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# A Failed Critique of State Constitutionalism

David Schuman
*University of Oregon*

## CORRESPONDENCE

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James A. Gardner begins *The Failed Discourse of State Constitutionalism*[1] with a story describing "the experience of a great many lawyers in this country."[2] The protagonist is an attorney whose client has an unlawful discrimination claim that for some reason cannot succeed under the U.S. Supreme Court's current equal protection jurisprudence. The attorney decides to present an argument based on her state constitution's equality guarantee, only to discover that the universe of material from which a plausible argument, not to mention a rich discourse, might emerge — existing case law and scholarship, "useful tidbits"[3] of constitutional history and philosophy from the state's jurists — is either thin, incoherent, derivative, or nonexistent.[4] The moral of Professor Gardner's story is that state constitutional discourse is impoverished.

I propose a different story. The time is the present. The place is Oregon. My protagonist, like Gardner's, has a client claiming unlawful discrimination. Heeding both the judicial[5] and extrajudicial[6] advice of the state's supreme court justices, she turns to the state constitution before even contemplating a challenge under the Equal Protection Clause. What she finds is a well-developed, carefully reasoned line of cases that does not significantly refer to federal law.[7]

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* Associate Professor of Law, University of Oregon. B.A. 1966, Stanford; Ph.D. 1974, University of Chicago; J.D. 1984, University of Oregon. — Ed.

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

2. *Id.* at 764.

3. *Id.* at 765.

4. *Id.* at 763-66.

5. *See, e.g.,* Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).

6. *See* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts,* 17 WILLAMETTE L. REV. 641 (1983); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379 (1980).

7. *See* Zockert v. Fanning, 800 P.2d 773 (Or. 1990); Sealey v. Hicks, 788 P.2d 435 (Or. 1990); Hale v. Port of Portland, 783 P.2d 506 (Or. 1989); Hunter v. State, 761 P.2d 502 (Or. 1988); City of Salem v. Bruner, 702 P.2d 70 (Or. 1985); State v. Freeland, 667 P.2d 509 (Or. 1983); Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970 (Or. 1982); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982); State v. Edmonson, 630 P.2d 822 (Or. 1981); State v. Clark, 630 P.2d 810 (Or. 1981); Monroe v. Withycombe, 165 P. 227 (Or. 1917);

These cases develop an entirely different method of analysis — one that does not include, for example, levels of scrutiny, fundamental rights, or suspect classes.[8] Further, the Oregon analysis is based on the particular language of the Oregon Constitution[9] as well as its historical, political, and cultural context.[10] It is sensitive to the general philosophy of Oregon constitutional jurisprudence as developed by the state's appellate courts over recent decades.[11] To refine her understanding of the case law, the Oregon attorney can also refer to a variety of scholarly articles devoted to the state equality guarantee.[12] In short, her research will quickly lead her to a richly textured, locally rooted state constitutional discourse, the lexicon of which she can then employ in fashioning her own contribution.

The Oregon practitioner could also find original, thorough, and coherent analyses of other frequently litigated provisions of the Oregon Constitution — analyses based in most cases on distinctly local history, text, culture, and traditions. For example, in Oregon, where

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Altschul v. State, 144 P. 124 (Or. 1914); White v. Holman, 74 P. 933 (Or. 1904); *In re* Oberg, 28 P. 130 (Or. 1891).

8. I have described this analysis as follows:

> The first step . . . is to classify the challenged discrimination as implicating either a true class [i.e., a pre-existing, socially-recognized self-conscious group], a "pseudo-class" [i.e., a group created or called into existence by the challenged state action itself, with no prior existence as a group], or an individual. Each of these types of discrimination is governed by different principles and rules. The government may not discriminate against a true class if the class is based on some immutable social or personal characteristic, and the classification derives from an invidious prejudice or stereotype. "Pseudo-class" discrimination is impermissible when the law does not leave entry into that class open on the same terms to all citizens. Distribution of privileges or immunities to individuals must proceed according to systematic criteria consistently applied; ad hoc, haphazard treatment, or treatment based on other impermissible or unauthorized criteria will be unlawful.

David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 244-45 (1988) (citations omitted).

9. Article I, § 20 of the Oregon Constitution reads: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." The Supreme Court of Oregon has noted that this provision guarantees equality not only to all classes of citizens, but to all citizens as individuals. This latter guarantee ensures that the state cannot distribute benefits or burdens unsystematically. State v. Clark, 630 P.2d 810, 814 (Or. 1981).

10. *See Clark*, 630 P.2d at 814. The court noted that the Oregon Constitution's equality provision predates the abolition of slavery, originating at a time when equality jurisprudence focused not on claims against oppression but against special privilege. 630 P.2d at 814. In fact, the population that ratified this provision also ratified a provision barring the immigration of blacks into the state. *See* OR. CONST. art. I, § 35 (repealed 1926).

11. For example, in several types of constitutional cases, the court has indicated that it will not engage in judicial balancing. *See, e.g.*, Salem College & Academy, Inc. v. Employment Div., 695 P.2d 25 (Or. 1985) (religion); State v. Kennedy, 666 P.2d 1316 (Or. 1983) (criminal procedure); State v. Robertson, 649 P.2d 569 (Or. 1982) (free expression).

12. *See* Simone Liebman, *Striking a Parental Notification Statute Under Oregon Constitutional Law*, 70 OR. L. REV. 651 (1991); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 140-43 (1970); Schuman, *supra* note 8; Jon P. Stride, Comment, *Oregon's System of School Finance: A Challenge to Constitutional Principles and Tradition*, 69 OR. L. REV. 295 (1990).

the supreme court eschews judicial balancing[13] and the constitutional free speech guarantee prohibits government restraint of expression "on any subject whatever,"[14] the only permissible speech limitations are those that were well established when the constitutional guarantee was adopted and that the guarantee was manifestly not designed to eliminate — such as liability for perjury or fraud.[15] Thus, noting that "Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views," and that "most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others," the Oregon Supreme Court has held that the Oregon Constitution protects even pornographic or obscene expression.[16]

Contrary to Gardner's thesis, the Oregon experience demonstrates what every Oregon lawyer knows: state constitutional law does not have to be infrequent, grudging, obscurely reasoned, unoriginal, or silent with respect to local history and culture. A state — even an out-of-the-way and relatively new one like Oregon — can develop a strikingly independent universe of constitutional references and a constitutional culture completely distinct from the one used by the U.S. Supreme Court.

This is not to say that many states have done so. Gardner is surely correct in his conclusion that state constitutional discourse in most jurisdictions, including the ones he surveys, is impoverished.[17] But as the Oregon experience demonstrates, once it becomes clear that a state's highest court is serious about the primacy and independence of

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13. *See supra* note 11 and accompanying text.

14. OR. CONST. art. I, § 8.

15. *See Robertson*, 649 P.2d at 576.

16. *See* State v. Henry, 732 P.2d 9, 16 (Or. 1987). Oregon search-and-seizure jurisprudence is equally independent. For example, the definition of *search* has nothing to do with anybody's "reasonable expectation of privacy," Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), but with whether or not the official conduct in question, if indulged in by government agents at will, would reduce the people's freedom from unwanted scrutiny. State v. Campbell, 759 P.2d 1040, 1048 (Or. 1988). Nor may state officials conduct an "administrative search" whenever the government's need outweighs the individual's; rather, the search must be authorized by either judicial warrant or legislation defining the purpose and scope of the intrusion. *See* State v. Bridewell, 759 P.2d 1054 (Or. 1988); *cf.* INS v. Delgado, 466 U.S. 210 (1984) (upholding administrative search under U.S. Constitution).

17. I suggest that this has nothing to do with inherent qualities of state constitutionalism. Rather, the reason is that state supreme court judges must introduce, demand, and subsequently nurture constitutional discourse. This is not an easy task. Presented with the option of either plugging particular facts into the U.S. Supreme Court's latest balancing test or multipronged analysis, or fashioning a coherent and original interpretation of the state charter from its text, history, and preincorporation case law, most judges facing overcrowded appellate dockets (not to mention lawyers facing cost-conscious clients) opt for the former.

the state constitution, lawyers and lower courts will begin to participate vigorously in the development of a rich and useful discourse. Because this experience proves that a carefully, patiently, and systematically cultivated state constitutionalism can produce such discourse, the inference to draw from the failure in other jurisdictions is not, as Gardner argues, that they should practice less state constitutionalism, but that they should practice it more and better.[18]

Gardner's argument, in any event, is that more state constitutional law is not only undesirable, but impossible. Acknowledging that my proposal for a state constitutionalism based on local culture is a "powerful" narrative that "hold[s] out the greatest hope for . . . independent state constitutional discourse,"[19] Gardner nevertheless argues that this hope "make[s] no sense" because (1) state constitutions do not in fact describe distinctive and coherent ways of life, (2) state constitutionalism is incompatible with national constitutionalism, and (3) as a people we have chosen to resolve this incompatibility in favor of the nation.[20] The existence of a distinctive and thriving state constitutional law in at least one jurisdiction refutes these arguments. They also fail on their own terms.

At the core of Gardner's assertion that state constitutions do not reflect significant local variations in culture is his observation that many of the distinctive provisions in state constitutions are either trivial,[21] "the result of pluralistic logrolling,"[22] or both. Thus, he argues, they are incapable of revealing anything meaningful about the citizenry's character or addressing that character in appropriately distinctive language. But courts in most instances should have no difficulty

18. Perhaps I am more reluctant than Gardner to abandon "impoverished" state constitutionalism in favor of its "successful," "rich," and "vigorous" federal analogue because I find recent *federal* constitutionalism to be impoverished — not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) (calling majority opinion "bulldozer," 112 S. Ct. at 2679; "embarrassment," 112 S. Ct. at 2681; "psychology practiced by amateurs," 112 S. Ct. at 2681; "beyond the absurd," 112 S. Ct. at 2682; "distortion[ ] of the record," 112 S. Ct. at 2683; "precious," 112 S. Ct. at 2683; "bedeviled (so to speak)," 112 S. Ct. at 2685; and "a jurisprudential disaster," 112 S. Ct. at 2685); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (characterizing issue as whether Constitution contains fundamental right to engage in homosexual sodomy; concluding respondent's claim that Constitution protects right to choose intimate companions is "facetious"); Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (calling objection, on Establishment Clause grounds, to city-sponsored celebration of birth of Christ a "stilted overreaction"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to subject unequal school funding scheme to heightened scrutiny because case presents no "suspect class" or "fundamental right").

19. Gardner, *supra* note 1, at 817 (citing David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 285 (1989)).

20. *Id.* at 817-18.

21. *Id.* at 819-20.

22. *Id.* at 821.

distinguishing between fundamental constitutive provisions and other, statute-like provisions that happen to be located in a document formally styled a "constitution," usually as the result of some single-issue plebiscite. Fundamental constitutive provisions are directed to the general distribution of state powers, or they embody substantive values that citizens would identify as basic and shared.[23]

Once the nonconstitutive portions of state constitutions, the merely political as opposed to the foundational, are filtered out, the remaining document may indeed contain significant peculiarities of text revealing local character. But even if the remaining words of the document are not particularly distinctive, their accent marks, their connotations, can be. Members of a state's legal community can inform the interpretation of the state constitution with local values and traditions. They can give distinctive meaning to the undistinctive text by interpreting it from their positions as members of a particular legal culture, lawyers in a particular place and time. Despite Gardner's arguments about the dangers of incompatibility and the nonexistence of distinctive state identities, that endeavor is a practicable and worthy one.

Gardner's "incompatibility" argument presents the following syllogism: America is a national community with a shared culture of universal norms enshrined in the U.S. Constitution. State constitutionalism presumes state communities of shared norms that are "different" or "incompatible" with the national one. Thus, since "only one constitution at a time can ever truly and safely reflect the essential character and fundamental values of a people,"[24] giving emphasis to state constitutions will lead to dangerous Balkanization.

The first problem with this reasoning is its major premise, which uses the inherently oxymoronic phrase *national community.* But even conceding that such a thing could exist, it does not follow that it must displace smaller, included communities. As observers of America since de Tocqueville have noted, we are a nation of overlapping and layered loyalties encompassing a multitude of communities,[25] many of which (for example, church and state) are far from incompatible.

23. Hanna Fenichel Pitkin, *The Idea of a Constitution,* 37 J. LEGAL EDUC. 167 (1987). In describing a constitution, Pitkin notes the two senses in which the word is used in our language: first, as "composition or fundamental make-up, . . . characteristic frame or nature," or what a stranger would learn of us from watching our conduct; and second, as "founding, framing, shaping something anew." *Id.* at 167-68; *see also* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013 (1984) (distinguishing "ordinary" from "extraordinary" lawmaking).

24. Gardner, *supra* note 1, at 827-28.

25. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 191 (Phillips Bradley ed. & Francis Bowen trans., Alfred A. Knopf 1945) (1862); 2 *id.* at 106-10.

Gardner's reference to "different or incompatible values"[26] glosses over a crucial distinction. Federal constitutional values do not compete with "different" state ones in the sense that they present citizens with "incompatible" choices. Under the Guaranty Clause[27] and the Supremacy Clause,[28] citizens are never free to choose substantive state values that conflict with federal ones; they can only choose state values that add to or embellish them. It makes no sense to argue that a value revealed by a more expansive right conflicts with the value revealed by a lesser one. This fact stems from the nature of constitutional values: they define what citizens have, not what they lack. The value embedded in the First Amendment has to do with how much freedom of expression Americans have, not how much authority to stifle it the government has. The Fourth Amendment declares that Americans value freedom from unreasonable searches; it does not declare that Americans value governmental authority to conduct all other searches. If the citizens of Oregon choose to protect pornographic expression[29] instead of allowing it to be criminalized, or to require warrants or legislative authorization even for so-called "administrative" searches,[30] they are not in conflict with differing federal value choices; the U.S. Supreme Court has simply said that Americans, through their Constitution, value *at a minimum* the freedom to engage in certain forms of expression and to be free from certain forms of government scrutiny. States remain free, in other words, to *add to* the national values given voice in the U.S. Constitution, which constitute a core, an irreducible minimum. An Oregonian shares fundamental constitutive values with all Americans and also a larger set with all other Oregonians.

The problem, then, is not incompatibility but choice. Noting the "vigor of federal constitutional discourse,"[31] Gardner concludes that "[t]he tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level."[32] The social consensus in favor of national constitutionalism, however, did not result from some inherent national

26. Gardner, *supra* note 1, at 824.

27. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . .").

28. U.S. CONST. art. VI.

29. *See* State v. Henry, 732 P.2d 9 (Or. 1987).

30. *See* State v. Bridewell, 759 P.2d 1054 (Or. 1988).

31. Gardner, *supra* note 1, at 828.

32. *Id.*

superiority, constitutional or otherwise. Nor, as Gardner correctly observes, did it come about because the incorporation doctrine "required state courts to look to federal law."[33] Rather, it resulted from the unwillingness of many state courts, particularly in the South, to use their own constitutions to protect their citizens from state overreaching. The incorporation doctrine arose to allow these citizens to bring their claims in federal court, under the federal Constitution. Once the Warren Court had developed expansive interpretations of citizens' federal constitutional rights, state courts had no incentive to vindicate rights under the state constitution — even if litigants had been feckless enough to claim them. During this period, raising state constitutional issues became futile. Thus, the "social consensus" in favor of the federal Constitution arose to fulfill a need that no longer exists; today, the states' constitutions frequently offer *more* protection than their federal counterpart. Increasing reliance on state constitutions is simply a return to normalcy.

Further, the "collapse of meaningful state identity" is as much a *result* of the hegemony of national constitutionalism as its cause. The relationship between identity and constitution is reciprocal and complex: identity creates constitution, and constitution creates identity. The Warren Court is at least partly responsible for shaping a generation of lawyers, scholars, politicians, and ordinary citizens who believe that *the constitution* means *the U.S. Constitution* and have therefore lost the habit of regarding a state as a political body that can have its own constitutional identity. As the Oregon example demonstrates, that habit of mind can be recaptured. For those of us who believe that the nation is too large a polity ever to achieve meaningful community, the recent weakening of distinctive state identities argues *for* a vital state constitutionalism as a restorative tonic.

Professor Gardner accurately depicts the depressed condition of state constitutional discourse in many jurisdictions. From that perfectly reasonable premise, he moves to an argument that state courts should abandon their attempts to improve it because that endeavor is inherently impossible and, in any event, undesirably schismatic. This argument ultimately fails, because he provides no convincing evidence that the development of sophisticated and vigorous state constitutional law is either impossible or unwise. By contrast, Oregon, as just one example, has shown that a state can develop a sophisticated independent constitutional culture without any noticeable threat to national values.

33. *Id.* at 806.