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SPEECH

THE "NEW FEDERALISM": CONFESSIONS OF A FORMER STATE SUPREME COURT JUSTICE

The Honorable Diane S. Sykes*

I am honored to present this year's Brennan Lecture. I'd like to begin by thanking Professors Spiropolous and O'Shea for the kind invitation and Dean Couch and the faculty and students here at OCU Law for the warm welcome and wonderful hospitality during my visit. It's a special privilege to be included among the distinguished scholars and judges who have preceded me in this lecture series. I appreciate the opportunity to participate in this important discussion of state constitutional law and government.

We come together at a time of heightened public interest in constitutional matters. An unusual confluence of events in our law and politics has thrust the issue of federalism to the fore. To a remarkable degree, public attention is focused on the relationship between the national government and the states, and between the government and the people. Examples abound. Just last week, Senator Rand Paul took to the

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floor of the United States Senate and held an old-fashioned talking filibuster on the constitutionality of the President's policy on using drone strikes against noncombatant Americans on American soil.[1] He lasted 13 hours and received saturation media coverage on cable news networks. In the end, he extracted a statement from the Attorney General acknowledging that the President lacks the power to use weaponized drones against noncombatant Americans within the United States.[2]

More generally, during the 2010 midterm elections we saw the rise of the Tea Party movement, with its emphasis on the constitutional limitations on the scope of the federal government's power.[3] At the intersection of politics and law, Arizona and several other states recently sought to enlarge the role of state and local law enforcement in addressing the national problem of illegal immigration.[4] The United States Supreme Court blocked Arizona's effort to assert itself into this federal sphere, at least for the most part.[5]

The President's proposal for a national healthcare law set off an intense and hard-fought political battle, with much of the debate centering on whether Congress has the power to require individuals to purchase health insurance. Soon after Congress passed the Affordable Care Act,[6] more than half of the states joined a lawsuit challenging its constitutionality, surely an unprecedented event in our history.[7] That the Supreme Court held *three days* of arguments in the healthcare litigation was also unprecedented, at least in modern times.[8] The Court's decision

1. 159 CONG. REC. S1150 (daily ed. Mar. 6, 2013) (statement of Sen. Paul).

2. Press Release, Sen. Rand Paul, Sen. Paul Reaches Victory Through Filibuster (Mar. 7. 2013), http://www.paul.senate.gov/?p=press_release&id=735.

3. *See* Wikipedia, *Tea Party Movement*, http://en.wikipedia.org/wiki/Tea_Party_movement (last visited Dec. 19, 2013); TEA PARTY PATRIOTS, http://www.teapartypatriots.org/ (last visited Dec. 19, 2013).

4. Alan Gomez, *States Make Daily Life Harder for Illegal Immigrants*, USA TODAY, Dec. 20, 2011, http://usatoday30.usatoday.com/news/nation/story/2011-12-20/illegal-immigrants-contracts-void/52132602/1.

5. Arizona v. United States, 132 S. Ct. 2492 (2012).

6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

7. Press Release, Nat'l Fed'n of Indep. Bus., Six Additional States Join NFIB/20 States in Healthcare Lawsuit (Jan. 18, 2011), http://www.nfib.com/press-media/press-media-item?cmsid=55701.

8. Lyle Denniston, *3 Days of Argument on Health Care*, SCOTUSBLOG (Dec. 19, 2011, 11:36 AM), http://www.scotusblog.com/2011/12/3-days-of-argument-on-health-care/; Lyle Denniston, *Court Sets 5 1/2-Hour Hearing on Health Care (FINAL)*, SCOTUSBLOG (Nov. 14, 2011, 10:49 AM), http://www.scotusblog.com/2011/11/court-sets-5-12-hour-hearing-on-health-care/.

in the case, under the name *National Federation of Independent Business v. Sebelius*,[9] is widely regarded as the most important federalism decision since the New Deal, and public interest in the case was sustained and extraordinary.

The Court's docket this term—in particular, the same-sex marriage cases[10] and the challenge to Section 5 of the Voting Rights Act[11]—will certainly keep these issues in the public mind. The Constitution has even come to Hollywood. Who would have thought that a two-and-a-half-hour historical epic about the adoption of the Thirteenth Amendment would be a huge box-office success?[12] We are witnessing a revitalized public conversation about the structure of government, the prerogatives of the states, and the rights of the people. It's entirely fitting that we keep the state constitutions in the mix.

Before we go any further, I had better put my cards on the table. As you've just heard in Professor O'Shea's introduction, and as the title of my talk suggests, I come to the topic of state constitutional law as an expatriate from the state courts and a skeptic of Justice Brennan's call to arms in state constitutionalism, which inspired this lecture series. I had the privilege of serving on the Wisconsin Supreme Court from September 1999 until July 4, 2004, when I joined the Seventh Circuit. Although Justice Brennan and I have service on our respective state supreme courts in common,[13] my approach to judging differs from his. Justice Brennan is, of course, a liberal legend whose tenure on the United States Supreme Court had a surpassingly important influence on our law. I was a conservative judge on the state supreme court and remain so in my present position on the federal court of appeals. But even those of us who do not share Justice Brennan's jurisprudential approach can agree on the fundamental significance of the state constitutions as an independent source of law. State constitutions are an important feature in the structure of our federalism. The genius of our "compound republic" is its division and allocation of power between two distinct governments and the separation of powers among the departments within each government.[14] This Madisonian "double security" for the rights of the

9. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

10. Hollingsworth v. Perry, 133 S. Ct. 786 (2012); United States v. Windsor, 133 S. Ct. 786 (2012).

11. Shelby County, Ala. v. Holder, 133 S. Ct. 594 (2012).

12. LINCOLN (Touchstone Pictures 2012).

13. Justice Brennan served on the Supreme Court of New Jersey from 1951 to 1956.

14. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961).

people cannot be fully effective if the state supreme courts neglect their independent duty to interpret the state constitutions.[15] That much is common ground.

So my skepticism about new federalism does not spring from a minimalist view of the legal and structural significance of the state constitutions or the sovereign authority of the state supreme courts. Instead, it is a product of my experience in the enterprise of state constitutional law during my tenure on the Wisconsin Supreme Court. When I joined the court, I did not doubt Justice Brennan's premise that the state constitutions are distinct sources of law that invite authoritative interpretation by the state supreme courts. For me, the more important and difficult question was *how*—by what decision method—the state constitution should be interpreted.

I. JUSTICE BRENNAN'S NEW JUDICIAL FEDERALISM

Before I share Wisconsin's experience with Justice Brennan's new federalism, let me lay a bit of background. It has been 36 years since Justice Brennan issued his famous clarion call to state-court judicial activism, spawning the movement known as the "new judicial federalism"—not to be confused with the "new federalism" of the Rehnquist Court, which of course was all about enforcing the doctrine of enumerated powers and policing the boundaries between the federal government and the states.[16] Justice Brennan's new federalism was much different. For those of you who are new to the subject, it all started in 1977 when Justice Brennan published an influential article in the *Harvard Law Review* in which he summoned the justices of the state supreme courts to carry on the Warren Court's "rights revolution" in their role as interpreters of last resort of the state constitutions.[17] He was perfectly transparent about what he was up to. His liberal project in federal constitutional law had stalled as the Supreme Court became more conservative, so he called on the state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation

15. *Id.*

16. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

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

from governmental intrusions on their freedoms."[18]

Justice Brennan began by describing the Warren Court's fundamental transformation of federal constitutional law:

> Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures, Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system—state courts no less than federal are and ought to be the guardians of our liberties.[19]

He continued:

> But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[20]

The point was unassailable. The Supreme Court's dramatic expansion of the scope and content of federal constitutional rights and its enforcement of the expanded rights regime against the states through the Due Process Clause of the Fourteenth Amendment had indeed produced the unintended consequence of an atrophy in state constitutional law. "[I]t was only natural," Justice Brennan wrote, "that when during the 1960s our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what

18. *Id.* at 503.
19. *Id.* at 490–91 (footnote omitted).
20. *Id.* at 491.

protections, if any, were secured by state constitutions."[21]

But the seismic shift in federal constitutional law under the Warren Court slowed and stabilized in the Burger Court years. Perhaps sensing the coming conservative counterrevolution, Justice Brennan proposed an enhanced role for the state supreme courts. "With federal scrutiny diminished," he wrote, "state courts must respond by increasing their own."[22] And, he said, the new emphasis on the state constitutions should be animated by the guiding principles of his preferred theory of constitutional law. He summarized the core of that philosophy in a few short but memorable sentences:

> [T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.[23]

This is the "living constitution" school of thought that so dominated the work of the Warren Court, and Justice Brennan's work in particular. It reflects an evolutionary understanding of the Constitution, one that frees judges to update its meaning to reflect contemporary values and adapt its broad language to modern conditions and problems. In practice, this jurisprudential approach was aggressively interventionist in implementing liberal social, political, and legal reform by judicial decree during the 1960s and 1970s. Though its effects are embedded in the Supreme Court's caselaw, the jurisprudence of the "living constitution" was waning by 1977 and is now no longer in active use in the federal courts. Justice Brennan's enlistment of the state courts was an effort to transplant this theory in the garden of state constitutional law.

Nine years later, in an important lecture at the New York University School of Law, Justice Brennan was pleased to report that the

21. *Id.* at 495.
22. *Id.* at 503.
23. *Id.* at 495.

transplantation had taken root.[24] He once again criticized the "retrenchment [that] . . . follow[ed] the Warren [Court] era"[25] and returned to the theme of his *Harvard Law Review* article. "For a decade now," he said, "I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."[26] "[T]he state courts," he said, "have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority."[27] They have been "increasingly reluctant to follow the federal lead," he said, and indeed had issued "over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law."[28]

Justice Brennan could be justifiably gratified by the rebirth of interest in state constitutional law that his 1977 article generated, although I detect a bit of irony in his suggestion that his theory of state constitutionalism "should be greeted with equal enthusiasm by . . . liberals and conservatives alike."[29] He explained that liberals would be happy because state constitutional rulings could only expand, not contract, the protections of the Federal Constitution.[30] Conservatives should be happy, he said, because "the state laboratories are once again open for business."[31] It's not entirely clear what he meant by the latter statement. To the extent that he was channeling Justice Brandeis, the point was counterintuitive. Justice Brandeis's praise for the states as laboratories of democracy was an appeal to judicial restraint, understood as deference to the political branches.[32] That impulse can hardly be ascribed to Justice Brennan.

A passage appearing a bit later in Justice Brennan's lecture illuminates a key feature of his challenge to the state courts. He said: "As

24. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

25. *Id.* at 547.

26. *Id.* at 548.

27. *Id.* at 549 (footnote omitted).

28. *Id.* at 548 (footnote omitted).

29. *Id.* at 550.

30. *Id.*

31. *Id.*; *see also* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

32. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties *if they wish to do so*."[33] The emphasis is mine. True to his philosophical roots, Justice Brennan was calling on state judges to exercise policy discretion, as if their authority to interpret and apply their state constitutions was perfectly coextensive with the modern approach to adapting the common law.[34] *The state judges may provide extra protection if they wish it*. This was not an appeal to interpretive judgment about the meaning and application of the state constitutions. It was an appeal to pure discretion, or more troubling still, an appeal to judicial will. Or so it seemed to me when I joined the Wisconsin Supreme Court in 1999 and began deciding cases.

II. THE WISCONSIN EXPERIENCE

A. New Federalism in Wisconsin: Two Decades of Agnosticism

I joined the Wisconsin Supreme Court more than two decades after Justice Brennan launched the new federalism movement. During this period, the court had largely resisted his approach to state constitutionalism. To be clear, the court did not doubt its authority or shrink from its duty to independently interpret the state constitution's declaration of rights. Indeed, in *State v. Doe*,[35] a decision issued just five months after Justice Brennan's manifesto appeared on the scene, the Wisconsin Supreme Court announced its agreement with his basic premise. Citing Justice Brennan's article as support, the court reaffirmed the sovereign authority of the State "to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment."[36]

Still, the court did not take the next step. The *Doe* case raised a challenge to a judge's order for a criminal suspect to provide handwriting exemplars, a practice that survived scrutiny under the Fourth and Fifth

33. Brennan, *supra* note 24, at 551 (emphasis added).

34. For a thoughtful explanation of the current theories of common-law constitutionalism, see Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181 (2009).

35. State v. Doe, 254 N.W.2d 210 (Wis. 1977).

36. *Id.* at 215.

Amendments based on recent Supreme Court precedent.[37] Notwithstanding its independent authority to interpret the Wisconsin Constitution, the court found no reason to construe the state protections against unreasonable searches and compulsory self-incrimination more broadly than the parallel federal rights. The state and federal constitutional guarantees are materially identical in text and purpose, and based on "three-quarters of a century of Wisconsin constitutional law" that had allowed analogous law-enforcement practices—orders for footprint exemplars, for example; and fingerprints and blood and breath samples—the justices held that court orders for compulsory handwriting exemplars do not violate the Wisconsin Constitution.[38] This was so, the court said, "even absent the controlling United States Supreme Court cases."[39]

In the ensuing two decades, other opinions invoked Justice Brennan's *Harvard Law Review* article, but only in dissent or concurrence.[40] By the time I joined the court in 1999, his approach to state constitutional law had not gained a foothold in Wisconsin. The general practice was to follow doctrinal developments in federal constitutional law, most notably on questions of criminal procedure where the state constitutional guarantees are textually identical or very similar to their federal counterparts. This was especially true in cases involving the state constitutional analogs to the Fourth and Fifth Amendments. In those cases the court would generally note its authority to "provide greater protection[] . . . under the Wisconsin Constitution" but explain that where the state and federal provisions are "virtually identical" in language and "no difference in intent is discernible," the court would construe the state guarantee in conformity with the Supreme Court's construction of the cognate provision in the federal constitution.[41] Sometimes the court also invoked prudential reasons for favoring consistency in interpretation: The use of different standards could engender confusion and instability, risks that are particularly

37. *Id.* at 214–15 (citing United States v. Mara, 410 U.S. 19 (1973)).

38. *Id.* at 216–17.

39. *Id.* at 217.

40. *See, e.g.*, State v. Kramsvogel, 369 N.W.2d 145, 159 (Wis. 1985) (Bablitch, J., dissenting); Thompson v. State, 265 N.W.2d 467, 474 (Wis. 1978) (Abrahamson, J., concurring); State v. Starke, 260 N.W.2d 739, 750 (Wis. 1978) (Abrahamson, J., concurring).

41. State v. Agnello, 593 N.W.2d 427, 433 (Wis. 1999) (citations omitted) (internal quotation marks omitted).

acute—and potentially dangerous—for law-enforcement officers making split-second decisions in the field.[42]

But the court did not *always* conform its state constitutional jurisprudence to the parallel federal constitutional doctrine. Two important cases decided just before I joined the court illustrate some nuances in Wisconsin's approach to new-federalism questions. *State v. Hansford*[43] was a challenge under the state constitution to a new statute that limited criminal misdemeanor trials to six-person juries. Textually almost identical to the Sixth Amendment's jury-trial right in criminal cases,[44] Article I, § 7 of the Wisconsin Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed . . . ."[45] In *Williams v. Florida*,[46] the Supreme Court rejected a federal constitutional challenge to a state court's use of a six-person jury in a criminal case, holding that the 12-person jury, though traditional under the common law, was not "an indispensable component of the Sixth Amendment" jury-trial right.[47] Despite the nearly identical language in the state and federal jury-trial guarantees, the Wisconsin Supreme Court declined to follow *Williams*. Instead, relying on historical practice in Wisconsin before and after statehood and an unbroken line of state supreme court decisions, the court held that the jury-trial right in the Wisconsin Constitution meant a jury of 12.[48]

State v. Miller[49] involved a challenge to a prosaic provision in the state traffic code that required all slow-moving vehicles on state roads to display a triangular, red and orange "slow moving vehicle" sign. The members of Wisconsin's Amish community refused to place the sign on their horse-drawn buggies because it violated their religious obligation to maintain separateness and avoid worldly symbols.[50] When several of

42. *See, e.g.*, State v. Guy, 492 N.W.2d 311, 313 (Wis. 1992); State v. Guzman, 480 N.W.2d 446, 448 (Wis. 1992); State v. Fry, 388 N.W.2d 565, 574 (Wis. 1986).

43. State v. Hansford, 580 N.W.2d 171 (Wis. 1998).

44. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

45. WIS. CONST. art. I, § 7.

46. Williams v. Florida, 399 U.S. 78 (1970).

47. *Id.* at 100.

48. *Hansford*, 580 N.W.2d at 176–78.

49. State v. Miller, 549 N.W.2d 235 (Wis. 1996).

50. *Id.* at 237.

them were cited for violating the slow-moving-vehicle statute, they sought a religious exemption based on the free-exercise clauses in the First Amendment and in the state constitution and also under the Religious Freedom Restoration Act of 1993, known as "RFRA."[51]

The First Amendment claim was likely foreclosed by the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[52] which abandoned the strict-scrutiny standard of review for most free-exercise claims. In the 1963 case of *Sherbert v. Verner*,[53] the Court had held that legal burdens on the exercise of religion are subject to strict judicial scrutiny; the government must demonstrate that its regulation serves a compelling public interest and no less-restrictive alternative exists. *Smith* established a new rule for facially neutral laws of general applicability, replacing *Sherbert*'s strict-scrutiny standard with the minimum requirement of basic rationality.[54] Congress attempted to restore the strict-scrutiny standard in RFRA, but the statute was under a constitutional cloud when the Amish-buggy case came before the Wisconsin Supreme Court.[55] So the court went directly to the state constitutional claim.

The threshold question in *Miller* was whether the state constitution's free-exercise clause should be construed in conformity with its counterpart in the First Amendment.[56] In other words, should Wisconsin's free-exercise doctrine be brought into line with *Smith*? The court answered this question "no," relying on its "long-standing recognition that the language of the two documents is not the same."[57] Article I, § 18 of the Wisconsin Constitution provides that "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted."[58] The court acknowledged that in a previous case it had said that the religion clauses in the state and federal constitutions served "the same dual purpose."[59]

51. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) (amended 2000).
52. Emp't Div. v. Smith, 494 U.S. 872 (1990).
53. Sherbert v. Verner, 374 U.S. 398 (1963).
54. *Smith*, 494 U.S. at 884–90.
55. *See* City of Boerne v. Flores, 519 U.S. 926 (1996) (granting certiorari to decide the constitutionality of RFRA); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).
56. State v. Miller, 549 N.W.2d 235, 239–40 (Wis. 1996).
57. *Id.* at 239.
58. WIS. CONST. art. I, § 18.
59. *Miller*, 549 N.W.2d at 238 (quoting State v. Miller, 538 N.W.2d 573, 576 (Wis. Ct. App. 1995) (citing King v. Village of Waunakee, 517 N.W.2d 671, 683–84 (Wis.

But the court concluded that the stronger language in the state provision called for a more protective implementing doctrine.[60] The court also relied on several of its early precedents interpreting the state constitution's free-exercise clause, including a case from 1890 holding that the religious-liberty guarantee in the state constitution "'operate[s] as a perpetual bar to the state, . . . from the infringement, control, or interference with the individual [free-exercise] rights of every person.'"[61] Reasoning from text and precedent, the court declined to follow *Smith*, retained the strict-scrutiny standard for free-exercise claims under the state constitution, and found the statute unconstitutional as applied to the Amish and their horse-drawn buggies.

B. 1999 and Beyond

This short review of new federalism in Wisconsin is not comprehensive, but it gives a general picture of where things stood when I joined the Wisconsin Supreme Court in 1999. The court was not in the so-called "primacy" camp, the label used for state supreme courts that followed a practice of consulting their state constitutions first and without regard to federal constitutional jurisprudence. But the court was not wholly in the "lockstep" camp either; it did not reflexively apply federal doctrine to cognate state constitutional guarantees. The court was something of a hybrid.[62]

And it was closely divided philosophically. Chief Justice Shirley

1994))).

60. *Id.* at 239.

61. *Id.* (quoting State *ex rel.* Weiss v. Dist. Bd., 44 N.W. 967 (1890)).

62. For background on the various approaches to Justice Brennan's new federalism, see generally ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS, pp. 113–234 (2009); Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837 (2011); Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "*Gunwall *is Dead—Long Live* Gunwall*!,"* 37 RUTGERS L.J. 1169 (2006); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002); Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211 (2006) (book review).

Abrahamson, a powerful legal thinker and prominent voice in the movement for an independent state constitutionalism,[63] led a group of three justices with liberal jurisprudential commitments. As I've explained, my approach to judging leans in the opposite direction; I replaced one of the court's conservatives. When I came on board, the court was loosely regarded as having a conservative majority, but just barely. That's an overgeneralization, of course; these labels can be tricky. But it gives a sense of the philosophical divide as I joined the court.

During my first year, I was assigned to write a number of opinions arising from criminal appeals, including several that raised search-and-seizure and double-jeopardy issues under the Fourth and Fifth Amendments and their counterparts in the state constitution. As I have explained, by this time it was well established in Wisconsin that because the state and federal criminal-procedure guarantees were materially identical in text and purpose, the court would interpret and apply the state rights in conformity with federal constitutional doctrine. Following that practice was noncontroversial, and writing for the court, I did so.[64] No separate argument was made under the Wisconsin Constitution in any of these cases. Although not all the decisions were unanimous, there was no disagreement about our approach to state constitutional law.

As it turned out, however, the most important and high-stakes case of the term *did* raise a substantial and controversial question of state constitutional law, although one that involved a clause in the state constitution without a counterpart in the federal. The case, *Vincent v. Voight*,[65] deeply divided the court in both method and result. *Vincent* was a challenge to the state school-finance formula under the education article of the Wisconsin Constitution. The court's approach to the case was a formative experience for me as a new justice. It made me cautious about my court's method of state constitutional interpretation.

63. *See, e.g.*, Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339 (2004); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982).

64. *See, e.g.*, State v. Derango, 613 N.W.2d 833, 841 n.4 (Wis. 2000); State v. Richter, 612 N.W.2d 29, 36 (Wis. 2000); State v. Hughes, 607 N.W.2d 621, 626 (Wis. 2000).

65. Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).

C. Vincent v. Voight: *Constitutional Interpretation or Policymaking?*

In 1973 the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez*,[66] a challenge to the Texas school-finance system brought by education-rights advocates seeking equalization of funding among school districts in the state. They argued that disparities in state and local funding from district to district violated the Equal Protection Clause of the Federal Constitution. The Court disagreed, holding that education is not a fundamental right for purposes of federal equal-protection analysis and sustaining the Texas system under rational-basis review.[67]

With the federal constitutional door closed, education-rights advocates shifted their focus to the state courts and began to develop theories under the education clauses of the state constitutions.[68] Not surprisingly, school-finance litigation proliferated in state courts around the country.[69] Activists and academics promoted the idea that state constitutions guaranteed a fundamental right to education, that this right should be judicially enforced by mandating equalization of funding across districts (among other remedies), and that the state's compliance with its constitutional duty should be measured by reference to the adequacy or quality of the education delivered by local school districts. This retooled litigation strategy met with mixed success,[70] finding favor in some state supreme courts but not Wisconsin's, at least not initially.

After *Rodriguez* the Wisconsin Supreme Court heard two major cases challenging the state school-finance formula under the state constitution. *Busé v. Smith*,[71] decided in 1976, was a challenge to the school-finance formula brought under Article X, § 3 of the Wisconsin Constitution, the so-called "uniformity clause" of the education article. That section provides as follows: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for

66. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

67. *Id.* at 34–39.

68. *See* Robert S. Peck, *For Trailblazers, When the U.S. Constitution Is Not Enough*, 45 NEW ENG. L. REV. 855 (2011).

69. *Id.*

70. *Id.*; *see also* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992).

71. Busé v. Smith, 247 N.W.2d 141 (Wis. 1976).

tuition to all children between the ages of 4 and 20 years . . . ."[72]

The education article of the state constitution was uncontroversial when Wisconsin achieved statehood in 1848 and was not the subject of debate in the constitutional convention. In rejecting the uniformity-clause challenge in *Busé*, the state supreme court reasoned mostly by implication from text and precedent. The court noted that although Article X, § 3 had been loosely construed as establishing a basic right to public education, the requirement of uniformity—that district schools "shall be as nearly uniform as practicable"—was stated in terms that left substantial discretion to the state legislature and local school districts.[73] Other sections of the education article also preserved a significant degree of autonomy for local units of government.[74] Accordingly, the court held that the uniformity provision did not require the state legislature to equalize school funding among districts.[75] The court also held, however, that the structure of the school-finance formula violated the state constitutional rule of uniform taxation by compelling some school districts "to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state."[76]

So the legislature went back to the drawing board and revised the state-aid package for local schools. In 1989 the state supreme court rejected a challenge to the new version of the school-funding formula under the education article of the state constitution. In *Kukor v. Grover*,[77] the court reaffirmed its earlier interpretation of the uniformity clause and also held that the funding formula did not violate the state constitution's equal-protection provision.[78]

That was the legal landscape when the court heard *Vincent v. Voight* in February of 2000. The finance formula then in effect achieved even greater district-to-district uniformity in school funding than the one at issue in *Kukor*, so the precedents should have been enough to resolve the case. The lower courts had so held,[79] and I saw no flaw in their reasoning. The plaintiffs—a large group of parents, students, and school-

72. WIS. CONST. art. X, § 3.
73. *Busé*, 247 N.W.2d at 149–50.
74. *Id*. (harmonizing Article X, § 3, the uniformity clause, with Article X, § 4, the requirement that each town and city raise a tax for the support of its common schools).
75. *Id*. at 148–50.
76. *Id.* at 155.
77. Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).
78. *Id.* at 585.
79. Vincent v. Voight, 614 N.W.2d 388, 400–01 (Wis. 2000).

board members representing property-poor school districts around the state—were joined by the state teachers' union as an intervening plaintiff and various advocacy groups as amici.[80] They understood that the claim could not succeed under the caselaw, so they urged the court to articulate a robust constitutional right to education under Article X, § 3 defined by reference to a standard of educational adequacy devised by the court. A majority of the justices obliged, although the case produced a set of splintered opinions and different majorities for the reasoning and result.

One group of four justices—the court's three liberals plus Justice N. Patrick Crooks—articulated a broad new definition of the education right in the state constitution.[81] Following the lead of a few other state supreme courts—notably Massachusetts and Kentucky—the new standard keyed the constitutionality of the school-finance formula to the content and adequacy of the education offered by local school districts.[82] But this four-justice majority could not agree on the outcome of the case. The three liberals thought the case should be remanded because the new legal standard was, well, *new*, and no record had been developed for its application.[83] They expressed some doubt about whether the funding formula would survive scrutiny under the new test, but they voted to send the case back to the trial court to apply it in the first instance.[84]

A different group of four justices held that the school-finance formula survived constitutional challenge under the prevailing interpretation of the uniformity clause in *Busé* and *Kukor*.[85] As I have noted, the finance formula at issue in *Vincent v. Voight* did an even better job of equalizing school funding than the one sustained in *Kukor*. This group of four justices also agreed that the formula did not violate Article I, § 1, the state constitution's equal-protection provision.[86] I was part of this four-vote majority to affirm the judgment upholding the school-finance formula.

Justice Crooks was the swing vote, and he wrote the decisive opinion

80. *Id.* at 396.

81. *Id.* at 415. Chief Justice Abrahamson and Justices William J. Bablitch and Ann Walsh Bradley joined this part of Justice Crooks's opinion for the court.

82. *Id.* at 406–08.

83. *Id.* at 416–17 (Abrahamson, C.J., concurring in part and dissenting in part). Justices Bablitch and Bradley joined Chief Justice Abrahamson's separate opinion.

84. *Id.*; *see also id.* at 421–25 (Bablitch, J., concurring in part and dissenting in part).

85. *Id.* at 408–13 (majority opinion); *id.* at 415–16 (Wilcox, J., concurring); *id.* at 425–29 (Prosser, J., concurring in part and dissenting in part); *id.* at 429–35 (Sykes, J., concurring in part and dissenting in part).

86. *Id.* at 413–15 (majority opinion).

in *Vincent v. Voight*. Because he had a foot in each camp, it's hard to reconcile the conflicting strains in his opinion. He joined the three justices on the liberal side of the bench to craft the expansive new legal standard for the state constitutional right to education.[87] But for reasons unstated, he neither applied the new standard nor saw any need to remand the case so the trial court could apply it. Instead, he joined the court's three conservatives—myself among them—to uphold the school-finance formula based largely on the court's precedents in *Busé* and *Kukor*.

I can offer no explanation for this odd result. The important point for our purpose today is how the court's liberal justices, plus Justice Crooks, arrived at the new standard for the state constitutional right to education. To speak plainly, they made it up. I'm sorry to be harsh, but in truth, there's no softer way to describe it. The court held that the uniformity clause in the state constitution's education article conferred on all Wisconsin students "a fundamental right to an equal opportunity for a sound basic education."[88] A "sound basic education" was further defined as "one that will equip students for their roles as citizens and enable them to succeed economically and personally."[89] There is more. The Wisconsin constitutional right to a "sound basic education" includes "the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude."[90] This part of the new standard was lifted from two state statutes setting curricular requirements for public schools, but the court constitutionalized them. And we're not done yet. The court also held that "[a]n equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills."[91] Summing up, the court concluded that "[s]o long as the legislature is providing sufficient resources so that school districts offer students the equal opportunity for a sound basic education as required by

87. *Id.* at 396–97, 406–08, 415.
88. *Id.* at 396.
89. *Id.*
90. *Id.* at 396–97.
91. *Id.* at 397.

the constitution, the state school finance system will pass constitutional muster."[92]

I will pause here for a moment to let all of this sink in. If we indulge the assumption that the court was engaged in the exercise of its power of judicial review, all these constitutional requirements were found in the penumbras emanating from a single sentence of the education article that reads as follows: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . ."[93] Who knew? This exquisitely detailed constitutional right was there all along just waiting to be excavated by the Wisconsin Supreme Court!

Of course not. As I said in my separate opinion concurring in part and dissenting in part, the court's "broad new definition of the right to education . . . is as breathtaking in scope as it is disconnected to anything in the text of the constitution";[94] there is simply "no support for it anywhere in the . . . Wisconsin Constitution."[95] Instead, the court's new "standard" for the "right to education" was "entirely the product of judicial invention," grounded in "ideas about constitutional educational adequacy found in the law reviews and the decisions of other state supreme courts"[96] I acknowledged that "[t]his may be fine education policy, and as a parent and a citizen I certainly support the educational aspirations and goals expressed by the new standard."[97] But as a judge, I was compelled to say as forcefully as I could that "the court's exercise in education clause standard-writing has nothing whatsoever to do with constitutional law."[98]

It is probably self-evident why this case sounded an alarm about my court's approach to questions of state constitutional law. But permit me a moment to explain how I would have decided the case. Simply put, I would not have decided the question at all—at least not as the parties, the amici, and my colleagues on the other side framed it. That is, I would not have resolved the constitutionality of the school-finance formula by recasting it as a question about the *content* of public education. As I explained in my separate opinion, the content of instruction offered in the

92. *Id.*
93. WIS. CONST. art. X, § 3.
94. *Vincent*, 614 N.W.2d at 431 (Sykes, J., concurring in part and dissenting in part).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

public schools is a nonjusticiable political question. "[T]he power to establish schools is inherent in state government, and so the education article of the Wisconsin Constitution has always been interpreted as a directive compelling the legislature to exercise its power for the establishment of a public school system . . . ."[99] The uniformity clause of the education article "says only that the legislature must establish uniform public schools, free and open to all. It does nothing to either prescribe or limit instructional character or content, leaving it exclusively to the legislature, which had inherent authority over it to begin with."[100]

In other words, the "[a]uthority over public education is inherent in the legislature; [Article] X, § 3 does nothing more than command its exercise for the creation and support of a system of generally uniform, tuition-free, district schools."[101] The state constitution, I pointed out, "is silent on the issue of the scope, content or character of the education provided by the public schools."[102] As such, "[a]ny definition of education or standard for educational adequacy is inherently a political and policy question, not a justiciable one."[103]

I acknowledged, as I had to, that the political-question doctrine had fallen into disuse after the Supreme Court's 1962 decision in *Baker v. Carr*,[104] but there was ample justification for importing and applying it to the question my colleagues ventured to decide. The content of public education is a matter entirely committed to the legislative branch of government. The question could not be decided without resort to a legislative-style policy judgment. And disputes about educational adequacy are wholly judicially unmanageable.[105] In short, "how much education is adequate to the requirements and expectations of students, parents and society at any given point in time manifestly involves policy determinations of a nonjudicial type."[106] It was up to the people, "through their elected representatives[,] . . . [to] decide what their schools will teach and how much education is adequate or desirable for

99. *Id.* at 430 (citing Zweifel v. Jt. Dist. No. 1, 251 N.W.2d 822 (Wis. 1977)); Busé v. Smith, 247 N.W.2d 141 (Wis. 1996); Manitowoc v. Manitowoc Rapids, 285 N.W. 403 (Wis. 1939).

100. *Vincent*, 614 N.W.2d at 431 (Sykes, J., concurring in part and dissenting in part).

101. *Id.* at 433.

102. *Id.*

103. *Id.* at 429.

104. Baker v. Carr, 369 U.S. 186 (1962).

105. *Vincent*, 614 N.W.2d at 432–35 (Sykes, J., concurring in part and dissenting in part).

106. *Id.* at 433.

their children."[107] In my view, "[w]hat constitutes an 'adequate' or 'sound' or even 'basic' education" was simply "not a question of constitutional law" for the court to decide.[108] Here is how I concluded my opinion:

> The expansive constitutional right to education announced and explicated by the court today is not derived from the constitution in any meaningful sense, and it is entirely inappropriate in our representative system to resolve disputes over educational content, adequacy or finance through [Article] X, § 3 litigation. To invoke the political question doctrine of nonjusticiability here is not to abdicate the responsibility of judicial review but to vindicate the democratic process by which these sorts of issues are best resolved.[109]

The court's two other conservatives also wrote separately to distance themselves from the lead opinion.[110] One joined my conclusion that the court's effort to define the content of public education involved a nonjusticiable political question.[111]

D. A Few Comments on Later Developments

My tenure on the state supreme court was not long; I served for four more years after the school-funding case was decided. The court's extravagant approach to the state constitution in *Vincent v. Voight* reinforced my conservative jurisprudential commitments and influences my view of state constitutionalism to this day. To the extent that the allure of Justice Brennan's new federalism has emboldened state supreme courts to smuggle discretionary policymaking into state constitutional law, put me down as dissenting. That's what happened in *Vincent v. Voight*. The court's power of judicial review did not give it a warrant to roam far and wide in the contemporary literature on educational adequacy and judicially fix education policy as a matter of state constitutional law.

107. *Id.* at 430.
108. *Id.*
109. *Id.* at 434.
110. *Id.* at 415 (Wilcox, J., concurring); *id.* at 425–29 (Prosser, J., concurring in part and dissenting in part).
111. *Id.* at 429–35 (Sykes, J., concurring in part and dissenting in part).

We decided several other major issues of state constitutional law during my short time on the court, including important first-impression decisions interpreting the state constitutional right to keep and bear arms,[112] the state constitution's gambling prohibition,[113] and a provision establishing and limiting the jurisdiction of the intermediate court of appeals.[114] As in *Vincent v. Voight*, the decisions did not yield a consistent and durable decision method for interpreting the state constitution, although some came closer than others.

The two cases involving the state right to bear arms were heard and decided together during the 2002–2003 term; they raised facial and as-applied challenges to a statute that criminalized the carrying of concealed firearms.[115] In 1998 the people of Wisconsin amended the state constitution to guarantee the right to keep and bear arms: Article I, § 25 of the Wisconsin Constitution provides that "[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Because the constitutional amendment had only recently been adopted, there was an ample historical record of its ratification. Yet we struggled with the issue. The text and history of the provision left no doubt that the right was individual, not collective. It was less clear, however, that the amendment had the effect of repealing the long-standing statutory ban on the concealed carrying of firearms. That is, we could not be sure that the scope of the right protected *all* concealed carrying of firearms under *any* circumstances. The "other lawful purpose" language in the new constitutional guarantee seemed to leave room for at least some reasonable state regulation of concealed carrying.

The cases ultimately produced six separate opinions; I was the only member of the court who did not write separately. The lead opinion in both cases covered the textual and historical ground comprehensively and well. I agreed with much but not all of the analysis in the lead opinions, but adding a seventh separate opinion was not going to help, and the cases needed to be decided. So we resolved on something of a compromise: A majority of the court rejected the facial challenge but sustained the as-applied challenge, crafting an individualized right-to-

112. State v. Hamdan, 665 N.W.2d 785 (Wis. 2003); State v. Cole, 665 N.W.2d 328 (Wis. 2003).

113. Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004).

114. *In re* John Doe Proceeding, 660 N.W.2d 260 (Wis. 2003); *see id.* at 281 (Sykes, J., dissenting).

115. WIS. STAT. § 941.23 (1999–2000).

bear-arms defense for use in concealed-carry prosecutions.[116] This vindicated the right in one of the cases but not the other, and left the statute in place for the legislature to rewrite it in order to accommodate the new state constitutional right to bear arms.

The majority opinion in the gambling case, which I joined, was a masterful examination of the history and meaning of Wisconsin's constitutional restrictions on gambling.[117] But the decision didn't survive very long. After I left the court, my successor joined the dissenters, and with the center of gravity altered, the court abruptly changed course, overruling key parts of the decision.[118] Finally, in the case regarding the jurisdiction of the court of appeals, I thought my colleagues strayed far from the text and history of this part of the constitution, which had been adopted in the mid-1970s when the intermediate appellate court was created; I was alone in dissent.[119]

During my tenure, we decided many more routine criminal appeals raising Fourth and Fifth Amendment questions for which the state constitutional provisions had been construed as coextensive with the federal rights. Our practice of declining to depart from the Supreme Court's jurisprudence on issues of constitutional criminal procedure was so well established that we were not often asked to separately interpret the parallel provisions in the state constitution. When we were asked to provide a more protective rule, more often than not we declined.[120]

That changed during the court's 2004–2005 term, the year after I left for the Seventh Circuit. In two notable decisions, the court explicitly embraced Justice Brennan's new federalism.[121] In *State v. Knapp*,[122] the court expanded the scope of the exclusionary rule under the state constitution to require the suppression of physical evidence obtained as a result of a *Miranda* violation. Just the year before in *United States v. Patane*,[123] the U.S. Supreme Court had held that the right against compulsory self-incrimination, which the *Miranda* rule protects, was not

116. *Hamdan*, 665 N.W.2d at 810–14 (holding for the challenge on an as-applied claim); *Cole*, 665 N.W.2d at 338–45 (rejecting the facial challenge).

117. *Panzer*, 680 N.W.2d at 671–97.

118. Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (Wis. 2006).

119. *In re John Doe Proceeding*, 660 N.W.2d at 281 (Sykes, J., dissenting).

120. A good example is *State v. Jennings*, 647 N.W.2d 142 (Wis. 2002).

121. State v. Knapp, 700 N.W.2d 899, 922 (Wis. 2005) (Crooks, J., concurring but writing for a majority of the court) (citing Brennan, *supra* note 17, at 500); State v. Dubose, 699 N.W.2d 582, 597 (Wis. 2005) (citing Brennan, *supra* note 17, at 500).

122. *Knapp*, 700 N.W.2d at 899–927.

123. United States v. Patane, 542 U.S. 630 (2004).

affected by the introduction of the nontestimonial physical fruits of a police officer's failure to give *Miranda* warnings. In *Knapp* the Wisconsin Supreme Court disagreed and invoked the state constitution to achieve a different rule and result.[124] But in doing so the court did not explain how the failure to comply with a requirement imposed as a matter of *federal* constitutional law should require a more expansive remedy under the state constitution. Instead, the court grounded its decision on a policy judgment about the deterrence rationale of the exclusionary rule.[125]

Similarly, in *State v. Dubose*,[126] the court revised its approach to eyewitness identifications, declaring that a common police procedure known as the "showup" was inherently unreliable and categorically inadmissible in Wisconsin courts. Before *Dubose*, Wisconsin had long followed the framework established by the U.S. Supreme Court in *Manson v. Brathwaite*[127] and *Neil v. Biggers*[128] to determine the admissibility of eyewitness identifications. This doctrine called for an individualized analysis of eyewitness identifications based on considerations of suggestiveness and reliability.[129] In *Dubose* the state supreme court suddenly shifted course and decided that the due-process clause of the Wisconsin Constitution "necessitate[d]" a categorical rule of inadmissibility.[130] Again, the court did not explain why case-specific reliability determinations no longer sufficed as a matter of due process. Instead, the court cited social-science research regarding eyewitness testimony *in general* and declared itself convinced that the U.S. Supreme Court's long-standing approach was now mistaken.[131]

I have discussed these developments elsewhere,[132] and a more detailed review is beyond the scope of this lecture. It suffices to note that the court made little effort to justify its decisions as a matter of state constitutional law. Secure in its authority to use the state constitution to reach a different result than the U.S. Supreme Court, the court simply did so. Indeed, that's exactly how the court explained itself in *Knapp*, the

124. *Knapp*, 700 N.W.2d at 921.
125. *Id.*
126. State v. Dubose, 699 N.W.2d 582 (Wis. 2005).
127. Manson v. Brathwaite, 432 U.S. 98 (1977).
128. Neil v. Biggers, 409 U.S. 188 (1972).
129. *Id.* at 199.
130. *Dubose*, 699 N.W.2d at 597.
131. *Id.* at 591–93.
132. *See* Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723 (2006).

case requiring the suppression of physical evidence obtained as a result of a *Miranda* violation. The court candidly said it would accept the defendant's invitation to "utilize" the state constitution to reach a different result than the Supreme Court had in *Patane*.[133] In other words, the power to decide was enough.

III. POSTSCRIPT

The cases I have highlighted today expose something that I think is too often lacking in our reinvigorated state constitutionalism: a normatively justified decision method or theory of state constitutional interpretation. The new judicial federalism has proceeded apace with too little attention to implementing a theoretical approach to state constitutional interpretation that is grounded in and justified by the principle of state-court judicial review. This is the "how" question that I raised at the beginning of my remarks. While it's certainly possible to "do" state constitutional law without a comprehensive theory of interpretation, in my view, the cases are too often characterized by loose and ad hoc reasoning that fails to promote clarity, coherence, and consistency in the law. And as *Vincent v. Voight* illustrates, such an unanchored approach to constitutional decision-making is hard to reconcile with the justification for the power of judicial review.

In state government, no less than in the national, the authority of the judiciary to set aside an otherwise valid law in the name of the state constitution arises by inference from the judicial duty to apply the law—including the law of the state constitution—in individual cases. Without the discipline of a decision method that both informs and constrains the exercise of judicial review in state constitutional cases, Justice Brennan's vision of state constitutionalism provides intellectual cover for state judges to embed their policy preferences into state constitutional law. By encouraging the state supreme courts to deploy the state constitution as a malleable instrument of legal change, Justice Brennan's new federalism disturbs the balance in the state constitutional design and undermines the ability of the people to shape and alter their basic civil, social, and economic institutions at the state and local levels.

Vincent v. Voight stands as a vivid example of unconstrained state constitutional interpretation. The court's freewheeling approach to interpreting the state constitution's education article arrogated

133. State v. Knapp, 700 N.W.2d 899, 912 (Wis. 2005).

educational policymaking to the court, encroaching on the prerogatives of the legislative and executive branches and ultimately eroding the rights of the people to direct the content and character of public education. This kind of unbounded judicial discretion is just as destabilizing to the political and legal order in state government as it is in the federal. At bottom, Justice Brennan's new federalism is judge empowering and invites state-court decisions that are transparently political—a means of achieving policy goals through state constitutional litigation. I am hardly the first to make this observation.[134]

Happily, the theoretical vacuum is being filled. There has been a veritable explosion of recent scholarship on the question of how state supreme courts ought to interpret state constitutions.[135] Some of the most influential new work on the subject has come from past Brennan Lecturers, so the OCU School of Law has provided a prominent forum for discussion and debate of this important but underdeveloped area of law. The legal thought has moved well beyond the early "lockstep" versus "primacy" debate, and even the "interstitial" and "criteria" approaches that fall between these two extremes.

The approach adopted by the Wisconsin Supreme Court in the *Miller* case—reasoning from text and precedent to a conclusion that the state

134. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 987 (1979); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1490–91 (1990); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988); Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263 (2008).

135. *See, e.g.*, JAMES A. GARDNER & JIM ROSSI, NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (2010); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005); WILLIAMS, *supra* note 62; Anderson & Oseid, *supra* note 62; Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265 (2007); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245 (2005); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Landau, *supra* note 62; Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998); Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylatic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003–2004); Randall T. Shepard, *State Constitutional Remedies and Judicial Exit Strategies*, 45 NEW ENG. L. REV. 879 (2011); Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225 (2007).

constitution's free-exercise clause requires a stronger implementing doctrine than the rule adopted in *Smith*—has been followed by several other state supreme courts in construing the religion clauses of their state constitutions.[136] The same is true in the context of eminent domain. The Supreme Court's decision in *Kelo v. City of New London*[137] ignited an enormous controversy over the protection of private-property rights. The Court held that the Fifth Amendment's Takings Clause does not prohibit the condemnation of private property for transfer to another private party in furtherance of an economic-development purpose.[138] This stirred a broad popular movement for legislative reform of eminent domain, and it was inevitable that state supreme courts would be asked to address the question under the takings clauses of state constitutions. Several have done so,[139] including the Supreme Court of Oklahoma, which declined to follow *Kelo* based on language in the state constitution's eminent-domain provision that is more protective of private-property rights than the corresponding language of the Fifth Amendment.[140]

The recent scholarly attention to the theory and method of state constitutional interpretation is all to the good. For my part, I have not come here today with a unified theory, just a general preference for an interpretive method that respects the separation of powers within state government, legitimizes the state courts' exercise of the power of judicial review, and constrains judicial discretion within a framework of traditional and authoritative sources of legal interpretation.

Originalism provides a good starting point, with its emphasis on the original public meaning of the constitutional text; it also takes stock of the structure and history of the state constitution as contextual evidence of meaning. Precedent has an important role to play, and drawing on federal constitutional doctrine is appropriate where the meaning of the cognate constitutional provision seems the same based on text, history, and tradition, or when the federal doctrine implements the state constitutional provision well. All this takes judgment, of course,

136. *See* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998) (collecting and analyzing cases); *see also* Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004).

137. Kelo v. City of New London, 545 U.S. 469 (2005).

138. *Id.* at 480–90.

139. Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1 (2011) (collecting and analyzing the cases).

140. Bd. of Cnty. Comm'rs v. Lowery, 136 P.3d 639, 645–48 (Okla. 2006); *see also* Somin, *supra* note 139.

especially when the constitutional language is broad and its application unclear. But it seems to me that a framework of state constitutional interpretation that requires meaningful engagement with the state constitution's text, structure, history, and precedent would help to remedy some of the irregularities, inconsistencies, and excesses that too often afflict state constitutionalism. As I've observed on another occasion, it would also have the virtue of constraining judges to behave as judges.[141]

141. *See* Sykes, *supra* note 132, at 737.