



PENN STATE LAW REVIEW

What State Constitutional Law Can Tell Us About the Federal Constitution

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INTRODUCTION

Courts and scholars have long sought to illuminate the relationship between state and federal constitutional law. Yet their attention, like the relationship itself, has largely been one-sided: State courts have consistently adopted federal constitutional law as their own, and scholars have attempted to illuminate why this is, and why it should or should not be so. By contrast, federal courts tend *not* to look to state constitutional law, even for persuasive authority. Nor have scholars argued at any length that federal courts can or should look to state constitutional law for guidance in answering the many constitutional questions common to the federal and state systems.

This short Article attempts to turn the focus around, by asking what state constitutional law can tell us about the federal constitution. The thesis explored here is that federal constitutional doctrine can and sometimes should do more to draw on state constitutional law, particularly when that law addresses—as it often does—analogue language or problems with which the federal courts have little experience. The Article calls this idea “reverse incorporation” for lack of a better phrase, but “federal constitutional borrowing of state constitutional law” would probably be more accurate, if a bit clunkier. In any event, the phrase is not meant to invoke the “reverse” incorporation

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My thanks to the law school for hosting the symposium, to Jamison Colburn and Gary Gildin for organizing it, to participants—especially Robert Williams and Jim Rossi—for their valuable feedback, to participants in the Cornell Constitutional Law Colloquium—especially Josh Chafetz, Michael Dorf, and Aziz Rana—and to Thomas Dominic for research assistance.

associated with *Bolling v. Sharpe*,¹ but to denote a wide range of “uses”: from looking to state doctrine as persuasive authority in federal cases to using it to *define* federal law.

Elsewhere, I have described this thesis in depth, considered some of the arguments for and against it, and sketched out some tentative normative claims about when and how federal constitutional law should draw more from state constitutional law.² This short piece presents an abbreviated version of the major arguments for and against such borrowing. It then goes on to address how reverse incorporation, like any interpretive tool, must be tailored to one’s preferred constitutional theory and to the particular constitutional issue presented. An originalist and a pragmatist will have very different uses for state constitutional law, for example, and will use it differently in Eighth Amendment cases than in Due Process cases. After identifying some of the concerns relevant to that kind of theory—and issue-tailoring, the Article concludes by addressing some general questions about the normative vision behind reverse incorporation.

I. REVERSE INCORPORATION OF STATE CONSTITUTIONAL LAW

Federal and state constitutions are interrelated in their history, text, traditions, and doctrine. State-level rights guarantees served as the model for many of the most familiar features of the Bill of Rights and of American constitutional law.³ As Justice Brennan noted, “Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.”⁴ But for a variety of reasons, arguably including the decline of state identity and inarguably including the rise of

1. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In that case, the Court held that the Fourteenth Amendment—whose language refers only to the states—applies to the federal government, a conclusion sometimes referred to as reverse incorporation. I use “reverse” to capture the fact that the approach I describe encourages the application of state constitutional law in federal doctrine. This is in some sense the “reverse” of the usual constitutional incorporation, which applies federal doctrine against the states. *Id.* at 500.

2. See Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011).

3. See Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 989 (1996) (“State charters are the foundation of American Constitutional law.”); see generally Gordon S. Wood, Foreword, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993) (discussing the role of state constitutions in establishing “the primary conceptions of America’s political and constitutional culture”).

4. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

incorporation doctrine,⁵ federal constitutional law eventually took center stage. Because federal rights guarantees came to bind the states in almost all particulars, and because the Warren Court interpreted those guarantees so broadly, the states' own constitutional guarantees became essentially superfluous.⁶ Constitutional litigation focused on federal rights, and state constitutional doctrine withered.

The perceived retraction of federal rights guarantees—particularly those of criminal defendants—under the Burger Court inspired something of a state constitutional law renaissance, or at least inspired calls for one. Often referred to as the “New Judicial Federalism,” this revitalization of state constitutional law was closely associated with Justice Brennan’s 1977 *Harvard Law Review* article, which called on state courts to interpret broadly their states’ constitutional guarantees.⁷ The idea, of course, was that state constitutional doctrine—once sidelined by the Warren Court’s expansive jurisprudence—might exceed the federal floor and guarantee rights left unprotected by the Supreme Court.

Despite Brennan’s entreaties, many if not most state courts continued to apply federal constitutional law as if it were their own. This approach, long lamented by many scholars of state constitutional law (not to mention state judges), is known as “lockstepping,”⁸ and remains perhaps the most common mode of state constitutional decisionmaking.⁹ Of course, the fact that state courts tend to adopt federal doctrine does not mean that they are obligated to do so. Indeed, Brennan’s invitation remains open: State courts are free to interpret their state constitutional rights guarantees more broadly (or less, though not to

5. See David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 280 (1992) (arguing that incorporation doctrine “resulted from the unwillingness of many state courts, particularly in the South, to use their own constitutions to protect their citizens from state overreaching”).

6. James A. Gardner & Jim Rossi, Foreword, *The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231, 1232–33 (2005) (noting that after the Warren Court’s expansive reading of individual rights, “state constitutional law was seen, not illogically, as in some fundamental way subordinate to national constitutional law”).

7. Brennan, *supra* note 4; Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (describing Brennan’s article as the “Magna Carta of state constitutional law”).

8. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102 (2000) (“Under the lockstep approach, the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court’s interpretation of the textual provision at issue.”).

9. Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1850 (2004) (“Despite . . . criticism, the lockstep approach remains the most common approach to state constitutionalism.”).

any effect)¹⁰ than the federal courts do analogous federal guarantees. And yet in practice state courts essentially treat federal constitutional law as if it were, if not binding, at least a strong form of persuasive authority.

There is, however, no reason why federal courts could not engage in the same kind of borrowing when, for example, they confront constitutional issues on which state constitutional law is well-developed and federal constitutional law is not. After all, federal constitutional law is no more (or less) bound by state constitutional law than state constitutional law is bound by federal law.¹¹ Federal judges are therefore just as free as their state counterparts to use the other's law as guidance, and occasionally issues arise for which the states have a relatively uniform and well-developed jurisprudence on a question with which the federal courts have little or no experience. The standard of review applicable to the "individual" right to bear arms is a timely example: Every state court to reach the question has employed a "reasonableness" standard for evaluating gun control laws,¹² and yet the Supreme Court in *Heller*¹³ and *McDonald*¹⁴ apparently declined to adopt such a test.¹⁵

But pointing out an asymmetry is not the same as making a convincing case for its correction, and so it is important to consider some of the arguments for and against federal borrowing of state constitutional law. I have explored these issues in more depth elsewhere,¹⁶ but a short summary is perhaps appropriate, beginning with the arguments in favor.

First, increased use of state constitutional law may help vindicate our constitutional commitment to federalism. States are often said to be "laboratories" whose experimentation with law and policy should be encouraged,¹⁷ and federal borrowing of state constitutional law provides

10. Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1127 (1992) ("[N]othing in federal constitutional law prevents state courts from interpreting state law more narrowly than federal, despite the fact that they are barred [by the Supremacy Clause] from enforcing the less-protective state law.").

11. The Supremacy Clause may render state constitutional law irrelevant where it conflicts with federal law, but that does not necessarily mean that state courts must interpret state constitutional law so as to avoid such conflict.

12. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686-87 (2007).

13. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

14. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010).

15. It is not entirely clear whether the *McDonald* plurality rejected the reasonableness test or simply declined to adopt it. Elsewhere, it approvingly cited a brief filed by thirty-eight state attorneys general arguing that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* at 3046.

16. See Blocher, *supra* note 2, at Part II.

17. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single

a relatively straightforward way for federal courts to learn from those lab experiments. If the state courts say that the exclusionary rule is the only way to prevent police misconduct, for example, then federal courts might be well served to follow the same path when developing Fourth Amendment doctrine.¹⁸ Moreover, on a more theoretical level, if federalism is supposed to divide or share power between the political branches of the state and federal governments, why not do the same with interpretive power within the judiciary?

Second, state constitutional law can serve as a relatively “objective” measure of current constitutional values. Of course, contemporary constitutional values are not relevant to all interpretive theories, nor to all legal issues. But they are often thought to be important when it comes to questions like what punishments are “cruel and unusual” and therefore violate the Eighth Amendment,¹⁹ or what rights are “fundamental” to a scheme of ordered liberty and thus incorporated against the states through the Fourteenth Amendment’s Due Process Clause.²⁰ A widespread and generally uniform state constitutional practice can be useful evidence in that regard. If state constitutions unanimously prohibit a certain punishment, for example, then it may be more confidently said that the punishment is “cruel and unusual” for the purposes of the Eighth Amendment.²¹ To the contrary, if the practice is widely accepted, that may be evidence of its constitutionality.²²

Third, borrowing of state constitutional law would appear to be a near-ideal kind of comparative constitutional law—a mode of interpretation that attempts to derive lessons from the similarities and

courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

18. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1039 (2003) (noting that when it applied the exclusionary rule against the states, “the Court was deeply influenced by an emerging consensus among state courts, which it carefully and extensively documented, that suppression of illegally seized evidence was the most effective way to deter constitutionally unreasonable searches”).

19. U.S. CONST., amend. VIII.

20. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

21. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (finding that execution of juveniles violates the Eighth Amendment based in part on the fact that thirty states and the federal government do not do so); *Atkins v. Virginia*, 536 U.S. 304, 313-14 (2002) (similar analysis and conclusion for mentally retarded offenders). This attention to state practice is in many ways a natural outgrowth of the modern Eighth Amendment doctrine, which the Court has said “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 311-12; *see also Roper*, 543 U.S. at 560-61.

22. *Baze v. Rees*, 553 U.S. 35, 41 (2008) (plurality opinion) (rejecting Eighth Amendment challenge to method of execution based in part on the fact that thirty six states and the federal government employ that method).

differences among legal systems.²³ Comparativism is obviously extremely controversial, but even those wary of the practice regularly say that it is less troubling, and may even be acceptable, where the comparator legal system is either based on or similar to our own.²⁴ In that sense, states are a perfect target for comparative analysis. They have much of the same constitutional language, similar traditions, and are in fact part of the very same constitutional system as the federal constitution.²⁵ Indeed, this particular argument in favor of borrowing may become stronger the more one doubts that states have any meaningful, independent identity.

But of course none of these arguments (nor any other) is necessarily a stand-alone winner, and depending on one's theory of interpretation or the constitutional question at issue, they may not have any cachet at all. And thus it is also important to describe and address some of the arguments against federal borrowing of state constitutional law.²⁶ The following discussion reviews three of the strongest.

First, there seems to be a general feeling that state constitutional law is not "good" enough to shape federal constitutional doctrine. This impression may partially be a comment on the perceived quality of state constitutions or the judges who interpret them, but there are also structural reasons that may be relevant. One could say, for example, that the easy amendability of state constitutions and the election of state judges makes state constitutional law too malleable and politically sensitive to represent the kind of "timeless" constitutional values we associate with the federal constitution.²⁷ After all, it is not hard to find examples of state judges losing their seats after handing down

23. See generally David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) (surveying the practice of comparative constitutionalism and suggesting a model for its proper use); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (similar).

24. See, e.g., William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) ("Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.").

25. Cf. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359 ("[T]he differences between the relevant state constitutions and the federal constitution are much smaller than the differences involved in the transnational comparisons that are a staple of comparative constitutional law.").

26. See Blocher, *supra* note 2, Part II.B.

27. See, e.g., David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287-88 (2008). As Pozen notes elsewhere, judicial elections at the state level might nonetheless serve a useful role as instruments of popular constitutionalism. See generally David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010).

constitutional rulings protecting politically unpopular groups or rights.²⁸ Just this past year, the Iowa judges who held that their state constitution protected a right to same-sex marriage were punished at the polls.²⁹ This may be troubling, as it suggests that judges might under-protect minority rights in order to stay on the bench. And yet in some areas of federal constitutional law, and for some interpretive theories, a degree of responsiveness may be a strength, such as when it comes to measuring beliefs about what constitutes “cruel and unusual” punishment or what rights are “fundamental.”

Second, it may well be that federal borrowing of state constitutional law is impossible because state constitutions are simply too different—either from the federal document or from each other—for comparativism to be useful. There are, of course, significant differences between state and federal constitutions. And yet there are also significant areas of overlap in terms of intent, structure, tradition, and text, particularly when it comes to the kinds of individual rights guarantees captured in the federal Bill of Rights.³⁰ Those similarities, after all, are what makes lockstepping possible (even if undesirable) at the state level. Moreover, state constitutions have enough in common with each other to enable the kind of inter-state borrowing chronicled by many scholars of state constitutional law.³¹

Finally, there are arguments against borrowing state constitutional law that derive not from the nature of state constitutional law, but from the nature of federal constitutional interpretation. If one believes that the federal constitution should be interpreted in line with the intents, understandings, or expected applications of the Founders, for example, state constitutional doctrine might seem to be irrelevant at best and distorting at worst. This objection is not easy to answer in general terms. Indeed, it demonstrates that reverse incorporation can be used as an interpretive tool in many different ways, depending on the constitutional issue before a court and on the court’s own theory of interpretation. The

28. See generally John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987) (describing successful campaign to unseat Rose Bird and colleagues on the California Supreme Court).

29. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

30. See, e.g., Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985) (noting that the federal Framers “derived much of their inspiration from guarantees provided by the colonies that became the original states”).

31. See generally Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835 (1997); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 179-80 (1985).

following Part attempts to push the argument forward by addressing some of those concerns.

II. WHEN AND HOW MUCH TO BORROW

The reverse incorporation described here is an interpretive tool, not an interpretive theory. As such, it does not provide complete or clear-cut answers to constitutional questions, nor is it self-justifying. In order to fully determine whether and how state constitutional law can usefully be imported into federal constitutional doctrine, one must have a thicker notion of what constitutional interpretation should be and what it should hope to achieve. A complete constitutional theory is far beyond the scope of this or any Article, but Section II.A advances some general observations that may be relevant for determining when and how the tool of reverse incorporation can be used consistently with various constitutional theories. It is similarly impossible to say whether or how this tool would be useful in each and every type of constitutional case, but Section II.B suggests some possible considerations.

A. *Tailoring to Theory*

Constitutional theory can shape the usefulness of reverse incorporation at two points: First, in determining whether to borrow state constitutional law; and second, in determining how much weight should be given to that law. That is, one must ask first whether and when an interpretive theory permits borrowing of state constitutional law, and—if it does—then ask how it employs that which is borrowed. The answers to these questions need not necessarily track each other. One can, for example, give an enthusiastically affirmative answer to the first question by saying that borrowing of state constitutional law is widely permissible, while hedging on the second question by saying that it is useful only as persuasive authority, or vice versa.

The ways in which one answers those two questions—the permissibility and importance of reverse incorporation—will almost certainly depend on one's preferred method of constitutional interpretation. An originalist, for example, might reject the broad use of contemporary state constitutional law on the grounds that it does not relate to the Founding-era intent or understanding of the people who wrote and ratified the federal constitution—the usual tools of originalist interpretation.³² And yet even the most committed originalist will

32. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851-52 (1989) (explaining that the “‘originalist’ approach to constitutional interpretation” includes “examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding”).

presumably look with interest to the Founding-era state constitutional law that informed, and may help illuminate, the meaning of the federal document.³³ Justice Scalia did precisely this in his self-consciously originalist opinion in *Heller*.³⁴ Indeed, many of the most recognizable features of American constitutionalism (including judicial review)³⁵ were first found in state constitutional law. To the degree that this is so, state constitutional law may prove to be an especially strong—and perhaps determinative—tool of originalist federal constitutional interpretation. In other words, it may be narrowly but highly relevant.

Similarly, textualism, which is often originalism's fellow traveler,³⁶ focuses on the meaning of the *words* in the federal constitution as being the primary (or arguably sole) relevant piece of interpretive information. For much the same reason as it should be relevant to originalists, state constitutional law should be of assistance to textualists, for the simple reason that state constitutions have language that is in many instances identical to that of the federal constitution.³⁷ Indeed, they served as its model.³⁸ So if one seeks insight into the meaning of the words in the latter, the language of the former can presumably be extremely illuminating.

Another major set of constitutional theories may be grouped together (again, very roughly) under the heading “living constitutionalism.” Like originalism and textualism, living constitutionalism comes in many forms. One major strain focuses on what might be called the “moral evolution” of society—the degree to which our shared moral commitments and beliefs have changed since the Framing, and how those changes can or should be effectuated in constitutional doctrine. For adherents to this approach, state constitutional law should be an especially useful barometer, since it is

33. *Id.* at 852 (noting that originalist analysis also includes examination of “the various state constitutions in existence when the federal Constitution was adopted”).

34. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 580 n.6, 583 n.7, 584-88, 590 n.13, 591-93, 599-606, 612-15, 628-30 (2008).

35. H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*, 53 ALB. L. REV. 283, 294 (1989) (“Only the eclipse of state constitutional law has led to *Marbury*'s enthronement as the case that ‘established’ judicial review.”).

36. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 731 (2010) (“[O]riginalism-driven textualism has assumed an increasingly prominent role in constitutional interpretation, at least within the academy.”).

37. Gardner, *supra* note 18, at 1029 (“[T]he texts of the state constitutions are, at many critical points, similar or even identical to one another and to parallel provisions of the U.S. Constitution.”).

38. Brennan, *supra* note 4, at 501 (arguing that state court decisions in the 1960s and 1970s “put[] to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions.”).

ultimately more malleable (responsive to changing moral commitments, that is) than the federal constitution. Changing interpretations of what punishments are permissible, for example, can be solid “objective” evidence of society’s moral commitments.³⁹ Another major strain of living constitutionalism is distinctly pragmatic in nature. It focuses less on moral commitments and more on the social impact of constitutional rules. Justice Breyer is often said to display such a pragmatic approach, frequently reciting and deferring to legislative fact-finding and policy decisions.⁴⁰ For pragmatists, state constitutional law may be useful inasmuch as it demonstrates the results of the states’ service as “laboratories of experimentation.” For example, in considering whether to incorporate the exclusionary rule against the states, the Court in *Mapp* looked to the experience of California, which had concluded as a matter of state constitutional law that the exclusionary rule was the only practical way to deter police misconduct.⁴¹

Of course, this broad and shallow overview does not begin to give sufficient attention to the interpretive theories it mentions, much less the many theories it does not. But the point is not to rework the Article’s thesis repeatedly for all approaches to constitutional interpretation—or the uncountable permutations thereof—but rather to show that, like any interpretive tool, the usefulness of reverse incorporation will vary according to one’s preferred theory. That may not make it any more universal than any other interpretive tool, but neither is it any less so.

B. *Tailoring to Questions*

There is another variable likely to impact the usefulness of state constitutional law as an interpretive tool—the nature of the constitutional case at issue. As with interpretive theories, different types of constitutional cases may call for different uses of state constitutional law, and may impact both the breadth and the strength of reliance on state constitutional law. And as with interpretive theories, the breadth and strength of use need not necessarily track one another.

39. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (relying on current state law as “objective indicia” of “evolving standards of decency”); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (same).

40. See Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 266 n.390 (2002) (noting “Justice Breyer’s tendency to defer to Congress as a co-equal branch of government and his deference to government more generally”).

41. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (citing *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955)). See also Gardner, *supra* note 1818, at 1039 (“[T]he Court was deeply influenced by an emerging consensus among state courts, which it carefully and extensively documented, that suppression of illegally seized evidence was the most effective way to deter constitutionally unreasonable searches.”).

One could, for example, say that state constitutional law is broadly relevant, but only as persuasive authority. Such a broad-but-shallow approach may be useful, for example, in cases where state constitutional law is used to evaluate the possible practical impact of a constitutional rule. Fourteenth Amendment cases considering the scope of the exclusionary rule may be exemplary, since the concerns involved in those cases are often the kinds of pragmatic considerations for which persuasive authority may be especially helpful. In other situations, one might say that state constitutional law is only relevant in narrow circumstances, but that in those circumstances it effectively *defines* the federal rule, rather than just serving as persuasive authority. This might be true when it comes to defining what punishments are “cruel and unusual,” or what rights are “deeply rooted in this nation’s history and traditions.”⁴²

There is, of course, another large set of constitutional issues not yet addressed: those involving “structural” constitutional questions.⁴³ If, as I have suggested, state and federal rights guarantees can be treated as analogues, why not do the same with state and federal rules regarding separation of powers or other structural matters? The possibility of structural comparativism with regard to structural provisions is intriguing and potentially fruitful, but I hold it aside here for a few reasons. Although there are undoubtedly many structural questions common to the state and federal systems—whether the executive is or should be “unitary,” for example⁴⁴—structural provisions appear to vary more than rights guarantees. State free speech guarantees are often identical to the text of the First Amendment,⁴⁵ but few states have constitutional language akin to the Commerce Clause.⁴⁶ This textual variance reflects a fundamental difference in the powers of states and the federal government. The federal government, of course, may act only where the federal constitution gives it power to do so. States, by contrast, have the

42. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

43. Many thanks to Josh Chafetz for encouraging me to think through these structural comparisons.

44. For one notable contribution on this point, see William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446 (2006).

45. Robert Force, *State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance*, 3 *VAL. U. L. REV.* 125 at 165-82 (1969) (comparing state bills of rights provisions to guarantees in the federal Bill of Rights and finding substantial similarities). *See also id.* at 138 (“Every state provides for the protection of some or all of the rights usually referred to as First Amendment rights. All states, with varying degrees of generality or specificity, guarantee the free exercise of religion and freedom of the press.”).

46. U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to “regulate Commerce . . . among the several States”).

general police power and can act anywhere they are not specifically prohibited. As a result, “State constitutions are documents of *limits*, while the federal constitution is a document of *grant*.”⁴⁷ Structural provisions in the federal constitution therefore play a fundamentally different role than those in state constitutions. The federal constitution’s structural provisions are primarily concerned with enumerating powers and with dividing it not only among the branches of the federal government but between the federal government and the states. To the extent that these concerns exist at the state level, they are not as strong.

In any event, because the importance of state constitutional law as an interpretive tool varies across theories and across cases, it is impossible to give a single answer to the question of how often it should be used and what weight it should receive. What counts as a strength for one interpretive theory or type of case will be a weakness for another. One might object that state constitutional law cannot be much of an interpretive tool if it is impossible to say precisely when and how much it is useful. But the versatility of the tool is not a good enough reason to reject it outright, any more than the other tools in the constitutional workshop that are more useful for some jobs than others. International comparativism, for example, is controversial and may not be appropriate in every case, but it cannot be rejected out of hand solely because it is difficult to say when it should be used and when it should not. Intranational comparativism should not be held to a higher standard.

The more pointed version of the objection accepts this counter-argument, and uses it as the basis for another: Reverse incorporation simply gives judges yet another manipulable tool with which to write their own preferences into law. This question—how to constrain the discretion of unelected, unaccountable federal judges—goes to the heart of interpretive theory and the countermajoritarian difficulty, and pithy answers are impossible. And yet there is no discernible reason to suspect that state constitutional law will be any *more* subject to manipulation or disagreement than the many other interpretive tools the federal courts already employ: legislative history, text, and history itself. Reverse incorporation of state constitutional law is by no means a perfect tool, but it is at least as useful as those that already clutter the Court’s workshop.

III. GENERAL QUESTIONS

The previous Part attempted to address some of the theory—and issue-specific questions—complicate any effort to give a general account

47. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 277 (1998).

of reverse incorporation. But there are also a few over-arching complications with the approach. This final Part identifies and attempts to address a particularly important one: In an approach that purports to be focused on state constitutional law, what exactly are the roles of states, and of constitutions?

This Article has referred—as all of us do—to “state constitutional law,” as if it were always clear what counts as such. But of course, defining state constitutional law is not necessarily any easier than defining federal constitutional law. State constitutional law could refer to the documents themselves, to the gloss given by state courts, or to something else entirely. In order to talk meaningfully about borrowing that law, shouldn’t we first define what it is?

Yes and no. Certainly, it would be useful if state constitutional law were capable of an easy definition. Otherwise it is entirely possible that federal courts attempting to borrow it might simply disagree about what it is they should be borrowing. This could in turn lead to complicated problems if, for example, federal judges disagree about whether “state constitutional law” is represented by a state constitution’s guarantee that “The individual right to keep and bear arms shall not be infringed,” or instead by that state’s supreme court’s holding that the right is subject to reasonable regulation. One might want to avoid the problem by saying that state courts are the final authority on the meaning of their constitutions, but this is not a complete answer, if federal courts are only looking for persuasive authority. The text of a state constitution may seem more “persuasive” to a federal judge than the state court’s interpretation of that text. If so, the federal court may end up borrowing a state constitutional doctrine that even the state’s own courts do not endorse.

And yet the inevitable difficulty of defining state constitutional law should not be any more disabling for reverse incorporation than for federal constitutional law as a whole. The fact that both are hard to define does not make it impossible to study or utilize them. We teach federal constitutional law, after all, despite deep intellectual rifts over such fundamental questions as whether the beliefs of “the people” do or should have any role in defining our constitutional tradition.⁴⁸ It seems no more troubling to speak of state constitutional law in comparably general terms.

48. One well-known iteration of this over-arching debate concerns “popular constitutionalism.” The literature is too vast and varied to summarize, but LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) is undoubtedly part of the canon, as is the criticism of Kramer’s work found in Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *HARV. L. REV.* 1594 (2005).

But even if we can hold aside the question of what counts as constitutional, another question arises: What does it matter? Many of the supposed benefits of reverse incorporation described above—accounting for popular will and measuring practical experience, for example—do not seem to depend on the “constitutional” nature of the borrowed law. What does one get from analyzing state constitutions that one does not get from, for example, analyzing state laws or taking public opinion polls? If there is nothing particularly relevant about state constitutions *qua* constitutions, isn’t the approach described here really one about “the constitution outside the constitution”?⁴⁹

This, too, is a difficult question that does not yield an easy answer. The instinctive move is to say that constitutions are “different” from other forms of law, but that is simply a way of re-stating the question, not resolving it. Establishing why and how they are different, or should be treated as such, requires a thicker account of constitutional law than I can muster here. Suffice to say, the benefits of borrowing described here are not necessarily attuned to whatever it is that makes a constitution a constitution. Inasmuch as state constitutional law is a useful tool for borrowing because of the persuasiveness of its reasoning, for example, it is not clear that it should carry any more weight than, say, the weight of academic opinion.

And yet the instinctive reaction—that constitutional law is different—seems to be right. Whatever one’s approach to federal constitutional interpretation, it surely *does* matter that state constitutional law is “constitutional.” Like federal constitutional law, it is an entrenched statement of a community’s constitutional values, one that—though easier to alter than the federal version—is both a statement of principle and an enforceable provision of basic law. Whether this differentiates state constitutional law much from other forms of state law is a valid question, the answer to which will surely vary state by state. But surely it is not too much to say (at least to the audience of this symposium) that state constitutional law is somehow special.

Reverse incorporation is not out of the woods yet. For just as one can question the role of constitutions *qua* constitutions, one might also question the role of states *qua* states.⁵⁰ If cities called their laws “constitutions” and treated them as such, would they be entitled to the same kind of respect as state constitutions? Or, to illustrate the issue from a different angle: Are different states entitled to the same “weight,”

49. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

50. Many thanks to Aziz Rana and Michael Dorf for raising these federalism questions.

or does California's constitutional law matter more than Wyoming's because seventy times as many people live in California? If the states are not counted equally, it would seem that they are not being treated as valuable as states, but rather as something else—proxies for public opinion, perhaps.

This is a difficult question to answer in the abstract, because the answer depends on the answers to the questions described above—in other words, on *how* one is using state constitutional law. In some cases, it must be true that state identity is not particularly important in the approach described here. If, for example, one uses state constitutional law simply as an indicator of contemporary constitutional values, then it might be true that state identity itself is not particularly important. One could just as easily count local-level regulations, or perhaps even public opinion polls. But one can also measure public opinion by counting states. That obviously will not necessarily capture what the majority of the public thinks, given the differences in population across states. But it would not be any less democratic than, say, the United States Senate.

On the other hand, if one is using state constitutional law only as persuasive authority, then it might very well be appropriate to count California's law for more than Wyoming's or vice versa, perhaps because one state's constitution or judges are "better" than the other's.⁵¹ The same could be said of issue-tailoring. If, for example, federal courts are facing some kind of federal constitutional issue with which some states have more expertise than others—a takings question that involves mineral rights, for example, or the treatment of an ethnic minority whose population is concentrated in a few states—then it may make perfect sense to count some states' constitutional law more than others.

This short defense of the importance of states is not meant to be comprehensive, but merely to show that reverse incorporation is not necessarily antagonistic—nor even agnostic—to federalism. But neither is it possible to offer a general account of the importance of states and constitutions, because it will vary according to all of the metrics described above. That may be somewhat disappointing, but it is a shortcoming common to nearly all interpretive tools. Few, if any, offer a general theory of their own relevance. The method of reverse incorporation described here is not alone in facing these complications.

CONCLUSION

This Article and the one on which it builds have attempted to suggest a relatively simple idea: Federal courts should, at least

51. Let me emphasize that I have *no* reason to believe that this is true.

occasionally, use state constitutional law at least as persuasive authority, and perhaps even as something more. Perhaps wrongly, I regard this as a relatively weak suggestion, since it does not seem like much to ask that the state courts' decisions—which are accorded respect in many other ways, such as through jurisdictional rules that protect them from federal review⁵²—be given some persuasive weight. But I recognize that even this idea is not neutral as to interpretive methodology. That is to say, one's view of constitutional interpretation is likely to color one's view of the relevance of state constitutional law, as is the nature of the constitutional issue being addressed. So I have attempted in these remarks to go a little further in describing the strengths and weaknesses of my thesis through the lens of some of the leading theories of constitutional interpretation. I have also attempted to address some of the major potential objections and underlying problems with this proposal. Fully resolving them is a task that will require far more work.

52. *See, e.g.*, *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 449-500 (1941) (holding that in most cases federal courts should not adjudicate the constitutionality of a state law until state courts have had a reasonable opportunity to do so); *Younger v. Harris*, 401 U.S. 37, 49-53 (1971) (requiring, with limited exceptions, federal courts to abstain from hearing civil rights tort claims arising from criminal prosecution until after conviction); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943) (allowing federal abstention when state courts have greater expertise in the matter); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976) (allowing abstention in cases of parallel litigation).