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A TIPPING POINT IN OHIO: THE PRIMACY MODEL AS A PATH TO A CONSISTENT APPLICATION OF JUDICIAL FEDERALISM

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I. INTRODUCTION

As cross-winds from the U.S. Supreme Court hint at the potential toppling of heretofore venerable precedent, we may be entering a new age of experimentation with and innovation of state constitutional law. This is, however, certainly not a new idea. In 1977, Justice Brennan issued a call for state courts to provide greater protections for individual rights through a reliance on state constitutions.[1] In the wake of a rapid expansion of federal constitutional rights during the Warren Court era, most state courts simply assumed that state constitutional provisions offered no more protection than the federal Bill of Rights, blindly accepting the Supreme Court's interpretation of federal rights as coterminous with state rights. But in Justice Brennan's view, the "lesson of history" showed that the opposite was true—the Bill of Rights built upon the foundation of state constitutional provisions.[2] Thus, Justice Brennan maintained that constitutional decisions by federal courts should be only "persuasive weight as guideposts," and then only when they are "logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees."[3] Additionally, Justice Brennan reasoned that by decoupling state provisions from corresponding federal provisions, state courts could ensure greater protections by virtue of the Supreme Court's inability to review decisions based upon state law.[4] In this way, Justice Brennan posited that individual rights would not be held hostage to the evolving composition (and accompanying doctrinal shifts) of the Court.

Although Justice Brennan's pitch may not have been novel, he is nonetheless "widely credited [for launching] the so-called New Judicial Federalism movement."[5] Despite a slow start, state courts eventually began developing state constitutional doctrine in earnest—an expansion of legal doctrine that soon became a "noted feature[] of the American

* Judge, Ohio First District Court of Appeals. I have deep gratitude for my law clerks Shannon Price, Nathan Truitt, Julian Johnson, and Jennifer Brumfield for their excellent assistance on this article. And I sincerely appreciate the thoughtful feedback from Steven H. Steinglass on an earlier draft of this article.

1. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).
2. *Id.* at 501.
3. *Id.* at 502.
4. *Id.* at 501.
5. Richard B. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 438 (2004).

legal landscape."[6] For example, between 1950 and 1969, state courts only relied on state constitutions ten times to justify protections that exceed the U.S. Constitution.[7] But two decades later, Washington Supreme Court Justice Robert Utter estimated that the number had skyrocketed to more than 450.[8] Indeed, in a 1986 speech, Justice Brennan declared that the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our times."[9]

Sixth Circuit Chief Judge Jeffrey Sutton recently introduced a new take on this question in his book *51 Imperfect Solutions*.[10] Although Chief Judge Sutton approaches the question from a different vantage point and with a different analytical structure than Justice Brennan, his underlying message—that state courts should independently analyze their own constitutions— echoes part of Justice Brennan's message. As this concept gains currency and adherents, state courts are rolling up their sleeves and delving deeper in interpreting their own constitutions.

As might be expected, however, the development of judicial federalism does not follow a straight path. Or, as Professor Robert F. Williams observed, the range of methodologies is sometimes "strikingly wide."[11] While still on the New Hampshire Supreme Court, Justice Souter highlighted the difficulty in deciding how much weight to give federal constitutional jurisprudence: "If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent."[12] Striking that balance often proves to be no easy task.

Although simplistic categories should be resisted, scholars have identified at least four sequencing approaches that states have adopted related to judicial federalism: lockstep, interstitial or supplemental, dual sovereignty, and primacy. A brief review of each methodology—and its strengths and weaknesses—is helpful to understanding exactly how Ohio fits within the judicial federalism landscape.

In this article, we use Ohio as a case study to explore the various

6. Robert K. Fitzpatrick, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1840 (2004).

7. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 968 (2013).

8. Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27 (1989).

9. Paul Marcotte, *Federalism and the Rise of State Courts*, 73 A.B.A. J. 60 (1987).

10. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

11. Robert F. Williams, *State Constitutional Methodology in Search & Seizure Cases*, 77 MISS. L.J. 225, 230 (2007).

12. State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986).

approaches to judicial federalism, focusing in particular on its equal protection and search-and-seizure jurisprudence. These examples reveal that the Ohio Supreme Court is evolving in its approach to judicial federalism, but the guidance it offers has not been consistent thus far (as the court itself acknowledges). As state constitutional issues emerge more at the forefront of the minds of Ohio lawyers and judges alike, the court may wish to adopt a primacy model. Such a model would restore the Ohio Constitution to its rightful prominence, honor Ohio's constitutional heritage, and provide clear guidance to litigants.

II. STATE INTERPRETIVE APPROACHES TO THE "NEW JUDICIAL FEDERALISM"

A. The Lockstep Approach

The lockstep approach presumptively tethers state constitutional provisions with federal constitutional jurisprudence.[13] Or, as one author put it: "the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court's interpretation of the textual provision at issue."[14] To be fair, the lockstep approach does not contend that the U.S. Supreme Court is always correct. Instead, it provides a "presumption of correctness from which the state court should be loathe to part."[15] Courts tend to justify this approach by the need for uniform enforcement of criminal laws and the need to avoid confusion, especially in the Fourth Amendment context.[16] Opponents of the lockstep approach counter that it "assumes a power that has been constitutionally delegated to others[:] the right of the people to 'alter' their constitution."[17] Or as Justice Utter of the Washington Supreme Court bluntly put it: to adopt the lockstep approach "is to rewrite our constitution without benefit of a constitutional convention and to deprive the people of this state of additional rights, which they adopted in our constitutional convention, without their consent."[18]

13. Hon. Mark S. Coven, *The Common Law as Guide to State Constitutional Interpretation*, 54 SUFFOLK U. L. REV. 279, 294-99 (2021); Thomas G. Saylor, *Fourth Amendment Departures and Sustainability in State Constitutionalism: The 2012 Widener Law & Government Institute Jurist in Residence Lecture*, 22 WIDENER L.J. 1, 12 (2012).

14. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102 (2000).

15. *Id.*

16. *See* Saylor, *supra* note 13, at 13.

17. Ronald K.L. Collins, *Reliance on State Constitutions—the Montana Disaster*, 63 TEX. L. REV. 1095, 1116 (1985).

18. State v. Smith, 814 P.2d 652, 661 (Wash. 1991).

B. The Interstitial Approach

The interstitial approach differs from the lockstep methodology by avoiding de facto tethering of the state and federal constitutions, instead offering a posture of deference—federal priority.[19] Under this approach, state courts "look[] first to the federal constitution to see if it protects the right."[20] And the court will only examine the state constitution for potential protections if "the Federal Constitution is not dispositive."[21] In other words, if the rights claimant prevails under the U.S. Constitution, that spells the end of the analysis.[22] But if the claim fails under the federal Constitution, the court turns to the state constitution to inquire further.[23]

The interstitial approach essentially views the U.S. Supreme Court's interpretation of federal constitutional rights as the floor, while 'the state court of last resort determines whether supplemental protection is afforded as a matter of state law.'"[24] But this perspective opens this approach to the criticism that when courts "recognize rights beyond the national minimum it can seem result oriented."[25] As Justice Stewart Pollock of the New Jersey Supreme Court retorts, however:

> One reason for following the supplemental model is that federal constitutional rights, as applied to the states through the fourteenth amendment, establish our national identity. In an increasingly mobile nation, each of us can take comfort in knowing that, throughout the United States, the federal constitution protects a core of basic liberties.[26]

C. The Dual Sovereignty Approach

The dual sovereignty (or dual reliance) approach requires state courts to "discuss or rely upon both federal and state law in forming their decisions," and thus "weave[] the two constitutions together."[27] Commentators criticize this approach for creating "problems in identifying decisions that were based on adequate and independent state

19. Coven, *supra* note 13.

20. Nathan Sabourin, *We're from Vermont & We Do What We Want: A "Re"-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1167-68 (2008).

21. *Id.* at 1168.

22. Williams, *supra* note 11.

23. *Id.*

24. Sabourin, *supra* note 20, at 1168 (quoting Jason J. Legg, *The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court*, 60 ALB. L. REV. 1799, 1805 (1997)).

25. Williams, *supra* note 11, at 241.

26. Stewart G. Pollock, *Adequate & Independent State Grounds as a Means of Balancing the Relationship Between State & Federal Courts*, 63 TEX. L. REV. 977, 986 (1985).

27. Sabourin, *supra* note 20, at 1167; Coven, *supra* note 13, at 295, n.140.

grounds."[28] In other words, the dual sovereignty approach may generate decisions that muddy the distinction between the state and federal constitutional law. Not only are these ambiguous decisions open to review by the Supreme Court if the state court fails to clarify the basis of the decision as independent state grounds, but these decisions offer unclear guidance on the development of state constitutional law.[29] Recognizing this problem, advocates of the dual sovereignty approach encourage state courts to precisely distinguish between the state and federal analyses in their opinions.[30] Advocates argue that such a distinction would allow state courts to participate in "the discussion and evolution of federal—as well as their own state's—constitutional law."[31]

D. The Primacy Approach

The primacy approach represents the antithesis to the interstitial approach. Under the primacy approach, courts begin with the state constitutional analysis, and only turn to the federal analysis if state law does not protect the interest at stake.[32] Advocates of this approach explain that the state constitutional analysis is "logically prior to review" under the federal constitution[33] and, thus, "all questions of state law" should be considered before turning to the federal analysis.[34] Some advocates of this approach even suggest that "subconstitutional" state issues should be addressed before turning to the federal issues. For example, one Oregon court explained that "[a]ll issues should first be addressed on a subconstitutional level. Courts then should consider any remaining issues under the Oregon Constitution. Finally, if no state law, including the state constitution, resolves the issues, courts then should turn for assistance to the Constitution of the United States."[35]

Justice Stevens extols the primacy approach as the best framework for "'facilitat[ing] [the] independent role of state constitutions and state courts in our federal system.'"[36] Unlike the lockstep approach, the primacy approach requires courts to resort to the state constitution, rather

28. Williams, *supra* note 11, at 243.

29. *See* Jason J. Legg, *The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court*, 60 ALB. L. REV. 1799, 1803-04 (1997).

30. Williams, *supra* note 11, at 243.

31. *Id.*

32. Sabourin, *supra* note 20; Coven, *supra* note 13.

33. Williams, *supra* note 11, at 239 (quoting Hon. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970)).

34. *Id.* at 239-40 (quoting State v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983)).

35. *Id.* (quoting State v. Tompkin, 143 P.3d 530, 534 (Or. 2006)).

36. *Id.* at 241 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 704 (1986) (Stevens, J., dissenting)).

than defer to federal courts. Unlike the interstitial approach, the primacy approach places the state constitution at the center of the analysis, rather than giving it a secondary role triggered only if federal law fails to resolve the matter. And unlike the dual sovereignty approach, the primacy approach "lead[s] state courts to be clearer about whether they intend their decisions to rest on adequate and independent state grounds," thus ensuring that the state's constitutional analysis does not collapse into the federal analysis.[37]

III. JUDICIAL FEDERALISM IN OHIO

With the backdrop on judicial federalism approaches in mind, let's take a closer look at Ohio. Over the years, Ohio courts have alternated between versions of the four methodologies discussed above but never conclusively settled on any single approach. Ohio's experience in vacillating between approaches is by no means unique or surprising—many other states have witnessed similar experimentation.[38] This Part outlines the history of judicial federalism in Ohio.

A. Early Adherence to Lockstep Interpretation

For decades, Ohio resisted the allure of Justice Brennan's call for a new judicial federalism, refusing several fairly blunt invitations from the U.S. Supreme Court to invoke state constitutional law as a response to reversal on federal constitution claims. For example, in the 1975 case *Forest City Enterprises v. Eastlake*, the Ohio Supreme Court initially held that a city charter amendment requiring an extraordinary majority via referendum to enact zoning changes violated federal due process guarantees by impermissibly delegating legislative power.[39] The U.S. Supreme Court reversed, emphasizing a provision of the Ohio Constitution that reserved the power of referendum to the people of each Ohio municipality.[40] A referendum, the Court held, could not itself be "characterized as a delegation of power."[41] However, if a party "consider[ed] the referendum result . . . to be unreasonable, the zoning restriction [wa]s open to challenge in state court, where the scope of the state remedy available to

37. *Id.* at 240.

38. *See, e.g.*, Paul Avelar & Keith Diggst, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L. J. 355 (2017).

39. Forest City Enter. v. Eastlake, 324 N.E.2d 740 (Ohio 1975) [hereinafter *Eastlake I*].

40. Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 673 (1976) ("In framing a state constitution, the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State.").

41. *Id.* at 672.

respondent would be determined as a matter of state law."[42]

On remand, the Ohio Supreme Court fumbled its opportunity to invoke due process guarantees under the Ohio Constitution and, at least, reassess the city's charter amendment. After all, *Eastlake I* explicitly recognized that "[z]oning provisions such as that in Eastlake's charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife . . . to perpetuate the de facto divisions in our society between black and white, rich and poor."[43] The U.S. Supreme Court's "pointed reference to state court relief" was interpreted by contemporary scholars as an invitation for Ohio—and other states—to take charge of urban zoning issues.[44] Instead, the Ohio Supreme Court issued a six-paragraph opinion that made no reference whatsoever to any specific provision of the Ohio Constitution. Without discussion, the court proclaimed that its decision in *Eastlake I* simply "must be overruled since we perceive no state due-process constitutional questions which, under this record, we would choose to decide in a manner other than that mandated by the opinion on remand."[45]

Another example of Ohio's early distaste for judicial federalism is embodied in the flagship First Amendment case, *Zacchini v. Scripps-Howard Broadcasting Co*.[46] In that case, Hugo Zacchini—a "human cannonball"—protested a nightly news broadcast showing his entire, fifteen-second performance.[47] The Ohio Supreme Court recognized Mr. Zacchini's right of publicity in his performance, but held that, as a member of the press, Scripps was privileged to record and show the performance as a matter of public concern.[48] "No fixed standard," the court declared, could be formulated to "bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance . . . [without] unduly restrict[ing] the 'breathing room' in reporting which freedom of the press requires."[49]

On appeal, the U.S. Supreme Court began its opinion by considering whether it even had jurisdiction over the state right-of-publicity claim.[50] The Court noted:

> Had the Ohio court rested its decision on both state and federal grounds,

42. *Id.* at 677.

43. *Eastlake I*, 324 N.E.2d 740 at 749.

44. Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1420 (1978).

45. Forest City Enter. v. Eastlake, 356 N.E.2d 499, 500 (Ohio 1976).

46. Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454 (Ohio 1976).

47. *Id.* at 455.

48. *Id.* at 461.

49. *Id.*

50. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

> either of which would have been dispositive, we would have had no jurisdiction. But the opinion, like the syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that the decision rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here.[51]

Having resolved the jurisdictional quandary, the Court reversed the Ohio Supreme Court's finding of First Amendment privilege for Scripps.[52] It crafted exactly the fixed standard the Ohio Supreme Court declared unworkable, holding that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[53] The Court went out of its way to emphasize that its new standard did not dictate the Ohio Supreme Court's reading of the Ohio Constitution: "the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case []."[54]

Again, the Ohio Supreme Court demurred this invitation to apply state law. In a terse, per curiam opinion, the court quoted several paragraphs from the U.S. Supreme Court's ruling, before concluding that it "discern[ed] no compelling reason . . . to render a constitutional declaration beyond that which the majority of the United States Supreme Court announced in reviewing this cause."[55] It remanded the case to the trial court, without instructions on how (or whether) Section 11, Article I of the Ohio Constitution ought to apply.[56] The majority's lack of analysis on the state constitutional issue did not go unnoticed. Justice Celebrezze bemoaned the court's "abidcat[ion of] its role as the ultimate arbiter of Ohio law," arguing that the U.S. Supreme Court's "entire act" standard was both unclear and "susceptible to easy circumvention."[57] And Justice Brown chastised the majority for "a transparent attempt to avoid drawing the boundaries of a press privilege."[58] Indeed, the majority's avoidance of state constitutional interpretation yielded lasting effects: the Ohio Supreme Court did not identify any significant divergence between the

51. *Id.* at 568.

52. *Id.* at 578-79.

53. *Id.* at 574-75.

54. *Id.* at 578-79.

55. Zacchini v. Scripps-Howard Broad. Co., 376 N.E.2d 582, 583 (Ohio 1978).

56. *Id.*

57. *Id.* at 584 (Celebrezze, J., concurring).

58. *Id.* at 585-88 (Brown, J., concurring) ("I do not agree with the majority that there is no alternative to remanding the instant cause to the trial court without providing state constitutional guidelines.").

Ohio Constitution and the federal First Amendment until two decades later.[59] This problem attains greater significance given the substantial textual differences between the First Amendment and its Ohio counterparts.[60]

Eastlake, *Zacchini*, and other, similar cases sparked criticism from scholars as well as members of the Ohio courts. In a 1984 article, legal scholars Mary Cornelia Porter and G. Alan Tarr lamented the Ohio Supreme Court's "record under the new judicial federalism" as consistent with the state's "fail[ure] to develop a body of state civil liberties law."[61] The Ohio Supreme Court, Porter and Tarr hypothesized, was "neither inclined, nor apparently equipped, to strike out and hold its own" among its fellow federal and state courts.[62] The court's reluctance to embrace its own lawmaking power caused it to "ignore[] opportunities to follow the lead of other courts in developing state constitutional law," with the result that Ohio constitutional law remained woefully underdeveloped.[63]

B. Arnold *and* Robinette*: An Interstitial Approach?*

The Ohio Supreme Court's first reference approving the new judicial federalism appeared in the 1993 case *Arnold v. City of Cleveland*, where gun-owners challenged the constitutionality of a municipal ban on

59. *See* Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000) ("It was the *Smith* decision that marked the divergence of federal and Ohio protection of religious freedom.").

60. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), *with* OHIO CONST. art. I, § 11 ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."), *and* OHIO CONST. art. I, § 3 ("The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances."), *and* OHIO CONST. art. I, § 7 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.").

61. Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 154-55 (1984).

62. *Id.* at 157.

63. *Id.* at 150, 154 ("The court not only has failed to develop a body of state civil liberties law but has little experience in interpreting the state constitution.").

"assault weapons" within the city of Cleveland.[64] At the time, the Second Amendment had not yet been incorporated against the states,[65] and federal law recognized no individual right to bear arms.[66] The plaintiffs maintained that Cleveland's municipal ban violated Section 4, Article I of the Ohio Constitution, which provides that "[t]he people have a right to bear arms for their defense and security."

In recognizing an individual, constitutional right to bear arms in Ohio, the Ohio Supreme Court announced its intention to "join[] the growing trend in other states . . . [and treat] the Ohio Constitution [a]s a document of independent force."[67] The federal constitution, the court explained, "provides a floor beneath which state court decisions may not fall . . . [but] state courts are unrestricted in according greater civil liberties and protections to individuals and groups."[68] The court embarked on an examination of the history of Section 4, Article I, as well as the unique syntax of the Ohio provision as compared to the federal Second Amendment.[69] Finally, it concluded that Ohio's individual right to bear arms was subject to reasonable regulation, and the assault-weapon ban in question constituted "a reasonable exercise of the municipality's police power."[70]

Arnold represented a substantial departure from the Ohio Supreme Court's previous cases implicating judicial federalism—so much that commentators have characterized the opinion as the court's "manifesto for its own Ohio constitutional emancipation."[71] The *Arnold* court even cited Porter and Tarr's "Anatomy of a Failure" article, offering a not-so-subtle acknowledgment of its previous avoidance of state constitutional interpretation.[72] For proponents of the new judicial federalism, *Arnold*'s promise to treat the Ohio Constitution as an independent source of rights and liberties rendered the decision the "poster child for judicial federalism in Ohio."[73] Of course, *Arnold* did not clarify exactly *how* the Ohio courts

64. Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993).

65. *Id.* at 167 ("We note that the Second Amendment has not yet been held to be applicable to the states.").

66. *Id.* at 166 ("The question as to whether individuals have a fundamental right to bear arms has, seemingly, been decided in the negative under the Second Amendment to the United States Constitution.").

67. *Id.* at 169.

68. *Id.*

69. *Id.*

70. *Id.* at 173.

71. Saphire, *supra* note 5, at 450.

72. *Arnold*, 616 N.E.2d at 168, n.8 ("It appears that the Ohio Supreme Court has been reluctant to use the Ohio Constitution to extend greater protection to the rights and civil liberties of Ohio citizens. When presented with opportunities to do so, this court has not, on most occasions, used the Ohio Constitution as an independent source of constitutional rights.").

73. Saphire, *supra* note 5, at 451. *See also* Robert F. Williams, *The New Judicial Federalism in*

would approach future cases involving parallel federal and state claims—but it certainly appeared to abandon the court's previous adherence to lockstep interpretation.

Yet no sooner did the Ohio Supreme Court announce its adherence to *some* version of new judicial federalism than it began to backpedal. In a 1995 case, *State v. Robinette*, the court confronted a motion to suppress evidence under both Article I, Section 14 of the Ohio Constitution and the federal Fourth Amendment.[74] Initially, the court held that both the Ohio Constitution and the Fourth Amendment required that "citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation."[75] Despite its passing reference to the Ohio Constitution, the decision relied almost entirely on federal law and did not provide independent analysis of the Ohio constitutional provisions at issue, opening the door to review by the United States Supreme Court.[76]

On appeal, the U.S. Supreme Court reversed, holding that no such bright-line rule for consensual interrogation existed under the Fourth Amendment.[77] As in *Zacchini*, the Supreme Court remanded the case with an explicit invitation for the Ohio Supreme Court to "clarify that its instructions to law enforcement officers in Ohio find adequate and independent support in state law."[78] Observers might have hoped that, post-*Arnold*, the Ohio Supreme Court would affirm its holding in *Robinette I* on state constitutional grounds—particularly given *Robinette I*'s insistence that its rule was mandated by the Ohio Constitution *in addition to* the Fourth Amendment.

No such luck. Instead, invoking the United States Constitution as "the primary mechanism to safeguard an individual's rights," the *Robinette II* court held that "Section 14, Article I of the Ohio Constitution affords protections that are coextensive with those provided by the Fourth Amendment."[79] It also announced the principle that, in future cases, the court should "harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are

Ohio: The First Decade, 51 CLEV. ST. L. REV. 415, 417 (2004) [hereinafter Williams, *New Judicial Federalism*] ("*Arnold* has become the standard citation supporting the independent force of the Ohio constitution.").

74. State v. Robinette, 653 N.E.2d 695 (Ohio 1995) [hereinafter *Robinette I*].

75. *Id.* at 696.

76. Ohio v. Robinette, 519 U.S. 33, 37 (1996) ("Although the opinion below mentions Art. I, § 14, of the Ohio Constitution in passing . . . , the opinion clearly relies on federal law nevertheless. Indeed, the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution.").

77. *Id.* at 39.

78. *Id.* at 45 (Ginsburg, J., concurring).

79. State v. Robinette, 685 N.E.2d 762, 766, 771 (Ohio 1997) [hereinafter *Robinette II*].

persuasive reasons to find otherwise."[80] It left the question of what might represent a "persuasive reason" to diverge from Supreme Court precedent for another day.

The standard announced in *Robinette II* approaches an interstitial model of judicial federalism—which, for all of its potential flaws, would at least require principled analysis of Ohio constitutional claims when raised.[81] But it also holds the seeds of what Robert F. Williams refers to as "prospective lockstepping," in which a state court "announces that not only for the instant case, but also *in the future*, it will interpret the state and federal clauses the same."[82] Prospective lock-stepping raises serious constitutional problems, not least of which is the possibility of anti-democratic, judicial amendment of the state constitution.[83] It may come of little surprise, then, that the Ohio Supreme Court has not consistently followed *Robinette II*—leaving a conspicuous void as to which interpretive model, if any, actually governs judicial federalism in the state.[84]

C. Judicial Federalism in Ohio's Modern Search-and-Seizure and Equal Protection Jurisprudence

To appreciate some of the nuance between these approaches, and why it matters, we drill down on the Ohio Supreme Court's post-*Robinette* approach to judicial federalism in two areas of the law: search-and-seizure and equal protection. This Section addresses each area in turn, with an eye toward our later, comparative analysis of judicial federalism in other states.

1. Search-and-Seizure

Despite *Arnold*'s purported embrace of the independent force of the Ohio Constitution, *Robinette II* reaffirmed the Ohio Supreme Court's intent to "harmonize" its search-and-seizure case law with that of the United States Supreme Court. And for roughly a decade, that was exactly what the court did. In *State v. Murrell*, for example, the court overruled a 1992 case that had held a police officer's traffic-stop search of a small, closed container inside the glove compartment of a car unconstitutional

80. *Id.* at 767.

81. Unlike the lockstep approach, the interstitial approach secures a role for the state constitution in the constitutional analysis. *See supra* Part II.A-D. And unlike the dual sovereignty approach, the role of the state constitutional analysis is distinct, rather than ambiguously weaved into the federal constitutional analysis. *Id.*

82. Williams, *New Judicial Federalism*, *supra* note 73, at 434.

83. *Id.* at 435.

84. *See supra* Part II.C.

on state and federal grounds.[85] The *Murrell* court explained its decision to roll back search-and-seizure protections as a product of the principle that "Section 14 Article I and the Fourth Amendment should be harmonized *whenever possible*."[86] So far as the United States Supreme Court continued to whittle away Fourth Amendment protections, the Ohio Supreme Court appeared willing to go along for the ride.

Only in 2003 did the court finally recognize a substantive, post-*Robinette II* distinction between the search-and-seizure protections of the Ohio Constitution and the Fourth Amendment. In *State v. Brown*, a defendant claimed that his arrest for the minor misdemeanor of jaywalking violated Section 14, Article I of the Ohio Constitution, and that evidence seized in a search incident to that arrest must be suppressed.[87] Because the U.S. Supreme Court's 2001 holding in *Atwater v. Lago Vista* clearly allowed the arrest under the Fourth Amendment,[88] the defendant's arguments hinged exclusively on state law.[89] Citing *Arnold* and its own, pre-*Atwater* precedent, the Ohio Supreme Court concluded that the Ohio Constitution "provide[d] greater protection than the Fourth Amendment" specifically "against warrantless arrests for minor misdemeanors."[90] In this one, discrete area, the court rejected state-to-federal harmony and chose to stand its ground. But at the same time, the court pointed to no textual, historical, or purposive differences that would suggest how to demarcate such distinctions in future cases.

Contemporary commentators on the *Brown* decision predicted it would be an outlier to Ohio's general rule of search-and-seizure harmonization.[91] However, at least one subsequent Ohio Supreme Court decision followed *Brown*, expanding the reach of the state's search-and-seizure constitutional protections.[92] In *State v. Brown II* (unrelated to *State v. Brown*) the court confronted the issue of whether an officer's lack of statutory authorization for a traffic stop resulted in a violation of the Ohio Constitution.[93] Federal Supreme Court jurisprudence permitted the stop as long as the officer had probable cause, and so—like *Brown*—the

85. State v. Murrell, 764 N.E.2d 986 (Ohio 2002).

86. *Id.*

87. State v. Brown, 792 N.E.2d 175 (Ohio 2003).

88. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

89. *Brown*, 792 N.E.2d at 176-77.

90. *Id.* at 178.

91. Marianna Brown Bettman, *Ohio Joins the New Judicial Federalism Movement: A Little To-ing and a Little Fro-ing*, 51 CLEV. ST. L. REV. 491, 500 (2004).

92. *See* State v. Brown, 39 N.E.3d 496 (Ohio 2015).

93. *Id.* at 447.

case hinged on the state constitutional issue.[94] In its second meaningful departure from federal search-and-seizure precedent, the Ohio Supreme Court concluded that "Article I, Section 14 of the Ohio Constitution affords greater protection than the Fourth Amendment against searches and seizure conducted by members of law enforcement who lack authority to make an arrest," and held the stop resulting in defendant's arrest unconstitutional.[95] The majority offered no reference whatsoever to *Robinette II*, instead relying heavily on *Brown* and *Arnold* for the proposition that state constitutional guarantees could and did exceed the scope of the Fourth Amendment.[96]

In dissent, Justice French emphasized the contradictions between the court's modern approach and the standard set forth in *Robinette II*. She criticized the *Brown II* majority for "creat[ing] a new state constitutional right . . . without carefully examining the language of the Ohio Constitution to justify its departure from federal law."[97] Under *Robinette II*, Justice French insisted, the majority was obliged to follow Fourth Amendment precedent "[a]bsent compelling reasons to differ."[98] Because the majority did not identify those "compelling reasons," it had no basis to depart from federal precedent.[99]

Since *Brown II*, the Ohio Supreme Court seems to have gravitated towards Justice French's approach to Article I, Section 14. In *Ohio v. Jordan* (decided in 2021), for example, the court held that, absent "persuasive reasons" for enlarging the Fourth Amendment's protections, "Article I, Section 14 of the Ohio Constitution provid[es] the same protections as the Fourth Amendment."[100] That said, the court has never foreclosed the possibility that Article I, Section 14 secures broader protections than the Fourth Amendment and has recently appeared to invite practitioners to raise such a claim.[101] But, as we explore below, without clearer guidance from the court, practitioners may be reluctant to bring such claims without an overarching analytical structure through which to filter them.

2. Equal Protection

In typical lockstep fashion, the Ohio Supreme Court declared in 1975

94. *Id.* at 450.
95. *Id.*
96. *Id.*
97. *Id.* at 451 (French, J., dissenting).
98. *Id.* at 456.
99. *Id.*
100. Ohio v. Jordan, No. 2020-0495, slip op. at 14 (Ohio Nov. 9, 2021).
101. *See infra* Part IV.B.

that the "limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States constitutions are essentially identical."[102] The court affirmed in the 1998 case *Am. Ass'n. of Univ. Professors v. Central State Univ.* its belief that the state and federal clauses are "functionally equivalent," and "the standards for determining violations . . . are essentially the same under state and federal law."[103] Fifty-five years later, this lockstep approach to equal protection in Ohio is still good law—sort of.[104] Ohio's approach to judicial federalism and equal protection claims is remarkable in two ways: first, because of its insistence that it has never changed; and second, because of the growing number of dissents and concurrences produced by its evolution.[105]

To this day, the Ohio Supreme Court has never overruled its declaration of "functional equivalence" between state and federal equal protection doctrine.[106] In a 2016 case, *State v. Noling*, a majority of the Ohio Supreme Court cited *Am. Ass'n. of Univ. Professors* for the proposition that "the federal and Ohio Equal Protections are to be construed and analyzed identically."[107] It struck down a statute limiting the ability of capital offenders to appeal denial of post-conviction DNA testing, citing state and federal precedent interchangeably.[108] In a 2018 case, *Stolz v. J & B Steel Erectors*, the court applied the equivalent of federal rational basis review to reject a state equal protection claim in just two brief paragraphs of discussion.[109] Likewise, in the 2020 case *Sherman v. Ohio Public Employees Retirement System*, the court invoked federal precedent to articulate the motion to dismiss standard for an equal protection claim.[110]

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102. Kinney v. Kaiser Aluminum & Chem. Corp., 322 N.E.2d 880 (Ohio 1975).

103. Am. Ass'n. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ., 717 N.E.2d 286 (Ohio 1999) [hereinafter *Am. Ass'n. of Univ. Professors II*].

104. In Westlaw, for example, *Am. Ass'n. of Univ. Professors II* is flagged as "Called into Doubt" by *State v. Mole*—but never explicitly contradicted or overruled. *See* State v. Mole, 74 N.E.3d 368 (Ohio 2016).

105. *See Mole*, 74 N.E.3d at 376 (discussing the tendency of judicial federalism decisions to provoke "vigorous dissents").

106. *See* Sherman v. Ohio Pub. Emps. Ret. Sys., 169 N.E.3d 602, 608, n.2 (Ohio 2020) (treating the equal protection provisions of the Ohio and federal Constitutions as functionally equivalent).

107. State v. Noling, 75 N.E.3d 141 (Ohio 2016).

108. *Id.*

109. Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1235 (Ohio 2018). *See also id.* at 1238-39 (Fischer, J., concurring) (explaining that the majority's application of rational basis review properly follows the court's "functional equivalents" precedent).

110. *Sherman*, 169 N.E.3d at 608. *See id.* at 608, n.2 ("Although *Wroblewski* refers to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the parties take the position that the federal Equal Protection Clause is the functional equivalent of the Equal Protection Clause in the Ohio Constitution in the context of this case.").

Yet in the midst of cases that seemingly continued to apply a lockstep approach to equal protection claims, the court also decided *State v. Mole*: one of its most ringing endorsements of judicial federalism since *Arnold*.[111] Discussed at length in Part IV, *Mole* involved a 2016 challenge to a statute criminalizing sexual conduct between a minor and a peace officer who was more than two years older than the minor.[112] The defendant police officer argued that the statute violated equal protection guarantees of both the Ohio Constitution and the United States Constitution. The court agreed, and in doing so, provided a nine-paragraph chronicle of its "inconsistent[]" response to "the hortatory call to the new federalism."[113] Emphasizing cases where it had departed from federal First, Fourth, and Fifth Amendment precedent, the court concluded:

> We once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers. We also reaffirm that we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states' constitutions. . . . Federal opinions do not control our independent analyses in interpreting the Ohio Constitution, even when we look to federal precedent for guidance.
>
> We can and should borrow from well-reasoned and persuasive precedent from other states and the federal courts, but in so doing we cannot be compelled to parrot those interpretations. Instead, we embrace the notion that we may, and should, consider Ohio's conditions and traditions in interpreting our own state's constitutional guarantees. In doing so, we are cognizant that "the individual-rights guarantees of the Bill of Rights were based on pre-existing state constitutional guarantees, not the other way around." This is particularly important to remember whenever the United States Supreme Court's decisions dilute or underenforce important individual rights and protections.[114]

The *Mole* court cited multiple articles by Chief Judge Sutton and ultimately invalidated the statute on both state and federal grounds.[115] As sweeping as this language was, it only commanded three votes and thus represents a plurality opinion rather than a majority (leaving more

111. State v. Mole, 74 N.E.3d 368, 372 (Ohio 2016).

112. *Id.*

113. *Id.* at 375-77.

114. *Id.* at 376 (quoting Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 167 (2009)).

115. *Id.* at 376, 389.

lingering questions than answers, as we'll see).

At first glance, *Mole* appears to represent a clear victory for advocates of judicial federalism. But recall that *Noling*, *Stolz*, and *Sherman* all followed *Mole*—and each continued to employ some form of the "functional equivalents" standard. In his 2018 *Stolz* concurrence, Justice Fischer highlighted this lack of uniformity in Ohio's equal protection jurisprudence as a reason for the court to "thoroughly reexamine the Ohio and federal Equal Protection Clauses" and question "whether they are indeed functional equivalents."[116] The simple fact that the Equal Protection Clause of the Ohio Constitution predates the Fourteenth Amendment of the U.S. Constitution, Justice Fischer explained, means that "there can be no legitimate argument that the Ohio Equal Protection Clause was the 'functional equivalent' of the federal Equal Protection Clause for the first 17 years that the Ohio clause existed."[117] To the extent that the 'functional equivalents' standard imposed a prospective lockstep approach, Justice Fischer maintained that the resulting "'upward delegation' of [the Ohio Supreme Court's] duty to interpret the Ohio Constitution is improper under our federal system and unconstitutional under the Ohio Constitution."[118]

There are many good reasons to understand Ohio's Article I, Section 2 Equal Protection Clause as substantively distinct from federal equal protection. Not only is the Ohio provision "textually distinct," but it also "emanat[es] from a different period in history, and, undoubtedly, [is] aimed at a different set of concerns from those at which the federal constitutional provision was aimed after the civil war."[119] The proper scope of equal protection under the Ohio Constitution is, of course, not the subject of this paper—but the uncertainty *surrounding* that scope is a clear byproduct of the court's oscillation between lockstep and non-lockstep models of judicial federalism. Until the court provides more clarity about which model of judicial federalism it will follow, it will continue to engender confusion for judges and practitioners alike.

IV. INCREASING TENSION AND THE NEED FOR A CONSISTENT INTERPRETIVE APPROACH

The Ohio Supreme Court's inconsistent approach to judicial federalism is not just theoretically frustrating but practically significant for judges who have to apply—and litigants who seek to enforce—state

116. Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228, 1238 (Ohio 2018) (Fischer, J., concurring).

117. *Id.* at 1236.

118. *Id.* at 1239.

119. Williams, *New Judicial Federalism*, *supra* note 73, at 429.

constitutional law. These inconsistencies, and the transforming composition of the federal judiciary (particularly the U.S. Supreme Court), present us with a tipping point, where Ohio courts should re-assess the relationship between state and federal constitutional law.

A. Challenges for Judges: A Closer Look at State v. Mole

Closer examination of the Ohio Supreme Court's various *Mole* opinions helps illustrate the confusion that Ohio's inconsistent embrace of judicial federalism creates for Ohio judges. *Mole* espoused at least three different interpretive methods for judicial federalism claims. First, in the lead opinion, Chief Justice O'Connor announced a seemingly new standard for when the court will invoke independent state grounds in its equal protection (and perhaps all judicial federalism) decisions: "[T]his court . . . can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is *both prudent* and *not inconsistent* with the intent of the [Ohio] framers."[120] This "prudent-and-not-inconsistent" standard at least provides some guidance to lower courts on how to evaluate a claim implicating both state and federal constitutional rights: it resembles an interstitial approach and indicates that policy considerations and historical record are paramount.

The trouble is that, despite *Mole*'s insistence on the primacy of the Ohio Supreme Court as "the ultimate arbiter of the meaning of the Ohio Constitution," the opinion did not actually elucidate the meaning of equal protection in the Ohio Constitution as distinct from the federal equal protection analysis.[121] Without discussion of the text or history of Article I, Section 2—and citing primarily federal case law—the plurality simply declared that Ohio equal protection law applied in the midst of finding a federal equal protection violation.[122] In an apparent effort to insulate the decision from U.S. Supreme Court review, *Mole* inserted: "[E]ven if we have erred in our understanding of the federal Constitution's Equal Protection Clause, we find that the guarantees of equal protection in the Ohio Constitution independently forbid [the application of the statute]."[123] But beyond its emphasis on the Ohio Supreme Court's *power* to interpret the Ohio Constitution to provide greater protections than the federal Constitution, the decision in *Mole* provided no explanation of why—in this specific instance—the Ohio Constitution *would* provide greater rights than its federal counterpart.

120. *Mole*, 74 N.E.3d at 376 (emphasis added).

121. *Id.*

122. *Id.* at 376-77.

123. *Id.*

In dissent, Justice Kennedy accused the lead opinion of "without any analysis . . . depart[ing] from [] century-old precedent . . . [and] stretch[ing] the precedent of this court and that of the United States Supreme Court to the breaking point."[124] Justice Kennedy pointed to *Arnold* as a model of the analysis that Ohio courts ought to undertake in judicial federalism claims, reasoning that "[b]ased on our precedent, in order to hold that the Ohio Constitution is more protective than the federal Constitution, the lead opinion needs to point to some language in Article I, Section 2 of the Ohio Constitution that is different from the language of the Fourteenth Amendment."[125]

This heavy emphasis on textual interpretation presents a different mode of analysis for Ohio courts to undertake rather than the "prudent-and-not-inconsistent" standard espoused by the *Mole* plurality. Read literally, Justice Kennedy's dissent implied that an Ohio court *cannot* depart from federal precedent *unless* it can point to meaningful textual (or historical) differences between state and federal provisions. While some judicial federalism scholars reject this assertion,[126] it represents a plausible interpretation of Ohio's (murky) precedent.[127] Moreover, a handful of post-*Mole* decisions have pointed to a lack of textual differences between state and federal provisions as a reason to strip state constitutional claims of independent force.[128] To be sure, the role of text is critically important (see Part V below), but based on the *Mole* plurality, in Ohio it is not the only consideration.

Finally, Justice French's *Mole* dissent offers yet another possibility. Justice French insisted that a finding of greater state-constitution protections would require "an independent analysis of the equal-protection guarantee in Article I, Section 2 of the Ohio Constitution premised on its language, history, or early understandings" that presents "compelling reasons why Ohio constitutional law should differ from the federal law."[129] Although Justice French's approach avoids the rigidity of

124. *Id.* at 390 (Kennedy, J., dissenting).

125. *Id.* at 392.

126. Saphire, *supra* note 5, at 460 (citing Brennan, *State Constitutions*; Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 639-40 (1994)).

127. *See, e.g.*, Saphire, *supra* note 5, at 459-60 (discussing Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999)).

128. *See, e.g.*, State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020) (rejecting claim that the Ohio Constitution's double jeopardy provision is broader than the double jeopardy provision under the Fifth Amendment, noting that "[t]he wording of [Article I, Section 10 of the Ohio Constitution and the Fifth Amendment to the United States Constitution] is nearly identical"); Ohio v. Jordan, No. 2020-0495, slip op. at 7 (Ohio Nov. 9, 2021) ("Article I, Section 14 of the Ohio Constitution contains virtually identical language" as the Fourth Amendment.).

129. *Mole*, 74 N.E.3d at 398-99 (French, J., dissenting) (quoting State v. Brown, 39 N.E.3d 469, 504 (French, J., dissenting)).

Justice Kennedy's, it still requires "compelling" reasons to depart from federal constitutional law, which would seemingly create a strong presumption that state and federal constitutional law are coextensive. And, despite the fact that Justice French rejected the lead opinion's interpretation of Article I, Section 2, her opinion itself never grappled with the "language, history, or early understanding" of that provision and, thus, provides little practical guidance to courts if they were to apply her standard.

Although *Mole* represents the most significant recent judicial federalism case in Ohio, it generated three contradictory approaches to judicial federalism (without commanding a majority for any approach). And even the lead opinion failed to fully explain the standard it was embracing. Subsequent cases have failed to elucidate matters—at least so far. Absent more precise guidance from the Ohio Supreme Court, this creates confusion for lower courts and may encourage the tendency of collapsing the federal and state constitutional rights. But this then perpetuates us in the very trap we're trying to avoid.

B. Challenges for Practitioners

More than one scholar of judicial federalism lays blame for the under-developed state constitutional law not on state court judges, but on state court practitioners.[130] After all, the Ohio Supreme Court can hardly be criticized for a dearth of precedent on state constitutional issues when Ohio lawyers fail to preserve and brief state constitutional issues.[131] But this road runs both ways: It is hardly fair to ask Ohio litigants to pour time, effort, and money into developing state constitutional claims when the prospects of a victory seem tenuous at best. Even where the law recognizes multiple interpretations, lawyers will make strategic choices about the claims that they bring based on the signals they receive from the state's highest court.[132] The Ohio Supreme Court's signals on judicial federalism have been mixed at best—and inconsistent at worst.

Richard S. Price described the problem succinctly in his 2015 article, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*.[133] Price conducted a comparative analysis of state and federal constitutional law claims over several decades and across

130. Richard S. Price, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*, 78 ALB. L. REV. 1393, 1405 n. 78 (2015).

131. *See, e.g.*, State v. Dibble, 150 N.E.3d 912, 916, n. 1 (Ohio 2020) ("Curiously, the parties have not presented any arguments under the Ohio Constitution in this court or in the proceedings below. Thus, we have no occasion to consider here the protections afforded under Article I, Section 14 of that document.").

132. Price, *supra* note 130, at 1408.

133. *Id.*

four states: Ohio, New York, Washington, and Oregon.[134] His data confirmed that, among the four states, Ohio litigants raised the fewest state constitutional claims.[135] This trend held true even in search-and-seizure cases where federal claims were clearly doomed to fail: Ohio lawyers simply did not argue state law claims, or, when they did, they offered claims that were "[not] well developed" and burdened by "confusion result[ing] from the court's own jurisprudence."[136] For Price, the reason behind this state-law-claim disparity was clear:

> The [Ohio Supreme Court's] consistent refusal to treat the state search provision independently gave lawyers no guidance on how to make such arguments or any indication that the court wanted to hear such issues. Thus, lawyers provided the legal arguments they had been trained to provide and utilized the law their state courts gave them to work with—that is, federal constitutional law.[137]

The results of Price's study supported the common-sense proposition that "lawyers need law."[138] Without clear law on how to evaluate their judicial federalism claims, Ohio lawyers choose—for the most part—simply not to bring them.

> The review of Ohio's judicial federalism case law in Part II underscores Price's point. Even in cases where the Ohio Supreme Court has invoked judicial federalism to depart from federal precedent, it has consistently failed to explain *why* it is doing so, or how whatever standard it espoused will be applied in subsequent cases. This failure to expound on the court's decision-making process impedes future judicial federalism claims in a few ways.

First, attorneys will be hard-pressed to evaluate their prospects of success with a state constitutional claim and might hesitate to rely on a state constitutional claim when advising a client to reject a plea deal or settlement offer. The impression that state law claims are losers—accurate or not—likely causes many of those claims to die before they can reach appellate courts. Richard Saphire, for example, recalls his enduring impression as a practitioner that the Ohio Constitution was "quite unlikely to be a source of any robust jurisprudence of individual rights."[139] In a similar vein, Justice Fisher once wrote that "I do not fault [the defendant] for failing to raise this issue under the Ohio Constitution. Indeed, this court's precedent would discourage even a seasoned attorney

134. *Id.* at 1409-11.
135. *Id.* at 1427-29.
136. *Id.* at 1430.
137. *Id.* at 1432.
138. *Id.* at 1453.
139. Saphire, *supra* note 5, at 443.

from raising such an argument."[140]

Next, the lack of a principled interpretive lens for evaluating judicial federalism claims prevents effective briefing and argument on claims that actually *are* brought. Where is an attorney presenting a judicial federalism claim supposed to look for support? Case law is relatively unhelpful: the court's tendency of false starts in the judicial federalism context renders the vitality of (already sparse) precedent questionable.[141] Constitutional history might be a good bet, but as discussed above, at least some members of the court believe that such history is largely irrelevant in the absence of textual differences between state and federal constitutional provisions.[142] Policy arguments face a similar hurdle: we simply don't know whether a majority of the court would treat policy considerations as relevant to a judicial federalism claim, let alone decisive. Without direction from the court on how a judicial federalism claim will be assessed, an attorney's best course is probably an "everything-but-the-kitchen-sink" approach—but this too raises problems. Even a litigant arguing a single state law claim will be hard-pressed to address all relevant case law, textual interpretation, constitutional history, and public policy arguments in the confines of one brief. Litigants bringing multiple claims (and working with less space) have almost no guidance on how to triage their arguments.

Practitioners, however, should not despair. The Ohio Supreme Court has recently suggested an openness to some state constitutional claims—especially in the equal protection context. Justice Fischer's assertions that the Ohio Supreme Court should "reexamine the Ohio and federal Equal Protection Clauses"[143] and that "[p]arties should not presume that rights afforded to a person under the United States Constitution . . . are the same rights as those afforded to a person under the Ohio Constitution"[144] are practically a flashing neon sign, saying: "Lawyers, bring your state equal protection claims here!" And it's not just Justice Fischer. Where the parties fail to properly raise an issue under the Ohio Constitution, it has become commonplace for the Ohio Supreme Court to explicitly "leave[] open the question whether the Ohio Constitution might offer greater rights and protections to our citizenry under these circumstances."[145] Language

140. State v. Hackett, 172 N.E.3d 75, 81-82 (Ohio 2020) (Fisher, J., concurring).

141. Consider, for example, the questionable status of the court's "functional equivalents" precedent in equal protection claims. *Supra* Part II.C.2.

142. *See supra* Part III.A.

143. Stolz v. J & B Steel Erectors, Inc., 122 N.E.3d 1228 (Ohio 2018) (Fischer, J., concurring).

144. *Hackett*, 172 N.E.3d at 82.

145. State v. Dibble, 150 N.E.3d 912 (Ohio 2020). *See also* State v. Tidwell, 175 N.E.3d 527, 531 n.1 (Ohio 2021) ("The court of appeals and the argument section of Tidwell's merit brief filed in this court each made a single reference to Article I, Section 14 of the Ohio Constitution. Because the decision below and the arguments on appeal are based entirely on Fourth Amendment jurisprudence, we likewise decide

of this nature may hint that the Ohio Supreme Court is interested in re-evaluating the protections provided by the Ohio Constitution and, perhaps, interpreting them with independent force. It is time for practitioners to respond to these hints and advance theories under state constitutional principles. Since courts generally do not address issues that the parties did not raise, courts need practitioners to develop these arguments in order to force courts to explore the protections provided by the state constitution.

Unfortunately, Ohio's decades-long flirtation with judicial federalism has become a self-fulfilling prophecy: Lawyers choose not to bring judicial federalism claims because they lack clear legal standards to follow; and this lack of meritorious judicial federalism claims prevents the court from developing clearer legal standards. The discussion above on search-and-seizure and equal protection jurisprudence is representative for how Ohio courts have approached such matters.

While there is no immediate fix for this problem, the time has come to provide a workable framework with which to analyze state constitutional claims. In the following Part, we will articulate how a "primacy" model could help move Ohio toward a more coherent, sustainable form of state constitutional interpretation. If we force ourselves to evaluate state constitutional law claims first, it compels us to develop better methodologies for evaluating those claims, thereby creating a more sustainable body of caselaw from which lawyers and judges can draw.

V. THE PRIMACY MODEL: OHIO'S PATH TO A COHERENT APPLICATION OF JUDICIAL FEDERALISM

Although some commentators have expressed concern about the potential for judicial federalism to generate outcome-oriented results, the alternative—blind adherence to a lockstep approach—represents an abdication of state sovereignty. States have different constitutional histories, and often different texts, than the federal constitution. Why would we conflate these? More importantly, we have positive, empirical

this case on that body of law."); State v. Hairston, 126 N.E.3d 1132, 1135 n.1 (Ohio 2019) ("The parties have not presented any argument under the Ohio Constitution; thus, we do not consider whether different standards might apply under the two provisions."); State v. Weber, 168 N.E.3d 468, 482 (Ohio 2020) (DeWine, J., concurring) ("The text of the Second Amendment provides that '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' The Ohio Constitution has a similar provision: 'The people have the right to bear arms for their defense and security * * *.' Because Weber bases his arguments on the Second Amendment, and because the lead opinion analyzes the right under the Second Amendment, I too will limit my focus to the federal guarantee."); State v. LaRosa, 179 N.E.3d 89, 95 (Ohio 2021) ("Because [the defendant] offers no argument specific to the Ohio Constitution and because he does not argue that its protections differ from those provided by the Fourth Amendment, our analysis focuses on only the Fourth Amendment's application in this case.").

experience to draw from, with several states applying judicial federalism, specifically the primacy model, in a consistent, articulable fashion. By answering the sequencing question (which claim, if any, do we analyze first) through the primacy model, it enables those courts to devote time and precision to the ensuing methodological question (how should we analyze this state constitutional claim?).

Some might question whether it makes sense to tackle the state constitutional question first if that poses a difficult analysis and the inquiry under the federal constitution is straightforward. By the same token, a court may wish to fully engage in the federal constitutional analysis even if it grants relief under the state (as an alternative holding). My point here is not to place strict parameters on the primacy model, because judicial discretion certainly can come into play. Rather, by adopting a mindset that courts will engage with state constitutional questions first, we promote an environment whereby such questions receive considerable attention from lawyers and judges alike. And we create a body of jurisprudence on the state constitution that is both thoughtful and engaged but also independent of federal guidance.

To see how this might look in practice, it is helpful to consider the experiences of some states that have adopted the primacy model.[146] For example, the Delaware Supreme Court has articulated perhaps the most detailed and systematic version of the primacy model, instructing courts to consider the following criteria when comparing state and federal constitutional provisions:

> (1) Textual Language—A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law. Textual language can be relevant in either of two contexts. First, distinctive provisions of our State charter may recognize rights not identified in the federal constitution. . . .
> Second, the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis . . . .
> (2) Legislative History—Whether or not the textual language of a given provision is different from that found in the federal Constitution, legislative history may reveal an intention that will support reading the provision

146. *See*, *e.g.*, State v. Perry, 610 So.2d 746, 750 (La. 1992) ("Greater judicial efficiency and coherence are promoted when we address state [constitutional] law issues first."); State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986) ("[A] state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right."); State v. Chaisson, 486 A.2d 297, 301 (N.H. 1984) ("We, of course, address the State constitutional issues first."); Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986) ("In construing the Arizona Constitution we refer to federal constitutional law only as the benchmark of minimum constitutional protection.").

> independently of federal law. . . .
> (3) Preexisting State Law—Previously established bodies of state law may also suggest distinctive state constitutional rights. State law is often responsive to concerns long before they are addressed by constitutional claims. Such preexisting law can help to define the scope of the constitutional right later established.
> (4) Structural Differences—Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. The United States Constitution is a grant of enumerated powers to the federal government. Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.
> (5) Matters of Particular State Interest or Local Concern—A state constitution may also be employed to address matters of peculiar state interest or local concern. When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. Moreover, some matters are uniquely appropriate for independent state action. . . .
> (6) State Traditions—A state's history and traditions may also provide a basis for the independent application of its constitution . . . .
> (7) Public Attitudes—Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters. While we have never cited this criterion in our decisions, courts in other jurisdictions have pointed to public attitudes as a relevant factor in their deliberations.[147]

Delaware courts have used this guidance to aid in deciding cases. For example, after independently analyzing each of these factors, the Delaware Court of Chancery has held that the Elections Clause under the Delaware Constitution has "independent content" from the Fourteenth Amendment.[148] And in another case, the Delaware Supreme Court applied these factors to hold that the good-faith exception to the exclusionary rule violated Article I Section 6 of the Delaware Constitution.[149]

The detailed roadmap offered by Delaware courts provides workable guidance to lawyers and judges alike as they wrestle with state constitutional questions. In fairness, however, this implicates the methodological question (how should we interpret our state's constitution?) more than the sequencing question (which claim, if any, do

147. Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784, 811-12 (Del. Ch. 2015) (quoting Jones v. State, 745 A.2d 856, 864-65 (Del. 1999)). These factors are very helpful but they would not need to be all adopted in this manner by a court applying the primacy approach.

148. *Id.* at 813.

149. Dorsey v. State, 761 A.2d 807, 819 (Del. 2000).

we analyze first?). For that reason, not every state will agree with all facets of this approach as delineated in Delaware, but adopting the primacy model forces the state to engage in the debate about *how* its constitutional claims should be evaluated. Those methodological questions can be difficult and divisive, but we should have that debate in the open.

Utah courts also analyze a wide range of factors when comparing state and federal constitutional provisions. For example, in *West v. Thomson Newspapers*, the Utah Supreme Court considered whether a newspaper company could be liable for defamation under the free press provisions of the Utah Constitution.[150] The court held that the Utah Constitution secured broader freedom of press protections than the federal First Amendment, focusing on the textual differences between the state and federal constitutions, the legislative history behind Utah's free press provisions, and the history of journalistic practices in the state.[151] In a 2007 case, the Utah Supreme Court relied on the text of the Utah Constitution, as well as decisions from other states that use the primacy model, to adopt a case-by-case inquiry to determine whether the prosecution's failure to disclose evidence violates the defendant's rights under the due process provisions of the Utah Constitution.[152] In reaching this conclusion, the court rejected the United States Supreme Court's opinion in *Arizona v. Youngblood*, where the Court imposed a burden on the defendant to show that the prosecution's failure to disclose was in bad faith, because the court determined that such a requirement did not secure "fundamental fairness" and was thus inconsistent with Article I, Section 7 of the Utah Constitution.[153]

Texas has also demonstrated that the primacy model can be applied in a workable manner. For instance, in *Davenport v. Garcia*, the Texas Supreme Court determined that a gag order violated the Texas Constitution, concluding that the Texas Constitution secured broader free speech protections than the federal constitution.[154] The court focused on the history of the text of the Texas Constitution, which the court traced back to the days when Texas was a Mexican territory.[155] Although the Texas Supreme Court has, more recently, refused to determine whether Texas' free speech provisions are more robust than the First Amendment in cases that do not involve a gag order, Texas courts maintain that "in interpreting our own constitution, we 'should borrow from well-reasoned

150. West v. Thomson Newspapers, 872 P.2d 999, 1006, 1013 (Utah 1994).

151. *Id.*

152. State v. Tiedemann, 162 P.3d 1106, 1117 (Utah 2007)

153. *Id.* (citing Arizona v. Youngblood, 488 U.S. 51 (1988)).

154. Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992).

155. *Id.*

and persuasive federal procedural and substantive precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary.'"[156]

These cases confirm that the primacy model, particularly Delaware's version of it, can be applied in a consistent and principled manner. These experiences can provide valuable lessons for Ohio, as guidance from other states that use the primacy model can help define the contours of our judicial federalism jurisprudence. In so doing, Ohio constitutional law may begin to evolve in a way that appropriately safeguards Ohioans' rights consistent with our constitutional design.

VI. CONCLUSION

Ohio has a rich constitutional heritage,[157] and the primacy model would appropriately honor that history by reinvigorating Ohio constitutional interpretation. Many of our constitutional provisions differ markedly from their federal constitutional counterparts.[158] Indeed, much of Ohio's constitution was influenced by the experience of other states,[159] sometimes more so than the federal constitution. It's past time to give those differences their due rather than "abdicat[ing] our constitutional interpretation to Washington."[160]

The primacy approach to judicial federalism would compel Ohio courts to consider the text, history, and purpose of Ohio's constitutional provisions first, before turning to the federal constitution. It would shine a spotlight on all of those areas where courts have treated state constitutional claims differently without explaining the why or how and hopefully provide answers to those questions. This practice will help develop a strong body of jurisprudence around our constitution and encourage lawyers to frame their constitutional arguments with a state-centric lens. Lawyers and courts, working together, can restore the independent force of the Ohio Constitution that our founders intended.

156. Kinney v. Barnes, 443 S.W.3d 87, 92 (Tex. 2014) (quoting *Davenport*, 834 S.W.2d at 20).

157. *See generally* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO CONSTITUTION: A REFERENCE GUIDE (2d ed. Forthcoming 2022).

158. *See, e.g.*, *supra* note 60 (citing the text of the First Amendment and Ohio's analogous provisions).

159. McClain v. State, No. C-200195, 2021 Ohio App. LEXIS 1401, ¶ 52 (Ohio Ct. App. Apr. 23, 2021) (Bergeron, J., dissenting) (citing City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006) (using "out-of-state opinions as guidance in interpreting Ohio's Constitution.")).

160. State v. Banks, Nos. C-200395 & C-200396, 2021 Ohio App. LEXIS 4253, ¶ 49 (Ohio Ct. App. Dec. 10, 2021) (Bergeron, J., concurring).