

# THE MATHEW O. TOBRINER MEMORIAL LECTURE.\*

## Divided We Stand: State Constitutions in a More Perfect Union

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I am honored to be delivering the Tobriner lecture at this distinguished law school. I did not have the privilege of knowing Justice Tobriner personally, but I have come to know him through his judicial decisions, his extrajudicial writings and the numerous scholarly reviews of his work and tributes of his many friends.<sup>1</sup>

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\* The Mathew O. Tobriner Memorial Lecture, given each year at Hastings College of the Law, was established to honor the life work and social vision of Justice Mathew O. Tobriner of the Supreme Court of California. The Lecture serves as a permanent memorial to this outstanding legal scholar and jurist.

This essay is a slightly expanded and annotated version of the Mathew O. Tobriner Memorial Lecture delivered at the University of California, Hastings College of the Law, on November 14, 1990. I wish to thank Jillian Carnahan, Diana Cook, Gretchen Engel, and Faith Spencer for their assistance in the preparation of the manuscript for publication.

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1. See, e.g., Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967); Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 UCLA L. REV. 5 (1972); Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CALIF. ST. B.J. 294 (1972); Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A. J. 21 (1968); Bird, Grodin & Sullivan, *In Memoriam Mathew O. Tobriner*, 33 HASTINGS L.J. xiii-xiv (July 1982); Bird, *Justice Mathew O. Tobriner — The Heart of a Lion, The Soul of a Dove*, 70 CALIF. L. REV. 871 (1982); Tribe, *Remembering Mathew Tobriner*, 70 CALIF. L. REV. 876 (1982); Balabanian, *Justice Was More Than His Title*, 70 CALIF. L. REV. 878 (1982); Bird, *Justice Mathew O. Tobriner—A Man of Uncommon Grace*, 11 HASTINGS CONST. L.Q. 161 (1984); Grodin, *Justice Tobriner: Portrait of the Judge as an Artist*, 29 HASTINGS L.J. 7 (1977); Pearlman, *Welfare Administration and the Rights of Welfare Recipients*, 29 HASTINGS L.J. 19 (1977); Willemsen, *Justice Tobriner and the Tolerance of Evolving Life Styles: Adapting the Law to Social Change*, 29 HASTINGS L.J. 73 (1977); Sloss & Becker, *The Organization Affected with a Public Interest and Its Members—Justice Tobriner's Contribution to Evolving Common Law Doctrine*, 29 HASTINGS L.J. 99 (1977); Adler & Mosk, *Justice Tobriner and Real Property*, 29 HASTINGS L.J. 127 (1977); Kamarck, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153 (1977); Horvitz, *Justice Tobriner's Tort Decisions: A Reaffirmation of the Common Law Pro-*

Two principles about which I shall speak emerge from Justice Tobriner's work. First, though respectful of history and precedent and aware of the importance of continuity, Justice Tobriner recognized that the law does not stand still but adapts to changing social and economic conditions.

Second, Justice Tobriner viewed courts as the guardians of individual rights and equal justice. An independent judiciary, he concluded, plays a vital role in affording to every individual protection against the government and against private centers of power.

I speak today about law and individual rights in the context of state constitutions, a subject well known to Justice Tobriner. When asked in February 1982 whether he agreed with Professor Anthony Amsterdam's comment that lawyers should go to the state supreme court on certain constitutional issues, Justice Tobriner is quoted as saying: "I think that's true. Our court has taken the position that we will protect the fundamental rights of the state constitution, and that we will do so even if the U.S. Supreme Court rules contrary to that."<sup>2</sup>

And that's what I'm going to talk about: state courts' protection of fundamental rights under the state constitutions.

I shall explore cases in three areas of constitutional law: (1) individual rights against unreasonable search and seizure; (2) individual rights to free speech; and (3) individual rights to education.

The cases show that state courts are increasingly deciding cases under their state constitutions; that examining state constitutional rights is a process with varying results; that although most state constitutional law decisions adopt the federal interpretation of individual rights, a significant number of decisions deviate from federal interpretation; that the development of state constitutional law depends to a substantial degree on the constitutional issue involved; and that individual rights are best protected through dialogue among the state and federal courts.

State constitutional law has deep roots in our legal system and can foster not a weaker but a stronger union of states. Thus my title *Divided We Stand: State Constitutions in a More Perfect Union*.<sup>3</sup>

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cess, 29 HASTINGS L.J. 167 (1977); Note, *Untangling Tarasoff*: Tarasoff v. Regents of the University of California, 29 HASTINGS L.J. 179 (1977).

2. Mathew O. Tobriner: *Reflecting on the High Court*, CAL. LAW., Feb. 1982, at 48.

3. "If a house be divided against itself, that house cannot stand."—Mark 3:25; "A house divided against itself cannot stand."—Abraham Lincoln, Speech to Republican State Convention, Springfield, Illinois, June 16, 1858.

## I. Individual Rights Against Unreasonable Search and Seizure

We look first at criminal cases and protection of the criminal defendant against unreasonable search and seizure, in particular, search and seizure of garbage. If your home is your castle, what about your royal garbage? Garbage is garbage, but the history of garbage is, according to academicians, scholarship.

Since the late 1960s many courts have been faced with the question of whether law enforcement officers who do not have search warrants may search and seize personal property deposited in garbage containers awaiting disposal.<sup>4</sup> The facts in the garbage cases are remarkably similar. Garbage tied in green, white, or otherwise opaque plastic bags is placed at the curb, in a dumpster or on the macadam. The police make a warrantless search of the suspect's garbage. The contents of the garbage are used as evidence in a criminal prosecution.

The issue presented to the courts is whether a warrantless garbage search constitutes an unreasonable search violating an individual's reasonable expectation of privacy. Most cases hold that "the police have the same right to go through your garbage as the average raccoon . . . ."<sup>5</sup>

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4. *See, e.g.*, *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986); *United States v. O'Bryant*, 775 F.2d 1528, 1533-34 (11th Cir. 1985); *United States v. Michaels*, 726 F.2d 1307, 1312-13 (8th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984); *United States v. Kramer*, 711 F.2d 789, 791-94 (7th Cir. 1983), *cert. denied*, 464 U.S. 962 (1983); *United States v. Terry*, 702 F.2d 299, 308-09 (2d Cir. 1983), *cert. denied sub nom.* 461 U.S. 931 (1983); *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Crowell*, 586 F.2d 1020, 1024-25 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *United States v. Mustone*, 469 F.2d 970, 972-73 (1st Cir. 1972); *State v. Kyles*, 513 So.2d 265, 269-70 (La. 1987); *Commonwealth v. Chappée*, 397 Mass. 508, 511-13, 492 N.E.2d 719, 721-22 (1986); *State v. Tanaka*, 67 Haw. 658-60, 701 P.2d 1274, 1276 (1985); *People v. Rooney*, 175 Cal. App. 3d 634, 641 P.2d 53 (1985), 221 Cal. Rptr. 49; *State v. Ronngren*, 361 N.W.2d 224, 228-30 (N.D. 1985); *Cooks v. State*, 699 P.2d 653, 656 (Okla. Crim. App. 1985), *cert. denied*, 474 U.S. 935 (1985); *State v. Stevens*, 123 Wis. 2d 303, 314-20, 367 N.W.2d 788, 794-97 (1985), *cert. denied*, 474 U.S. 852 (1985); *State v. Brown*, 20 Ohio App. 3d 36, 37-39, 484 N.E.2d 215, 217-18 (1984); *State v. Oquist*, 327 N.W.2d 587 (Minn. 1982); *People v. Whotte*, 113 Mich. App. 12, 317 N.W.2d 266 (1982); *Commonwealth v. Minton*, 288 Pa. Super. 390-93, 432 A.2d 212, 215-18 (1981); *State v. Schultz*, 388 So. 2d 1326 (Fla. Dist. Ct. App. 1980); *People v. Huddleston*, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976); *Willis v. State*, 518 S.W.2d 247, 249 (Tex. Crim. App. 1975); *Smith v. State*, 510 P.2d 793 (Alaska 1973), *cert. denied*, 414 U.S. 1086 (1973); *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded sub nom.* *California v. Krivda*, 409 U.S. 33 (1972), *reh'g denied*, 409 U.S. 1068, *aff'd on remand sub nom.* *People v. Krivda*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973); *State v. Fassler*, 108 Ariz. 586, 592-93, 503 P.2d 807, 813-14 (1972); *Croker v. State*, 477 P.2d 122, 125-26 (Wyo. 1970); *People v. Edwards*, 71 Cal. 2d 1096, 1104-05, 458 P.2d 713, 715-18, 80 Cal. Rptr. 633, 634-38 (1969); *State v. Purvis*, 249 Or. 404, 411, 438 P.2d 1002, 1005 (1968).

5. Ehrenreich, *Keeping Garbage in the Family*, MOTHER JONES, Sept. 1988, at 10.

The cases have caught the attention of the popular press, as well as the law reviews, and inspired articles with such catchy titles as *Keeping Garbage in the Family*,<sup>6</sup> *Trash Piles of the Rich and Famous*,<sup>7</sup> *Lifting the Lid on Garbage*,<sup>8</sup> and *The Last Rights of Garbage*.<sup>9</sup>

These cases are not, as the legal and popular press recognize, simply about garbage. They are about protecting individual rights to privacy, about law enforcement officers combatting crime, and about federalism—the relation of state and federal constitutions and state and federal courts. As Curtis Sitomer wrote in the *Christian Science Monitor*, “Garbage, in the abstract, may appear to be trivial. In principle, however, when trash becomes evidence in a criminal trial, it takes on a whole new constitutional aroma.”<sup>10</sup>

Our story starts in 1971 with a California case, *People v. Krivda*.<sup>11</sup> The California Supreme Court, by a divided vote, with Justice Tobriner in the majority, held that a police search of the defendant’s trash barrels without a warrant was illegal and that the evidence had to be suppressed. When the state sought review, the United States Supreme Court vacated the California judgment and remanded the case to the California Supreme Court to state whether it based its holding on the Fourth and Fourteenth Amendments to the federal constitution, or upon the equivalent provision of the California constitution, or upon both.<sup>12</sup> The California constitution, like many state constitutions, protects individuals against unreasonable searches and seizures, using virtually the same language as the Fourth Amendment.<sup>13</sup>

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6. *Id.*

7. *Trash Piles of the Rich and Famous*, *BUS. WK.*, Oct. 30, 1989, at 20A.

8. *Lifting the Lid on Garbage: The High Court Gives Police Broad Power to Search Trash*, *TIME*, May 30, 1988, at 54.

9. *The Last Rights of Garbage*, *U.S. NEWS & WORLD REP.*, May 30, 1988, at 9. The warrantless search and seizure of garbage has even attracted Hollywood’s attention, serving as the premise for the film *The Star Chamber*. “The script depicts two painful cases . . . in the court of a California judge. This judge is then elevated to a nine-member Superior Court and finds that his colleagues are a self-appointed Star Chamber, secretly engaged in rectifying injustices caused by the exclusionary rule.” Stanley Kauffman on Films, *NEW REPUBLIC*, September 19 & 26, 1983.

10. Sitomer, *When Garbage Is Not Trash*, *CHRISTIAN SCI. MONITOR*, Aug. 23, 1990, at 14.

11. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

12. *California v. Krivda*, 409 U.S. 33 (1972).

13. CAL. CONST. art. 1, § 13. This section provides that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

The United States Supreme Court was unwilling to review California's *Krivda* decision until it knew which constitution governed the case. It was well aware that if the state constitution protected the defendant's rights there was no issue for the United States Supreme Court to review.

Ironically, had *Krivda* been decided in 1985 instead of in 1972, the United States Supreme Court probably would not have remanded the case. The United States Supreme Court held in 1983, in *Michigan v. Long*,<sup>14</sup> that absent a state court's plain statement that the decision rests on adequate and independent state grounds, the United States Supreme Court will presume that the state court resolved the issue on federal constitutional grounds.<sup>15</sup>

Upon remand from the United States Supreme Court a unanimous California court concluded that it had relied in *Krivda* on both the federal and California constitutions, and that the California constitution furnished an independent ground to support the decision.<sup>16</sup> Thus, the United States Supreme Court would not review this case.

What a surprise! A search and seizure case turning on state constitutional law. Most Americans in the early 1970s, including most lawyers and judges, identified civil liberties with the federal constitution. Immersed in the Warren court decisions, few thought about state constitutions. But for most of this country's history, from 1787 to 1925, state law—that is, the common law, state statutes and state constitutions—was the primary guarantor of individual rights against infringement by

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14. 463 U.S. 1032, 1040-41 (1983).

15. In a January 27, 1988 address to the National Conference of Chief Justices in Williamsburg, Virginia, Chief Justice Rehnquist commented on the *Michigan v. Long* holding. He acknowledged that the case "has received its share of criticism." He recounted the criticism, defended the decision, and argued that the state courts may construe their state constitutions as they wish but must take responsibility for their actions. He said:

Some believe that it reflects hostility to the resurgence of interest in the development of state constitutional rules that offer greater protection of individual rights than is offered by cognate provisions of the United States Constitution. I think this view is mistaken. Our court has neither the authority nor the inclination to oppose efforts to construe state constitutional provisions more liberally than their federal counterparts are construed. The [state constitutional law] movement is a classic example of Justice Brandeis' praise for the federal system as making possible experimentation in fifty different state laboratories to see what the proper solution to a question is. But I think that those who undertake these "experiments," to use Justice Brandeis' term, must be willing to assume the responsibility for doing so . . . whatever the methods of accountability may be in your state, they can be pursued by whatever number of people choose to avail themselves of those methods.

Chief Justice William H. Rehnquist, Remarks at the National Conference of Chief Justices, Williamsburg, Virginia (Jan. 27, 1988), in *Materials for the State Constitutional Law Seminar* (March 11, 1988), Washington, D.C. (sponsored by the National Association of Attorneys General State Constitutional Law Clearinghouse Project).

16. *People v. Krivda*, 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

the state government. For most of this country's history the federal bill of rights was viewed as protecting individuals solely against federal government encroachment.<sup>17</sup>

In 1925 the United States Supreme Court began to apply selected federal constitutional guarantees to the states.<sup>18</sup> This process, known as selective incorporation, accelerated in the 1960s so that by the early 1970s most of the criminal justice guarantees in the Bill of Rights were applicable to state law enforcement officers.<sup>19</sup>

The United States Supreme Court's selective incorporation resulted, however, in federal domination of civil liberties law. As can be seen in the numerous state garbage cases in the 1970s and 1980s, litigants and state courts typically ignored state bills of rights or, without discussion, treated similar state and federal provisions as interchangeable.<sup>20</sup> In contrast to the *Krivda* case, most federal and state courts upheld garbage searches under the federal constitution.<sup>21</sup>

Only a few state courts, Wisconsin being one of them, examined both the federal and state constitutions in deciding garbage cases. Wisconsin upheld the garbage search under both constitutions.<sup>22</sup> Abrahamson, J., dissenting. Hawaii alone struck down a garbage search under its own state constitution.<sup>23</sup>

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17. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144-45 (1985); Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 956 (1982).

18. *Gitlow v. New York*, 268 U.S. 652 (1925).

19. Abrahamson, *Criminal Law and State Constitutions*, *supra* note 17, at 1147.

20. *See, e.g.*, *Cooks v. State*, 699 P.2d 653 (Okla. Crim. App. 1985); *State v. Kyles*, 513 So. 2d 265 (La. 1987); *Commonwealth v. Chappee*, 397 Mass. 508, 492 N.E.2d 719 (1986); *State v. Ronngren*, 361 N.W.2d 224 (N.D. 1985); *State v. Brown*, 20 Ohio App. 3d 36, 484 N.E.2d 215 (1984); *State v. Oquist*, 327 N.W.2d 587 (Minn. 1982); *People v. Whotte*, 113 Mich. App. 12, 317 N.W.2d 266 (1982); *Commonwealth v. Minton*, 288 Pa. Super. 381, 432 A.2d 212 (1981); *State v. Schultz*, 388 So. 2d 1326 (Fla. Dist. Ct. App. 1980); *People v. Huddleston*, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976); *Willis v. State*, 518 S.W.2d 247 (Tex. Crim. App. 1975); *State v. Fassler*, 108 Ariz. 586, 503 P.2d 807 (1972); *Croker v. State*, 477 P.2d 122 (Wyo. 1970); *State v. Purvis*, 249 Or. 404, 438 P.2d 1002 (1968).

21. Before *Greenwood v. California*, 486 U.S. 35 (1988), California and Hawaii alone prohibited warrantless searches of garbage under their state constitutions. *See, e.g.*, *State v. Tanaka*, 67 Haw. 658, 659-62, 701 P.2d 1274, 1275-76 (1985); *People v. Rooney*, 175 Cal. App. 3d 634, 221 Cal. Rptr. 49 (1985); *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded sub nom. California v. Krivda*, 409 U.S. 33 (1972), *reh'g denied*, 409 U.S. 1068, *aff'd on remand sub nom. People v. Krivda*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973); *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

22. *State v. Stevens*, 123 Wis. 2d 303, 309, 367 N.W.2d 788, 792 (1985) (Heffernan, C.J., Abrahamson, J., and Bablitch, J., dissenting). *See also Smith v. State*, 510 P.2d 793, 795 n.4 (Alaska 1973), *cert. denied*, 414 U.S. 1086 (1973).

23. *State v. Tanaka*, 67 Haw. 658, 659-62, 701 P.2d 1274, 1275-76 (1985).

When the United States Supreme Court did rule on the Fourth Amendment protections against garbage searches, it held, seven to two, in *California v. Greenwood*<sup>24</sup> that the Fourth and Fourteenth Amendments to the United States Constitution did not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home.<sup>25</sup> The United States Supreme Court viewed its conclusion that society would not accept an accused's claim to a reasonable expectation of privacy in trash left for collection as reinforced by federal courts of appeals that unanimously rejected similar claims of privacy and the numerous state courts that held that police may conduct warrantless searches and seizures of garbage.<sup>26</sup>

In the two years since *Greenwood*, at least seven state appellate

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24. 486 U.S. 35 (1988). For commentary on the *Greenwood* decision, see e.g., 1 LA FAVE, SEARCH AND SEIZURE § 2.6 (c) (2d ed. 1987) at 59-63 (1991 Supp.); Note, California v. Greenwood: *Discarding the Traditional Approach to the Search and Seizure of Garbage*, 38 CATH. U.L. REV. 543 (1989); Note, *Warrantless Search and Seizure of Curbside Garbage: California v. Greenwood* 108 S.Ct. 1625 (1988), 58 U. CIN. L. REV. 361 (1989); Note, California v. Greenwood, *Supreme Court Decides to Keep the Fourth Amendment Out of the Trash*, 67 N.C.L. REV. 1191 (1989); Herprich, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U.L. REV. 993 (1989).

25. The *Greenwood* case began in the California court system. *People v. Greenwood*, 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (1986). In 1986, the California courts again had to decide a garbage case. The United States Supreme Court had not squarely ruled on the issue. *Krivda* was thus binding precedent in California that a warrantless search of trash barrels left for routine collection violated the federal and California constitutions. 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). The Court of Appeals in *Greenwood* suppressed the evidence from the garbage search, resting its decision on federal, not state, constitutional law. *Id.* at 735, 227 Cal. Rptr. at 542. The reason for this clear demarcation of authority lies in an amendment to the California constitution adopted after *Krivda* but before *Greenwood*. *Id.* at 735, 227 Cal. Rptr. at 541-42, citing CAL. CONST. art. 1, § 28(d). The amendment provides that relevant evidence shall not be excluded in any criminal proceeding. *Id.* The California Supreme Court interpreted the amendment as abrogating a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal Constitution. *In re Lance W.*, 37 Cal. 3d 873, 886-90, 694 P.2d 744, 752-55, 210 Cal. Rptr. 631, 639-42 (1985). Thus in order to suppress the evidence against him, Billy Greenwood was required to prevail in the California courts on fourth amendment grounds. For discussion of the amendment to the California constitution and the *Lance* case, see J. GRODIN, *IN PURSUIT OF JUSTICE*, 113-15 (1989).

26. 486 U.S. at 41-43. The Court commented in note 5 to the opinion: "Given that the dissenters are among the tiny minority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that 'society will be shocked to learn' of today's decision."

I have conducted my own unscientific survey of Wisconsinites' views on garbage. The general consensus of my audiences is that what's in their garbage is their private business and that law enforcement officers should not be rummaging through garbage without a warrant. These views raise questions about how a court determines society's reasonable expectation of privacy.

courts have decided garbage cases.<sup>27</sup> Each court, except Alabama's,<sup>28</sup> examined its state constitution, often with only cursory examination of state constitutional history and state constitutional law interpretation. Four state courts found the United States Supreme Court's *Greenwood* decision persuasive authority for interpreting the state constitution. The fact remains, however, that the state courts applied their own constitutions.

The New Jersey Supreme Court concluded, in July 1990, that its state constitution required law enforcement officials to have a warrant based on probable cause to search garbage left on the curb for collection.<sup>29</sup> The New Jersey majority essentially disagreed with the *Greenwood* majority opinion and amplified and adopted Justices Marshall's and Brennan's dissent. The New Jersey court repudiated the holdings of "virtually every other court that has considered the issue," 120 N.J. 224, 576 A.2d 814, declaring that "the trouble with those cases is that they are flatly and simply wrong as to the matter of the way people think about garbage."<sup>30</sup> To the New Jersey Supreme Court, permitting police

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27. *State v. Hempele*, 120 N.J. 182, 576 A.2d 793 (1990); *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990); *Commonwealth v. Pratt*, 407 Mass. 647, 659-61, 555 N.E.2d 559, 567-68 (1990); *People v. Pinnix*, 174 Mich. App. 445, 436 N.W.2d 692 (1989); *State v. Henderson*, 435 N.W.2d 394 (Iowa Ct. App. 1988); *State v. Trahan*, 229 Neb. 673, 686-89, 428 N.W.2d 619, 622-23 (1988); *People v. Thivierge*, 174 Mich. App. 258, 435 N.W.2d 446 (1988).

28. *Walls v. State*, 536 So. 2d 137, 139 (Ala. Crim. App. 1988).

29. *State v. Hempele*, 120 N.J. 182, 221, 576 A.2d 793, 813 (1990). The day after this lecture was delivered, Nov. 15, 1990, the Washington Supreme Court handed down its decision declaring unconstitutional under its state constitution the warrantless search of garbage. *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990). The Washington Supreme Court concluded that the Washington constitution protects privacy interests which may not be covered by the Fourth Amendment to the United States Constitution. *Id.* at 575, 800 P.2d at 1114. Violation of a right of privacy under the Washington constitution "turns on whether the State has unreasonably intruded into a person's 'private affairs.'" *Id.* at 577, 800 P.2d at 1115 (quoting *State v. Myrick*, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 153-54 (1984)). The court said the difference between the state and the federal constitutions concerning the right of privacy is as follows:

Const. art. 1, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjective privacy expectations of modern citizens who, due to well-publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. 120 N.J. at 195-97, 576 A.2d at 799-801.

The court held that the defendant's "private affairs" were unreasonably intruded upon when the law enforcement officers searched his garbage without a warrant. *Id.* at 223, 576 A.2d at 814.

30. 120 N.J. at 225-26, 576 A.2d at 814-15. According to the court, "Our decision today does not follow the course set by the [United States] Supreme Court because 'we are persuaded that the equities so strongly favor protection of a person's privacy interest that we should apply



to pick their way through garbage bags like Templeton the Rat and to peruse the vestiges of a person's private affairs is repugnant to the ideal of the right to be let alone—the right embraced in the state constitutional guarantee against unreasonable search and seizure.

In contrast to the New Jersey justices, many state judges approach their state constitutions with almost a presumption that the state constitution is to be interpreted in the same way as the federal constitution. Many state judges, including two dissenters in the New Jersey garbage case, object vigorously to state courts interpreting state constitutional provisions differently from the federal constitution unless special circumstances exist.<sup>31</sup>

But should not different opinions about individual rights in search and seizure cases be expected and accepted? Differences of opinion are inevitable as judges must reconcile the competing needs of law enforcement officers and rights of individuals. Courts are caught between the need to protect public safety and a constitutional obligation to protect individual rights in a society that perceives a mounting incidence of crime.

Differences in interpretation of the state and federal constitutions should be viewed, I believe, as examples of the difficulties of interpreting language, especially the broad phrases of a bill of rights. Not all judges will necessarily agree on a single interpretation of language—whether a contract, statute or constitution. While we are comfortable with the idea that the Uniform Commercial Code, for example, might be interpreted differently by each state, we balk at the idea of interpreting identical federal and state constitutional provisions differently. Why is this so?

We accept division of opinion within the United States Supreme Court on interpretations of constitutional language. We accept modifications by the United States Supreme Court in its interpretation of an unamended federal constitution. Often, however, judges and commentators find unacceptable a state court's interpretation of a state constitutional provision that is different from five of the nine United States Supreme Court justices' interpretation of a virtually identical federal constitutional provision. Why should state courts not closely examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?

Our discomfort when a state court deviates from the United States Supreme Court in the area of criminal constitutional law can be ex-

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our own standard rather than defer to the federal provision.'” *Id.* at 223, 576 A.2d at 814 (citation omitted).

31. *Id.* at 228-29, 576 A.2d at 816-17.

plained in several ways. First, this body of law encompasses individual rights that we characterize as fundamental. We have a hard time grasping that judges should differ over fundamentals. If the right is fundamental, we shrink from readily accepting contradictory interpretations of it.

Furthermore, state judges experience a sense of chutzpah in expressing disagreement with the United States Supreme Court. Judges are accustomed to thinking in a hierarchical way, and the United States Supreme Court is at the top of the ladder. This attitude was evidenced by one of the dissenting New Jersey justices who warned that "one of the unanticipated consequences of that supposedly benign doctrine of state-constitutional rights is an inevitable shadowing of the moral authority of the United States Supreme Court. Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties."<sup>32</sup> Others do not believe that interpretation of a state constitution by a state supreme court—the court with the duty to interpret the document—in any way diminishes the moral force of the United States Supreme Court.<sup>33</sup>

Finally, many state court judges believe that uniformity between state and federal constitutional interpretation of search and seizure provisions is itself a positive value. On a philosophical level, they regard the state constitutional law movement as threatening the vision of one nation under law.<sup>34</sup> On a practical level they deplore the need for law enforcement officers to learn two sets of legal principles. They worry that citizens will be confused when they find that under virtually identical constitutional provisions it is permissible for a federal agent, but not a state law enforcement officer, to search garbage without a warrant. One of the New Jersey dissenting justices was persuaded that different federal and state treatment of the ordinary commodity of garbage would appear

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32. *Hempele*, 120 N.J. at 226, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part).

33. *See, e.g.*, *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) (United States Supreme Court decisions have "great weight in interpreting" the double jeopardy provision, art. II, § 10 of the Arizona constitution, because uniformity is desirable, but federal precedents should not be followed blindly); *State v. Arrington*, 311 N.C. 633, 642-43, 319 S.E.2d 254, 260 (1984) (according "great weight" to search and seizure decisions of the United States Supreme Court, but holding them not to be binding as to questions exclusively concerning state law and adopting *Illinois v. Gates*, 462 U.S. 213 (1983)).

34. In truth, the constitutional vision that we have shared as a people is not one of state constitutional guarantees of freedom. Whether God-given or the result of social compact, the content of our freedom under law is drawn from the Bill of Rights. I rather doubt that most Americans think otherwise.

*Hempele*, 120 N.J. at 227, 576 A.2d at 816 (O'Hern, J., concurring in part and dissenting in part).

illogical to the public and that the public would distrust a legal system that develops such distinctions.<sup>35</sup>

In contrast, other judges and commentators perceive the emphasis on uniformity as impinging on deeply rooted traditions of federal and state constitutional interpretation, state sovereignty and federalism.<sup>36</sup> To them disparity among federal and state court interpretations has positive benefits. They envision a federal system—horizontal and vertical federalism—that fosters a continuing dialogue among courts as courts search for sound constitutional interpretation in a changing world. Most criminal cases arise in state courts, and state judges as well as federal judges have expertise in dealing with search and seizure issues. Moreover, if a state errs, the error does not take on national importance and is corrected fairly easily. Diversity, as Chief Justice Rehnquist reminds us, is to be cherished and applauded under the theory that states serve as “social laboratories.”<sup>37</sup>

For contrast, let us turn to the free speech cases.

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35. Such distinctions between federal and state constitutions are difficult for a citizen to fathom. . . . Different treatment of such an ordinary commodity [as garbage] appears illogical to the public and hence breeds a fundamental distrust of the legal system that develops such distinctions.

*Id.* at 230, 576 A.2d at 817 (Garibaldi, J., dissenting).

36. See also *State v. Kimbro*, 197 Conn. 219, 234-351, 496 A.2d 498, 506-07 (1985) (discussing the court's duty to interpret state-guaranteed fundamental civil liberties); *Brown v. State*, 657 S.W.2d 797, 807 (Tex. Crim. App. 1983) (parroting opinions of the United States Supreme Court denigrates “the special importance our Texas forbearers attached to their rights” declared in the state constitution) (Clinton, J., concurring); *State v. Badger*, 141 Vt. 430, 447-49, 450 A.2d 336, 346-47 (1982) (state constitution is not a “mere reflection of the federal charter”; constitution's role in federalist system compels court to address state constitutional issues); *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969) (“To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities”).

37. In a now famous dissent, Justice Brandeis referred to states as “laboratories” for social and economic experimentation. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

No one suggests that the state courts be the sole guardians of individual liberty. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 200 (1984) (asserting that the revitalization of state constitutional law is no excuse to weaken national safeguards); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 395 (1980) (noting that although no state can reject the minimum national standard, states can expand the standards); Abrahamson, *Homegrown Justice: The State Constitutions*, ch. 11 in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (McGraw ed. 1985), at 314 (noting the continuing need for federal courts to be involved in the protection of individual rights); Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 970-71 (1982) (state courts are protective of maintaining the role of the United States Supreme Court).

## II. Individual Rights to Free Speech

Again we have a recurring fact situation: A group of citizens want to pass out leaflets or collect signatures on a political document in a privately owned shopping mall. There are 3,000 enclosed malls in this country and another 20,000 or so shopping centers of various sizes,<sup>38</sup> many replete with tropical foliage, comfortable benches, ornamental fountains, climate controlled air, recorded music, and deputized security forces. The malls, with names like Woodfield, Northgate, Hilldale and Southdale—Garrison Keillor of the fictional Lake Wobegon has added the Chippendale and Mondale shopping malls to Minneapolis—attract thousands of people each day, replacing the central business district in many communities.

The mall owners seek to bar these free expression activities even though they do not disrupt normal business operations or the convenience of customers. Some might title this part of the lecture "Discounting Freedom of Speech: Closeout at the Mall," or simply, "Just Shut Up and Shop."

The mall cases are not about merchandising. The cases present a conflict among several of this country's most cherished tenets: freedom of expression, private property, limited government and federalism. The resolution of the cases implicates Justice Tobriner's principles of the interplay of precedent and change and the state's role in protecting individual rights against the government and private centers of power.

In 1970 the California Supreme Court concluded by a six to one vote, with Justice Tobriner in the majority, that persons seeking signatures on an initiative petition at the Inland Center, the largest shopping mall in San Bernardino County, were entitled to engage in this peaceful, orderly free expression activity.<sup>39</sup> The California court based its decision on the First and Fourteenth Amendments to the federal constitution.

The Inland Center mall sought certiorari. The United States Supreme Court refused to hear the case. Two years later the United States Supreme Court took an Oregon case that was almost identical to the earlier California case, *Lloyd Corp. v. Tanner*, and held that the individuals had no first amendment rights on private property.<sup>40</sup>

On the strength of the *Tanner* decision, the Inland Center mall returned to the California Supreme Court seeking reconsideration. The

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38. Peck, *Just Shut Up and Shop*, THE PROGRESSIVE, Oct. 1987, at 23.

39. *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), cert. and reh'g denied sub nom. *Homart Devel. Co. v. Diamond*, 402 U.S. 988, 404 U.S. 874 (1971), 405 U.S. 981 (1972), 409 U.S. 897 (1972).

40. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972).

California Supreme Court concluded, in contrast to its position in the *Krinda* garbage case, that in light of the most recent United States Supreme Court decision the mall owners could bar the political activity.<sup>41</sup> Justice Tobriner joined Justice Mosk's dissent, objecting to the majority's disregard for basic guarantees in the state constitution and the independent nonfederal grounds upon which the earlier opinion could have been based. The two justices characterized the majority opinion as "a blow to fundamental principles of federalism as old as our republic."<sup>42</sup>

Five years later in 1979 several high school students, relying on the California constitution, sought relief when the Pruneyard Shopping Center prohibited them from soliciting signatures to protest a United Nations resolution condemning Zionism.<sup>43</sup> The California constitution, in contrast to the negative proscription of the federal constitution, provides, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."<sup>44</sup> Forty-three states have constitutional provisions linguistically similar to the California constitution.<sup>45</sup>

The California Supreme Court held that the state constitution granted the individual greater protections than the federal constitution and protected reasonable petitioning in privately owned shopping centers.

The United States Supreme Court agreed to review the case. According to Justice Mosk, the "California court sensed doom to its theory of state constitutionalism."<sup>46</sup> The California Supreme Court was pleasantly surprised. In 1980, Justice William Rehnquist, writing for a Court unanimous in judgment, affirmed the decision of the California Supreme Court.<sup>47</sup> The *Pruneyard* case reaffirmed the principle that states were

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41. *Diamond v. Bland*, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

42. *Id.* at 336, 521 P.2d at 464, 113 Cal. Rptr. at 472. For criticism that the California Supreme Court was inconsistent in resting decisions on state or federal grounds, see Barnett, *The Supreme Court of California, 1981-1982 Foreword: The Emerging Court*, 71 CALIF. L. REV. 1134, 1189 (1983); Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984).

43. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). For a discussion of the *Pruneyard* case, see J. GRODIN, *IN PURSUIT OF JUSTICE*, 124-26 (1989).

44. CAL. CONST. art. 1, § 2.

45. Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180-81 n.79 (1980).

46. Mosk, *The Emerging Agenda in State Constitutional Rights Law*, 496 ANNALS 54, 63 (1988).

47. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Chief Justice Burger and Justices Brennan, Stewart, Marshall and Stevens joined Justice Rehnquist's opinion; Justices

free to guarantee to individuals liberties more expansive than those conferred by the federal constitution. *Pruneyard* reiterated that the First Amendment to the federal constitution does not reach private action. Furthermore, *Pruneyard* made clear that state constitutional provisions construed to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited do not implicate the mall owners' federally protected property or free speech rights.<sup>48</sup>

In the decade following *Pruneyard*, ten state courts have addressed the issue of individual free expression in shopping malls under the state constitution's guarantee of freedom of expression.<sup>49</sup> Most state courts have held that their constitutional free speech provisions, like the First Amendment, govern state action only and do not proscribe the conduct of private parties who limit free expression on their own property.<sup>50</sup> Environmentalists, Lyndon LaRouche supporters, women's rights activists, socialists, and protesters of nuclear power, the draft and telephone rates have been forced out of the mall.

Some of these state courts chose to incorporate the federal constitutional concept of state action into their state constitutions even though the framers of the state constitutions apparently deliberately stated the right of free expression in broader language than the First Amendment.<sup>51</sup>

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White and Blackmun joined in parts of the opinion; Justice Marshall filed a concurring opinion. Justice Powell filed an opinion concurring in part and in the judgment in which Justice White joined; and Justice Blackmun filed a statement concurring in part. *Id.* at 75-76.

48. *Id.* at 88. Recent cases have moved commentators to question the continued validity of *Pruneyard's* holding that the states were not unconstitutionally interfering with the mall owners' property rights. See, e.g., Note, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989).

49. *Lloyd Corp. v. Whiffen*, 307 Or. 674, 773 P.2d 1294 (1989); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989); *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (Ariz. App. 1989); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987); *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211 (1985); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E.2d 590 (1983); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981); *Alderwood Assocs. v. Washington Environmental Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981).

50. See, e.g., *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989).

51. For commentary on the mall cases and the state action requirement, see Levinson, *Freedom of Speech and the Right of Access to Private Property under State Constitutional Law*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, ch. 2 (McGraw ed. 1985); Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111 (1989); Sundby, *Is Abandoning State Action Asking Too*

Furthermore, by incorporating the federal constitutional concept of state action as a state constitutional law doctrine the courts were adopting a theory characterized as a "conceptual disaster area."<sup>52</sup>

Let us compare the development of state constitutional law in the mall and the garbage cases. In the mall cases the federal and state constitutional provisions are different. In the garbage cases the federal and state constitutional provisions are virtually identical. In the mall cases the United States Supreme Court expressly endorsed the states' power to adopt a more expansive view of free expression than the federal constitution adopts. In contrast, some United States Supreme Court justices disparaged the state courts' adopting more expansive protections for the criminal defendant than the federal constitution grants.<sup>53</sup> One point of convergence seems to be that commentators are critical of the United States Supreme Court's analysis of both the law of search and seizure and state action.<sup>54</sup>

Despite the disparities between the garbage and free speech issues, adopting federal constitutional interpretation as the interpretation of the state constitution was the norm. Put plainly, the state courts showed an unwillingness to deviate from the United States Supreme Court in the mall cases just as they had in the garbage cases. Why, we might ask?

The explanation does not lie in the value of uniformity stressed in the criminal cases. People are accustomed to different states having different property laws. The moral authority of the United States Supreme

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*Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139 (1989); Margulies, *A Terrible Beauty: Functional State Action Analysis and State Constitutions*, 9 WHITTIER L. REV. 723 (1988); Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986); Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986); *The Supreme Court — 1979 Term, State-Guaranteed Right to Speak in Privately Owned Shopping Centers*, 94 HARV. L. REV. 75, 169 (1980); Note, *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983); Note, *Free Speech, Initiative and Property Rights in Conflict — Four Alternatives to the State Action Requirement in Washington*, 58 WASH. L. REV. 587 (1983); Rossman, *Leaflets in Shopping Malls, America's New Main Street*, Letter to the Editor, N. Y. Times, Dec. 31, 1985.

52. Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). See also *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282, 1303 (Utter, J., concurring); Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1991); Devlin, *Constructing an Alternative to "State Action" As A Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1991).

53. See, e.g., *Florida v. Casal*, 462 U.S. 637, 639 (1978) (Burger, C.J., concurring).

54. See, e.g., 1 LAFAVE, SEARCH AND SEIZURE § 1.2 (2d ed. 1987); Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

Court does not seem to be undermined when the United States Supreme Court appears to encourage state courts to make up their own minds on free expression in a mall. People would not be confused or label the law illogical if individuals could set up booths to gather signatures on a petition in one mall but not in another. Moreover, protecting free speech is a more popularly accepted notion than suppressing evidence of a drug deal.

One explanation is that developing the law to allow free expression in malls is not easy. Having struggled with a mall case in my own home state, I know. Read my dissent.<sup>55</sup>

The division of justices within the state courts, the close votes and the vociferous dissents in the shopping mall cases demonstrate the difficulty the state courts face in balancing the competing rights and developing an interpretation of the state constitutional guarantee of free expression to govern the mall cases.

Granting individuals access to private property for purposes of free expression increases potential litigation. Granting access might mean courts would, on a case-by-case basis, balance the right of access with the reasonableness of the malls' rules regulating the time, place and manner of expression. And right of access to private property does not end with polite political speech and it does not end at the shopping mall. What about the free expression rights of individuals who are engaging in commercial speech or artistic expression? What about different venues? Retirement communities, nursing homes, and abortion clinics? Anti-abortion picketers have attempted to rely on state constitutions to go onto private parking lots or into clinics to counsel pregnant women seeking abortion.<sup>56</sup>

The very difficulty of the mall cases may argue in favor of a state-by-state resolution of the dispute and experimentation rather than national decision-making by the United States Supreme Court. On the other hand, this same difficulty may discourage state courts from striking out on their own.

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55. *Jacobs v. Major*, 139 Wis. 2d 492, 531, 407 N.W.2d 832, 848 (1987) (Abrahamson, J., dissenting).

56. *See, e.g., State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987); *State v. Migliorino*, 150 Wis. 2d 513, 442 N.W.2d 36 (1989). Resort to state constitutions does not belong to any one philosophical or political group. *See Right to Life Advocates v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. App. 1987), *cert. denied*, 488 U.S. 824 (1988). For a discussion of this case, see Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1576, 1599-1601 (1990).



In both the garbage cases and the mall cases, most state courts have adopted the federal interpretation of individual rights although the impetus for doing so may have been different.

We turn to my last series of cases, individual rights to education.

### III. Individual Rights to Education

Once again we see the courts dealing with a recurring issue: the local property tax as a traditional means of raising money for education. While poorer school districts may tax at higher rates than more affluent ones, the poorer districts raise less money because of the lower value of the property and spend less for each pupil than the richer districts. The California Supreme Court explained: “[A]ffluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all.”<sup>57</sup>

In 1971 the California Supreme Court in the six to one *Serrano* decision, with Justice Tobriner in the majority,<sup>58</sup> held that the public school financing system, with its reliance on local property taxes and resultant wide disparities in school revenue available per pupil, invidiously discriminates against the poor and violates the Equal Protection Clause of the Fourteenth Amendment of the federal constitution. *Time Magazine* commented that “potentially the [*Serrano*] decision is the most far-reaching court ruling in schooling since *Brown v. Board of Education*.”<sup>59</sup>

Two years after *Serrano*, the United States Supreme Court rejected the claim of San Antonio children that finance disparities infringed upon the right of the children to equal protection under the federal Constitution.<sup>60</sup> Education is not a fundamental right according to the United States Supreme Court. Critical to the majority’s analysis was its reading of the federal Constitution as a catalogue of negative proscriptions.<sup>61</sup> The Court believed that the federal constitution protects citizens only when laws deprive, infringe, or interfere with a person’s fundamental liberties and that “[i]t is not the province of [the United States Supreme] Court to create substantive constitutional rights in the name of guaran-

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57. *Serrano v. Priest*, 5 Cal. 3d 584, 600, 487 P.2d 1241, 1251-52, 96 Cal. Rptr. 601, 611-12 (1971). For a discussion of this case, see Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720 (1972).

58. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

59. *TIME*, Sept. 13, 1971, at 43.

60. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1972).

61. See Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 887, n.76 (1989).

teeing equal protection of the laws."<sup>62</sup>

Moreover the Court confessed its lack of competence to make wise decisions with respect to the raising and disposition of public revenues, the goals of education, and the correlation between educational expenditures and quality of education. The Court also acknowledged that considerations of federalism counseled against its interfering with the state education system. Federalism, according to the *San Antonio* case, requires state officials to exercise primary responsibility for resolving educational issues; education is a state function.<sup>63</sup>

The attempt to gain relief under the federal constitution foundered because the federal constitution had no textual basis supporting a governmental duty to educate. In contrast, the fifty state constitutions recognize, with varying formulations, the state's duty to establish and maintain a system of publicly funded schools.<sup>64</sup>

Following the *San Antonio* case, New Jersey in 1973<sup>65</sup> and California in 1977<sup>66</sup> were the first states to address the constitutionality of their school financing under their respective state constitutions. Both states declared the school financing systems unconstitutional, relying on the state constitution's equal protection provision and the state constitutional provisions requiring thorough and efficient education. In 1990, in yet another round of this apparently interminable New Jersey litigation, the New Jersey Supreme Court, by unanimous vote, declared the state's most recent school financing formula unconstitutional.<sup>67</sup>

As of 1990, more than twenty state appellate courts have considered challenges to school funding schemes. About ten state courts have struck down their state statutes, but even more have upheld them.<sup>68</sup> Within the

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62. *Rodriguez*, 411 U.S. 1, 33 (1972).

63. *Id.* at 42. The Court announced, "[T]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand." *Id.* at 58.

64. "The constitutions of 40 states clearly mandate that the legislature 'establish', 'maintain', 'support', or 'provide for' some sort of system of public schools. There is some ambiguity about the constitutions of Iowa, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Mexico, Rhode Island, Tennessee, and Vermont." U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES, 115 n.1, A-113 (July 1989); Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661-70 (1989).

65. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

66. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

67. *Abbot v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990).

68. Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Washington, Wisconsin, and Wyo-

last two years the Montana,<sup>69</sup> Kentucky<sup>70</sup> and Texas<sup>71</sup> supreme courts have struck down their statutes, while Wisconsin upheld its funding scheme (Abrahamson, J., dissenting).<sup>72</sup> School financing cases are pending in twelve states and efforts to organize suits in five other states are being considered.<sup>73</sup>

While federalism—the relation of the federal and state governments—was one stumbling block for the federal Supreme Court, separation of powers is the stumbling block for many state courts to declare the financing laws invalid. The state courts do not wish to transgress, and properly so, the line between the judicial and legislative role of government by dictating to the legislature how the school system must be financed.<sup>74</sup>

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ming have considered state constitutional challenges to the funding schemes for their public school systems. Arkansas, California, Connecticut, Kentucky, Montana, New Jersey, Texas, Washington, West Virginia, and Wyoming declared the state funding scheme unconstitutional.

For a catalogue of the school financing cases and the bases of the decisions, see Catalano and Modisher, *State Constitutional Issues in Public School Funding Challenges*, 2 EMERGING ISSUES IN STATE CONST. LAW 207 (1989). For a discussion of West Virginia school financing, see R. NEELY, *HOW COURTS GOVERN AMERICA*, 170-89 (1981).

69. *Helena Elementary School Dist. v. State*, 236 Mont. 63, 769 P.2d 684 (1989).

70. *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).

71. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The Texas Supreme Court struck down the Texas legislature's latest school financing plan in *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991), *reh'g overruled*, 34 TEX. SUP. CT. J. 368 (Tex. 1991).

72. *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

73. *Equivalent Education: Suits Attack Funding That Favors Rich Schools over Poor*, 76 A.B.A. J. (Aug. 1990) at 10.

For commentary on the school finance cases, see Hubsch, *Education and Self-Government: The Right to Education under State Constitutional Law*, 18 J. L. & EDUC. 93 (1989); Hugg, *Federalism Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13 (1989); Downey, *Constitutional Theory: Federalism in the Michigan v. Long Era and Delaware v. Van Ardsell — The Continued Need for Coherent Adjudication*, in 1988 ANNUAL SURVEY OF AMERICAN LAW 503; Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989); Pierce, *School Finance*, 67 OR. L. REV. 31 (1988); Note, *Equal Educational Opportunity Revisited: Abbott v. Burke and the "Thorough and Efficient" Law in New Jersey*, 40 RUTGERS L. REV. 193 (1987); Note, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation*, *Buse v. Smith Criticized*, 1981 WIS. L. REV. 1325 (1981); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, ch. 12 (Robert F. Williams ed., M-159, Oct. 1988); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 109, A-113 (July 1989).

74. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 112, A-113 (July 1989).

In all three areas—search and seizure of garbage, free expression in the malls, and the right to education—the United States Supreme Court has refused to extend federal protection of individual rights. It is in the area of education that most state constitutional law cases have arisen and more state courts have developed a jurisprudence independent of federal constitutional law. Why?

Is it because the differences between the federal and the state constitutions are most pronounced in education? Is it because the state courts face less federal intervention in education than in garbage or the malls? Is it because education has traditionally been recognized as a state obligation, while restraining unreasonable searches and seizures and restraining interference with free expression have been regarded in recent years as federal issues? Is it because the state courts recognize that they are unencumbered by the institutional restraints that the federal courts suffer? Is it because neither the people nor the judges expect uniformity from state to state in educational matters and that diversity is acceptable? Is it because unless the state courts act, there is little likelihood that the federal courts or the state legislatures will?

Commentators have noted that almost independent of whether the state supreme court upheld or struck down the finance law, the school financing decisions have been very influential. State legislatures have begun to struggle with recasting funding mechanisms to assure a thorough and efficient education for all children. Poverty lawyers are urging that the reasoning of the school finance cases be transferred to other kinds of public services, and they are looking to state constitutional law as one of the vehicles for awakening government to the plight of children and the poor.<sup>75</sup>

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75. See, e.g., Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577 (1989); Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 892-96 (1989).

Justice Tobriner wrote of the *Serrano* decision as follows:

Another massive movement in the economic legal sphere is the rise of the new equal protection doctrine and its resplendent exemplar, *Serrano v. Priest*. Justice Sullivan struck down as unconstitutional the grotesque system of school financing that is tied to local taxes, usually on real property, so that poorer districts bear a discriminatory burden. As Professor Karst stated, "The novelty in the *Serrano* opinion's characterization of education as a fundamental interest is not the recognition of education's importance; it is that *Serrano* coupled the interest in education with wealth discrimination rather than racial discrimination." Karst raises the query whether the reasoning of the decision is "transferable from education to other kinds of public services such as fire and police protection, hospitals, or recreational facilities—a question which the court properly did not address."

Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 UCLA L. REV. 5, 11-12 (1972) (quoting Karst, *supra* note 57).

#### IV. Conclusion

Let me summarize the lessons I draw about state constitutional law development from the cases we have explored.

First, after two decades of discussion of state constitutional law and thousands of cases in which state courts have interpreted their constitutions, state courts and lawyers still tend to apply the federal constitution and United States Supreme Court cases rather than the state constitution. It is not clear whether the habits and training of the 1960s and 1970s with emphasis on federal law (and this emphasis continues in 1990) are too strong to be overcome; whether the lawyers have not raised the state constitutional issues in the cases; whether judges and lawyers are insecure about the correct way to approach state constitutional issues; or whether state judges do not wish to take responsibility and be held accountable to the people of the state for rendering decisions under the state constitution as the United States Supreme Court has mandated in *Michigan v. Long*.

Second, change is evident nevertheless. Lawyers, judges, commentators, and law students *are* paying more attention to state constitutions. As of 1990, we are dealing with a large body of state constitutional law, as state courts examine their state constitutions more frequently than in the past.<sup>76</sup>

Third, state constitutional law describes a process, not a result. The cases demonstrate that basing a decision on the state constitution does not augur the result. State constitutional law cannot be equated with either cases that adopt federal constitutional law or deviate from decisions of the United States Supreme Court. In the development of state constitutional law, state courts have been adopting as well as departing from decisions of the United States Supreme Court in interpreting state constitutions.<sup>77</sup>

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76. The September/October 1990 edition of LEXIS Liaison (vol. 2, no. 5), published by Mead Data Central, Inc., noted the lawyers' trend to turn "more frequently to state courts for redress and protection in conflicts over individual rights and freedoms" and gives examples of LEXIS searches for several state constitutional law questions.

77. To many observers, the phrase "state constitutional criminal law" refers only to those state cases in which state courts interpret their own constitutions in such a way as to depart significantly from federal constitutional law. I do not view state constitutional criminal law as existing only when this law differs from the federal mold. In using federal constitutional law as an interpretive base, a state court is still effectively defining its own constitution. Therefore, a study of state constitutional criminal law should include state cases that adopt federal decisions as valid interpretations of state constitutions as well as those that do not. If the state is the laboratory, all experiments must be studied.

Fourth, state judges should be paying more attention to the state constitutions that they have sworn to support. They must write clear opinions stating the basis of their decisions in terms understandable to the bar and the public affected by the decision. Two constitutions protect individuals in our federal system, and a continuing dialogue between and among the courts can contribute to novel construction and fresh approaches to the disputes courts must resolve.<sup>78</sup>

Just as it seems strange to lawyers in 1990 that in the early part of the twentieth century the federal Bill of Rights did not extend to protection of individuals against state government, future generations may look back and wonder why state courts have ignored their state constitutions for so long.

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Let me conclude by returning to the words of Justice Tobriner—words that will serve as a guide to state court judges moving into the twenty-first century. “Courts must often rule,” he wrote,

in a night that has no light of precedent and no beacon of scientific proof. They engage in the lonely task of balancing the need for order and stability with the goal of liberty and due process, seeking to preserve a heritage of individualism in a hierarchy of pervasive institutionalism.<sup>79</sup>

Abrahamson, J., concurs.

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Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1166 (1985).

See Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 JUDICATURE 190 (Dec.-Jan. 1991) (concluding that most state constitutional decisions in criminal procedure adopt the federal rule and that state constitutional law is not synonymous with rejection of United States Supreme Court doctrine); Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 282 (1989) (concluding that Florida courts have applied Florida constitutional law “sparingly” and advocating careful interpretation of state constitutions so as to avoid “haphazard expansion of state constitutional rights”).

78. See U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES (1989).

79. Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A. J. 21, 23 (1968).