 and accompanying text.

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14. The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. Article 12 of the Declaration of Rights provides in pertinent part that “every subject [held to answer for any crime or offence] shall have a right . . . to be fully heard in his defence by himself, or his council, at his election.” MASS. CONST. art. XII.

15. “[The Supreme] Court has recognized that the Sixth Amendment right to counsel [is necessary] in order to protect the fundamental right to a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

norm, though constitutionally enumerated and fundamentally important, does not define a protected liberty interest; instead, it works with other such norms to protect against wrongful conviction and the general deprivation of personal liberty that would result.¹⁶

This distinction is important to my answer to Dean Sager's question for two reasons. First, the liberty interest in freedom from unreasonable searches and seizures constitutes an important substantive part of our nation's normative separation between legitimate governmental activities and personal freedoms with which the government may not interfere.¹⁷ Given the subordinate status of states in our federal political construct, it simply does not make sense that a state court should be able to independently redraw this normative line based on no more than disagreement with the Supreme Court concerning its location. As one of our nation's foundational principles, this liberty interest should have the same content across the land. In contrast, state constitutional expansion of a procedural protection such as the right to counsel does not disturb the national boundary that marks the content of our liberties on the one hand and permissible governmental power on the other. If anything, the liberty interest that such a procedural norm protects—freedom from wrongful conviction—would be ratified by a state's expansion of the protection beyond that offered by the Sixth Amendment, thus strengthening rather than undercutting the uniformity of our nation's foundational liberty interests.

Even if one regards this uniformity interest as largely symbolic and is thus prepared to accept state-by-state differences in the content of our nation's core liberty interests, there is a second theoretical problem with state constitutional expansion of the search-and-seizure norm, again stemming from the subordinate status of states in our federal system.¹⁸ To have a constitution that is worthy of both the name and treatment as such—that is, a written instrument adopted by a sovereignty that establishes as a foundational matter the powers and duties of government as well as the particular limitations of governmental power, thereby guaranteeing certain rights

16. *Id.* at 684.

17. *See* U.S. CONST. amend. IV.

18. *See* James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1254-59 (2005) [hereinafter *Whose Constitution Is It?*].

to the people against governmental power¹⁹—a state must have sufficient independence or autonomy to deliver on the protections it there guarantees. As I will argue below, there is a serious question as to whether a state has the political autonomy necessary for its courts to impose, as a matter of constitutional interpretation, a state-specific reordering of the search-and-seizure normative mandate.²⁰ In each state, there is significant federal law-enforcement presence, utilizing officers as well as courts that are not subject to state constitutional limits on searches and seizures; indeed, this freedom to ignore state constitutional limits on searches and seizures can even extend to state and local police in certain circumstances.²¹ States are thus in a poor position to guarantee their citizens the enhanced protection that a state constitutional expansion of the search and seizure norm purports to offer. It is therefore difficult to recognize the sort of state control over the search-and-seizure norm that seems a theoretical predicate for its constitutional construction and enforcement.²² Again, the same is not true for procedural protections such as the right to counsel.²³ The impact of those normative protections occurs exclusively within a state's court system, an area of undoubted state authority and control.²⁴

Finally, as I will develop, there are practical and prudential reasons that combine with these two conceptual reasons to counsel state-court deference to the Supreme Court in interpreting the search-and-seizure norm but that overcome the presumption of such deference in interpreting the right-to-counsel norm.

My argument will proceed in two parts. First, I will outline its doctrinal background, which by now is familiar territory. I will then turn to the development of my presumption-based approach, beginning with its underlying premises and a review of the competing interpretive theories in state constitutionalism, and concluding with my norm-specific answers to Dean Sager's question.

19. This is the positivist, Lockean view of a constitution, an instrument limning the metes and bounds of the power delegated by "the people" to the government that these people have come together to form. *Id.* at 1249-50.

20. *See infra* Part II.

21. *See infra* Part II.

22. *See* TARR, *supra* note 6, at 173-209.

23. *Id.*

24. *Id.*

I. DOCTRINAL BACKGROUND

For the first 150 years or so of the Declaration of Rights’ existence, the federal and state constitutions operated on parallel tracks, the federal Bill of Rights applying only to the federal government²⁵ and state constitutions applying to their respective governments. However, with the post-Civil War enactment of the Fourteenth Amendment, federal due process protection was expanded to apply to state governments and their actors. Over the next century, reaching its height in the rights revolution of the 1960s, almost all of the federal Bill of Rights were “incorporated” into the Fourteenth Amendment’s due process protection and thus became applicable to the states, creating the rights overlap here at issue.²⁶

This applicability of federal rights to the states caused little confusion at first.²⁷ The federal rights set the minimum level of protection that individuals enjoyed against state governments, leaving a state court free as a matter of positive law to interpret a state constitutional provision to provide greater protection than the analogous federal provision.²⁸ But because the Supreme Court that extended those federal rights to the states—for the most part the Warren Court—also took a broad view of those rights, few if any state courts were inclined to further extend the protection thus imposed.²⁹ As a practical matter, the rights revolution of the Warren Court overwhelmed the states, including Massachusetts, and the Court led the way in the development of constitutional doctrine in this area of rights overlap.³⁰

State court interpretive deference to the Supreme Court began to erode in the 1970s in response to the Court’s retrenchment, first under Chief Justice Burger and then Chief Justice Rehnquist, regarding the scope of individual rights.³¹ Dissatisfied with the narrowing of federal constitutional protections, state courts—the Supreme Judicial Court among them³²—began to respond, albeit

25. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247-48 (1833).

26. See TARR, *supra* note 6, at 181-84.

27. *Id.* at 183.

28. *Id.*

29. *Id.* at 161-65.

30. See *Judicial Treatment of the Massachusetts Declaration of Rights*, *supra* note 9, at 920-21.

31. See TARR, *supra* note 6 (cataloging this development).

32. As Justice Wilkins observed in 1980:

In recent years, the Supreme Judicial Court has exercised the option to impose higher state constitutional standards in some instances and, in many

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cautiously in the beginning, with opinions that took a broader view than did the Supreme Court concerning the scope of particular individual rights.³³ This emergent willingness of state courts to interpret state constitutional provisions more broadly than the cognate, in some cases identical, federal provisions brought on the debate concerning the legitimacy and wisdom of what could be seen as state-by-state overrides of applicable federal law.

II. THE QUESTION: DEFERENCE OR DISSONANCE?

A. Underlying Premises

There is no doubt as to the positive-law authority of state courts, Massachusetts’s Supreme Judicial Court among them, to interpret the constitutions of their respective states independent of the Supreme Court’s interpretation of similar, or even identical, provisions in the federal Constitution.³⁴ State constitutions provide that authority limited only by the federal Constitution’s Supremacy Clause, which requires state court judges to follow federal law where and as it applies.³⁵ If a particular federal constitutional right has been incorporated into the Fourteenth Amendment’s Due Process Clause and is thus applicable to the states, state courts are bound to apply that protection as interpreted by the Supreme Court, but these mandated federal rights do no more than establish the minimum protection owed to individuals against state govern-

other instances, without exercising that option, the court has explicitly acknowledged its authority to act independently under the state constitution. While these rumblings are not yet powerful and appear only in certain constitutional areas, they are intensifying, suggesting that the personal freedoms of the Declaration of Rights may be about to receive new attention.

Judicial Treatment of the Massachusetts Declaration of Rights, *supra* note 9, at 889-90. Although Justice Wilkins went on to note what he characterized as the “historical reticence” of the Supreme Judicial Court “to alter even judge-made or common law principles,” *id.* at 890 n.9, his prediction of increased attention on the Declaration of Rights by the Court has proved prescient. See, for example, Grasso, *supra* note 9, for a summary and thoughtful critique of search-and-seizure decisions in which the Supreme Judicial Court has interpreted Article 14 of the Massachusetts Declaration of Rights to provide more protection than the Fourth Amendment.

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33. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court acknowledged that a decision of a state court resting on “adequate and independent [of federal law] state grounds” is insulated from its review even though the decision is directly contrary to its decision based on an analogous, or even identical, federal constitutional provision. The Court in *Long* stated that this state-ground basis of decision must be “clearly and expressly” stated to avoid federal review, *id.* at 1041, a requirement easily satisfied by a simple statement to that effect.

34. Sager, *supra* note 1, at 959.

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35. See U.S. CONST. art. VI, cl. 2.

ment actions.³⁶ State courts are free—again, as a matter of positive law—to interpret and apply the provisions of their respective state constitutions that protect those same rights. If the state court interprets these protections to be greater than their federal counterparts, the enhanced state protections prevail.

The challenge, as Dean Sager puts it, is identifying the extent, if any, to which state courts should defer to the Supreme Court's interpretation of a federal constitutional provision in exercising that authority to expand analogous state constitutional protection beyond that federal protection.³⁷ Any such deference would flow not from positive law, but from more amorphous constraints such as the nature of judicial decision making and judicial responsibility that inhere in our federal system of democratic government.³⁸ Because such deference flies in the face of the positive-law authority of state courts to interpret their respective constitutions, it is fair to put the burden on one who would limit its exercise based on conceptual limitations like decisional legitimacy and judicial restraint. How does my argument meet that burden?

Let me start with some plausible attributes of responsible judicial decision making by a state court in our federal system that features dual enforcement of fundamental norms. This is an issue which has occupied countless scholars, judges, and lawyers and has resulted in an immense literature that has yet to yield a consensus, and I do not pretend here to capture where the matter stands. But it seems fair at least to say that a state court—particularly one whose members are appointed and thus insulated from the political process—should exercise its interpretive authority in a principled fashion, not as an exercise of political will. That is, constitutional interpretation should be based on established, plausibly neutral interpretive principles. These principles require attention to the text, history, and underlying intellectual foundation of the provision in question as well as respect for the limits inherent in judicial decision making, such as attention to established and ostensibly binding precedent and the doctrine of *stare decisis*. In short, constitutional interpretation should employ the recognized tools of appropriate

36. See, e.g., Randal S. Jeffrey, *Equal Protection in the State Courts: The New Economic Equality Rights*, 17 *LAW & INEQ.* 239, 251 (1999).

37. Sager, *supra* note 1, at 959.

38. *Id.* at 960-61.

judicial decision making as opposed to the unbounded policy-based decision making that characterizes the legislative process.³⁹

A second premise on which my argument rests flows from the anomalous nature of state constitutionalism. As Professor James Gardner has written, the very idea of a subordinate polity like a state having a constitution is at best odd.⁴⁰ In the classical positivist view, constitutions are written instruments adopted by the constituents of an independent sovereignty giving structure and ceding power to some form of government but imposing particular limitations on the exercise of that power against the constituent citizenry.⁴¹ Given that a state does not enjoy such sovereign autonomy but rather is a subordinate part of the United States, it is difficult—at least as a matter of theory—to justify a state’s constitutional norms displacing those of the nation, imposing limits on elected officials more stringent than those imposed by the cognate national norms.

Of course, in our federal system, states are not mere regional departments fully subordinate to the federal government. As Professor Gardner observes, states are by design partly subordinate to, but partly independent of, the nation of which they are a part.⁴² The key, then, is to identify those areas in which a state has sufficient independence in our federal construct to substitute its constitutional limitations for analogous federal limitations on state officials directly accountable to the people, thus changing within that state the normative relationship between the citizens and their government.

39. See, e.g., Kermit Roosevelt, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1308-09 (2008) (distinguishing judicial authority from legislative authority by observing that judicial departures from precedent require justification in recognized principles); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006) (arguing that courts have no demonstrable competency advantage over legislatures in construing constitutional-rights provisions); cf. Richard Fallon, *The Core of an Uneasy Case for Judicial Review*, 125 HARV. L. REV. 1693, 1716-18 (2008) (conceding that judicial review may lack democratic legitimacy due to its counter-majoritarian nature, but arguing that it promotes overall governmental legitimacy to the extent that it protects against violations of, mostly, individual rights).

I certainly do not mean to say that policy has no place in constitutional interpretation. Policy is essential to unlocking the meaning and proper application of the purposely indeterminate norms here at issue. But a court’s employment of policy ought to respect the constraints that inhere in the judicial function.

40. *Whose Constitution Is It?*, *supra* note 18, at 1253.

41. See, e.g., INTERPRETING STATE CONSTITUTIONS, *supra* note 6.

42. *Whose Constitution Is It?*, *supra*, note 18, at 1254.

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To be clear, I have no doubt that a state legislature may impose limitations on state officials that extend protections of its citizens beyond those required by federal constitutional norms. As the governmental organ elected by and thus politically accountable to the people, a decision by the legislature to restrict the use of state power for policy reasons is wholly appropriate. The question here is the legitimacy of state courts doing so through constitutional interpretation.

My premise here is straightforward. For a state court to substitute its interpretation of a cognate constitutional provision for that of the Supreme Court, thus increasing a particular limitation on governmental power vis-a-vis individuals within that state, the emergent state constitutional norm must be one that will be fully effective within that state. If there are governmental actors in the state who may ignore the more protective normative mandate (and thus state citizens who must suffer the ostensibly forbidden governmental conduct), that restructured norm has no claim to constitutional status. Quite simply, a norm that governmental actors are free to disobey cannot be regarded as one of the foundational principles that limits governmental power within that state. In such a case, the state (acting through its courts) lacks the sovereign autonomy necessary to rely on that norm as a constitutional limitation on its government. In contrast, if a state constitutional interpretation expanding protection beyond that afforded by the federal cognate is capable of full enforcement within the state, the state has sufficient autonomy to justify such a constitutional mandate.

This insistence on state autonomy as a necessary predicate for state constitutional expansion of cognate norms is underscored by recalling that the constitutional protections at issue here are limited to those that have been incorporated into the Fourteenth Amendment's Due Process Clause.⁴³ The Supreme Court's criterion for incorporation is that the norm be "fundamental to our scheme of ordered liberty and system of justice,"⁴⁴ one of the "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions."⁴⁵ The rhetoric may change from case to

43. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034-35 (2010).

44. *See id.* at 3032 (citing and quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968), in holding that the Second Amendment's right to bear arms is incorporated into the Fourteenth Amendment's Due Process Clause and thus applicable to the states).

45. *Id.* at 3034. Over the years, the Court has described these rights in a variety of ways, for example, as a "fundamental right, essential to a fair trial," *Gideon v. Wain-*

case, but the idea is the same. Only fundamental rights—essentially those set forth in the Bill of Rights⁴⁶—have been imposed through incorporation on states. So, the cognate state and federal constitutional provisions at issue here, which share virtually identical texts, history and ideological foundations,⁴⁷ are at bottom no more than state and federal versions of the same core norms. If a state court is going to disagree with the Supreme Court concerning the meaning or reach of such a norm, in effect overruling the Court in that regard within its state, at the very least it should be a norm as to which the state can claim autonomy grounded in its ability fully to enforce its version of the shared normative command within its borders. Anything short of that risks limitation by constitutional pretense.

Of course, these premises—even if one accepts them—do not answer Dean Sager’s question concerning state deference to the Supreme Court. However, they set the parameters of the discussion to which I now turn, beginning with the competing theories of state constitutionalism.

B. *Competing Interpretive Theories*

Three interpretive approaches have emerged over the years to deal with this puzzle: the total-deference or so-called lockstepping approach, the state-primacy approach, and the supplemental or interstitial approach.⁴⁸

1. Lockstepping

The first approach, sometimes called lockstepping,⁴⁹ reflects a top-down view of constitutional interpretation. Under this ap-

wright, 372 U.S. 335, 343-44 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 471 (1942)), or “a procedure [that] is necessary to an Anglo-American regime of ordered liberty,” *Duncan*, 391 U.S. at 149-50 n.14. However it is described, the overlap of federal and state protection here at issue is confined to core normative values embodied in the federal and state constitutions.

46. *McDonald*, 130 S. Ct. at 3034-35 & n.13 (noting that “[o]nly a handful of the Bill of Rights protections remain unincorporated” and listing five: “the Sixth Amendment right to a unanimous jury verdict[.] . . . the Third Amendment’s protection against quartering of soldiers; . . . the Fifth Amendment’s grand jury indictment requirement; . . . the Seventh Amendment[’s] right to a jury trial in civil cases; and . . . the Eight Amendment’s prohibition on excessive fines” (citations and numbering omitted)).

47. As noted above, Articles 12 and 14 preceded and served as models for their federal counterparts. See *supra* note 7 and accompanying text.

48. See, e.g., TARR, *supra* note 6, at 180-85.

49. See, e.g., JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* §1.06[2] (4th ed. 2006); TARR, *supra* note 6, at

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proach, state courts interpreting state constitutional provisions openly and almost automatically defer to the Supreme Court’s interpretation of the federal cognate.⁵⁰ Such conformity between state and federal constitutional protections reflects the national supremacy in the state-federal relationship. Moreover, its emergent uniform standards are consistent with the notion that constitutional interpretation flows from law, not judicial preference, which promotes at least the appearance of principled decision making.⁵¹ That said,⁵² this insistence that state constitutions conform jit-for-jit, jot-for-jot to their federal counterpart flies in the face of the dual sovereignty that is an essential feature of our federal system. States may not be wholly independent sovereigns in the sense that a nation is, but neither are they mere regional administrative subdivisions of our nation.⁵³ And, while our state-federal system of dual enforcement of constitutional norms is hardly free of conceptual or practical difficulties, it does provide a mechanism for a more diverse and robust consideration of the meaning and application of our nation’s core norms, an advantage that should not be discarded out of hand.⁵⁴

2. Primacy Approach

The intuitive alternative to lockstep interpretation is to consider a state’s constitution as the primary source of constitutional protection for its citizens. When responding to a claimed constitu-

180-82. Florida went so far as to amend its constitution to require that its search-and-seizure provision “be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” FLA. CONST. art. I, § 12; see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005) [hereinafter *State Courts Adopting Federal Constitutional Doctrine*] (discussing this approach and the question of whether such lockstepping should bind a state to future Supreme Court interpretations of federal cognates of state constitutional provisions).

50. TARR, *supra* note 6, at 180-85.

51. *Id.*

52. It is easy to overstate these claims. If the status of a constitutional decision as law depends on its appearance as such, it seems a fragile claim to legitimacy.

53. See, e.g., *Whose Constitution Is It?*, *supra* note 18, at 1254 (pointing out that states are “subnational units . . . partly dependent and partly independent; partly autonomous and partly subordinate[, with the] subnational unit’s autonomy [possibly] restricted territorially or by area of competence, or both”).

54. See, e.g., Abrahamson, *supra* note 6, at 1181-86 (noting early on in the onset of state constitutionalism the potential for state-court contributions to constitutional jurisprudence); *State Courts Adopting Federal Constitutional Doctrine*, *supra* note 49 *passim*.

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tional violation arising from a state constitutional provision and its federal cognate, primacists argue that a state court should begin with the state’s version of that provision and employ an interpretive approach similar to that which has developed in federal constitutional interpretation.⁵⁵ Only if the state provision does not support the claimed constitutional protection should the state court turn to the federal provision.⁵⁶ After all, the reasoning goes, incorporated federal protections are back-ups that are meant only to supply a corrective if state law is under-protective.⁵⁷ To turn first to the federal constitution puts the cart before the horse, which improperly subordinates the state constitution and undercuts its development in a system of federalism premised on parallel constitutional protections.⁵⁸

If lockstepping is too top-down, leaving too little room for state constitutional development, this primacy alternative seems too bottom-up, over-emphasizing the role of state constitutionalism in our system of overlapping constitutional protections. Given states’ subordinate status in our nation’s political structure, a state court’s interpretation of a common normative protection that lies at the heart of our national political values should start, both logically and conceptually, with the federal constitution,⁵⁹ which presumptively sets the national standard. The idea that a state court should instead start with its own constitution, the federal constitution serving only as a back-up, must ultimately rest on the view that each state is an independent sovereignty, a political co-equal of the nation of which it is a part, and thus that its constitution must predominate within its borders, limited only by the Supremacy Clause’s positive command that applicable federal law cannot be ignored.⁶⁰ As Professor Gardner puts it, while there is room in our federal system for interpretive difference, that is different than full independence.⁶¹

55. TARR, *supra* note 6, at 184-85.

56. *Id.*

57. *Id.*

58. An early proponent of this primacy theory of interpretation is Professor Hans Linde, formerly the Chief Justice of the Oregon Supreme Court. See Linde, *supra* note 6, at 396; TARR, *supra* note 6, at 183-84.

59. See *Whose Constitution Is It?*, *supra* note 18, at 1255 (arguing that “the partial subordinancy of states in a federal system” significantly limits a “state polity’s agency, [a] limitation[] that [is] severely in tension with the premises of constitutional positivism, especially the requirement of political self-construction”). Simply and obviously put, states in our federal system are not independent sovereignties with the political capacity for full self-governance.

60. INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 84.

61. See *Whose Constitution Is It?*, *supra* note 18, at 1265-66.

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There is a practical side to this point as well. When a litigant claims constitutional protection founded in both the state and federal constitutions, there is no need to go further if the federal provision provides the claimed protection.⁶² The federal Due Process Clause that binds the state requires recognition of the claim. The question of whether the state constitution’s protection is less than, the same, or greater than that provided by the federal constitution is quite beside the point, in a word, moot. Moreover, federal constitutional doctrine is in all likelihood better developed than its state counterpart,⁶³ a practical reason to start at this point rather than beginning at some less developed point in state law. Finally, if the constitutional issue raised by a claim is unresolved as a federal matter, the state court has the opportunity to participate and be heard in the development of the federal standard, not as a sideline critic but as a court duty-bound to interpret and apply the federal constitution.⁶⁴ It is thus not surprising that the primacy approach has not attracted many adherents among state courts.⁶⁵

62. See TARR, *supra* note 6, at 14.

63. As noted, the rights revolution of the Warren Court basically overwhelmed the states, leading the way in developing a considerable body of constitutional doctrine in this area of cognate rights. See *supra* Part I. State courts became accustomed to following that lead, respectively developing their own precedent concerning federal rights. See *Judicial Treatment of the Massachusetts Declaration of Rights*, *supra* note 9, at 920.

64. It is critically important that state courts remain engaged in this area of the interpretation and application of federal constitutional law. The availability of federal post-conviction relief has become so narrow that state courts have become critically important for considering federal constitutional claims in criminal cases tried in state courts. See Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1) (2006) (limiting federal habeas corpus review of state-court proceedings to decisions on the merits that violated “clearly established Federal law, as determined by the Supreme Court” or that were “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”); see also *Teague v. Lane*, 489 U.S. 288 (1989) (essentially limiting federal habeas corpus review of asserted state-court constitutional errors to violations of constitutional principles prevailing at the time the conviction became final); *Williams v. Taylor*, 529 U.S. 362, 362 (2000) (making it clear that *Teague*’s limitation of federal habeas corpus review to principles prevailing at the time of conviction equated to AEDPA’s “clearly established Federal law, as determined by the Supreme Court of the United States”).

65. Oregon, perhaps understandably, as well as Maine and New Hampshire are among the courts that have taken this approach to interpreting their respective constitutions. See TARR, *supra* note 6, at 184 n.39. The Supreme Judicial Court has at times claimed allegiance to the primacy approach, but not on any consistent basis. Compare *Commonwealth v. Rodriguez*, 722 N.E.2d 429, 434 (2000) (“As a general rule in deciding . . . questions [of search-and-seizure rights], we look first to any applicable statutes, then to our State Constitution (if argued separately), and only if necessary to the Federal Constitution.”), with *Commonwealth v. Martin*, 827 N.E.2d 198, 199-200 (Mass. 2005) (looking first to federal law before turning to state law to find the basis for the

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3. Supplemental or Interstitial Approach

Most states have taken a middle ground between lockstepping’s automatic deference to the federal constitution and primacy’s relegation of it to a secondary role, an approach called by some “supplemental,” by others “interstitial.”⁶⁶ In this approach, the state court looks first to the federal version of the cognate provision, and turns only to the state version if the federal provision does not afford the asserted protection.⁶⁷

This approach of examining the meaning and application of common fundamental norms first from the federal perspective strikes the right balance in our federal system. Its relegation of state law to an interstitial role may at first seem troubling because state law only comes into play when the federal right does not provide the claimed protection, which may create the impression that the turn to the state constitution was driven by disagreement with the Supreme Court more than anything else.⁶⁸ This appearance of result-oriented jurisprudence is exacerbated by the resulting body of state-constitutional law, which due to its limited, interstitial use may turn out to be a relatively narrow, disconnected set of precedents that quite often reflect policy disagreements with contrary Supreme Court decisions,⁶⁹ effectively over-ruling those federal decisions within that state.⁷⁰

claimed right); *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 176-77 (Mass. 2000) (same); *Commonwealth v. Smith*, 593 N.E.2d 1288, 1291-93 (Mass. 1992) (same). See generally Grasso, *supra* note 9 (demonstrating that notwithstanding its claim to the primacy approach in *Rodriguez*, the Supreme Judicial Court often employs the supplemental approach in addressing search-and-seizure issues under Article 14).

66. See TARR, *supra* note 6, at 182-83.

67. *Id.*

68. See, e.g., *id.* at 183; *In the Glare of the Supreme Court*, *supra* note 6, at 1044, 1047-49, 1063.

69. Of course, this is not necessarily so. To be sure, under this approach the court will not, or at least should not, consider the state’s constitution if the federal provision provides the claimed relief. But even if the court does turn to the state provision because the federal version of the right provides no relief, the court may determine that the state right is no more protective than the federal cognate. This alignment of the state version of the norm with its federal counterpart, called by some “reflective adoption,” see, e.g., *State Courts Adopting Federal Constitutional Doctrine*, *supra* note 49, at 1506-08, is properly a part of the supplemental approach unless one assumes that a state court that interprets its own constitution does so only if it is bent on rights expansion. This is not lockstep if that term means, as it suggests, necessarily tethering the state version of a norm to its federal cognate.

70. See, e.g., Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984); *In the Glare of the Supreme Court*, *supra* note 6, at 1047-49.

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In an apparent effort to avoid this impression of decisional illegitimacy, some state courts have gone out of their way to identify the independent bases on which their state-constitutional decisions rest. This interpretive approach typically parallels federal constitutional analysis by examining the text of the provision and intent of its framers as well as the state's precedents, history, and unique traditions or political values to find support for a decision that the state provision is different and offers broader protection than its federal counterpart.⁷¹ Some courts have even developed specific criteria to guide their divergence from federal precedent in an effort to avoid the temptations—or the appearance—of result-oriented decision making.⁷²

This is overcompensation that is not only unnecessary but doomed to failure.⁷³ There may be principled reasons for a state court to find different, more protective meaning for a common norm and to impose its version of that norm within its state, but it is almost never because the state and federal provisions have significantly different text⁷⁴ or distinct intellectual and historical roots.

71. See TARR, *supra* note 6, at 183 & n.36; see, e.g., *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000) (citing differing text and history of the Fifth Amendment and Article 12 of the Declaration of Rights as a justification for broader reading of Article 12's protection against compelled self-incrimination).

72. See, e.g., *State v. Hunt*, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring) (setting out the following seven factors to measure the legitimacy of the New Jersey Supreme Court relying on its state constitution supplementally to expand rights recognized in both the federal and state constitutions: (1) textual language; (2) legislative history; (3) pre-existing state law; (4) structural differences; (5) matters of particular state interest or local concern; (6) state traditions; and (7) public attitudes); see also *Commonwealth v. Edmunds*, 586 A.2d 887, 895 & n.7 (Pa. 1991); *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986); *In the Glare of the Supreme Court*, *supra* note 6, at 1046-55 (criticizing the criteria approach as subordinating state constitutions to the federal constitution).

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

74. There are, of course, some textual differences—even in constitutions that predate the federal constitution—that convey different meaning. For example, Article 12 of the Declaration of Rights provides not just for the right to confront a prosecution witness in a criminal trial, but the right for “face-to-face” confrontation, thus explicitly providing for more protection than does the Sixth Amendment. Compare *Commonwealth v. Amirault*, 677 N.E.2d 652, 660-62 (Mass. 1997) (holding that Article 12's explicit requirement of “face-to-face” confrontation requires just that and that a courtroom seating arrangement which at best permitted the defendant to see only the profiles of child witnesses whom he was accused of raping violated that requirement), with *Maryland v. Craig*, 497 U.S. 836, 849-50, 857 (1990) (holding that the Sixth Amendment does not in every case require face-to-face confrontation and that where necessary to protect a child witness from trauma its absence does not violate the Sixth Amendment's confrontation clause).

That is certainly so in a state like Massachusetts, whose Declaration of Rights served as a model for the federal Bill of Rights.⁷⁵ Even in states with less direct ties between their respective constitutions and the federal cognate, resting different meaning on a claim of distinct language, history, and intellectual roots is an empty claim. We are, after all, the same people, and regional differences—ideological and otherwise—have all but disappeared in the face of the ever-increasing mobility and homogenation of our society.⁷⁶ When this cultural and political convergence is coupled with the fact that the rights provisions of the federal and the various state constitutions generally have common historical and intellectual roots, articulating common, national norms, the idea that—based on the conventional interpretive tools of text, history, and fundamental values—a rights provision of a state constitution might be sufficiently distinct from

75. Even so, the Supreme Judicial Court seems on occasion to suggest this independence as a basis for its state-constitutional decision making. See, e.g., *Mavredakis*, 725 N.E.2d at 178 (citing the differing language and history of the Fifth Amendment and Article 12 as one of the justifications for more broadly reading Article 12’s protection against compelled self-incrimination than that of the Fifth Amendment). See generally Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405 (2004). Then-Justice, now Chief Justice Ireland’s review of the Supreme Judicial Court’s interpretive methodology in state constitutionalism describes a supplemental approach utilizing the conventional interpretive tools of history, text, precedent, and policy judgments informed by distinct regional history and culture. *Id.* But see *Judicial Treatment of the Massachusetts Declaration of Rights*, *supra* note 9, at 889-91 (describing an early methodology, a supplemental approach characterized by “a strong tradition of judicial restraint” exhibiting deference both to “the lead of the United States Supreme Court” and particularly “legislative determinations”) and cases cited and described.

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In a review of the Supreme Judicial Court’s state-constitution jurisprudence twenty years later, Justice Wilkins described a court more willing to disagree with its national counterpart (particularly on Fourth Amendment issues), relying on

[progressive state] traditions and a state Constitution that expresses concepts of reasonableness and fairness that should be reapplied as society changes . . . [to] justify an independent and different conclusion on a constitutional issue by judges who are sworn to uphold not only the United States Constitution but also the Constitution of the Commonwealth.

Herbert P. Wilkins, *The State Constitution Matters*, 44 BOSTON B. J. 4, 17 (Dec. 2000) [hereinafter *The State Constitution Matters*].

76. It is not that we cannot tell one strip mall from another as we drive cross-country or that our local broadcasters all speak with the same accent, but that the dual identity of state and federal citizenry long ago blurred, leaving the cultural and political constant that we are not Virginians, Californians, or Arkansans, but Americans who might live in Virginia, California, or Arkansas. This disappearance of any felt cultural and ideological autonomy of the states—that a state is constituted in a way that is fundamentally different than the rest of the nation—has contributed to the erosion of viable state constitutional positivism. See *Whose Constitution Is It?*, *supra* note 18, at 1254.

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the similar provision of the federal constitution to be interpreted differently seems nothing short of a fantasy.⁷⁷ Professor James Gardner calls this analytic approach the “[d]ead [e]nd of [r]omantic [s]ubnationalism,”⁷⁸ and that seems a fair assessment.

In our federal system, state constitutionalism must be interstitial, its proper role being to supplement the protection provided by the federal version of our nation’s basic norms.⁷⁹ The state-constitutional law that develops can never be the seamless comprehensive doctrine characteristic of an independent sovereignty’s constitutional jurisprudence, nor should it be. In this area of constitutional overlap, state-constitutional law is by nature a gap-filler, a corrective, not a primary source of constitutional protection. When, then, is such gap-filling, such correction appropriate and when is deference to the content of the federal norm the better course? This, of course, is Dean Sager’s question, which we can now attempt to answer.

C. *The Operative Content of Appropriate Deference*

Asking when deference is appropriate recognizes, of course, that federal supremacy over the states does not require unfailing state-court deference to the Supreme Court concerning the meaning and application of a fundamental national norm.⁸⁰ That is so even though, as developed above, conventional constitutional analysis, with its focus on text, history, and ideological context, helps little here due to the substantial identity of the state and federal norms in question. But that underlying identity of norms does not compel the conclusion that two related versions, even textually identical versions, of a particular norm must yield a consensus as to its meaning in every context and application. These are purposely spacious, indeterminate mandates—here, freedom from unreasonable searches and seizures, the right to counsel in a criminal prosecution—that are fairly subject to more than one interpretation. Common words and history do not necessarily dictate common meaning. That said, our interpretive context is not a philosophical inquiry in which we write on a blank tablet. Rather, this interpretive effort occurs in a settled political construct in which the fifty states are not independent sovereignties but constituent parts of a

77. See INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 53-79.

78. *Id.* at 53.

79. Sager, *supra* note 1, at 973-76.

80. *Id.* at 973.

sovereign nation. On what principled basis, then, may a state court decline to defer to the Supreme Court concerning the meaning of such a basic norm?

1. State Courts as “Agents of Federalism,” Monitoring the Supreme Court

One approach would be to acknowledge state-court policy-based dissonance concerning the meaning and reach of common norms and to embrace it as a healthy aspect of the unique state-nation relationship inherent in our federal system.⁸¹ Professor Gardner advances this position, arguing that the federal system, with its overlapping state and federal authority, has as its primary purpose the protection of its citizens’ liberty.⁸² In effect, Professor Gardner argues, the national and state governments act as monitors of one another, each designed to resist instances of potential overreaching by its respective counterpart.⁸³ In this view, state courts are supposed to interpret state law, including state constitutions, to resist the Supreme Court’s interpretation of a cognate federal provision if the state court concludes that the federal interpretation of the norm could result in an undue assertion of governmental power within the state.⁸⁴

This approach turns the apparent vice of independent state constitutional analysis into its principal virtue. Recognizing that conventional state constitutional analysis is a doomed enterprise, providing thin cover for what at bottom is a policy difference with the Supreme Court concerning the meaning or reach of a common norm, Professor Gardner embraces such policy-based resistance as a viable tool for state courts to use in their role as watch dogs (“agents of federalism” in his words)⁸⁵ protecting the people against national government overreaching.⁸⁶ The overlapping but potentially disparate rights-protection by the state and national

81. INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 18-19.

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82. *Id.* Some have taken issue with this description of federalism, arguing that it is unduly narrow. See Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 226-28 (2008). That may be, but in the area of criminal procedure it seems an apt construct.

83. INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 18-19.

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84. *Id.* at 181-82.

85. *Id.* at 186-87.

86. *Id.*

governments in this view operates as a vertical system of checks and balances, protecting the liberty interests of the people.⁸⁷

This is an elegant construct and does much to address the concerns for decisional legitimacy that haunt state constitutional analysis. But it does so by recognizing a presumption that state courts have open-ended authority to enhance fundamental normative protections through the state constitution to protect the liberty interests of the state's citizens. In effect, this presumes away the subordinate status of states in this area of conflicting state and federal interpretations of common normative values. As Professor Gardner concedes, state courts do not have a general mandate in our federal system to engage in unfettered oversight of the Supreme Court and thus to construct a competing constitutional common law.⁸⁸ The authority of the state court so to act must be grounded in state law,⁸⁹ likely the constitution of the state in question.

But, as Professor Gardner acknowledges, no state constitution explicitly authorizes its courts to overrule the Supreme Court concerning the breadth of a particular right articulated in both the federal and state constitutions.⁹⁰ He further concedes that some state constitutions may authorize a judicial role that is too narrow to permit this sort of activism, a narrowness perhaps founded in distrust of judicial decision making that is apparent from the text, history, or other tools of constitutional construction.⁹¹ Gardner bases this presumed state court authority on the central role that courts play in the liberty maximization lying at the heart of our federal system.⁹² This aspect of judicial review, he argues, is so integral to our constitutional system that one who would deny that role for a par-

87. *Id.* at 195-98. Although the focus of this Article is individual rights, Professor Gardner does not limit this notion of checks and balances to rights protection but extends it to structural issues as well. *Id.* at 187-94.

88. *Id.* at 181-82.

89. *See* *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). A state legislature could, of course, enact a statute providing greater protection to individuals than does a federal constitutional provision, but a legislature has undoubted political authority to speak for the state's citizens in that regard. *See, e.g.*, MASS. GEN. LAWS ch. 276, § 1 (2008) (limiting the scope of a search incident to arrest to "fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape").

90. INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 228-29.

91. *Id.* at 245-53.

92. *Id.* at 243-45.

particular state court has the burden to show that the state's constitution forbids it.⁹³

This presumption reorders the nation-state relationship. Inferior state courts become the presumptive final arbiters of the meaning and scope of fundamental national norms, potentially balkanizing the meaning and scope of the normative boundaries that lie at the heart of our common political values. This reordering becomes all the more clear when one asks, on what basis should a state court exercise its presumed prerogative as an agent of federalism to expand a common, core right within its state? Professor Gardner would leave it to the state court, acting as a presumptive agent of federalism, to identify those Supreme Court decisions that unduly threaten a particular individual right to be free of governmental interference. As attractive as Professor Gardner's answer to Dean Sager's question may seem, in the end it affords too much open-ended discretion to state courts, coming close to reducing the Supreme Court to just another supreme court.

2. Presumption of Uniform Meaning

Rather than presuming, as Professor Gardner does, the across-the-board legitimacy of state court expansions of our core normative protections in the name of liberty maximization, a norm-specific approach makes more sense. The nation's supremacy over its constituent parts justifies starting with a presumption of state-court deference to the Supreme Court's interpretation of fundamental norms, but this presumption should give way when state-by-state adjustments of particular fundamental norms is consistent both conceptually and practically with our federal construct.

In deciding when that is so, one must begin with the underlying constitutional interests at stake. All criminal-procedure protections ultimately protect liberty, which as Ronald Dworkin puts it, "is that part of freedom that government would do wrong to restrain."⁹⁴ But the liberty interests respectively protected by the search-and-

93. *Id.* Justice Wilkins in his more recent review of the Supreme Judicial Court's state constitutional jurisprudence, would find such a mandate in what he calls the [progressive state] traditions and a state Constitution that expresses concepts of reasonableness and fairness that should be reapplied as society changes . . . [to] justif[y] an independent and different conclusion on a constitutional issue by judges who are sworn to uphold not only the United States Constitution but also the Constitution of the Commonwealth.

The State Constitution Matters, *supra* note 75, at 17.

94. Dworkin, *supra* note 13, at 471.

seizure and right-to-counsel norms are different not only in content but in kind. Take the right to counsel.⁹⁵ It does not stake out a particular activity—a “freedom” in Dworkin’s terms—“that [the] government would do wrong to restrain.”⁹⁶ Rather, along with familiar rights such as the right of a criminally accused to a jury trial and to confront witnesses against him, it offers procedural protection against wrongful conviction⁹⁷ and the loss of personal freedom, a cognizable liberty interest, that would ensue. My argument is that these sorts of procedural protections, imposed on the states both through the federal Bill of Rights⁹⁸ and through state constitutions, generally overcome the presumption of state-court deference to the Supreme Court.

State constitutional expansion of a procedural protection such as the right to counsel works no change on the nation’s normative boundary that marks out constitutional liberties and protects them from governmental restraint. The protected liberty interest is freedom from conviction and imprisonment without due process, that is, wrongful conviction, and that core interest is, if anything, ratified rather than disturbed by enhancing such procedural protections. Further, these procedural rights are integrally tied to the adjudicative process and thus are essentially local in their impact, having full effect within but none beyond a state’s court system. The state thus has exclusive dominion and control over these normative protections, giving it a strong claim to the political autonomy that is the conceptual predicate to their constitutional construction by its courts.

95. The Sixth Amendment in pertinent part provides: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI; *see also* *People v. Cain*, 556 N.E. 2d 141, 143 (N.Y. 1990) (defendants have “a right to be present, with counsel, at all material stages of a trial”).

96. Dworkin, *supra* note 13, at 471.

97. Here I use “wrongful conviction” to mean a conviction inconsistent with due process, not conviction of an innocent. Though conviction of an innocent would surely be wrongful as a moral matter, to date at least, the Supreme Court has yet to hold that there is a substantive due process right to an acquittal if one is innocent. Whether so confining due process in this context to procedural protections is “right” or not is beyond the scope of this Article. I will proceed on what I understand is the current state of normative protections in this area to be, that is, wholly procedural.

98. This is admittedly an overstatement, but not by much. The Eight Amendment’s right to a grand jury has not been incorporated, *see Hurtado v. California*, 110 U.S. 516, 534-35 (1884), nor has the Sixth Amendment’s right to a unanimous jury verdict, *see McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034-35, n.13 (2010). However, the rest of the safeguards designed to protect against wrongful convictions have been incorporated and are thus applicable to the states.

From a prudential standpoint, this inherent connection to the adjudicative process supports the decisional legitimacy of the courts—based on institutional competence and expertise—in gauging the effectiveness of such norms in protecting against a wrongful conviction. Moreover, judges insulated from the political process are likely in the best position to fairly assess the procedural protections afforded to those accused of crimes, a cohort that does not typically enjoy much political support.⁹⁹

Lavallee v. Justices in the Hampden Superior Court,¹⁰⁰ decided by the Massachusetts Supreme Judicial Court in 2004, illustrates the point. There the Supreme Judicial Court held under Article 12 of the Declaration of Rights that the right to counsel requires not only the presence of counsel at bail and detention hearings,¹⁰¹ but more broadly the appointment and presence of counsel in every criminal case by or reasonably soon after arraignment.¹⁰² In so holding, the court went beyond Supreme Court interpretations of the Sixth Amendment concerning the reach of the right to counsel, and an examination of the court’s analysis demonstrates that this lack of interpretive deference was wholly justified.¹⁰³

The Supreme Judicial Court’s interpretive approach did not rest on differing text or history of the two provisions. Like many cognate constitutional provisions, both the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights provide for this normative protection in essentially identical terms.¹⁰⁴ That is no surprise because the Declaration of Rights served as a model for the Bill of Rights.¹⁰⁵ For its part, the Supreme Court has interpreted the federal version of this right to provide for clear but spare normative baselines, holding, most notably in *Gideon v. Wainwright*, that indigent persons accused of crimes, at least those involving any likelihood of incarceration, are entitled to

99. See, e.g., Fallon, *supra* note 39, at 1709 (asserting “that courts are likely to have a perspective that may make them more sensitive than legislatures to some possible rights violations” due in part to “judges’ professional training and mission [that] involves a solicitude for rights as they have historically been understood”).

100. *Lavallee v. Justices in Hampden Superior Ct.*, 812 N.E.2d 895 (Mass. 2004).

101. *Id.* at 900-01.

102. *Id.* at 903.

103. *Id.*

104. The Sixth Amendment in pertinent part provides: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. Article 12, in pertinent part, provides: “[a]nd every subject [held to answer for any crime or offense] shall have a right . . . to be fully heard in his defence by himself, or his council, at his election.” MASS. CONST. art. XII.

105. See *supra* note 9 and accompanying text.

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representation by appointed counsel.¹⁰⁶ While the Court went on to hold that the Sixth Amendment requires not just counsel in some formal sense, but effective assistance of counsel,¹⁰⁷ it is fair to say that the Court has not been aggressive in expanding the right to counsel, leaving plenty of “untiled space,” to return to Dean Sager’s expression, beyond these baselines.

This minimalist approach may well have been intentional, deferring to the states as a matter of comity to round out the protection as best makes sense in the particular context of each state’s adjudicative procedures. Over thirty years ago, Dean Sager argued that such purposeful under-enforcement of constitutional norms by the Supreme Court is appropriate for institutional reasons, including comity, leaving it for the states to expand, or not, these normative protections.¹⁰⁸ That may lay behind the relatively thin texture of the Court’s right-to-counsel jurisprudence.

The Court has thus held under the Sixth Amendment that while the right to counsel attaches when the prosecution begins,¹⁰⁹ the right does not entitle an accused to the appointment—much less the presence and advice—of counsel until a “critical stage” of the proceedings.¹¹⁰ According to the Court, such “critical stages” of the proceedings are those “that amount to ‘trial-like confrontations,’ at which counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’”¹¹¹ While it is surely true that counsel’s presence and advice during such adversarial confrontations is critical, limiting counsel’s role to such confrontations ignores the equally important role that counsel plays in developing an effective defense. Yet, that is where the Court left the matter.

What if a state court, as a matter of cost-saving or necessity, does not appoint attorneys to represent indigent defendants until well after arraignment? Is arraignment or the period that follows arraignment a “critical stage” requiring the presence of an ap-

106. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

107. See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986); *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

108. See Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1248 (1978) [hereinafter *Fair Measure*].

109. See *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (holding the right to counsel attaches when “a prosecution is commenced”); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (holding that a prosecution is commenced “at . . . the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”).

110. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211-13 (2008).

111. *Id.* at 212 n.16 (internal citations omitted).

pointed attorney? If it is, does the failure to appoint counsel during that period violate an indigent accused's right to counsel categorically or only upon a showing of actual harm? These are questions that the Supreme Court has left open under the Sixth Amendment,¹¹² and they lay at the heart of *Lavallee*.

In the run-up to *Lavallee*, the Massachusetts Superior Court sitting in Hampden County found itself with an insufficient number of qualified lawyers willing to accept indigent appointments due to what all agreed was a very low rate of legislatively authorized compensation.¹¹³ As a result, many unrepresented "indigent . . . defendants . . . [were] held [preventively] or in lieu of bail," and they petitioned for declarative relief authorizing the trial courts to order compensation at a higher rate, one which would attract qualified lawyers in sufficient numbers to provide assistance of counsel to indigent defendants at the early stages of the proceedings.¹¹⁴ Of course, any such declarative relief would rest on a right to counsel that substantively entitled *Lavallee* and his fellow petitioners to such representation.

In its ruling, the Supreme Judicial Court relied on Article 12 to enhance the federal protection limned by the Supreme Court, holding that irrespective of any showing of actual harm, the right to counsel requires not only the presence of counsel at any bail or preventive detention hearing¹¹⁵ but more broadly the appointment and presence of counsel in every case by, or reasonably soon after, arraignment.¹¹⁶ This state constitutional expansion of the right to counsel was both theoretically and prudentially appropriate.

112. *Id.* at 212 (reaffirming that the right to counsel attaches at arraignment, defined there as the defendant's initial appearance before a magistrate, but declining further to decide whether arraignment is a "critical stage" requiring the presence of counsel or, if it is, whether the criminal defendant must show harm in order to claim a violation if counsel was not then present).

113. *Lavallee v. Justices in Hampden Superior Ct.*, 812 N.E.2d 895, 899-900 (Mass. 2004).

114. *Id.* at 900.

115. *Id.* at 903.

116. *Id.* at 903-06. The court declined to authorize the requested increase in attorney compensation, principally out of respect for the separation of powers and the legislature's appropriation authority. *Id.* at 907-09. While urging the executive and legislative branches to craft a permanent solution, as interim relief, the court ordered that "on a showing that no counsel is available to represent a particular . . . defendant despite good faith efforts, such a defendant may not be held more than seven days and the criminal case against such a defendant may not continue beyond forty-five days." *Id.* at 901.

The court could have grounded its holding in the Sixth Amendment, in effect fleshing out the federal version of this common, fundamental normative protection. The

First, the state court's refinement of this procedural right did not disturb the national contours of constitutional liberty. The liberty interest at stake was avoiding wrongful conviction, and the court's intent was explicitly to protect that interest in the context of the state's procedures for adjudicating criminal cases.¹¹⁷ So, the court's unequivocal requirement that counsel be present throughout the post-arraignment stage of the process, even though under the federal version of the right this may not be a "critical stage" requiring such presence, was explicitly a function of Massachusetts procedure and the issues under that procedural system that an accused is required to address.¹¹⁸ The court pointed out that under Massachusetts's Rules of Criminal Procedure, a defendant must file a pretrial conference report within twenty-one days of arraignment.¹¹⁹ In this report a defendant sets forth his decisions on critical issues such as whether to present particular defenses and memorializes his and the prosecution's respective discovery obligations. Further, within seven days of filing the conference report,¹²⁰ a defendant must decide which pretrial-motions if any he wishes to file and then draft and file them.¹²¹ Each of these steps is critically important to mounting an effective defense, and the advice of counsel, founded on a full investigation and understanding of the case, seems here essential.

As a matter of decisional autonomy, there could not be a more state-specific normative protection than the right to counsel, at least that part of the right that affects the post-investigation adjudication of a criminal case.¹²² Its impact is by definition confined to the

court is surely authorized, indeed obligated where necessary to resolve a claim, to interpret and apply that federal constitutional provision, but it chose instead to decide the case under Article 12's right-to-counsel provision. While the Sixth Amendment would have given the court a voice in the development of the federal right, given the nature of the claims, the need for finality, and the potential implications for the coordinate branches of government, it seems a better choice for the court to have founded its decision in state-constitutional law.

117. *Id.* (stating that the deprivation "resulted in severe restrictions on their liberty and other constitutional interests").

118. *Id.* at 904.

119. *Id.*

120. *Id.*

121. *Id.*

122. There is another aspect to this right, which is providing an interface, once criminal proceedings have begun, for meeting and communicating with the accused's adversary, i.e., the government. *See* *Massiah v. United States*, 377 U.S. 201, 205-06 (1964). As to this aspect of the right to counsel, where the normative protections extend beyond the courtroom and its procedures, the state-constitutional analysis may be a little different.

state's pretrial, trial, and post-trial proceedings;¹²³ it has no impact on the similar proceedings of federal courts within the state or the courts of other states. And, there is no doubt that the state through its courts can implement an enhanced version of this normative protection, forcing, if necessary, its state actors—prosecutors, police officers, and so on—to comply. Given the confinement of the right to counsel to a state and its actors coupled with the state's ability to enforce the right's protective mandate on those actors, states through their courts have the sovereign autonomy that is a predicate to constitutional construction of the right to counsel under their respective state constitutions.

From a prudential perspective, the court's experience and expertise in the adjudication of criminal cases and its institutional prerogative to superintend this process seem beyond question,¹²⁴ thus supporting its claim to institutional competence and decisional legitimacy in crafting this state constitutional enhancement of the right-to-counsel protections.¹²⁵ And, while the national template for this right was, and remains, open to similar development, it is not clear that it should be, given the jurisdiction-specific reasons for the court's carefully crafted and quite particular holding.¹²⁶ Perhaps it is better to leave such filling-in of this "untiled" constitutional space to each state, with the national version of the norm

123. See, e.g., *Lavallee*, 812 N.E.2d at 901.

124. In this regard, it seems worth noting that the justice who wrote the decision, Justice Francis Spina, was particularly well suited to the task, having served as a prosecutor and criminal defense attorney for many years prior to his appointment to the bench. Supreme Judicial Court, Francis X. Spina, Mass.gov (Mar. 1, 2011, 1:30pm), <http://www.mass.gov/courts/sjc/justices/spina.html>. He also served as a Superior Court judge, where he presided over many, many criminal cases, before his appointment first to the Commonwealth's Appeals Court and then to the Supreme Judicial Court. *Id.* If anyone understands how the Massachusetts criminal justice process works, it is Justice Spina.

125. One might complain that the court should have utilized the less drastic and more mutable powers of superintendence to accomplish this result. There is often much to be said for such institutional self-restraint in judicial decision making, leaving open a role for the legislature and a door for future adjustment if future conditions suggest it. See, e.g., *Judicial Treatment of the Massachusetts Declaration of Rights*, *supra* note 9, at 889. However, this particular case, rubbing up against the legislative appropriation prerogative while implicating the core of the fundamental right-to-counsel protection, called out for a definitive resolution, and the state-constitutional basis for the decision seems entirely appropriate. If the state actors with the direct power to craft a permanent solution to this problem held back, the court had staked out the basis for a more direct and drastic remedy.

126. *Lavallee*, 812 N.E.2d at 901.

providing its broad baselines.¹²⁷ However that question may be answered, the Supreme Judicial Court's decision in *Lavallee* illustrates why independent state constitutionalism can make sense even when the protection in question is a fundamental norm common to both the state's and the nation's constitutions.

So, too, it would seem for other rights that offer procedural protections for the individual liberty interest in avoiding wrongful conviction and incarceration, at least those rights such as the right to a jury trial and the right to confront witnesses, which provide their respective procedural protections once the criminal proceeding has begun. Each such right is confined in its effect to the state's adjudicative process, which is a sector of the state's governmental processes about which the courts have an undoubted claim to expertise and decisional legitimacy and over which they exercise full control. As to these fundamental rights, the presumption of interpretive deference to the Supreme Court is overcome, and state constitutional expansion of their protection is appropriate.

The same cannot be said for the Fourth Amendment's and Article 14's norm protecting against unreasonable searches and seizures. For reasons both conceptual and prudential, the presumption of national uniformity should hold in this situation, counseling state-court deference to the Supreme Court concerning the content of this normative protection.

The protection against unreasonable searches and seizures is not a procedural right that protects an underlying liberty interest. The norm itself marks the boundary between freedom from particular investigative intrusions and constitutionally permissible law enforcement conduct. While enhancing a procedural right such as the right to counsel marks no change in the contours of our nation's core liberties, any adjustment to the search-and-seizure balance changes the normative boundary that defines the respective liberty and governmental interests in this important area of governmental interface with its citizenry. If a state court works such an adjustment under its constitution, it does not just ratchet up the procedu-

127. I do not overlook that the Sixth Amendment provides the only constitutional right-to-counsel protection in the federal courts. But in limning its bounds, the Supreme Court presumably is mindful of the protections in this regard afforded by federal statutes and the federal Rules of Criminal Procedure, which are of course promulgated by the Court with the assent of Congress. *See* 28 U.S.C. §§ 2071, 2074 (2006). The Court can thus afford a minimalist approach to the constitutional protection, keeping an eye on the Rules and statutes to plug any apparent holes in the federal system.

ral protection of an underlying liberty interest common to the states and the nation; it creates a different balance of constitutional interests within that state, giving rise to the possibility of a state-by-state patchwork of protection, drained of the normative force that national consensus provides. Even if constitutional dissonance does not reach that level, state constitutional adjustments of the search-and-seizure balance undercut the uniform meaning one would expect in a fundamental, national norm.

From the perspective of decisional or sovereign autonomy, there is a serious question as to a state's ability effectively to impose constitutionally enhanced search-and-seizure protection. The search-and-seizure protection is directed principally at governmental law enforcement, and both federal and state law-enforcement agents operate within each state, sometimes side-by-side, enforcing federal and state versions of what are essentially the same crimes.¹²⁸ When a state seeks to impose more demanding search-and-seizure protections, the overlapping system of dual law enforcement significantly undercuts the force of such additional protections. Federal officers ordinarily are not bound by the state limits, even if the matter under investigation results in a state court prosecution.¹²⁹ State officers are similarly not subject to more stringent state protections when they are a participating in a federal investigation, again even if the matter is ultimately tried in state court.¹³⁰ And, of course,

128. The facts underlying *Commonwealth v. Connolly*, 913 N.E.2d 356 (Mass. 2009), discussed below, provide a typical example. Connolly was convicted in Massachusetts Superior Court of trafficking in cocaine (124.31 grams) in violation of MASS. GEN. LAWS ch. 94C, § 32E(b)(3) (2008) (punishing possession of between 100 and 200 grams of cocaine with intent to distribute by imprisonment for not less than ten years and not more than twenty years) and distribution of cocaine (three grams) in violation of MASS. GEN. LAWS ch. 94C, § 32A(c) (2008) (punishing distribution of cocaine in any amount by imprisonment for up to ten years). See *Connolly*, 913 N.E.2d at 374. Connolly could have been charged and tried in federal court for the same conduct. See 21 U.S.C. § 841A(a)(b)(1)(C) (2006) (punishing the distribution of cocaine in any amount and possession of cocaine in any amount with intent to distribute by imprisonment up to twenty years). Under the respective state and federal statutes, not taking into account the respective sentencing guidelines in the two jurisdictions or applicable fines in each, Connolly thus faced thirty years in state prison and forty years in federal prison for the two counts. In the event, he was prosecuted only in state court. See *Connolly*, 913 N.E.2d at 360.

129. See *Commonwealth v. Cryer*, 689 N.E.2d 808 (Mass. 1998) (general rule plus collective enterprise exception); *Commonwealth v. Gonzalez*, 688 N.E.2d 455 (Mass. 1997) (same).

130. See *Gonzalez*, 688 N.E.2d at 458 (holding that absent a state-federal "combined enterprise," which had as its purpose bringing a state prosecution, in which "State officials retained more authority over the investigation," or in which "[s]tate involvement [had] been more substantial," evidence seized in violation of Article 14 but consis-

state constitutional protections are not recognized in federal court no matter who conducted the investigation,¹³¹ creating an opportunity for forum shopping in those cases in which both federal and state law criminalize the conduct in question. So, while a more demanding state version of the search-and-seizure norm would have considerable impact on criminal investigation practices in a state, the ability of both state and federal officers to opt out of the state's more demanding search-and-seizure protection in investigating a broad range of cases—e.g., drug and gun cases in which searches and seizures are almost always employed—significantly reduces the state's claim to constitutional autonomy with respect to this norm. Simply put, there is too much seepage, eroding the sovereign control of the norm on which interpretive autonomy must rest.¹³²

Commonwealth v. Connolly,¹³³ a case recently decided by the Supreme Judicial Court, serves as a useful example. At issue was whether police installation and monitoring of a global positioning system (GPS) device on Connolly's car constituted a "search" or a "seizure," thus subjecting this investigative technique to the search-and-seizure norm's reasonableness requirement.¹³⁴ The Supreme Judicial Court decided as a state constitutional matter that such GPS surveillance constituted a "seizure" of Connolly's car and thus required a warrant to be lawful.¹³⁵

The Supreme Court has yet to consider the issue,¹³⁶ but it is entirely plausible that the Court, or until that happens, the First

tent with the Fourth Amendment is not subject to exclusion in state prosecutions); see also *Commonwealth v. Brown*, 925 N.E.2d 845, 850-51 (Mass. 2010) (citing and reaffirming *Gonzalez*).

131. See Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?*, 46 WM. & MARY L. REV. 1437, 1445-52 (2005) (criticizing this state-to-federal version of the silver platter doctrine).

132. Others have made a related point, observing that the need for uniformity in federal law is not categorical but rather varies depending on the extent to which the norm and its likely violation is confined to single states or, alternatively, will involve "interstate spillovers." See Michael Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1485 (2005) (citing and quoting RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 288-89 (1996)). Although the spillovers that Solimine and Posner considered were geographic, the same point holds for spillovers within a state if the impact is on both state and federal actors.

133. *Connolly*, 913 N.E.2d at 356.

134. *Id.* at 366-67.

135. *Id.* at 369-70. The officers had obtained a warrant before installing and monitoring the GPS device, and the court went on to hold that the warrant satisfied Article 14's reasonableness requirement. *Id.* at 371; see *infra* note 150.

136. *Id.* at 367-68.

Circuit, will reach a different conclusion,¹³⁷ deciding that this intrusion is neither a “search” nor a “seizure” under the Fourth Amendment. In that event, under federal law police officers would be free to install and to monitor these devices at their discretion,¹³⁸ making the the state’s enhanced search-and-seizure protection¹³⁹ dependent on whether federal officers or state police install and monitor the GPS. Indeed, even without any federal involvement, state officers who install a GPS and seize the drugs in a case like *Connolly* could hand the seized narcotics over to federal authorities for federal prosecution, thus shielding their surveillance from enhanced state-constitutional oversight. Finally, if (as is often the case) such an investigation is conducted by a joint task force in which federal, state, and local officers work together, the GPS surveillance would remain beyond state-constitutional review even in state court if a state judge decides that the investigation was predominately federal.¹⁴⁰ With so much potential for state and federal officers to evade the enhanced protection announced in *Connolly*, it is difficult to see the state as having the degree of sovereign independence from the nation to claim the search-and-seizure norm as a separate, state constitutional limitation on governmental power.

From a prudential perspective, judgments concerning the meaning and reach of the search-and-seizure norm do not fit easily into the conventional model of judicial decision making. Deciding whether any particular investigative intrusion is, first of all, a “search”—determined by assessing our society’s “reasonable expectation[s] of privacy”¹⁴¹—and, if it is, whether that intrusion marks a reasonable balance of the privacy and public-safety interests there implicated, boil down to open-ended, often empirically based policy judgments. Such decision making seems a far cry from

137. Indeed, a circuit split has developed on this issue, with the Seventh, Eighth, and Ninth Circuits holding that GPS installation and monitoring does not constitute a search under the Fourth Amendment, the D.C. Circuit holding that it does. *Compare* *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010), *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), *and* *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), *with* *United States v. Maynard*, 515 F.3d 544 (D.C. Cir. 2010).

138. *See, e.g., Marquez*, 605 F.3d at 609.

139. *Connolly*, 913 N.E.2d at 369-70.

140. *See* *Commonwealth v. Gonzalez*, 688 N.E.2d 455, 458 (Mass. 1997) (declining to apply Article 14’s more demanding standard to police conduct because the investigation in question was predominately federal, as opposed to a combined, state-federal investigation); *see also* *United States v. Pforzheimer*, 826 F.2d 200, 204 (2d Cir. 1987); *People v. Coleman*, 882 N.E.2d 1025, 1032 (Ill. 2008).

141. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring); *accord Connolly*, 913 N.E.2d at 367.

the application of established and more neutral principles typically characteristic of judicial interpretation.

Of course, judges can and should utilize policy in their decision making. The problem here is that the interest balancing that is necessarily a part of interpreting the search-and-seizure norm is a different sort of policy application than that required to flesh out a procedural protection such as the right to counsel. In answering search-and-seizure claims, the decision maker is explicitly called on to make empirical judgments concerning the way society works,¹⁴² and even more perilously, normative judgments concerning how it ought to work,¹⁴³ and then to translate the resulting conclusions into a judgment of what constitutes a reasonable balance of the competing individual and collective interests involved. Here, both for reasons of institutional competence and of political legitimacy, the political insulation of judges works against, not for, them as decision makers.

Policy judgments such as these are more characteristic of the legislative process than the adjudicative process, and elected legislators seem far better positioned than appointed judges to make these calls.¹⁴⁴ That seems all the more so given that this interest balancing is inevitably a function of time and place, a point that seems confirmed by the search-and-seizure doctrinal shifts, for example, in responding to advancing technology during the past half-century or so.¹⁴⁵ At the least, we ought to pause before embedding any partic-

142. Is there, objectively speaking, an actual expectation of privacy? See *Katz*, 389 U.S. at 360-61.

143. Is that expectation one which society is prepared to recognize as reasonable or legitimate? *Id.*

144. Because the executive branch is directly involved in the law enforcement process, I will take it as a given that it is not a candidate to strike this constitutional balance.

145. The best, and in the end perhaps problematic, example is the Court's shift to the reasonable-expectation-of-privacy test in *Katz* to define searches in the then-early years of telecommunications and related technologies. See *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring). In reviewing the Supreme Court's application of this test in deciding whether tracking a beeper constitutes a search under the Fourth Amendment, the Supreme Judicial Court in *Connolly* noted that "the Court has relied on the level of sophistication of the particular electronic device, and the physical location from which the device transmitted its signal, to determine whether use of the device interferes with a reasonable expectation of privacy and therefore constitutes a search." *Connolly*, 913 N.E.2d at 367.

This past term, the Supreme Court sounded this very note of caution in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), a case in which the Court held that a city's review of the contents of a city employee's messages that were recorded on a city-issued communications device was reasonable under the Fourth Amendment. *Id.* at 2632-33. Every justice except Justice Scalia agreed that "[t]he judiciary risks error by elaborating

ular balance of interests in what some have aptly called the “constitutional calcification”¹⁴⁶ that characterizes judicial constitutional interpretation.

Using *Connolly* again as our example, to determine if installing and monitoring a GPS device constitutes a “search” of the car or its owner, a court must ask itself whether, empirically, people in our society expect their cars to be free of such devices and the monitoring of movement that these devices enable, and, if so, whether normatively that expectation is one that society is prepared to accept as reasonable.¹⁴⁷ Alternatively, to determine if the intrusion constitutes a “seizure” of the car, a court must ask whether this investigative technique constitutes “some meaningful interference with [the owner’s] possessory interests in [the car]”¹⁴⁸ even though the owner would know nothing about the device and would retain full use of the automobile, an equally fact-bound and value-laden question. If the installation and monitoring of the GPS device constitutes a “search” or a “seizure” of the car,¹⁴⁹ the court must then ask under

too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Id.* at 2629. Comparing today’s world with that of *Katz*, when the justices felt comfortable looking “[to their] own . . . experience to conclude that there is a reasonable expectation of privacy in a telephone booth,” the Court observed that “[r]apid changes in the dynamics of communication and information transmission” make it difficult to “predict[] how . . . privacy expectations will be shaped . . . or the degree to which society will be prepared to recognize those expectations as reasonable.” *Id.*

146. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1692-93 (2005) (referring to constitutional decisions immunized from legislative, or even subsequent judicial review, by virtue of their asserted constitutional foundation).

147. See *Katz*, 389 U.S. at 360-61. As the Supreme Judicial Court put the question before deciding not to answer it with respect to GPS surveillance, is there “an expectation of privacy that society is prepared to consider reasonable”? *Connolly*, 913 N.E.2d at 367 (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)).

148. *Connolly*, 913 N.E.2d at 367.

149. *Id.* at 369 & n.13. The court’s analysis of this issue was, it is fair to say, wholly policy-based. The court began by observing that under Fourth Amendment principles, to constitute a “seizure” of *Connolly*’s car, the installation and monitoring of the GPS device to track the vehicle’s movements had to impose “some meaningful interference” with *Connolly*’s possessory interest in the car. *Id.* at 367, 369. In deciding this test was met notwithstanding *Connolly*’s continuing possession and unfettered use of the car, the court opined that “[t]he owner of property has a right to exclude it from ‘all the world,’ and the police use [of the car to conduct surveillance] ‘infringes [on] that exclusionary right.’ . . . [Such surveillance] is a seizure not by virtue of the technology employed, but because the police use private property (the vehicle) to obtain information for their own purposes.” *Id.* at 369-70 (citations omitted) (quoting *Karo*, 468 U.S. at 729 (Stevens, J., dissenting)). As authority, the court cited only Justices Stevens’ dissenting opinion in *Karo*, a case in which the Supreme Court held that police monitoring of a beeper that they had installed in a drum of chemicals prior to the defen-

what circumstances would it be “reasonable” for the police to employ this investigative technique.¹⁵⁰ These questions require balancing individual privacy interests against collective public-safety interests—both in some sense liberty interests¹⁵¹—and their answers depend on the sort of policy considerations, grounded in time and space, that seem ill-suited for courts to decide in an adjudicative context. They are rather quintessentially legislative decisions.¹⁵²

The legislature is the governmental body elected to address such policy issues, and its decisions have political legitimacy and accountability that judicial decisions do not share.¹⁵³ Moreover, the legislature has more appropriate tools to explore the practical ramifications of such an issue,¹⁵⁴ freeing it from the narrow factual predicate of a judicial decision and allowing input of the citizenry that is missing from judicial decision making. Public hearings, open debate, and voting by elected representatives would replace the record and briefs of the parties, perhaps augmented by amicus submissions, followed by necessarily cloistered deliberation and decision making of appointed judges. And, if due to conditions un-

dant’s purchase of the drum did not constitute either a search or a seizure as long as the drum remained in a public place, theoretically open to the view of the public. *Karo*, 468 U.S. at 708, 713-14.

150. *Connolly*, 913 N.E.2d. at 371. Once the Supreme Judicial Court decided that the GPS installation and monitoring constituted a seizure requiring a warrant, it had further to decide whether a warrant issued under the common-law authority of the courts would suffice to satisfy the constitutional requirement of reasonableness or whether instead the constitution requires one issued under a state statute, MASS. GEN. LAWS ch. 276, § 1 (2008), that limits execution of the warrant to a seven-day period following its issuance. The court held that because the search authorized would not yield tangible property, the statutory provision—which did not mention GPS or similar devices but rather facially applied to search warrants for tangible property—is inapplicable to a warrant to install and monitor a GPS device. *Id.*

151. See INTERPRETING STATE CONSTITUTIONS, *supra* note 6, at 84.

152. Indeed, in the wake of the federal circuit split on the question of whether installation and monitoring of a GPS device constitutes a “search” under the Fourth Amendment, the Boston Globe lead editorial on September 2, 2010, admonished Congress to step in and “impose reasonable guidelines on the use of high-tech surveillance without a warrant or probable cause.” Editorial, *Supreme Court, Congress Need New Rules for GPS Searches*, BOS. GLOBE, Sept. 2, 2010, http://www.boston.com/boston_globe/editorial_opinion/editorials/articles/2010/09/02/supreme_court_congress_need_new_rules_for_gps_searches/.

153. See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (explaining the constitutional role of legislatures: “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people” (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976))).

154. Included in this calculus would be the costs in confusion arising from the different standards.

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foreseen or a sense based on subsequent experience that the decision was a mistake, a legislative decision would be subject to review and change, a plasticity missing in judicial constitutional decisions. There is certainly a place for policy-based judicial decision making, but the open interest balancing informed by society’s reasonable expectations and societal conventions¹⁵⁵ that is necessary to give meaning to the search-and-seizure norm is not such a place.¹⁵⁶ Dean Sager thus excluded the search-and-seizure norm from his under-enforcement theory,¹⁵⁷ noting that such contextual interest balancing makes it an inapt candidate for such analysis.¹⁵⁸

Taking this argument to its logical conclusion, one could argue that no court—including the Supreme Court—should strike the interest balance that interpreting the search-and-seizure norm requires, but my argument need not go that far. My point here is one of judicial prudence grounded as much in institutional competence as decisional legitimacy. The Court has incorporated the Fourth Amendment’s search-and-seizure norm into the Fourteenth Amendment’s Due Process Clause, thus imposing it on the states.¹⁵⁹ As such, it falls to the Court, as the final arbiter of federal law, to decide its meaning as a national, foundational limit on state action. My point is that state courts should defer to the Court concerning the content of that normative balance, not that no court could ever decide that meaning.

Beyond these conceptual and prudential reasons counseling state-court deference to the Supreme Court concerning the meaning of constitutional search-and-seizure protections lie practical reasons for normative uniformity as well.¹⁶⁰ The search-and-seizure norm has become immensely complicated as courts struggle to craft the intermediate standards and particular rules by which this open-ended norm is applied in each investigative context.¹⁶¹ The never-

155. See *Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (using the yardstick of “widely shared social expectations” to measure the content of third-party consent as a basis for a reasonable search).

156. To be sure, any such legislative action would be subject to the Fourteenth Amendment’s up-only limitation, and it could well fall to the state court in reviewing that policy in a particular case to make that determination. Since federal law to this point has examined the search-and-seizure norm principally from the perspective of protection against police excesses, that would be the perspective of the state court in answering this federal question.

157. See *supra* note 108 and accompanying text.

158. See *Fair Measure*, *supra* note 108, at 1244 n.104.

159. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

160. See *infra* note 162 and accompanying text.

161. See *infra* note 162 and accompanying text.

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ending stream of Fourth Amendment cases that each year are decided and reported throughout the nation bears witness to this continual expansion and mutation of the doctrine.¹⁶² As already noted, this norm and its doctrinal web is aimed at and must be applied by police officers in the field, often in the face of unanticipated, rapidly unfolding circumstances.¹⁶³ The set of rules limning the bounds of constitutional behavior is complicated enough without adding another, separate layer of state doctrine on top of extant federal standards and rules. To be sure, conflicts between state and federal rules or standards should, for state officers, be resolved in favor of the more demanding state rules, and state and local officers would presumably be trained in accordance with the state version of the norm. But two layers of overlapping rules cannot but create confusion, particularly in instances in which state and federal officers operate with one another, each subject to different rules. This possibility of confusion further dilutes the added protection that individuals might receive from an ostensibly more demanding state constitutional version of this norm.

None of this suggests, however, that state courts are relegated to the sidelines in interpreting or applying the search-and-seizure norm, only that deference to the Supreme Court here is appropriate. When, as in a case like *Connolly*, the federal meaning or scope of the normative protection is open, state courts are free—indeed, obligated—to flesh out the meaning of the norm, but as a matter of

162. Almost every term, the Supreme Court decides several Fourth Amendment cases that extend or change the face of the search-and-seizure norm or its remedy. *See, e.g., Arizona v. Gant*, 129 S. Ct. 1710 (2009) (overturning almost thirty years of case law governing the limits of automobile searches incident to the arrest of a recent occupant); *Herring v. United States*, 555 U.S. 135 (2009) (extending the exclusionary rule's good-faith exception to the fruits of arrests based on faulty, negligently maintained police records of outstanding warrants). The ink on these opinions was barely dry before a circuit split arose on the application of the exclusionary rule's good-faith exception to fruits of car searches, lawful when conducted but unlawful after *Gant*. *Compare United States v. McCane*, 573 F.3d 1037, 1042-45 (10th Cir. 2009) (applying good-faith exception to exclusionary rule to evidence obtained in reliance on *Belton*, the case overruled by *Gant*), *with United States v. Gonzalez*, 578 F.3d 1130, 1132-33 (9th Cir. 2009) (declining to apply good-faith exception based on *Belton* reliance, citing conflict with retroactivity principles). In *Davis v. United States*, 598 F.3d 1259 (11th Cir. 2010), *cert. granted*, 131 S. Ct. 502 (2010), the Supreme Court granted a writ of certiorari to resolve this issue. And so it goes and will continue to go.

Viewing this doctrinal growth from the admittedly parochial perspective of a law professor, the same casebook's pages that I have used in teaching just a portion of Fourth Amendment law over the past quarter century have more than doubled, from some 300 to well over 600, an admittedly crude but nevertheless telling measure of the increasing breadth and complexity of this search-and-seizure doctrine.

163. *See supra* note 162 and accompanying text.

federal, not state, law.¹⁶⁴ At the time the Supreme Judicial Court considered *Connolly*, there were some tea leaves from old Supreme Court decisions from which one could attempt to predict how the Court might answer the question, along with a few lower federal court and state supreme court decisions going both ways, but there was nothing close to definitive concerning the Fourth Amendment's answer to this question.¹⁶⁵ There was even less certainty under Article 14.¹⁶⁶ The only thing certain was that the Supreme Judicial Court, the highest court in Massachusetts, had undoubted positive-law authority to found its decision in either provision, federal or state.¹⁶⁷ Had the court based its decision on the Fourth Amendment, the decision would have resolved *Connolly*'s constitutional claim,¹⁶⁸ would have been consistent with the presumption of a national uniform search-and-seizure norm, and would have afforded the Supreme Judicial Court a timely and appropriate voice in the development of this fundamental normative protection.¹⁶⁹ That is hardly a sidelines role in national search-and-seizure jurisprudence.

CONCLUSION

Let me conclude by returning to Dean Sager's question: when in state-constitutionalism should a state court defer to the Supreme Court in the interpretation of a cognate constitutional provision?¹⁷⁰ As a matter of presumption, always. Given that the constitutional

164. *Commonwealth v. Connolly*, 913 N.E.2d 356, 367-68 (Mass. 2009).

165. *Id.*

166. *See id.* at 369-70. As noted above, the only authority that the court cited in support of its Article 14 holding was a dissenting opinion by Justice Stevens in a twenty-five year-old case. *Id.* at 369 (citing *United States v. Karo*, 468 U.S. 705, 728 (1984)).

167. *Connolly*, 913 N.E.2d at 369-70.

168. If the court had couched its decision in *Connolly* as a Fourth Amendment decision, there would have been nothing further for the court to decide under Article 14. As noted, the court went on to hold that the execution of the GPS warrant within a fifteen-day period (which was outside the seven-day period required by Massachusetts statute for the execution of some warrants) was reasonable, but this was as a matter of state common law, not constitutional law. *See id.* at 371.

169. One of the criticisms of state-court deference to the Supreme Court, either through the lockstepping or supplemental approach, is that the differing views of the state courts on these important constitutional issues are lost, providing no counterweight to the views of the nine judges on the Court. That may be a price to be paid for national uniformity as to those cognate provisions for which the presumption holds, but not always, as this case shows. However the issue might ultimately be decided by the Supreme Court, if it ever is, the Supreme Judicial Court would have been heard and could have provided authority, albeit limited to its persuasive force outside the Commonwealth, concerning the Fourth Amendment's meaning in this regard, a matter that is almost certain to arise elsewhere.

170. Sager, *supra* note 1, at 959.

overlap here at issue only arises in the case of core constitutional values common to the nation and its fifty constituent parts, a presumption of common meaning, state and federal, is justified. And in our nation, in which states are assigned a subordinate role, if judgments differ concerning the content of a fundamental constitutional norm, it again seems justifiable to look to the Supreme Court as the constitutional arbiter.

But this presumption of uniformity, with state-court deference to the Supreme Court in its service, should give way in the face of compelling conceptual and practical reasons. As I have tried to demonstrate, all constitutional norms—even fundamental ones—are not the same. If as is true with the protection against unreasonable searches and seizures, the normative protection delineates a core liberty interest common to both the nation and its fifty constituent states, it makes sense that the subordinates in that political relationship defer to their superior concerning the meaning and scope of that interest. Certainly in the case of the search-and-seizure norm, this deference is more than an aesthetic preference, because the states' subordinate status is underscored by their innate inability to fully implement a different, expanded version of that norm within their own borders. So, without even accounting for prudential and practical concerns that counsel against state constitutional expansion of search-and-seizure protections, state courts simply have no business re-configuring this national balance of constitutional interests.

On the other hand, there are many constitutional protections, like the right to counsel, that provide procedural protection to the fundamental liberty interest in avoiding wrongful convictions. Here, states overcome their subordinate status and with it the presumption that their courts ought to defer to the Supreme Court in giving state constitutional shape to these core normative protections. Enhancing the right-to-counsel protection or ones like it fortifies rather than redefines the underlying, national liberty interest, and states are able to fully implement such expanded protections because their reach is wholly local.

In the end, allowing or even encouraging state constitutional expansion of core national constitutional protections does not force a choice between deference and dissonance. Fundamental normative protections that are by nature uniquely national, where states cannot escape their subordinate status, should be the province of the nation and its Supreme Court. But those normative protections, although of fundamental, national import, that are essentially

local in their implementation and effect should be fair game for independent state constitutional enhancement. There is nothing dissonant about lack of deference in that instance. It is merely playing out Professor Gardner's observation that in our brand of federalism, states are in that peculiar position of sometimes being subordinate to—but other times being independent of—the nation of which they are a part.