Interpreting STATE CONSTITUTIONS

A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM

JAMES A. GARDNER

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INTERPRETING STATE CONSTITUTIONS

To my parents

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Like most people who study state constitutional law, I came to the field by accident. A long-standing interest in law and democracy led me to a decision by the New York Court of Appeals upholding the legality under the New York Constitution of the legislative practice of hiring employees, at public expense, to work on partisan political campaigns—a practice I was convinced ought to be unconstitutional under any reasonable conception of basic democratic principles. In studying its opinion, I incidentally noticed that the court had relied for its construction of the New York Constitution almost entirely on decisions of the U.S. Supreme Court construing the U.S. Constitution. This seemed puzzling: why would the decisions of a federal court construing the federal Constitution furnish the main body of precedent in a state law case arising under structural provisions of that state's constitution?

This question initially piqued my interest not as a scholar, but as a lawyer. Obviously, the lawyer defending the legislature had offered the New York court federal case law to support the challenged practice. Why? Why not New York case law? And in any event, how could the lawyer challenging the practice have allowed the court to accept these decisions as authoritative? Didn't he or she argue against the relevance or persuasiveness of federal law? As I dug further into New York constitutional law, I found that the Court of Appeals often relied on federal constitutional decisions when construing provisions of the state constitution. Sometimes it followed federal decisions, and sometimes it rejected them. Yet I could find no coherent explanation why the court so frequently used federal constitutional law as its point of departure, nor could I discern any pattern among the cases that might indicate when the Court of Appeals would accept federal decisions and when it would not.

As a former litigator, I was bothered immensely by this. If I were litigating a case involving the New York Constitution, how would I know what body of law a New York court would consider authoritative? What arguments could I

make—what words could I address to the court—to persuade it to follow or to reject decisions of the U.S. Supreme Court interpreting analogous provisions of the U.S. Constitution? After reading well over a thousand state constitutional decisions from many states and thoroughly investigating the scholarly literature of state constitutional interpretation, I found myself no closer to a satisfying answer.

This lawyer's interest in the language of judicial persuasion has, as much as any scholarly curiosity, driven my inquiry into state constitutional law. The lack of a satisfying language in which to discuss something is a sure sign of distress; it suggests some disjunction between what people think they ought to do and what they think may acceptably be said. The main attempt to bridge this gap has thus far been made by scholars and judges associated with the New Judicial Federalism movement. Members of this group most commonly argue that a state constitution should be approached and interpreted precisely in the way one would approach and interpret the national Constitution—that is, as an independent, free-standing body of positive constitutional law. This prescription rests, however, on a methodological analogy that implicitly treats states as equivalent to nations and state polities as equivalent to national polities. While this might be an accurate way to think of states in a confederacy such as existed under the Articles of Confederation, or under a Calhounian compact theory of national union, it seems plainly inadequate as an account of what states are under the complex system of federalism we actually have. For this reason, I have long found the language of state constitutional argument offered by the New Judicial Federalism to be unpersuasive. That state courts generally have been unwilling to change their adjudicatory practices in response to these kinds of arguments suggests that they may harbor similar doubts.

This book is an attempt to devise a new and different language in which to address and persuade state courts in cases arising under state constitutions. The language I offer here is one not of methodological convention, but of function—the functions that state constitutions serve in a system of federalism. Those functions are far more complicated, and ambiguous, than students of the subject have sometimes been willing to acknowledge. Putting function at the center of a theory of constitutional interpretation, I believe, puts the horse before the cart. The methodological conventions of constitutional interpretation do not precede, but rather follow from, the functions that a constitutional document serves within a legal system. Although its practitioners have made enormous strides in advancing our understanding of state constitu-

tions, the New Judicial Federalism has sometimes faltered by beginning with interpretational conventions and from them deducing the functions of state power, when the analysis should be the other way around.

* * *

This book has taken shape over the course of more than a decade, during which time I have accumulated more debts than I can possibly acknowledge. Robert Schapiro, who read pieces of the book on more than one occasion and then read and commented on the entire manuscript, has been a wonderful sounding board and has offered many valuable ideas and suggestions. I am also indebted to Jay Mootz for his unflagging willingness over many years to engage and discuss the ideas that went into the book and many of the articles that preceded it. Guyora Binder offered much insightful commentary on the main ideas of the book and many valuable suggestions on a draft of the manuscript. Lynn Mather, director of the Christopher Baldy Center for Law and Social Policy, not only gave me very useful comments on the manuscript but also arranged a manuscript development workshop in which I received much valuable feedback from the participants. Portions of the manuscript have also benefited from workshops at the University at Buffalo Law School, Indiana University School of Law (Indianapolis), Roger Williams University School of Law, and Western New England College School of Law, and from the comments of an anonymous reviewer for the University of Chicago Press. Among the many research assistants who have provided valuable help over the years, I owe the largest debts to Stephanie Lebowitz and Jesse Baldwin.

I wish to acknowledge a special debt to my friend Bob Williams, the dean of state constitutional legal scholars. When as a newly minted academic I first began to write about state constitutional law, Bob immediately embraced me as a colleague even though my work criticized some of his own. A lesser spirit might have taken offense at these nips about the heels, but Bob instead welcomed me into what he has always viewed as a large-scale collaborative effort by many heads and hands to make sense of this stubbornly difficult field. I have benefited from his insights, his generosity, and his camaraderie ever since. Finally, I must thank my wife, Lise Gelernter, and my daughter Sarah for their patient and enthusiastic support of this project as it has finally come to fruition.

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CONTENTS

Preface | ix

INTRODUCTION | The Problem of State Constitutional Interpretation | 1

ONE | The Emergence of the Modern Debate | 23

TWO | The Dead End of Romantic Subnationalism | 53

THREE | The Mechanics of Federalism | 80

FOUR | State Constitutions in the Federal Scheme | 121

FIVE | Patterns of Distrust | 143

SIX | A Functional Account of State Judicial Power | 180

SEVEN | An Approach to State Constitutional Interpretation | 228

AFTERWORD | Function and Interpretation | 273

Appendix | 277

Bibliography | 285

Index | 301

INTRODUCTION

The Problem of State Constitutional Interpretation

When people who are familiar with American constitutional law learn that some scholars, lawyers, and judges devote considerable time and effort to the problem of interpreting state constitutions, they are sometimes skeptical. How, they ask, can state constitutions pose interpretational problems that differ in any way from the well-worn interpretational issues that have long dominated the study of federal constitutional law? "It's a constitution," these skeptics announce. "It has words. Interpret it. What's the big deal?"

This is an understandable reaction. In our legal system, the way one interprets a legal document depends to a great degree on what kind of document it is. We have rules and conventions governing the interpretation of contracts, wills, deeds, judicial opinions, statutes, regulations, and many other classes of documents. Although these bodies of interpretational rules bear some noticeable family resemblances, they have evolved over long periods of time to serve different purposes, and thus in many cases differ from one another substantively in significant ways. Indeed, as any teacher of law well knows, the thoughtless application of a set of interpretational conventions developed for one class of legal documents to a different class of documents constitutes a rudimentary legal error. This is not necessarily to say that interpretational approaches suitable for one kind of legal document can never be applied to other kinds. It does mean, however, that the use of interpretational tools across categorical boundaries and in settings for which they were not originally designed must be soundly justified before it can be accepted as legitimate.

By what conventions ought the constitution of an American state be interpreted? To the skeptic, this looks like an easy question. A state constitution has the word "constitution" emblazoned prominently across the top of it. That seems like a bit of a hint. State constitutions have preambles and bills of rights. They contain articles dealing with the powers and organization of the legislative, executive, and judicial branches of government. They have been drafted

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by constitutional conventions and ratified by the people of the state. They look for all the world exactly like . . . well, constitutions. Clearly it must follow that they should be approached and interpreted using the methods and techniques of constitutional law as we know it, which is to say, federal constitutional law. Thus, to interpret a state constitution, one simply turns to the text, structure, history, precedent, purposes, framers' intentions, values of the polity, and all the other tools and conventions familiar from our well-developed tradition of federal constitutional interpretation.

On closer inspection, however, things turn out to be considerably more complicated. The problem is not that standard conventions of constitutional interpretation are unsuitable for application to state constitutions—clearly, they are a great help in illuminating the meaning of these documents. Rather, the difficulty is that the application of the conventions of federal constitutional interpretation to a state—or "subnational"—constitution, particularly within the structure of dual sovereignty established by a system of federalism, is rarely as straightforward as it would be to the constitution of a nation. Consider a typical problem that arises frequently in the interpretation of state constitutions. The U.S. Supreme Court tells us that the starting point in interpreting any constitutional provision is the text. Fair enough. Here is the text of Article I, § 12, clause 1, of the New York Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Anyone who knows constitutional law will notice immediately that the language looks familiar. It is in fact identical, word for word, to the Fourth Amendment of the U.S. Constitution, and was obviously copied directly from that document. What is the meaning of this text?

One obvious inference is that because it uses the same words as the Fourth Amendment, Article I, § 12 of the New York Constitution means precisely the same thing. But on what basis might such a conclusion rest? The meaning of the Fourth Amendment was established slowly, over many years, by decisions of the U.S. Supreme Court, especially in its decisions elucidating the meaning of the words "unreasonable," "searches," and "probable cause." Does Article I, § 12 of the New York Constitution have the same meaning the Supreme Court

has given to the Fourth Amendment because words like "unreasonable" and "search," when used in certain combinations, simply *have* a particular meaning whenever they are used in a document purporting to be a constitution? That seems unlikely. According to conventions of constitutional interpretation worked out by the Supreme Court in the early twentieth century, constitutional words and phrases are not to be given their meaning according to some set of hypothesized principles of natural law. On the contrary, a constitution, as the Court has long maintained, must be understood as a unique positive enactment, to be given the meaning that it actually and contingently has, not the meaning that it in any sense "should" have.

If the text itself is inconclusive, the Supreme Court has told us that constitutional meaning also is illuminated by precedent. To see the problems here, it is useful to consider a concrete factual setting. Suppose that New York State troopers begin to look for marijuana farms in rural areas by using aerial surveillance. Because the surveillance is indiscriminate—the troopers look at everything they can see from the air—they cannot demonstrate probable cause and thus neither seek nor obtain a warrant. Suppose that by this surveillance state police find marijuana and charge someone with growing it, and a New York court is presented for the first time with the question of whether Article I, § 12 of the New York Constitution demands that police obtain a warrant before engaging in aerial drug surveillance.

The U.S. Supreme Court has held, in construing the identical language of the Fourth Amendment, that aerial surveillance is not a "search" within the meaning of the Constitution.[1] Clearly, this precedent is not controlling under the New York Constitution. But there is a more interesting question: is it even relevant, and if so, in what way? The language of the state constitution was copied, obviously deliberately, from the federal constitutional provision. This seems to suggest that New Yorkers included this language because they liked the federal provision and wanted something similar in their own constitution. But similar to what? When the U.S. Supreme Court construes the Fourth Amendment, it is construing a provision that was ratified in 1791 and has been in continuous existence ever since. The present New York Constitution was adopted in 1938; prior versions contained no protection whatsoever against unreasonable searches and seizures.[2] Which version of the Fourth Amendment, then, did New Yorkers admire and adopt—the version that was initially

1. California v. Ciraolo, 476 U.S. 207 (1986).

2. Galie, *The New York State Constitution*, 59.

drafted in 1791 or the version that, by 1938, it had been become after 147 years of authoritative construction by the U.S. Supreme Court? Or did New York write into its state constitution the meaning of the Fourth Amendment independently of how it had been construed by federal courts? Did New York, in other words, incorporate into its constitution the meaning of the Fourth Amendment's text as it "really" is, separate and apart from the body of federal jurisprudence construing it? But must we not, consistent with standard federal conventions, reject as a legitimate aide to constitutional interpretation the notion that constitutional language has a universal, natural meaning independent of judicial construction? Or could that rejection be too hasty? Might different rules of construction apply to state constitutions? And even if constitutional language has a true meaning independent of what judges may make of it, surely the Supreme Court of the United States is equally obliged to give the provision its "real" meaning, in which case its decisions ought to be given some respect, even deference.

Conversely, might the New York Constitution's word-for-word adoption of a federal constitutional provision be understood to evince a desire to link New York's constitutional law of search and seizure to the Fourth Amendment, however it might henceforth be authoritatively construed by the Supreme Court? The New York Court of Appeals, New York's highest court, has sometimes suggested as much.[3] But if judicial review under a constitution is justifiable at all, is it not justified mainly by the presence of a backup democratic check on judicial decisionmaking, whether by direct election of judges or, indirectly, through their appointment by other officials who are themselves democratically elected? Why would the people of a state wish to make the meaning of their own constitution depend upon the decisions of a court over which they exercise no meaningful democratic control?

But there's more; the constitutional appropriation of text raises a whole family of different problems. Under the U.S. Constitution's "incorporation" doc-

3. People v. Harris, 570 N.E.2d 1051, 1053 (N.Y. 1991) ("Because the language of the Fourth Amendment of the United States Constitution and section 12 of article I of the New York State Constitution prohibiting unreasonable searches and seizures is identical, it may be assumed, as a general proposition, that the two provisions confer similar rights."). Regarding aerial surveillance, the New York Court of Appeals has said that "the identity of language in the two clauses supports a policy of uniformity in both State and Federal courts," and it has interpreted the two provisions to require the same result. People v. Reynolds, 523 N.E.2d 291, 293 (N.Y. 1988). But see People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (rejecting open fields exception for posted land).

trine, the prohibition on unreasonable searches and seizures embodied in the Fourth Amendment independently restrains New York State officials by operation of the Fourteenth Amendment's Due Process Clause. Yet that would seem to render Article I, § 12 of the New York Constitution utterly superfluous if it means substantially the same thing as the Fourth Amendment: if the two have the same meaning, then the Fourth Amendment, which applies mandatorily under the Supremacy Clause, controls the outcome and makes Article I, § 12 irrelevant. One of the basic canons of federal constitutional interpretation requires courts to give effect to every word of a constitution if it is at all possible to do so. If the New York Constitution is a constitution, and both it and the U.S. Constitution are part of a single nationwide constitutional scheme of federalism, then the principle of avoiding constitutional redundancy seemingly ought to apply. But if the principle does apply, the only way to comply with it, and thus to give independent effect to Article I, § 12, is to interpret the New York provision to mean something different from the Fourth Amendment. Yet this would result in a paradoxical rule of construction requiring that the more closely a state constitutional provision resembles a federal constitutional provision, the more different the meaning it must be given. That seems to make little sense.

State constitutional interpretation seems to raise problems at every turn. Suppose we resort, as the U.S. Supreme Court often does, to history; perhaps New York's experience with unreasonable searches and seizures by government officials can provide some insight into the problems Article I, § 12 was designed to guard against. But can New York's historical experience of high-handed government searches and seizures be much different from the nation's? The people of the United States adopted the Fourth Amendment mainly to prevent any repetition of their experience of British general warrants, which were used to search indiscriminately for evidence of colonial tax evasion. These intensely disliked warrants were executed in major commercial centers—including New York City.[4] Indeed, New York's experience of search and seizure is an important aspect of the *national* experience of search and seizure. Can its experience, then, really provide sufficient traction for a distinctive interpretation of identical constitutional language?

Other problems arise if we consult the intentions of the drafters and rati-

4. See, e.g., Dickerson, *Writs of Assistance as a Cause of the Revolution*, 54–58; Levy, *Original Intent and the Framers' Constitution*, 233; Cuddihy and Hardy, "A Man's House Was Not His Castle," 391.

fiers of Article I, § 12. It is possible, of course, that records of the 1938 New York constitutional convention might show that the intentions of the drafters of Article I, § 12 differed sufficiently from the intentions of the drafters of the Fourth Amendment to justify giving it a different meaning (the records, by the way, show nothing of the sort).[5] Yet this possibility is not without its difficulties, for those who drafted and ratified the New York Constitution were not just New Yorkers but also Americans, who lived under, and whose consent sustained the legitimacy of, the Constitution of the United States. Is it really plausible that New Yorkers could simultaneously will the words "unreasonable" and "probable cause" to have one meaning under the U.S. Constitution and a different meaning under the New York Constitution?

At this point the skeptic might say, "All right, state constitutional interpretation raises some unique difficulties for provisions copied directly from the U.S. Constitution, but most provisions of state constitutions are not duplicative, and for these the usual methods of constitutional analysis may be straightforwardly applied." That is partly true, but only partly. First, as chapter 1 explains, the individual rights provisions of state constitutions have been the focus of by far the greatest attention and controversy. Many of them exhibit problems of overlap and duplication, making the handling of such provisions one of the central problems of state constitutional interpretation. Second, even though most provisions of state constitutions have not been pilfered from the U.S. Constitution, they have typically been pilfered from the constitutions of other states. For two centuries, constitutional drafting in the American states has proceeded mainly through a process of borrowing, swapping, and copying from somebody else's constitution.[6] This simply replicates many of the difficulties caused by copying federal constitutional law, but with the constitutional text, precedent, and traditions of another state as the problematic point of reference.

Most important, however, state constitutional law does not come only from state constitutions; it comes also, and perhaps preponderantly, from judicial decisions interpreting state constitutions. When analyzed by the standards and conventions that govern the interpretation of the U.S. Constitution, the actual practices of state courts are puzzling and raise a host of additional questions.

In the first place, state courts often appropriate and adopt federal constitutional doctrine as the rule of decision for state constitutional provisions not

5. See Galie, *The New York State Constitution*, 58–62.

6. Tarr, *Understanding State Constitutions*, 50–55.

only when the state constitutional text is identical to its federal counterpart, but even when it differs in potentially significant ways. For example, the Massachusetts Constitution's provision against unreasonable searches and seizures provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.[7]

This language differs in obvious respects from the language of the Fourth Amendment: it lacks the term "probable cause," for example, and establishes the "formalities" of "the laws" as the reference point for evaluating the constitutionality of warrants. In spite of these differences, the Massachusetts Supreme Judicial Court has construed it to be identical to the Fourth Amendment in virtually all respects and for virtually all purposes.[8]

The Religion Clauses of the First Amendment of the U.S. Constitution provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The religious freedom provision of the Virginia Constitution could not be more different. It provides:

> That religion or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled

7. Mass. Const. Part the First, art. XIV.

8. In a small number of cases, the Supreme Judicial Court has construed the Massachusetts Constitution to provide broader protection than does the Fourth Amendment. For example, the court has held that the state provision requires a more demanding showing of probable cause to issue a search warrant on the testimony of informants, Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985), and that police pursuit of a person constitutes a seizure within the meaning of the provision, Commonwealth v. Stoute, 665 N.E.2d 93 (Mass. 1996).

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