A STUDY IN UNACCOUNTABILITY: JUDICIAL ELECTIONS AND DEPENDENT STATE CONSTITUTIONAL INTERPRETATIONS

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"For a decade now, I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."

—Justice William Brennan,
James Madison Lecture on Constitutional Law,
at the New York University School of Law, Nov. 18, 1986[1]

ABSTRACT

For the past thirty years, advocates have asked state judges to interpret their state constitutions in ways that would provide expansive protections for criminal defendants, beyond the minimum guarantees required by the federal constitution. However, this New Federalism movement has largely ignored the forces that constrain state judges when they interpret their state constitutions, to the detriment of criminal justice reform advocates.

This article focuses on state constitutional search-and-seizure provisions to analyze five possible constraints on state judges: the presence or absence of an intermediate appellate court, the age of the state's constitution, the political ideology of state voters, the method of enacting state constitutional amendments, and the method by which a state's judges are retained. It asks if any of these factors make a court more likely to interpret its state's search-and-seizure provision as either controlled by the federal constitution or independent of it. It finds only one factor—a state's judicial retention method—is statistically significant. The more electorally-

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1. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

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accountable judges are, the less likely they are to interpret their search-and-seizure provision independently of the federal constitution.

This relationship is worrisome because judicial elections are supposed to give voters more control over the substance of state law by making judges sensitive to the voters' opinions. However, this article shows that elected judges are more likely to tie their state constitutional standards to the federal constitution than are unelected judges. Electing judges, then, produces an unintended result: it makes a state court more likely to turn a state constitutional question, which should be decided by the state court, into a federal constitutional question to be decided by the United States Supreme Court.

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In the 1970s, criminal defense advocates began seeking refuge in state courts. They asked state judges to find more protections under state constitutions than the United States Supreme Court found in similar provisions of the federal constitution.[2] This New Federalism movement, as it came to be known, developed with increasing urgency as Chief Justice Warren E. Burger led the United States Supreme Court away from many of the Warren Court's expansive protections for criminal defendants.[3] By the early 1990s, the movement was an accepted part of the judicial landscape.[4] But scholars of New Federalism too often focus on a narrow question: How do state judges decide when to provide more rights under a state constitution than the federal constitution provides?[5] They do not ask whether some forces constrain state judges from providing more protections in the first place.

This article argues that many state judges are constrained by judicial elections, which appear to limit whether a state court will interpret its state constitution independent of the federal constitution. Unlike the relatively independent federal judiciary, state judges exist in an electorally-accountable framework where most are subject to election and to a real threat of state constitutional amendments that can override their decisions.[6] This article shows that judges who face partisan re-election are

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2. *See, e.g.*, Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317–20 (1986) (noting trend during 1970s and 1980s of more rights-protective state constitutional decisions); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 843–50 (1991) (recounting "fits and starts" through which New Federalism movement began).

3. *See, e.g.*, Tarr, *supra* note 2, at 845–46 ("What prompted these paeans to the glories of federalism, however, was often less a concern about the integrity of state constitutions than about the direction of the United States Supreme Court."); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729, 732 (1976) ("As a result of the Burger Court's seemingly inexorable relaxation of federal protection for criminal defendants, a number of state courts have continued to expand basic rights on state law grounds . . . ."). It should also be noted that the New Federalism movement is broader than the criminal defense context. *See, e.g.*, Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1020–21 (2003) (recognizing courts' expansive state constitutional protections in free speech, religion, privacy, due process, and equality during first two decades of New Federalism).

4. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63, 64 (1994).

5. *See, e.g.*, Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 298 (1977) (observing that "the debate thus far has focused on the propriety of such interpretation"); Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 230 (2007) [hereinafter Williams, *Search & Seizure*] (discussing Tarr's work and describing the central question in state constitutional law as legitimacy of state constitutional rulings that diverge from federal constitutional standards).

6. *See infra* notes 131–134 and accompanying text (discussing prevalence of judicial

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the most likely to interpret their state's constitution to mirror the federal constitution. Conversely, judges who serve for life are the least likely to do so. This finding has implications for both the state of the New Federalism movement and for the ongoing debate about judicial elections, because it suggests the two issues are more intertwined than commonly realized. When states adopt electorally-accountable judicial retention methods, intending to give the public a more democratic relationship with their governing laws, it appears that they in fact produce the opposite result: state courts that refuse to depart from federal standards. This suggests advocates seeking expansive state constitutional interpretations could benefit out-of-court advocacy, as well, by pushing for changes in judicial election methods.

This article is organized into three parts. Part I examines the origins of New Federalism and discusses the failure of scholars studying the movement to question whether state judges are in fact free to interpret state constitutions independent of the federal constitution. Part II examines five factors that could constrain a state court's ability to interpret its state constitution independent of the federal constitution. It classifies state constitutional interpretations as either dependent[7] on the federal constitution or independent[8] of it. It finds that of five possible constraints on state judges, the method by which state judges are retained—ranging from partisan re-elections to lifetime appointments—is the best predictor of whether a state court will adopt an independent or dependent interpretation. The more electorally accountable state judges are, the more likely a state court is to adopt a dependent interpretation. Part III shows that dependent interpretations make state judges less accountable to state voters because they shift substantive decisions to the United States Supreme Court. It also explains that dependent interpretations cannot be justified by a desire for judicial accountability, a respect for the intent of state constitutional framers, or *stare decisis*.

The article concludes by returning to the idea of state courts as a haven for advocates in light of the findings discussed in Parts II and III. It suggests that when dependent interpretations foreclose advocates from arguing for greater state constitutional rights, they can pursue a new path: judicial election reforms. Unless judges are able to freely choose how to interpret their state constitutions, continued calls for expansive protections are likely to remain unanswered.

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elections), and notes 113–114 (discussing state constitutional amendment procedures).

7. *See infra* note 44 and accompanying text (defining dependent interpretations).

8. *See infra* note 45 and accompanying text (defining independent interpretations).

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I.
THE NEW FEDERALISM MOVEMENT

A. Origins of New Federalism

In the 1960s, as the United States Supreme Court incorporated the criminal procedure provisions of the Bill of Rights against the states, state courts began applying the federally-guaranteed rights to criminal defendants for the first time. For two reasons, state judges generally did not consider providing additional protections under their state's constitution. First, the Warren Court's criminal procedure revolution set a high floor of protections for criminal defendants, leaving state judges largely unconcerned with providing additional rights.[9] Second, the Supreme Court incorporated nine criminal procedure provisions in eight years,[10] keeping state courts busy applying the newly-required rules rather than allowing them time to experiment with additional guarantees.[11]

A decade later, the situation changed. In 1968, Richard Nixon's tough-on-crime politics helped him win the presidency, and while in office he appointed four justices who undercut many of the prior Court's protections for criminal defendants.[12] The Fourth Amendment was "most

9. *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1490 (1987) ("As long as state courts were engaged in absorbing these new standards, they left analogous provisions in state constitutions unexplored.").

10. *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (incorporating protection against double jeopardy); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating right to a jury trial); Washington v. Texas, 388 U.S. 14, 23 (1967) (incorporating right to compel attendance of witnesses); Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967) (incorporating right to speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating right to confront witnesses); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (incorporating privilege against compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (incorporating right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating prohibition on cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating Fourth Amendment's exclusionary rule).

11. *See* Brennan, *supra* note 1, at 548 ("Busy interpreting the onslaught of federal constitutional rulings in state criminal cases, the state courts fell silent on the subject of their own constitutions."); Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1118 (1984) ("The federalization of the Bill of Rights led to the almost wholesale abandonment of any interest in state civil liberties guarantees."). *See also* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 21 (1988) (suggesting that advocates brought fewer cases under state provisions because new federal rights of action were more protective of criminal defendants).

12. For a discussion of the 1968 presidential campaign's focus on crime, see KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 38 (1997). For a discussion of the propensity of the Nixon appointees to cut back on criminal protections, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (examining the impact of Burger Court's criminal procedure decisions).

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clearly targeted for attack."[13] While the Warren Court rarely reviewed state decisions upholding Fourth Amendment rights of defendants, the Burger Court made a practice of taking such cases and rejecting expansive state court readings of federal rights.[14] In these cases, the Burger Court created an exception to the exclusionary rule for police acting in "reasonable" reliance on invalid warrants,[15] found that bank customers have no legitimate expectation of privacy in their bank records,[16] and enlarged the search-and-seizure power of police and prosecutors with[17] and without[18] a warrant. These decisions cut back on many of the seminal cases of the Warren Court, often by reducing or eliminating the remedies for constitutional violations.[19]

These decisions had two effects on state courts. First, they generally lowered the floor of federal protections that state courts were required to provide to criminal defendants. Second, they gave state courts room to experiment with using state constitutions to provide greater protections for defendants. Justice William Brennan urged state courts in this course, becoming one of the most outspoken champions of New Federalism.[20] In 1977, Justice Brennan authored a *Harvard Law Review* article telling state judges they "cannot rest when they have afforded their citizens the full protections of the federal constitution."[21] Instead, Justice Brennan argued, state judges must look to state constitutional provisions as a "font of individual liberties" and not let the United States Supreme Court's

13. Brennan, *supra* note 1, at 547.

14. *See* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 260 (1984) (noting that in the 1983 term, of ten Fourth Amendment cases the Court agreed to review, all involved lower courts suppressing challenged evidence). On the fragile state of the Fourth Amendment exclusionary rule during the Burger Court, see BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 114–16 (1979) (describing Chief Justice Burger's opposition to exclusionary rule and Justice Black's uncertainty about it, as well as refusal by Justice Brennan and Justice Marshall to grant certiorari on cases raising the issue, lest it be overruled).

15. United States v. Leon, 468 U.S. 897, 926 (1984).

16. United States v. Miller, 425 U.S. 435, 443 (1976).

17. *See* Andresen v. Maryland, 427 U.S. 463, 482–84 (1976) (finding no Fourth Amendment violation when search warrant authorizes seizure of specific items "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" (citations omitted)).

18. *See* United States v. Watson, 423 U.S. 411, 424 (1976) (finding warrantless felony arrests, when made in public and based on probable cause, to be constitutional).

19. *See* Steiker, *supra* note 12, at 2505–10 (arguing that remedies for Fourth Amendment violations are "particularly vulnerable to exceptions promulgated in the name of fine-tuning the rule . . . .").

20. Justice Brennan is frequently credited with popularizing New Federalism. *See, e.g.*, Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345, 352 (2007).

21. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

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interpretation of federal law "inhibit the independent protective force of state law."[22] Justice Brennan charged that while "in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not to also raise the state constitutional questions."[23]

State courts and advocates answered this call. By 1987, more than 450 state court opinions interpreted state constitutions to provide more protection than the federal constitution.[24] Some state courts wrote explicit teaching opinions that outlined the court's approach to state constitutional interpretation and asked advocates to press the issue.[25] Other courts asked, sua sponte, for parties to brief state constitutional issues even if they did not raise them below.[26] One justice (likely Justice Brennan) even quizzed an attorney during oral arguments at the United States Supreme Court about why the attorney did not bring a state constitutional claim before the state's high court.[27] The attorney said that while the law allowed him to do so, he simply had not; he assured the justices he would do so "at every opportunity in the future."[28] Supporters hailed the newfound emphasis on state constitutions as a "phoenix-like resurrection of federalism."[29]

As New Federalism became more popular, however, its critics became more vocal. They called expansive state court opinions unprincipled and the judges who wrote them results-oriented.[30] They argued there is little reason to provide more protection under a state constitution than the

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22. *Id.*

23. *Id.* at 502.

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

25. *See generally* State v. Jewett, 500 A.2d 233 (Vt. 1985) (stating court's intent to raise bench and bar's "plane of consciousness" about New Federalism, presenting overview of movement, and detailing several constitutional arguments that advocates could advance); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1019–21 (1997) [hereinafter Williams, *Glare*] (describing such opinions as educating bar "in the technique of making state constitutional arguments").

26. *See, e.g.*, State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (raising state constitutional issue and remanding for argument on it).

27. *See* Wilkes, *supra* note 3, at 749 n.107 (recounting oral arguments in Michigan v. Mosley, 423 U.S. 96 (1975)).

28. *Id.* The failure to make a state constitutional argument is consequential. If the Michigan Supreme Court had issued its decision on state grounds, the United States Supreme Court could not have reviewed *Mosley*. *See* discussion *infra* Part III.A. Brennan reiterated his call for state constitutional arguments in his *Mosley* dissent. *Mosley*, 423 U.S. at 120–21 (1975) (Brennan, J., dissenting).

29. Stanley Mosk, *The State Courts*, AMERICAN LAW: THE THIRD CENTURY: THE LAW BICENTENNIAL VOLUME 213, 216 (Bernard Schwartz ed., 1976).

30. *See* Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5, 6 (1989) (summarizing main critiques of New Federalism).

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federal one when two provisions are textually identical.[31] Some derided the reasoning in New Federalism cases as a "cute trick" and the result as "not a 'real' constitutional decision at all."[32]

State courts responded to this criticism, often by changing the methods they used to decide state constitutional cases. Some announced criteria by which the court would decide whether to adopt a United States Supreme Court decision as controlling the interpretation of a related state constitutional provision.[33] Others conducted an independent analysis of federal precedent before announcing their decision to follow federal case law. These changes were greeted as reflecting a "maturing" of New Federalism.[34]

B. The Assumption That State Courts Can Choose Freely Between Dependent and Independent Interpretations

As New Federalism matured, scholars started to document the three basic analytical methods state courts use when a state constitutional provision mirrors a federal one: the primacy, criteria, and lockstep approaches. Each method gives a different level of presumptive validity to federal decisions. Under the primacy approach, a state court does not presume federal decisions are correct. Instead, it analyzes its state constitution first, and only continues to a federal analysis if doing so is necessary to the case.[35] Under the criteria approach, a state court examines a federal decision first and considers criteria that might justify departing from it.[36] This approach necessarily presumes the validity of a federal decision, though the presumption itself is rebuttable. By contrast, under

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31. *See* Ira Reiner & George Glenn Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights*, 23 PAC. L.J. 1183, 1256 (1992) (charging that state courts that depart from federal precedent when state and federal constitutions are similar and where majority does not base its opinion on strong state interest "advertise the subjective and personal aspect of judging, by pitting the conclusions of the state court against those of the United States Supreme Court"); Williams, *Glare*, *supra* note 25, at 1016 (noting this early criticism).

32. *See* H.C. Macgill, *Introduction—Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) (explaining that while many had accepted new federalism as legitimate by early 1980s, some detractors remained).

33. *See* Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead—Long Live Gunwall!,"* 37 RUTGERS L.J. 1169, 1171–76 (2006) (describing Washington State's approach and noting others).

34. Williams, *Glare*, *supra* note 25, at 1017.

35. *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980) (advocating for primacy approach and arguing that lawyers should argue state constitutional points first and relegate federal constitutional issues to "a short final section").

36. *See* Spitzer, *supra* note 33, at 1173–75 (discussing criteria approaches used by New Jersey and Washington State). These criteria often include the text of the state constitution, its legislative history, preexisting state law, state traditions, and structural differences between the state and federal constitutions. *Id.*

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the lockstep approach federal decisions always control. State courts who use the lockstep approach deem state constitutional provisions "coextensive" with the federal constitution; they do not depart from federal precedent and do not discuss any criteria that could justify analyzing state law separately.[37] This means that once a state court declares a state constitutional provision will be interpreted in lockstep with a federal provision, federal case law controls the future interpretation of the state provision.

These different methods sparked volumes of scholarship about which method is most legitimate. Advocates of the primacy approach argue it is the only method that forces state courts to determine the nature and scope of state-protected rights, promoting the development of a sound body of state constitutional law and encouraging dialogue on constitutional values between the state courts and the United States Supreme Court.[38] Its critics say state courts only adopt a primacy approach when a court wants to achieve a given result, or that state courts are "pretending" to take a primacy approach while actually adopting federal methods of analysis, resulting in a "counterfeit" interpretation.[39] Supporters of the criteria approach say that by outlining the factors the court considers important, a state court enables advocates to argue all relevant issues.[40] Critics say the criteria approach prevents state courts from interpreting their constitutions independently because it begins with the presumption that the United States Supreme Court is correct.[41] Supporters of the lockstep approach argue that in some areas—notably criminal procedure—the resulting uniformity between federal and state law is desirable because it creates clear rules.[42] But the lockstep approach is the most controversial, in part

37. *See infra* notes 51–71 (quoting dependent interpretations).

38. *See, e.g.*, Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000); Glenn S. Goodnough, *The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 ME. L. REV. 491, 499 (1986); Linde, *supra* note 35, at 392–93.

39. Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79, 135–36 (2007).

40. Spitzer, *supra* note 33, at 1200.

41. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 402 (1984) [hereinafter Williams, *Shadow*] ("Any attempt to limit independent state constitutional interpretation . . . to only those cases fitting categorical formulations, or meeting certain criteria, further frustrates state constitutional processes."). *See also* James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1732 (2003) (arguing state courts should consider their role as "agents of federalism" in deciding whether to depart from federal interpretation).

42. The Oregon Supreme Court, now in the primacy camp, expressed this desire for uniformity in 1974. *See* State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) (adopting decision rule of United States Supreme Court and overruling prior decision of Oregon Supreme Court out of fear that not doing so would add "confusion" by creating "Oregon rule" and "federal rule.").

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because when a court adopts a lockstep approach, it vows to interpret the state provision identically to the federal provision in future cases, even if there are compelling reasons not to do so.

The problem with this debate is that it largely focuses on the normative question of which analysis is most legitimate. It does not address a crucial and preliminary descriptive question: Is a state court actually free to choose between these methods? Or, as this article suggests, do electoral mechanisms constrain state judges from having a true choice?

II.
CONSTRAINTS ON STATE CONSTITUTIONAL INTERPRETATION

This Part examines possible constraints on state judges in interpreting state constitutions. It studies decisions from all fifty states, focusing on state constitutional search-and-seizure provisions. It finds that the method a state uses to retain judges is the best and only significant predictor among those examined of whether a state court will interpret its constitution independent of the federal constitution. Judges who face partisan re-election are significantly more likely to interpret their state's constitution as identical to the federal constitution. Conversely, judges who serve for life are significantly less likely to do so. The retention method was a better predictor than the political ideology of state voters, the presence or absence of an intermediate appellate court, the age of a state's constitution, and the method of amending a state's constitution.

A. Methods

1. General Approach

This study does not categorize state constitutional decisions in terms of the primacy, criteria, or lockstep approaches discussed in Part I. Because some state courts alternate among these analytical methods, such an approach would be imprecise at best.[43] Instead, the study focuses on state search-and-seizure provisions and classifies state court decisions interpreting these provisions as either independent of the federal constitution or dependent on it. These classifications address the same basic issue as the analytical methods discussed in Part I—the degree to which a state court should treat federal precedent as presumptively correct in interpreting a state provision—but allow for uniform comparison among states.

Two types of decisions are classified as dependent. The first set of

43. *See, e.g.*, Spitzer, *supra* note 33, at 1176 (noting "[e]mpirical studies suggest that 'primacy' states do not uniformly adhere to their own constitutions.").

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decisions declare a state's search-and-seizure provision "the same as" or "identical" to the Fourth Amendment, or mandate the state provision be construed "in conformity with," "in harmony with," "*in pari materia*," or coextensively with the federal provision.[44] Such decisions necessarily presume that federal standards govern the interpretation of state constitutions. The second set of decisions avoid such explicit statements but treat a newly-issued decision of the United States Supreme Court as controlling the interpretation of the analogous state provision. Such treatment is the essence of dependent interpretation.

Likewise, two types of decisions are classified as independent: decisions that analyze a claim primarily on state grounds without relying on a related federal provision, in line with the primacy approach, and decisions that explicitly find that the state search-and-seizure provision provides "broader" or "greater" protections than its federal counterpart.[45] By providing greater protections, a state court necessarily relies on its state constitution independent of the federal constitution. Thus, both types of independent interpretations reject the presumption that federal constitutional decisions control the analysis of state constitutional provisions.

The goal of this study is to determine what factors constrain state courts in deciding whether to adopt an independent or dependent interpretation. Five possible constraints were analyzed: the political ideology of a state, the presence or absence of an intermediate appellate court, the age of the state's constitution, the process for amending the state constitution, and the state's judicial retention method.[46] A logistic regression was then conducted, using the type of interpretation—either dependent or independent—as the dependent variable and all five of the possible constraints as independent control variables.

2. Independent and Dependent Interpretations

a. Search and Seizure

While many state constitutional provisions are similar to federal ones and could therefore prompt state courts to adopt dependent interpretations, this study focuses on search-and-seizure provisions for several reasons. First, all fifty states have state constitutional provisions analogous to the Fourth Amendment, allowing for uniform comparison

44. *See infra* notes 51–71 (quoting dependent interpretations).

45. *See infra* notes 74–102 (quoting independent interpretations).

46. This model initially included a sixth factor, the regional location of the state. However, that factor was not included in the final model because it was highly correlated with several other factors, resulting in multicollinearity.

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among states.[47] Second, criminal law is particularly salient to state voters and state politicians. When state voters enact constitutional amendments, they often do so in response to criminal procedure decisions by state courts.[48] Judicial election campaigns focus on crime, with candidates boasting about their "tough on crime" credentials.[49] Thus, if there is a connection between a judicial retention method and dependent interpretations, it is likely to be seen in this area.[50]

b. Classification of States

Under this analysis, twenty-one states have dependent interpretations of their state constitutional search-and-seizure provisions: Alabama,[51] California,[52] Florida,[53] Georgia,[54] Illinois,[55] Iowa,[56] Kansas,[57] Kentucky,[58]

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47. *See* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 194 n.19 (1991) (noting that all fifty state constitutions have search and seizure provisions, thirty-four of which are "substantially identical" to Fourth Amendment).

48. *See* Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984) (finding at least nineteen state constitutional amendments "designed to curtail criminal procedure rights" enacted between 1970 and 1984); Utter, *supra* note 24, at 39 (asserting that state constitutional amendment process has "largely targeted" cases involving criminal rights).

49. *See, e.g.*, Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 328–31 (2010) (quoting judges who boasted "tough on crime" policies during election campaigns and who attacked opponents as "soft on crime").

50. This thesis had been advanced by others. *See, e.g.*, Williams, *Search & Seizure*, *supra* note 5, at 226 ("If one were to pursue a case study of state courts interpreting their state constitutions to be more protective than the Federal Constitution . . . search and seizure cases would provide the best material.").

51. *See* Chandler v. State, 680 So. 2d 1018, 1021 (Ala. Crim. App. 1996) ("[C]ase law . . . has consistently indicated that the protection afforded by [the state provision] is no greater than that provided by the Fourth Amendment."). *See also* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 418 (2007) (stating Alabama Supreme Court "has not diverged from federal interpretations of the Fourth Amendment when construing its state analog").

52. CAL. CONST. art. I, § 28(f)(2) (amending state constitution to forbid courts from excluding "relevant evidence" in criminal proceeding); *In re* Lance W., 694 P.2d 744, 755 (Cal. 1985) (interpreting the 1982 amendment to "permit exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution").

53. FLA. CONST. art. I, § 12 (mandating the state's search-and-seizure provision be construed "in conformity" with the Fourth Amendment).

54. *See* Wells v. State, 348 S.E.2d 681, 683 (Ga. Ct. App. 1986) (calling protections provided by state and federal search-and-seizure provisions "the same").

55. *See* People v. Caballes, 851 N.E.2d 26, 44–45, 46 (Ill. 2006) (reaffirming commitment to "limited lockstep" analysis); People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (allowing departure from federal interpretation only when there is "substantial" evidence that the framers of the state constitution intended a different interpretation).

56. *See* State v. Carter, 733 N.W.2d 333, 337 (Iowa 2007) (deeming the state provision "coextensive" with the Fourth Amendment).

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Maine,[59] Maryland,[60] Michigan,[61] Missouri,[62] Nebraska,[63] Nevada,[64] North Carolina,[65] North Dakota,[66] Ohio,[67] Texas,[68] Virginia,[69] West Virginia,[70] and Wisconsin.[71] Two of these dependent states deserve special consideration: Florida[72] and California[73] have each adopted constitutional amendments

57. *See* State v. Ninci, 936 P.2d 1364, 1373 (Kan. 1997) (describing protections under state provision as "identical" to federal ones).

58. *See* Holbrook v. Knopf, 847 S.W.2d 52, 55 (Ky. 1992) (noting the state provision "should be interpreted coextensively with federal guarantees").

59. *See* State v. Fredette, 411 A.2d 65, 67 (Me. 1979) ("It has been the consistent position of this court not to adopt an exclusionary rule pursuant to our Constitution when the United States Supreme Court has not applied such a rule to the states under the Fourth and Fourteenth Amendments . . . .").

60. *See* Scott v. State, 782 A.2d 862, 873 (Md. 2001) (construing the state provision "*in pari materia*" with the Fourth Amendment).

61. *See* People v. Collins, 475 N.W.2d 684, 691 (Mich. 1991) (requiring a "compelling reason" to depart from the Fourth Amendment). *But see* Sitz v. Dep't of State Police, 506 N.W.2d 209, 217–18 (Mich. 1993) (noting *Collins* should not be read to require courts to ignore state constitutional search-and-seizure law).

62. *See* State v. Rushing, 935 S.W.2d 30, 34 (Mo. 1996) (holding the state provision is "coextensive" with the Fourth Amendment).

63. *See* State v. Hicks, 488 N.W.2d 359, 363 (Neb. 1992) (finding the state constitutional provisions and the Fourth Amendment share "the same standard").

64. *See* Gama v. State, 920 P.2d 1010, 1013 (Nev. 1996) (holding the state's constitution "provides no greater protection than that afforded under its federal analogue").

65. *See* State v. Garner, 417 S.E.2d 502, 510 (N.C. 1992) (finding "there is nothing to indicate anywhere in the text of [the state provision] any enlargement or expansion of rights beyond those afforded in the Fourth Amendment").

66. *See* State v. Schmalz, 744 N.W.2d 734, 741 (N.D. 2008) (explaining the state provision is "nearly identical" to Fourth Amendment).

67. *See* State v. Robinette, 685 N.E.2d 762, 766–67 (Ohio 1997) (finding that state and federal search and seizure provisions are "virtually identical" and therefore grant the "same protection").

68. Texas courts have expressly reserved their authority to offer protections greater than the federal protections. *See* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991) (holding that when analyzing state search and seizure provisions, state courts "will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue"). In practice, however, Texas courts have not deviated from federal interpretations. *See* Gorman, *supra* note 51, at 458 ("A review of the case law reveals no decision where Texas courts have exercised their authority to diverge.").

69. *See* Lowe v. Commonwealth, 337 S.E.2d 273, 275 n.1 (Va. 1985) (recognizing state protections as "substantially the same as those contained in the Fourth Amendment" (quoting A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 182 (1974))).

70. *See* State v. Duvernoy, 195 S.E.2d 631, 634 (W. Va. 1973) (noting state provision is construed "in harmony" with Fourth Amendment). *See also* Gorman, *supra* note 51, at 462 (noting author was "unable to locate reported cases where West Virginia has diverged").

71. *See* State v. Sumner, 752 N.W.2d 783, 788 (Wis. 2008) (explaining court "ordinarily" construes state and federal provisions "coextensively").

72. FLA. CONST. art. I, § 12 (interpreted by the state high court to allow the exclusion of "relevant evidence" in a criminal proceeding only where the Fourth Amendment requires it).

73. CAL. CONST. art I, § 28(f)(2).

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that result in dependent interpretations.

Twenty-nine states have independent interpretations: Alaska,[74] Arizona,[75] Arkansas,[76] Colorado,[77] Connecticut,[78] Delaware,[79] Hawaii,[80] Idaho,[81] Indiana,[82] Louisiana,[83] Massachusetts,[84] Minnesota,[85] Mississippi,[86] Montana,[87] New Hampshire,[88] New Jersey,[89] New Mexico,[90] New York,[91] Oklahoma,[92] Oregon,[93] Pennsylvania,[94] Rhode Island,[95] South Carolina,[96]

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74. *See* Woods & Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138, 150 (Alaska 1977) (finding the state provision "contains an even broader guarantee" than its federal counterpart).

75. *See* State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984) (adopting a broader prohibition against warrantless entry than the Supreme Court and noting that its holding under the state constitution is "independent of federal authority").

76. *See* State v. Sullivan, 74 S.W.3d 215, 218 (Ark. 2002) ("[T]here are . . . occasions when this court will provide more protection under the Arkansas Constitution . . . .").

77. *See* People v. Oates, 698 P.2d 811, 815 (Colo. 1985) (finding the state constitution "protects a greater range of privacy interests than does its federal counterpart").

78. *See* State v. Oquendo, 613 A.2d 1300, 1309 (Conn. 1992) (holding the state constitution affords "greater protection" than the Fourth Amendment).

79. *See* Jones v. State, 745 A.2d 856, 866 (Del. 1999) (finding the state provision "may provide individuals with greater rights").

80. *See* State v. Mallan, 950 P.2d 178, 186 (Haw. 1998) (noting that "our case law and the text of our constitution appear to invite this court to look beyond the federal standards in interpreting the right to privacy").

81. *See* State v. Agundis, 903 P.2d 752, 757 (Idaho 1995) (stating "we are not bound by the United States Supreme Court's interpretations," and citing two previous cases where court found "broader protection" under state search and seizure provision).

82. *See* Mitchell v. State, 745 N.E.2d 775, 786 (Ind. 2001) ("[T]his Court has made an explicit point to interpret and apply [its state provision] independently. . . .").

83. *See* State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (declaring the state provision "not a duplicate of the Fourth Amendment or merely coextensive with it . . . .").

84. *See* Commonwealth v. Williams, 661 N.E.2d 617, 621 n.9 (Mass. 1996) (noting its state constitution "provides greater substantive protection" than the federal one).

85. *See* State v. Carter, 697 N.W.2d 199, 210 (Minn. 2005) ("We are free to offer protections under the Minnesota Constitution that are greater than those under the United States Constitution.").

86. *See* Graves v. State, 708 So. 2d 858, 861 (Miss. 1997) (finding the state provision "extends greater protections" than the Fourth Amendment).

87. *See* State v. Lewis, 171 P.3d 731, 736 (Mont. 2007) (holding the state's "unique constitutional language affords Montanans a greater right to privacy and, therefore, broader protection").

88. *See* State v. Koppel, 499 A.2d 977, 979–80 (N.H. 1985) (finding state provision includes "greater protection for individual rights").

89. *See* State v. Hempele, 576 A.2d 793, 800 (N.J. 1990) (declaring court has "duty" to "give full effect" to state provisions when federal constitution provides lower level of protection).

90. *See* State v. Gutierrez, 863 P.2d 1052, 1061 (N.M. 1993) (noting the court had recently "demonstrated a willingness to undertake independent analysis" of state provisions when federal law "begins to encroach" on them).

91. *See* People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001) (stating court "has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution . . . .").

92. *See* Turner v. City of Lawton, 733 P.2d 375, 380 (Okla. 1986) (calling the state

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South Dakota,[97] Tennessee,[98] Utah,[99] Vermont,[100] Washington,[101] and Wyoming.[102]

B. Results: Constraints on State Constitutional Interpretation

Five factors were examined to determine if they constrained state constitutional interpretation, with a focus on whether the presence of each factor made a state more likely to adopt a dependent or independent interpretation. Those factors are: the political ideology of a state, the presence or absence of an intermediate appellate court, the age of the state's constitution, the process for amending the state constitution, and the state's judicial retention method.

The best predictor of whether a state court will adopt a dependent interpretation among those studied is a state's judicial retention method. The more electorally accountable judges are, the more likely a court is to adopt a dependent interpretation. This was the only statistically significant factor of those examined. Of course, other factors beyond those studied here could affect a court's decision to adopt an independent or dependent interpretation, and the model used in this study does not account for all possible factors. However, as table 1 shows, no other factor examined had such a clear connection.[103]

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provision "broader in scope" than the Fourth Amendment).

93. *See* State v. Davis, 834 P.2d 1008, 1012–14 (Or. 1992) (analyzing the state provision first, before turning to the Fourth Amendment claim).

94. *See* Commonwealth v. Chase, 960 A.2d 108, 116 (Pa. 2008) (noting court has departed from federal constitution without considering criteria for doing so).

95. *See* R.I. CONST. art I, § 24 ("The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."). This provision was passed as a constitutional amendment in 1986, amid the New Federalism debate, but critics have chastised the Rhode Island Supreme Court for not fully following its spirit, and instead leaning toward dependent interpretations. *See* Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 665–66 (2005).

96. *See* State v. Weaver, 649 S.E.2d 479, 483 (S.C. 2007) ("[S]earches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution.").

97. *See* State v. Schwartz, 689 N.W.2d 430, 435 (S.D. 2004) ("[T]his Court may interpret the South Dakota Constitution as providing greater protection to citizens . . . .").

98. *See* State v. Cox, 171 S.W.3d 174, 183 (Tenn. 2005) (describing state standard applied "on occasion" that "tends to provide greater protection" than federal constitution).

99. *See* State v. DeBooy, 996 P.2d 546, 549 (Utah 2000) ("[W]e will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens.").

100. *See* State v. Costin, 720 A.2d 866, 868 (Vt. 1998) (describing state constitution as giving "broader protection" than federal constitution (citing State v. Kirchoff, 587 A.2d 988 (Vt. 1991))).

101. *See* City of Seattle v. Mesiani, 755 P.2d 775, 776 (Wash. 1988) (characterizing the state constitution as providing "greater protection" than its federal counterpart).

102. *See* Abeyta v. State, 167 P.3d 1, 6 (Wyo. 2007) (calling state provision "stronger" than federal one).

103. Only judicial retention method is significantly related to the state's interpretation

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TABLE 1 Statistical Significance of Five Possible Constraints on State Constitutional Interpretation

Factor	p value
Presence or Absence of Intermediate Appellate Court	.974
Age of State Constitution	.974
Political Ideology – majority either Democrat or Republican	.501
Political Ideology – split evenly between Democrats and Republicans	.940
State Constitutional Amendment Procedure – Legislative Processes	.478
State Constitutional Amendment Procedure – Ballot initiatives	.468
Judicial Retention Method	.026

1. Presence or Absence of Intermediate Appellate Court

There are several practical reasons to believe states without intermediate appellate courts would be more likely to adopt dependent interpretations. Without an intermediate appellate body, state supreme courts typically have to take more cases.[104] This gives them an incentive to adopt well-known and easy-to-apply rules, decreasing the need for appellate review. Independent interpretations thwart this goal by requiring a state's highest court to oversee the development of a new body of state law. Dependent interpretations, by contrast, require trial courts to apply known federal standards, minimizing the need for appellate review and lowering the caseload of the state's high court. We might therefore predict that states without intermediate appellate courts would be more likely to have dependent interpretations.

However, the presence of an intermediate appellate court has no measurable effect on the judicial interpretation.[105] As table 2 shows, only

of its constitutional search and seizure provision. However, the five variables together explain only about 16 percent of the variation in this interpretation ($R^2 = .157$). The vast majority of this variation is therefore explained by some combination of variables not accounted for in the model.

104. *See* Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 28–29 (1993) (noting that creation of intermediate appellate courts shifts error-correction review to intermediate court and leaves state's high court more free to develop policy). The average appellate disposition time for state courts can be three years or more and the absence of an intermediate appellate court extends this delay. Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 373 (2010). This results in more decisions without opinions or in per curiam opinions. *Id.* It also affects how frequently justices of the state's high court dissent. Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 59 (Feb. 1990).

105. The p value of this factor was .974, meaning it is not statistically significant.

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ten states do not have intermediate appellate courts, and of those only three have dependent interpretations.[106] This is the opposite of what we might expect.

TABLE 2 Intermediate Appellate Courts

	Number of States	Number of States with Dependent Interpretations	Percent of States with Dependent Interpretations
No Intermediate Appellate Court	10	3	30%
Intermediate Appellate Court	40	17	42.5%

2. *Age of State Constitutions*

The age of a state's constitution could also affect state constitutional interpretation, although this factor could cut in both directions. We might expect judges in states with older constitutions to adopt dependent interpretations because such states have necessarily rejected modifying their governing document. However, the opposite could also be true: state judges might interpret older constitutions flexibly, and independently, which could eliminate the need for a state constitution to be updated. The data do not support either prediction.

As table 3 shows, there is no visible connection between the decade in which a state last revised its state constitution and whether a state's high court adopts a dependent or independent interpretation.[107] Indeed, the age of a state's constitution does not appear to have any effect on state constitutional interpretation.

106. These states are: Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES, 296–97 tbl.5.2 (2009) [hereinafter BOOK OF THE STATES].

107. The p value of this factor was .974, meaning it is not statistically significant. Data on the age of state constitutions are drawn from *id.* at 12 tbl.1.1.

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TABLE 3 Age of State Constitutions

Decade	Number of States Adopting Constitution	Number of States with Dependent Interpretations	Percent of States with Dependent Interpretations
1780s	2	0	0%
1790s	1	0	0%
1800s	0	0	—
1810s	0	0	—
1820s	1	1	100%
1830s	0	0	—
1840s	1	1	100%
1850s	5	2	40%
1860s	3	3	100%
1870s	7	4	57%
1880s	3	1	33%
1890s	8	2	25%
1900s	2	1	50%
1910s	2	0	0%
1920s	0	0	—
1930s	0	0	—
1940s	2	1	50%
1950s	2	0	0%
1960s	4	2	50%
1970s	5	3	60%
1980s	2	1	50%
1990s	0	0	—
2000s	0	0	—

3. Political Ideology of State Voters

Criminal law issues fall largely along the liberal-conservative paradigm, with liberals tending to favor more protections for criminal defendants than conservatives do.[108] We could therefore expect that the political ideology of a state's voters would predict whether a state court will adopt an independent interpretation. Under this theory, state courts with a high percentage of Democratic voters would favor independent interpretations while courts in largely Republican states would favor

108. *See, e.g.*, Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 (noting that decisions "favoring, say, prosecutors and employers are said to be conservative, while those favoring criminal defendants and people claiming discrimination are said to be liberal").

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dependent interpretations.[109]

However, the study shows no statistically significant connection between the political party of a state and the adoption of an independent or dependent interpretation.[110]

4. Method of Enacting State Constitutional Amendment

State judges are subject to two accountability mechanisms: retention methods that control the re-election or reappointment of individual judges and constitutional amendments that override decisions of the entire court. We might expect that *any* judicial accountability method would constrain state judges since, after all, accountability mechanisms were designed to limit state courts. However, this is not the case. The degree of electoral accountability of a state's constitutional amendment procedure does not appear to affect state constitutional interpretation.[111]

Unlike federal constitutional amendments, state amendments are relatively frequent and easy to enact.[112] All states have provisions for proposing constitutional amendments through the state legislature. This study focuses on proposing amendments, rather than ratifying them, because ratification procedures are largely uniform.[113] This makes the requirements for proposing a constitutional amendment the more effective check on state judiciaries.

Constitutional amendment procedures can be grouped into five

109. States were assigned political parties based on their congressional delegations, which allows for a more uniform comparison of party support than would be had by comparing statehouse control. This study was conducted during the 111th Congress. For a list of members of the 111th Congress, see BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS 1774-PRESENT, http://bioguide.congress.gov/biosearch/biosearch.asp (search for "111" in "Year OR Congress") (last visited Oct. 1, 2011). Arizona, Maine, and Mississippi were evenly split between parties and were therefore omitted from this analysis. Maine has a dependent interpretation. Arizona and Mississippi have independent interpretations.

110. The p value for states with either a majority of Republicans or a majority of Democrats was .501, meaning it was not statistically significant. The p value for states split evenly between Republicans and Democrats was .940, which is also not statistically significant.

111. The p value for legislative amendment processes was .478, meaning it was not statistically significant. The p value for ballot initiative amendment processes was .468, which is also not statistically significant. Some states have both types of processes. *See infra* note 114.

112. *See* G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 15 (2011) ("Most current state constitutions have averaged more than one constitutional amendment for every year since their passage.").

113. In forty-three states, an amendment is ratified if approved by a majority of voters who vote on the amendment. BOOK OF THE STATES, *supra* note 106. at 14 tbl.1.2. Three other states require approval by a majority of voters in the overall election. *Id.* One state requires approval by two-thirds of voters on the amendment, another by three-fifths, another by either a majority of voters in the election or by three-fifths of voters on the amendment, and one state does not require a vote at all. *Id.*

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categories.[114] Arranged from most electorally accountable to least—the same spectrum used to assess judicial retention methods—the procedures for proposing a state constitutional amendment are: ballot initiatives, passage by a majority of one legislative session, passage by a supermajority of one legislative session, passage by either one legislative session (with a higher margin of votes) or two legislative sessions (with a lower margin of votes), and passage by two legislative sessions.[115] As table 4 shows, the degree of electoral accountability in a constitutional amendment process appears to bear no relation to whether a state court adopts a dependent or independent interpretation.

If dependent interpretations are more likely when judges face any accountability mechanism, then we would predict states with the most electorally-accountable state constitutional amendment procedures would be more likely to have dependent interpretations. However, this is not the case.

Overall, this study shows the degree of electoral accountability of a state's constitutional amendment process has little or no relation to a state court's constitutional interpretation.[116] These results run counter to the prediction that any strong judicial accountability mechanism will produce dependent state constitutional interpretations. Indeed, the absence of any relationship between the strength of state constitutional amendment procedures and a state court's likelihood of adopting a dependent interpretation suggests there is something particular to judicial retention methods that makes them more likely to produce dependent interpretations than any other factor examined here.

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114. Some states fall into two categories because states that allow ballot initiatives do so in addition to the traditional process of amending the constitution through the legislature. *See id.* at 14 tbl.1.2 (listing procedures in each state to amend constitution through legislature); *id.* at 16 tbl.1.3 (listing eighteen states that allow constitutional amendments through ballot initiatives).

115. This arrangement is based on accountability to a majority of the public. More majoritarian methods such as ballot initiatives are therefore ranked ahead of methods that protect against majoritarian control, such as requiring passage by two consecutive legislatures. It is intended to be analogous to the scale used in assessing judicial retention methods. *See infra* note 119.

116. This lack of relationship is surprising because ballot initiatives frequently target unpopular criminal decisions by state courts. *See* Wilkes, *supra* note 48, at 257 (finding that fourteen states adopted nineteen criminal procedure amendments to state bills of rights between 1970 and 1984).

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TABLE 4 Constitutional Amendment Procedures

Constitutional Amendment Method	Number of States	Number of States with Dependent Interpretations	Percent of States with Dependent Interpretations
Ballot Initiative	18	9	50%
One Legislative Session, Majority Vote	10	2	20%
One Legislative Session, Supermajority Vote	25	15	60%
Either One or Two Legislative Sessions	3	0	0%
Two Legislative Sessions	12	4	33.3%

5. Judicial Retention Methods

Judges of a state high court are subject to one of seven retention methods.[117] Those methods can be arranged from most electorally accountable to most independent as follows: partisan elections, nonpartisan elections, retention elections,[118] reappointment by the legislature, reappointment by the governor, reappointment by a judicial nominating commission, and the non-reappointment of judges who serve either for life or until a mandatory retirement age.[119]

117. These categories are drawn from BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6 (listing, but not ranking these retention methods). However, as G. Alan Tarr has noted, there is "considerable convergence" among these systems, making categorization difficult. G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1447 (2003). For example, partisan activists sometimes retain large roles even in states where judicial elections are ostensibly nonpartisan. *Id.* at 1449.

118. In retention elections, no opposing candidates are permitted and voters answer either yes or no to the question "should Judge *X* be retained in office?" *See* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33. J. LEGAL STUD. 431, 452 (2004) (describing ballots in retention elections). Retention elections are common in merit-based selection plans, where an independent commission recommends judicial candidates to the governor and judges are subject to retention elections. Sandra Day O'Connor, *The 2009 Earl F. Nelson Lecture: The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 486 (2009). In 1940, Missouri was the first state to adopt a merit plan; since then, more than thirty states have adopted at least some aspect of one. *Id.*

119. The methods are classified according to the number of voters who can influence a retention decision. This is why, for example, legislative reappointment is classified as more electorally accountable than gubernatorial reappointment. This spectrum is, of course, simplified. The continuum between independence and accountability is inherently "dealing with questions of degree and technique." Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1576 (1988). As Seidman notes, there is no "perfect accountability" because judges who "care more about the result in a case than

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This study focuses on methods of retaining judges instead of methods by which judges are initially selected. It does so because only after a judge takes office can her desire to remain in judicial office affect a court's opinions.[120]

Judicial retention methods appear to constrain state constitutional interpretation. As table 5 shows, the more electorally accountable state judges are, the more likely a court is to adopt a dependent interpretation.[121] The logistical regression model used in this study found the connection between judicial retention methods and dependent interpretations statistically significant.[122] Judges who face the most electorally-accountable retention system, partisan elections, are the most likely to adopt dependent interpretations.[123] Those who face the second most accountable system, nonpartisan elections, are the second most likely to have dependent interpretations.[124] Those with the third most electorally-accountable system, retention elections, are third most likely.[125] Those with the fourth most electorally-accountable system, legislative appointments, are fourth most likely.[126] Those with the fifth most

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winning re-election will not be deterred by the threat of losing their office," and no perfect independence, because "so long as [judges] are appointed by politicians rather than anointed by a sign from the heavens, there will remain some popular control over the judicial product." *Id.*

120. This is the precise issue that the federal judiciary hopes to avoid through lifetime appointments. However, scholars have noted that even in that system, judges who wish to be promoted to a higher court retain some of this temptation to please those who can elevate them. *See, e.g.*, Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 672–73 (2002) (noting that "[t]iers of judging inside Article III [courts] can undermine judicial independence . . . ." and describing the problem of "bench climber" judges).

121. This includes both gubernatorial appointments subject to the consent of the legislature and those subject to the consent of a judicial nominating committee. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6..

122. The p value for this variable was .026, meaning it is significant to the .05 level.

123. Five states have partisan judicial elections. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6. Of these states, Alabama, Ohio, Texas, and West Virginia have dependent interpretations. Louisiana has an independent interpretation.

124. Fourteen states have nonpartisan judicial elections. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6. Of these states, Georgia, Kentucky, Michigan, Nevada, North Carolina, North Dakota, and Wisconsin have dependent interpretations. Arkansas, Idaho, Minnesota, Mississippi, Montana, Oregon, and Washington have independent interpretations. It is also notable that although Michigan's elections are nonpartisan, candidates can be nominated by political parties. *Id.*

125. Nineteen states have retention elections. *Id.* at 303–05 tbl.5.6. Of these states, California, Florida, Illinois, Iowa, Kansas, Maryland, Missouri, and Nebraska have dependent interpretations. Alaska, Arizona, Colorado, Indiana, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming have independent interpretations.

126. Three states have legislative reappointment. *Id.* Virginia is the only one with a dependent interpretation. South Carolina and Vermont have independent interpretations.

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electorally-accountable system, gubernatorial appointments, are fifth most likely.[127] And states with the sixth and seventh most electorally-accountable systems—reappointment by a judicial nominating commission, and the "non-reappointment" of judges who serve for life or until mandatory retirement, respectively—are least likely to have dependent interpretations.[128]

TABLE 5 Judicial Retention Methods

Judicial Retention Method	Number of States	Number of States with Dependent Interpretations	Percent of States with Dependent Interpretations
Partisan Election	5	4	80%
Nonpartisan Election	14	7	50%
Retention Election	19	8	42.1%
Legislative Reappointment	3	1	33.3%
Gubernatorial Reappointment	5	1	20%
Judicial Nominating Commission Reappointment	1	0	0%
Life Term or Service Until Mandatory Retirement Age	3	0	0%

C. Discussion: The Constraining Force of Judicial Elections

State courts are most likely to adopt dependent interpretations when judges face high amounts of electoral accountability. This result is consistent with observations by many state judges who acknowledge that judicial elections make them keenly aware of, and responsive to, political pressures. Former Washington Supreme Court justice Robert F. Utter has said that "state supreme court justices live with the reality that most of them are in some manner accountable to the public about their decisions."[129] Former California Supreme Court Justice Otto Kaus echoed that concern. "There is no way a judge is going to be able to ignore the

127. Five states have gubernatorial reappointment. *Id.* Maine is the only with a dependent interpretation. Connecticut, Delaware, New Jersey, and New York have independent interpretations.

128. Hawaii is the only state where judges are reappointed by a Judicial Nomination Commission. *Id.* It has an independent interpretation. Judges in Massachusetts, New Hampshire, and Rhode Island serve for life or until a mandatory retirement age. *Id.* All have independent interpretations.

129. *See* Utter, *supra* note 24, at 48.

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political consequences of certain decisions, especially if he or she has to make them near election time," Justice Kaus said. "That would be like ignoring a crocodile in your bathtub."[130]

In thirty-eight states, some type of election decides whether judges of the highest court will remain in office.[131] Partisan elections are most notorious for affecting judicial behavior, but even retention elections, where no opponents appear on the ballot, can affect the actions of state judges. In a 1991 survey of 645 judges who had faced retention elections, 60.5% said the elections affected their behavior.[132] The elections made them more sensitive to public opinion, encouraged them to avoid controversial cases or rulings before elections, or even caused them to impose longer sentences on criminal defendants.[133] Campaigns by opposition groups can even chill the behavior of judges who are not on the ballot, as they seek to "'send a message' to other justices and thereby to affect decisions of the court."[134] Thus, while the common perception is that these threats should not be considered credible because sitting judges almost always prevail in elections, in reality judges in the more electorally-accountable systems do face a higher threat of defeat, making such threats more real to them.[135] Even judges who face only reappointment and not re-

130. Paul Reidlinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

131. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6. In nineteen of these thirty-eight states, judges face only retention elections. *Id.*

132. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994) (919 judges were surveyed, and 645 responded). *See also* Aman L. McLeod, *Differences in State Judicial Selection*, *in* EXPLORING JUDICIAL ELECTIONS POLITICS 10, 25–26 (Mark C. Miller ed., 2009) (discussing other studies that analyze how elections affect judicial behavior).

133. Aspin & Hall, *supra* note 132, at 312–13. Eighteen judges surveyed did not provide answers to specific questions about *how* judicial retention elections affected their behavior after indicating that their behavior was affected.

134. Tarr, *supra* note 117, at 1453. The most oft-told cautionary tale is that of Rose Bird, former Chief Justice of the California Supreme Court. Her appointment in 1977 upset the political right and the law enforcement establishment, and she barely survived her first retention election. Critics derided her as "soft on crime" and a decision reversing the death sentence of a man convicted of kidnapping and murdering a twelve-year-old girl became an emblem of the campaign against her. The victim's mother appeared on television to denounce Justice Bird. After being targeted by at least five recall campaigns, Justice Bird was ousted in 1987 by a 2-to-1 margin. By election day, she had voted to reverse all sixty-one death sentences she had considered. Reidlinger, *supra* note 130, at 52, 58. *See also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 737–38, & 737 n.144 (1995) (describing these events). A more recent example is the ousting of three Iowa Supreme Court justices in retention elections after a heated campaign led by critics of a decision that allowed gay couples in the state to marry. *See* A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 34, 2010, at A1 (describing one of the campaign's leaders as trying to "send a message to judges nationwide").

135. The fact that most sitting judges prevail in elections does not eliminate this chilling effect. Nearly 95% of House Representatives facing re-election also prevail, but there is no doubt they are sensitive to majoritarian politics. *See Reelection Rates Over the*

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election are exposed to some electoral forces. For example, gubernatorial candidates in states where governors are charged with appointing state justices often campaign on promises to appoint judicial conservatives.[136]

Dependent interpretations are an easy out for judges facing electoral pressure. By claiming a state search-and-seizure provision is controlled by the federal constitution, state judges avoid making a substantive decision on the merits of a criminal defendant's claim. Yet dependent interpretations raise special concerns for those who care about judicial accountability, because they allow state judges to avoid deciding substantive issues by tying the interpretation of their state's constitution to existing federal standards. Because the increasing politicization of state judicial elections puts more pressure on judges to make politically-acceptable decisions, this option appears increasingly attractive. For decades, judicial elections were sleepy affairs with low turnout. Now, they have grown increasingly contested, giving an advantage to candidates who pander to majoritarian views.[137] The margin of victory has also decreased in re-election contests, making campaigns all the more important.[138]

III.
A LACK OF ACCOUNTABILITY

While state courts are more likely to adopt dependent interpretations when they are more accountable to the electorate, dependent interpretations actually make state judges less accountable in two key ways. First, as Part III.A explains, state judges who adopt dependent interpretations become less electorally accountable for substantive decisions of state law because they shift decision-making to the United

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Years, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/bigpicture/reelect.php?cycle=2008 (last visited Oct. 1, 2011) (finding 94% of congressional incumbents won re-election in 2008, and examining historical pattern). A recent study showed dramatic differences in electoral defeats among judicial retention systems. *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 83 (2009) (finding only 1.3% of judges in retention elections were defeated during a 14-year period, 5.2% of judges were defeated in nonpartisan contests, and—significantly—31% of judges were defeated in partisan elections).

136. *See* Wilkes, *supra* note 48, at 232 n.38 (finding that in states where judges are appointed by governors, gubernatorial candidates often may promise to appoint judges who will be "strict constructionists").

137. *Id.* at 734–35. On the increasing politicization of judicial elections, see JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, BRENNAN CTR. FOR JUSTICE, JUSTICE AT STAKE: THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, vi–viii (Jesse Rutledge, ed., 2006), *available at* http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006 (finding high court candidates in five states set spending records in 2006 and that third-party interest groups spent at least $8.5 million to support or oppose judicial candidates nationwide. Candidates raising the most money won 68% of the time, down from 85% in 2004.).

138. Croley, *supra* note 134, at 734.

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States Supreme Court. Second, as Part III.B explains, dependent interpretations make state judges less publicly accountable because they stifle the process that legislators and citizens use to respond to state court decisions. Because the United States Supreme Court, rather than a state court, decides the substantive issue in a dependent case, there is little room for state political actors to blunt the impact of a decision or to enact a state constitutional amendment to override it. As Part III.C explains, dependent interpretations cannot be justified out of either respect for *stare decisis* or for the intent of a state's constitutional drafters.

A. Electoral Unaccountability

Judicial elections are designed to make state judges electorally accountable to voters. Although they were initially implemented as a way to give judges a power base separate from the legislatures that used to control judicial appointments,[139] today partisan judicial elections are largely defended as an electoral accountability mechanism.[140] This position has drawn much criticism. The American Bar Association has called for the eradication of judicial elections,[141] and Justice Sandra Day O'Connor has launched a campaign to change how states select judges.[142] The United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co.* heightened debate on the topic, after the Court found a West Virginia judge violated due process guarantees by refusing to recuse himself from an appeal brought by a company whose chairman spent $3 million on the judge's partisan election campaign.[143] In response, some states have

139. *See* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 195–96 (1993) (noting that most legislatures in original states appointed judges and explaining that the shift to electing judges was intended by some reformers within state constitutional conventions to make judges more independent by giving them a power base separate from the legislature).

140. *See, e.g.*, BONNEAU & HALL, *supra* note 135, at 2 ("[J]udicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens and the bench.").

141. ALFRED P. CARLTON, JR., AM. BAR ASS'N, JUSTICE IN JEOPARDY 1–3 (2003), *available at* http://www.abanet.org/judind/jeopardy/home.html.

142. *O'Connor Judicial Selection Initiative*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., http://www.du.edu/legalinstitute/judicial_selection.html (last visited Nov. 5, 2011).

143. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264–65 (2009). The case resulted from an appeal of a $50 million verdict against A.T. Massey Coal Company. *Id.* at 2257. After the verdict but before an appeal to the state's highest court, West Virginia held its 2004 partisan judicial elections. *Id.* Knowing the state's high court was likely to hear the case, Massey's CEO supported Brent Benjamin, an attorney challenging a sitting justice. *Id.* The CEO's $3 million in contributions was more than the total amount sent by any other Benjamin contributor. *Id.* After his election, Justice Benjamin refused to recuse himself from the case and the state court overturned the jury verdict in two separate 3-2 decisions. *Id.* at 2257–58.

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jettisoned or reformed partisan judicial elections in recent years.[144] Nevertheless, even critics of judicial elections do not deny that elections are designed to make judges accountable to voters.[145]

Dependent interpretations prevent this accountability. By shifting decision-making from state courts to the United States Supreme Court, dependent interpretations give unelected federal justices the final say over the substance of a state constitution. In effect, they allow state judges to avoid electoral accountability.

1. Supreme Court Review of State Court Decisions

The doctrine that delineates when the United States Supreme Court will review state court decisions helps to insulate from public scrutiny those state judges who adopt dependent interpretations. States have always been presumed to be the final authority on the meaning of state laws.[146] If a state court decides a case based on state law, the United States Supreme Court can only review the decision if it violates the federal constitution.[147] However, many cases raise issues under both federal and state law. Most criminal defendants, for example, are prosecuted in state courts and many claim protections under both the state and federal constitutions.[148] If a state court decides such a case on the federal grounds, the United States Supreme Court can review it.[149] However, if the state court decides the case on an independent and adequate state ground, the

144. *See, e.g.*, BONNEAU & HALL, *supra* note 135, at 11 (noting that Arkansas and North Carolina recently switched from partisan to nonpartisan elections). Other states, including Wisconsin, have created public funding systems for judicial elections. *See Judicial Selection in the States: Wisconsin*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=WI (last visited Nov. 5, 2011) (describing state's public financing system).

145. Some criticize judicial elections as unrepresentative of majority will because of low salience among voters and inadequate knowledge about candidates. *See* BONNEAU & HALL, *supra* note 135, at 7–8 (recognizing this argument as one of two arguments traditionally advanced by critics of judicial elections). However, this issue is distinct from that of electoral accountability. Elected judges are accountable to those who vote; the issue of who votes is a separate question.

146. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590, 632–33 (1874) (rejecting the notion that the United States Supreme Court could review questions of state law raised in the same case with federal questions); BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 13 (1991) ("From the earliest days of the nation's history, state—not federal—courts were to be the ultimate interpreters of state law, including state constitutional provisions.").

147. LATZER, *supra* note 146, at 13.

148. *See* RONALD JAY ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & WILLIAM J. STUNTZ ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL 14 (2005) ("The vast majority of criminal cases are processed in state rather than in federal courts." (internal citations omitted)).

149. *Id.*

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United States Supreme Court cannot review the issue.[150] Most problems arise when state courts decide cases without saying on what grounds the decision is based. In these cases, the appellate jurisdiction of the United States Supreme Court turns on whether a state court decision is based on state or federal law.[151]

Until 1983, the United States Supreme Court dealt with ambiguous state decisions in one of three ways: by dismissing the case, vacating or continuing the case so that the state court could clarify the basis for its decision, or researching state law to determine the basis for the state court decision.[152] None of these approaches were satisfactory. Examining state law was a lengthy process that risked misinterpretation.[153] Vacating and continuing for clarification was awkward and inefficient.[154] Dismissing the cases left them intact, allowing state courts to erode United States Supreme Court rulings without making clear that they did so only as a matter of state law.[155]

In *Michigan v. Long*, the United States Supreme Court chose another route: presuming a state court did not decide an issue on state grounds unless it made "clear" by a "plain statement" that it had done so.[156] The Court has interpreted this requirement strictly. In *Long*, the Michigan Supreme Court held that police illegally searched a defendant's car in violation of both the Fourth Amendment and the state constitution.[157] Despite this invocation of the state constitution, the United States Supreme Court majority was "unconvinced that [the state decision] rests upon an independent state ground" because apart from two citations to the state constitution, the state court relied exclusively on federal cases.[158] Instead, the Court found that "references to the state constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law."[159] The Court has since made clear that it will invoke jurisdiction liberally under *Long*. Unless a state court "expressly assert[s] that state-law sources gave [a defendant] rights distinct from, or broader than" federal rights, the Court can claim jurisdiction.[160] That is, the United States Supreme Court

150. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

151. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 499 (5th ed. 2003) (describing the United States Supreme Court's jurisdiction over state court decisions).

152. *Long*, 463 U.S. at 1038–39.

153. *Id.* at 1039.

154. *Id.* at 1039–40.

155. *Id.* at 1040; LATZER, *supra* note 146, at 23.

156. *Long*, 463 U.S. at 1040–41.

157. *Id.* at 1037 n.3.

158. *Id.* at 1043.

159. *Id.* at 1044.

160. *See* Florida v. Powell, 130 S. Ct. 1195, 1200 (2010).

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presumes it has jurisdiction unless a state court explicitly withholds it.[161]

2. *United States Supreme Court Review and Dependent Interpretations*

Dependent interpretations cannot make the type of plain statement envisioned by *Long* because they necessarily avoid relying on independent state law.[162] *Long* requires state courts to explicitly state their intent to develop an independent body of state law.[163] So long as they do so, state courts are free to create a "separate sphere" of state constitutional rules.[164] But dependent interpretations—by definition—fail to do this.[165] As a result, they defer substantive decisions to the United States Supreme Court.[166]

State v. Robinette illustrates the importance of whether a state court decision is dependent or independent.[167] In that case, the defendant was pulled over for driving sixty-nine miles per hour in a forty-five-mile-per-hour construction zone.[168] The deputy sheriff intended only to warn the defendant, but after examining his license the deputy asked if the defendant was carrying illegal contraband, including weapons or drugs.[169] The defendant said no, but "automatically" agreed when the deputy asked to search the car, believing he could not refuse.[170] The deputy sheriff found drugs in a search of the car, and the defendant argued that the evidence from the search should be suppressed.[171] The Ohio Supreme Court held that the car search was consensual and the deputy was therefore required to have told the defendant he was free to go after the lawful traffic stop

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161. *See* LATZER, *supra* note 146, at 24 ("The message [in *Long*] to the state courts was clear: differentiate state and federal law basis for (liberal) decisions, or face Supreme Court review. . . . The plain statement rule was an effort to prevent the state courts from subtly liberalizing United States constitutional law and undoing the Burger Court's pro-prosecutorial reshaping of criminal procedure.").

162. This is true regardless of the state constitutional provision at issue. *See, e.g.*, Pennsylvania v. Muniz, 96 U.S. 582, 588 n.4 (1990) (finding, in Fifth Amendment context, that reference to state constitutional provision that "offers a protection against self-incrimination identical to that provided by the Fifth Amendment" does not rest on independent and adequate state ground).

163. *Long*, 463 U.S. at 1040–41.

164. *See* Althouse, *supra* note 9, at 1492.

165. *See supra* notes 51–71 (providing excerpts from dependent interpretations).

166. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 414 (1998) ("By refusing to deviate from federal doctrine, state courts actually do refrain from exercising judicial review under state constitutions.").

167. State v. Robinette (*Robinette II*), 685 N.E.2d 762 (Ohio 1997).

168. State v. Robinette (*Robinette I*), 653 N.E.2d 695, 696 (Ohio 1995), *rev'd* 519 U.S. 33 (1996).

169. *Id.*

170. *Id.*

171. *Id.*

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ended and before the consensual search began.[172] This right to be told was "guaranteed by the federal and Ohio Constitutions."[173] But the state court judges—who face partisan re-election[174]—mentioned only one Ohio case in the decision, itself interpreting a federal case, and otherwise cited only to federal precedent.[175] Thus, the United States Supreme Court determined it had jurisdiction under *Long*.[176] The United States Supreme Court then overturned the Ohio court, finding the federal constitution guaranteed no such right.[177]

On remand, the Ohio Supreme Court reaffirmed its commitment to a state constitutional provision "coextensive" with the Fourth Amendment despite having announced that the "free to go" warning was required by both the federal and state constitutions just two years earlier.[178] It reached this decision even though Justice Ruth Bader Ginsburg had concurred separately to express her doubt that the Ohio court meant to base its initial holding on federal grounds.[179] Given this doubt, Justice Ginsburg instructed the Ohio court that, on remand, it "may choose to clarify that its instructions to law enforcement officers in Ohio find adequate and independent support in state law . . . ."[180] She even provided an example of a recent Montana Supreme Court decision that had done so.[181] In spite of its prior reading of the state's search-and-seizure provision, the encouragement from Justice Ginsburg, and the urging of amici,[182] the Ohio court reiterated that state protections are "coextensive with those provided by the Fourth Amendment."[183] The court continued: "Therefore, the Ohio Constitution does not require a police officer to inform an individual, stopped for a traffic violation, that he or she is free to go before the officer may attempt to engage in a consensual interrogation."[184] The Ohio court's opinion never addressed the possibility of interpreting the state

172. *Id.* at 699.

173. *Id.*

174. Ohio Supreme Court candidates are nominated through partisan primaries, but the party's name does not appear on the ballot in the general election. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6.

175. Ohio v. Robinette, 519 U.S. 33, 37 (1996).

176. *Id.*

177. *Id.* at 39–40.

178. *Robinette II*, 685 N.E.2d 762, 766 (Ohio 1997).

179. *Robinette*, 519 U.S. at 42–43 (Ginsburg, J., concurring).

180. *Id.* at 44–45.

181. *Id.* at 44.

182. Joint Brief of Amici Curiae Ohio Ass'n of Criminal Def. Lawyers & Am. Civil Liberties Union of Ohio Found., Inc. in Support of Appellee Robert D. Robinette at 6–8, *Robinette II*, 685 N.E.2d 762 (Ohio 1997) (No. 94-1143), 1997 WL 33770427, at *6–8.

183. *Robinette II*, 685 N.E.2d at 771.

184. *Id.* The court did distinguish the case from the "free to go" issue, ultimately holding that under the totality of the circumstances the defendant did not consent to search of his car, thus suppressing the evidence. *Id.* at 771–72.

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constitution independently.[185] Instead, it in effect let the United States Supreme Court decide the state constitutional issue.

State judges who face re-election have been quick to adopt dependent interpretations even when no case is remanded to them. In October of 1995, the Nevada Supreme Court addressed the issue of pretextual traffic stops.[186] It found that such stops were valid only if a reasonable officer would have stopped the suspect without relying on an improper purpose.[187] Eight months later the Nevada court—one in which judges face nonpartisan re-election—reversed itself, rejecting the "would have" test.[188] The switch came after the United States Supreme Court's decision in *Whren v. United States*, which held that pretextual traffic stops do not violate the federal constitution, even when a reasonable officer would not have stopped the driver, so long as the officer had probable cause to believe a law was violated.[189] Without even discussing the substance of its state's constitution, the Nevada Supreme Court said that after *Whren* it was "constrained to overrule" two state cases that found the "would have" test controlling.[190] In addition, the Nevada court found that the state's search-and-seizure clause "provides no greater protection than that afforded under its federal analogue," and adopted *Whren* as "the proper test under the Nevada Constitution as well."[191] Of course, the state court did not have to reach this conclusion, as a matter of state constitutional law.[192] Yet the Nevada court overruled two state precedents—without discussion of their merits—to fall into line with the United States Supreme Court.

While it is not clear the Ohio and Nevada courts acted out of a fear of electoral reprisal in these cases, it is significant that courts are more likely to adopt dependent interpretations when judges face electorally-accountable retention methods, and these cases demonstrate some of the consequences of dependent interpretations. Electing judges is supposed to give voters greater control over the substance of state law, by making state judges attuned to their wishes. Yet they actually produce the opposite result: when judges are elected, they are more likely to adopt dependent interpretations, thereby passing state constitutional questions off from state courts and on to the United States Supreme Court.

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185. *Id.*

186. Alejandre v. State, 903 P.2d 794 (Nev. 1995), *overruled by* Gama v. State, 920 P.2d 1010 (Nev. 1996).

187. *Alejandre*, 903 P.2d at 796.

188. *Gama*, 920 P.2d at 1013.

189. Whren v. United States, 517 U.S. 806, 819 (1996).

190. *Gama*, 920 P.2d at 1013, *overruling Alejandre*, 903 P.2d 794 *and* Taylor v. State, 903 P.2d 805 (Nev. 1995).

191. *Id.* at 1013.

192. *See supra* notes 146–147 and accompanying text.

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Dependent interpretations allow judges to avoid controversial decisions when they face re-election—a tactic that ignores the value that a state places on judicial accountability when it creates an elected judiciary in the first place.

B. Public Unaccountability

Dependent interpretations decrease the public accountability of state judiciaries in at least three ways. First, by deciding state constitutional questions on federal grounds, the state court blunts the ability of state political actors—including legislative and executive branches—to react to state constitutional decisions. Second, dependent decisions muddle the exchange of ideas between the United States Supreme Court and state courts. Third, dependent interpretations deprive state courts of the public dialogue that legitimates their decisions. By isolating decisions from public debate, judges avoid discussion of controversial questions of state constitutional law. This frustrates the development of an independent body of state case law that could spark academics, advocates, and voters into vigorous debate on the meaning of a state constitution and allow for the possibility of meaningful change.

This result is particularly ironic because elections are designed to encourage debate. Traditional orthodoxy holds that the more issues discussed and debated during a campaign, the higher the quality and greater the legitimacy of a popular election.[193] But dependent interpretations thwart open debate on unpopular issues, in part because independent interpretations require a state court to stand on its own reasoning, an unattractive option to judges facing both future elections and an unpopular issue in the case at hand. Unlike federal judges, state judges "fear political retaliation and thus may rationally choose to avoid flaunting their reliance on state law, preferring to create the appearance that they act as unwilling puppets of the Supreme Court."[194] By adopting dependent interpretations, state courts escape the public scrutiny inherent in electorally-accountable judicial models.

1. Loss of Political Dialogue

When a state court is forced to interpret a state constitution on its own terms—because, for example, the provision at issue has no federal

193. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 311 (2008) (discussing the tensions inherent in this traditional model as applied to judicial elections).

194. Althouse, *supra* note 9, at 1510. *See also* Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 612 ALB. L. REV. 1399, 1403–04 n.23 (1998) ("[S]tate constitutional law puts the spotlight on the state judges because it is *their* law . . . .").

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counterpart—its decision is a vehicle for debate on the meaning of the state constitutional provision.[195] Political actors respond to the decision. Legislators try to attack unpopular outcomes. Citizens might attempt a ballot initiative that overrules the decision. In short, these decisions spark dialogue among the citizens and political branches of a state.[196]

Dependent interpretations avoid this debate. As explained in Part III.A, state judges do not decide the substantive outcome of a case when they adopt a dependent interpretation—the United States Supreme Court does. This shields state judges from criticism about the substance of a decision. Instead of debating substantive issues, citizens, legislators, and other political actors can only debate the process a state court used in making its decision, i.e., its decision to adopt a dependent interpretation. The shift from substance to procedure makes it less salient, because the public in large part does not understand or care about procedural issues. State courts obviously know how to interpret state constitutional provisions without reference to the federal constitution; they must do so whenever a state provision does not have a federal counterpart. Yet many refuse to undertake this separate analysis when a federal counterpart does exist.[197] There is little explanation for this. There is no doctrinal reason for courts to use ordinary principles of constitutional interpretation to interpret state constitutional provisions when they have no federal counterpart, but to abandon those principles when a similar federal provision exists.[198]

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195. As Barry Friedman has said of the United States Supreme Court, "The Court facilitates and shapes the constitutional debate. The Court sparks discussion as to what the text should mean by siding with one constituency's interpretation, or synthesizing several, as to what our norms should be." Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 654 (1993). Although this observation is made with respect to judges in the largely independent federal judiciary, it should be no less the case for the largely accountable state judiciaries; both are ultimately accountable to public will.

196. Examples are plentiful. The campaign of New Jersey Governor Chris Christie is an apt one. As a candidate, Christie promised to "gut" the agency charged with implementing the New Jersey Supreme Court's *Mount Laurel* decision and as governor he appears to be following through on this pledge. *See* Lisa Fleisher, *Bill to End COAH Gets Hearing in Senate*, STAR-LEDGER, Feb. 2, 2010, http://www.nj.com/starledger/stories/index.ssf?/base/news-1/1265075723119940.xml&coll=1. Controversial for several decades, the *Mount Laurel* decision was made under the zoning portion of the state's constitution. It established that municipalities in New Jersey had an affirmative obligation to provide affordable housing. *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 731–33 (N.J. 1975). *See also* Friedman, *supra* note 195, at 655–58 (describing cycle of constitutional dialogue).

197. *See* Linde, *supra* note 35, at 386–87 (observing that when no federal constitutional provision is on point, advocates argue state constitutional issues but that when federal analogue exists they generally stop doing so).

198. *See* Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 387 (2007) ("If other provisions of the state constitution are given their intended effect, I do not understand by what justification courts would decline even to consider the matter when it

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Dependent interpretations also distort the checks and balances of the political system by preventing state political actors from trying to overturn or undercut the substance of a court decision.[199] If state legislators believe a substantive decision was dictated by federal law—which they cannot alter—they are unable to change the outcome by amending the state constitution or supporting new judicial candidates.[200]

This short-circuits the dialogue that should exist between courts and political actors. When a state court decides a case on state grounds, it can enable or even invite political branches to weigh in on a decision. This is most clearly the case when a state court decides an issue on statutory grounds instead of state constitutional grounds and highlights the difference in the opinion. *People v. Cahan* is a classic example.[201] In that case, the California Supreme Court considered the applicability of the exclusionary rule in the years before the federal constitution required states to impose it.[202] The power to formulate rules of evidence is shared between California's judiciary and its legislative branch, with the legislature retaining the superior power. Justice Roger Traynor's opinion made clear that the court adopted the exclusionary rule as a "judicially declared rule of evidence," rather than as a rule required by the state constitution.[203] Traynor was aware of the latter option, having written a decade prior that "California is free to interpret its own constitution."[204] *Cahan* can be fairly read, then, as an invitation to the legislature to respond to the court's decision.

It is not a stretch to argue that when state courts choose to adopt dependent interpretations, they often do so in part to intentionally avoid this type of exchange with other branches. State courts have shown that they are capable of exploiting the jurisdictional boundaries of the United States Supreme Court to gain more power over coordinate branches. The California Supreme Court did so during the 1970s, when it began relying on both state and federal precedents in deciding constitutional questions, without saying whether state or federal law controlled its outcome.[205] In the days before *Long*, this dual reliance method insulated a decision from review by the United States Supreme Court. Scholars and state officials

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comes to search and seizure provisions.").

199. *See* Althouse, *supra* note 9, at 1509–10 (describing this choice).

200. *Id.*

201. People v. Cahan, 282 P.2d 905 (1955).

202. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of Fourth Amendment must be excluded from state proceedings).

203. *Cahan,* 282 P.2d at 910.

204. People v. Gonzales, 124 P.2d 44, 46–47 (Cal. 1942).

205. *See* George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996–99 (1979) (describing dual reliance approach).

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denounced the practice. In an article co-written with Clifford Thompson, California Attorney General George Deukmejian said, "By invoking the state constitution the court insulates its decisions from federal judicial review; by simultaneously invoking the Federal Constitution, the court effectively blocks popular review through the initiative process." He argued, "In a sense, this dual reliance makes the people of California the prisoners of the privileges conferred by their own state constitution."[206] Even those supportive of independent interpretations were uneasy with the approach.[207]

Dependent interpretations achieve the same result. Legislators and citizens can debate the procedure state courts use to decide these cases (i.e., the adoption of a dependent interpretation). But they cannot hold state judges accountable for the substantive decisions in such cases, because the United States Supreme Court—not the state judges—made those decisions. Nor can state actors demand that state courts adopt an independent interpretation by, say, passing a state constitutional amendment. Rhode Island voters did this, but to little effect: after all, state judges are the ones who interpret such amendments.[208] This leaves little public accountability for state courts with dependent interpretations and little space for legislators, governors or citizens to act.

2. Loss of Court-to-Court Dialogue

Dependent interpretations also remove a state court from ongoing dialogue with the United States Supreme Court. Paradoxically, the same features that make it easier for a state court to adopt a dependent interpretation—namely, a state constitutional provision textually similar to a federal provision—also make dialogue between the two levels of courts that much more important. When state and federal courts both interpret similar provisions, it enhances discussion about the meanings of constitutional guarantees.[209] But dependent interpretations avoid this discussion entirely by declaring in advance that the state court will abide

206. *Id.* at 996–97. Rather than create this result, Deukmejian and Thompson argue that state courts that invalidate an action under the state constitution should not refer to the federal constitution at all. *Id.* at 998.

207. *See, e.g.*, Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 398–99 (1988) (noting that while invoking both state and federal constitutional decisions "may be the product of imprecise opinion writing, one suspects that another factor may sometimes be an unwillingness on the part of the state tribunal to accept full responsibility for what may be an unpopular decision").

208. *See* R.I. CONST. art I, § 24 ("The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."); Bender, *supra* note 95, at 669 (chastising court for not interpreting amendment more broadly).

209. *See* Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1057 (2010) (observing that dialogue between two sovereigns on single issue enhances development of new law).

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by future decisions of the United States Supreme Court.

When a state court rejects the reasoning of a United States Supreme Court decision on the grounds that it provides too little protection for criminal defendants, this sends a message to the Court.[210] When several states do this, it tells the Justices that the consensus behind their decision might not be as strong as they believed. James Gardner argues that rejections by state courts offer "a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling."[211] Conversely, if a state court decides to adopt a federal decision in a single case, it signals approval of the federal decision. But dependent interpretations seem to do more than this, because they prospectively tie the state court to future Supreme Court decisions. The state court casts its vote on upcoming issues once it proclaims its state constitution is dependent on the federal constitution.[212] By doing so, the state court opts out of future dialogue.

This dialogue on constitutional meaning need not occur only among liberal states seeking greater protections for criminal defendants. Some state courts with dependent interpretations clearly believe that only the minimum amount of protection should be afforded to criminal defendants. Because they must enforce the federal floor, however, state courts simply adopt the federal rule as their state rule. States are free as a matter of state constitutional law to provide less protection than the federal constitution does; they just cannot enforce the lower guarantees. But by independently interpreting a state constitution to provide fewer protections than the federal constitution, a state court can send a message to the United States Supreme Court that the federal floor has been set too high.[213] Indeed, it appears Maine has taken such a position on the exclusionary rule, acknowledging the state constitution does not require one.[214]

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210. *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1006 (2003).

211. *Id.* at 1033.

212. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?* 46 WM. & MARY L. REV. 1499, 1526 (2004) [hereinafter Williams, *Lockstepping*] ("Such decisions seem like binding 'holdings,' resolving the question in the future, even possibly despite unanticipated changes in federal constitutional doctrine.").

213. *See* Latzer, *supra* note 194, at 1406 (explaining that states can interpret passages from their own constitutions to provide less protection than similar provisions in federal constitution).

214. *See* State v. Tarantino, 587 A.2d 1095, 1097–98 (Me. 1991). *See also* Latzer, *supra* note 194, at 1406 (discussing Maine Supreme Court's independent interpretation in *State v. Tarintino*). Unfortunately, Maine did not make a forceful statement in deciding the issue. Instead, *Tarintino* is written in conclusory terms, with no explanation of how the court reached this outcome. But even without explanation, state court noncompliance adds to this dialogue. *See, e.g.*, TARR & PORTER, *supra* note 11, at 13–14 (discussing noncompliance

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This exchange of ideas contributes to the work of both state courts and the United States Supreme Court. State judges rely on these discussions, particularly when the state itself does not have a long history of independent interpretations upon which to draw.[215] This dialogue also heightens debate on the United States Supreme Court, where dissenting justices attempt to pen opinions forceful enough to capture the votes of state court judges.[216] Justice Brennan and Justice Marshall were particularly forward in this regard, at times explicitly inviting state courts to reject the United State Supreme Court majority's reasoning and result.[217]

Dependent interpretations preclude such dialogue. If no state court has an independent interpretation, the United States Supreme Court has less reason to articulate the persuasiveness of its opinions.[218] The force of the dissenting justices and a consideration of future state rules heightens this discussion. Without independent interpretations, this value is lost. The fact that courts are more likely to adopt dependent interpretations when judges are elected is disturbing, then, because it suggests the retention methods of one state's judiciary can affect the dialogue between all courts.

3. Loss of Public Dialogue

Perhaps more importantly, dependent interpretations remove state constitutional decisions from review by a state's citizens, scholars, and advocates. By declaring a state constitutional provision coextensive with the federal constitution, the state court usurps power from the people of that state. Without a dependent interpretation, which forecloses legislative action, citizens of a state could unite to pass a constitutional amendment that delineates the protections their state constitution should afford. Dependent decisions, by contrast, tie a state to national standards, defeating the ability of states to allow their citizens to decide, and live by

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by state courts in areas including race relations, police interrogations, church-state relations and search-and-seizure law).

215. *See* TARR & PORTER, *supra* note 11, at 31–32.

216. *See* Williams, *Shadow*, *supra* note 41, at 375–76 (noting state courts have become "a new audience" for Supreme Court dissenters).

217. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 396 (1976) (Marshall, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting). Some have criticized this practice. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) (arguing it is "inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court").

218. *See also* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 256–57 (2008) (discussing importance of exchange of ideas between federal and state courts).

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their own standards.[219] It also creates what one scholar has called the problems of the "vanishing constitution," and of "amending without amendments."[220] When a state court abrogates its independent legal authority, Ronald Collins argues that "the court assumes a power that has been constitutionally delegated to others. That power is the right of the people to 'alter' their constitution."[221]

Dependent interpretations also chill debate by scholars, academics, and advocates who would otherwise work to develop state constitutional law.[222] Dependent decisions, as Roger Williams notes, "will render lawyers, scholars and lower court judges 'literally speechless' when it comes to independent state constitutional analysis."[223] This transforms state constitutional law into the "row of shadows" Justice David Souter condemned when he was a judge on the New Hampshire Supreme Court.[224] As he argued:

> It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.[225]

Some commentators have downplayed the effects of dependent interpretations, arguing that courts are "merely deciding to give their coordinate branches of government maximum freedom of action, by declining to subject them to *two* separate systems of judicial review—federal and state—rather than to just one, the federal courts."[226] But state constitutions are part of the "double security" of rights created to protect

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219. *See* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1474 (1987) (discussing importance of federalism for ensuring states' abilities to make laws that conform to their own particular values).

220. Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1111, 1116 (1985).

221. *Id.* at 1116.

222. *See* Williams, *Lockstepping*, *supra* note 212, at 1526.

223. *Id.* (internal citations omitted).

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

225. *Id.*

226. Reiner & Size, *supra* note 31, at 1254.

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individual liberties.[227] By prospectively delegating their interpretation of state law to the United States Supreme Court, state judges ignore their role in the system of dual constitutionalism.[228] To uphold their duties, state judges need only say: "Although we may interpret the state constitution however we think is appropriate, we are persuaded in this instance that the federal rule best reflects the requirements of our state constitution."[229] Yet many nonetheless bind themselves to federal guarantees.

C. Lack of Justification for Dependent Interpretations

Supporters of dependent interpretations might argue that they are justified by *stare decisis*, or because this result was intended by the state's constitutional drafters. These arguments do not hold up, as the following sections illustrate. Indeed, a respect for precedent does not necessarily favor dependent interpretation.

1. Stare Decisis

In at least two states, courts have changed their interpretation method shortly after a change in judicial retention methods. Such shifts undercut arguments that *stare decisis* alone requires dependent interpretation.

In New Mexico and Tennessee, state courts switched from dependent interpretations to independent ones after the states adopted less electorally-accountable methods of retaining judges. In 1988, New Mexico switched from partisan re-elections to a hybrid system in which a nominating commission recommends judicial candidates for gubernatorial appointment, after which judges face only retention elections.[230] The next year, the New Mexico Supreme Court "marked its first departure from federal Fourth Amendment jurisprudence" and five years later it remarked that "[r]ecently, this Court has demonstrated a willingness to undertake independent analysis of our state constitutional guarantees . . . ."[231]

Tennessee tells a similar story. Before 1971, all judges in Tennessee were subject to elections.[232] In 1971, the state legislature created a merit-

227. THE FEDERALIST NO. 51 (Madison).

228. *See* Landau, *supra* note 198, at 385 ("State court judges have a sworn obligation to give . . . state laws [including state constitutions] authoritative interpretation. That obligation cannot, in effect, be prospectively delegated to the United States Supreme Court.").

229. Latzer, *supra* note 194, at 1408.

230. *History of Reform Efforts: New Mexico*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NM (last visited Feb. 23, 2011).

231. State v. Gutierrez, 863 P.2d 1052, 1061 (N.M. 1993).

232. *History of Reform Efforts: Tennessee*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception

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based selection process for all appellate judges.[233] In 1974, the state repealed the system for state supreme court judges, who were again subject to election.[234] Twenty years later, the process changed once more, returning state supreme court judges to the merit plan.[235] Although the Tennessee court had a long history of dependent interpretations,[236] in the late 1990s it began announcing it would independently interpret the state's constitution.[237] In 2007, the Tennessee Supreme Court explicitly stated that the state's search-and-seizure provision "offers more protection than the corresponding provisions of the Fourth Amendment."[238]

If *stare decisis* were the primary concern for courts with dependent interpretations, state courts would retain dependent interpretations regardless of the process by which judges are retained. Yet this has not happened. Similarly, a concern for *stare decisis* should counsel in favor of retaining state precedents that conflict with a new federal rule, or at least an extended discussion of a state court's decision to overrule any state precedents, but this does not hold true. For example, the Nevada Supreme Court rejected two prior state cases to align its state constitutional interpretation with a newly-announced Fourth Amendment rule.[239] It did so without any discussion of the workability of the prior state rules or any reliance on them, concerns that are usually central to any *stare decisis* analysis.[240]

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ption.cfm?state=TN (last visited Feb. 23, 2011).

233. *Id.*

234. *Id.*

235. *Id.*

236. *See, e.g.*, Sneed v. State, 423 S.W.2d 857, 860 (Tenn. 1968) (calling state provision "identical in intent and purpose with the Fourth Amendment"); State v. Downey, No. 03C01-9307-CR-00221, 1995 WL 594346, at *4 (Tenn. Crim. App. Oct. 10, 1995) (stating that since *Sneed* was decided in 1968, the state court only departed from federal search-and-seizure jurisprudence in two narrow areas). However, the Tennessee court did not automatically harmonize all state cases with federal standards after it adopted an independent interpretation. *See, e.g.*, State v. Lakin, 588 S.W.2d 544, 549 n.2 (Tenn. 1979) (declining to overrule pre-*Sneed* state cases that established more restrictive open fields doctrine than federal law).

237. In 1997, the Tennessee Supreme Court recognized that the state search-and-seizure provision "may afford citizens of Tennessee even greater protection" than the Fourth Amendment. State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997). In 1998, it announced two scenarios in which it would depart from federal precedent: (1) when adopting federal standards would require overruling "a settled development of state constitutional law," and (2) when "linguistic differences justify distinct interpretations of state and federal constitutional provisions." State v. Vineyard, 958 S.W.2d 730, 733–34 (Tenn. 1998).

238. State v. Berrios, 235 S.W.3d 99, 105 (Tenn. 2007).

239. Gama v. State, 920 P.2d 1010, 1013 (Nev. 1996).

240. *Cf.* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 855 (1992) (discussing factors to consider in deciding whether case should be overruled: its workability, reliance on it, changes in relevant doctrine, and changes in relevant factual circumstances).

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2. Intent of State Constitutional Framers

An entirely different motive may therefore drive dependent interpretations. Some courts justify dependent interpretations on the grounds that the state constitution was drafted with the intent that it only provide the same level of protection that the federal constitution provides.

The Illinois Supreme Court has partially adopted this logic. That court analyzed its lengthy history of lockstep interpretations five years ago, after a case was remanded to it by the United States Supreme Court. The Illinois Court stated that although the legislature last revised its constitution in 1970, its lockstep doctrine "has deep roots in Illinois" and was "firmly in place" before that revision, and further that "[t]his fact would have been known to the drafters of the Bill of Rights of the 1970 constitution."[241] For these reasons, the provision was interpreted to provide no more protection than the federal constitution. Still, as advocates in the case pointed out, the 1970 revision took place before the Burger Court's criminal procedure counter-revolution and before the advent of technologies like DNA testing and advanced electronic surveillance, which present new scenarios that could merit discussion about departing from federal constitutional rules.[242] As amici, the American Civil Liberties Union of Illinois argued:

> By "harnessing" its interpretation of the Illinois Constitution to the United States Supreme Court's jurisprudence, this Court would improperly abdicate its non-delegable constitutional duty to "say what the law is." In so doing, this Court would undermine the sovereignty and independence of the State of Illinois, and degrade both this Court and the rights of Illinois citizens.[243]

The state court rejected this argument, finding its "limited lockstep approach is not a surrender of state sovereignty or an abandonment of the judicial function."[244] Instead, the court said, the approach is "based on the premise that the drafters of the 1970 constitution and the delegates to the constitutional convention intended the phrase 'search and seizure' in the state document to mean, in general, what the same phrase means in the

241. People v. Caballes (*Caballes II*), 851 N.E.2d 26, 33 (Ill. 2006). Just a year after Michigan v. Long, the Illinois Supreme Court roundly affirmed its longstanding practice of dependent interpretation, despite the objections of a concurring judge who criticized the approach as "dangerous" because it "limits our power to interpret our own State Constitution in the future." *See* People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984).

242. *Cf. Casey*, 505 U.S. at 857–60 (noting import of changed factual circumstances and changed doctrine in considerations of *stare decisis*).

243. Brief for the Am. Civil Liberties Union of Ill. et al. as Amici Curiae in Support of Appellant, *Caballes II*, 851 N.E.2d 26 (2006) (No. 91547), 2005 WL 4889150 at *11.

244. *Caballes II*, 851 N.E.2d at 45.

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federal Constitution."[245]

Again, this argument does not adequately justify dependent interpretations. The intent of state constitutional drafters is surely relevant to the interpretation of a state constitution. However, the Illinois court does not explain how dependent interpretations can be reconciled with the state's electorally-accountable judiciary that—like those of many other states—is also a product of its state constitution.[246] Judges in Illinois are selected in partisan election campaigns and subject to retention elections, a design that makes Illinois judges electorally accountable to state voters. Yet dependent interpretations leave voters with less control over state law because they shift substantive state law questions to justices of the United States Supreme Court, who are not accountable to any voters. It is difficult to believe state constitutional drafters intended both of these opposing results.

Moreover, respect for *stare decisis* and for the original intent of state constitutional drafters does not explain why state courts are more likely to adopt dependent interpretations when judges are elected. If these are the main reasons state courts have implemented dependent interpretations, then a state's judicial retention method should have little relation to whether a state court adopts a dependent interpretation. But as Part II shows, this is not the case. State courts are significantly more likely to adopt dependent interpretations when judges face election, and significantly more likely to adopt independent interpretations when they do not.

This pattern suggests that dependent interpretations allow judges to avoid substantive decisions in states where voters can easily remove them from office. This connection is particularly troubling at a time when judicial elections are transforming into contests more closely resembling legislative and executive elections—attracting a growing number of challengers,[247] a surge in fundraising,[248] and increased attention from special interest groups.[249] These changes are likely to make dependent

245. *Id.*

246. *See* ILL. CONST. art. VI, § 12(a) ("Judges shall be elected at general or judicial elections . . . ."). Illinois state judges are selected in partisan elections but face only retention elections thereafter. BOOK OF THE STATES, *supra* note 106, at 303–05 tbl.5.6.

247. *See, e.g.*, BONNEAU & HALL, *supra* note 135, at 80 tbl.4.2 (showing that 51% of judicial incumbents subject to partisan or nonpartisan elections faced challengers in 1990 and that 77% did so in 2004).

248. *See, e.g.*, JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009 8 (2010), *available at* http://www.justiceatstake.org/file.cfm/media/cms/JASNPJEDecadeONLINE_8580859AA28D1.pdf (finding that state supreme court candidates raised $206.9 million nationwide between 2000 and 2009, more than doubling $83.3 million raised between 1990 and 1999).

249. *See id.* at 2 (noting that in 2008 special interest groups and political parties

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interpretations even more attractive to electorally-accountable judges in the future, thereby shifting a greater number of state constitutional issues from state courts to the United States Supreme Court.

IV.
CONCLUSION

If New Federalism began with a call to advocates to seek more protection under state constitutions, this article shows that this call can only be answered in some states. The link between electorally-accountable retention methods and dependent interpretations suggests that a fear of electoral politics prevents some state courts from independently interpreting their state constitutions. When a court with elected judges adopts a dependent interpretation, it defeats the electorally-accountable retention method the voters designed by shifting state constitutional questions away from state courts and to the United States Supreme Court.

Perhaps the biggest problem with dependent interpretations is that no body beyond the state court making the interpretation can review it. While the United States Supreme Court retains review of the substance of dependent interpretations and can reverse or affirm the result in a given case, it cannot order a state court to adopt a different process when interpreting future cases. This process is a matter of state law and therefore up to the state courts. Nor can political actors influence this result. Dependent interpretations reduce the ability of state legislators and governors to respond to such decisions. By deciding the state issue on federal grounds, a state court leaves few paths for political actors to overturn or undercut the state court's action. Even state constitutional amendments—which look promising at first—cannot guarantee a state court will independently interpret its state constitution. In Rhode Island in 1986, voters passed an amendment designed to reaffirm the state constitution as separate from, and not controlled by, the federal constitution.[250] While this came in the midst of the New Federalism movement, that court has been criticized for not interpreting its state constitution as independently as scholars had hoped.[251] The only actors who can change a state court's decision to adopt dependent interpretations of state constitutional provisions, then, are the judges who adopt the interpretation. Yet as this article shows, electorally-accountable judicial retention methods appear to constrain them from doing so.

Rather than continuing to call for greater state constitutional protections, it is time for advocates to investigate obstacles that prevent

accounted for 52% of all television spending related to state supreme court campaigns, the first time that non-candidates outspent candidates).

250. *See supra* note 95.

251. *Id.*

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state courts from independently interpreting state constitutions. More than political ideology, the presence or absence of an intermediate appellate court, the age of a state constitution, or the process of amending the state constitution, the answer seems to be judicial elections. By examining the link between judicial elections and dependent interpretations—and attempting to understand and change it—advocates will be better able to press courts to undertake independent interpretations of state constitutions.

For advocates who want to expand protections for criminal defendants, continuing to call for expanded state constitutional interpretations can be ineffective. For those foreclosed from such advocacy, it is time to take the call for expanded state constitutional interpretations beyond the courtroom. As this article makes clear, judicial elections constrain state judges in interpreting their state constitutions. Rather than continuing only in litigation-based advocacy, supporters of broader criminal rights should turn to other avenues. Partnering with organizations dedicated to reforming judicial elections is a promising place to begin.

As a broad survey of the connection between state constitutional interpretation and constraints on judicial decisionmaking, this article does not attempt to provide the detailed state-by-state analysis advocates will need to understand how this connection is evinced within each state. Further studies are important for several reasons, some already noted. The rising costs of judicial elections and their increasing rates of competition suggest state judges will be more motivated than ever to avoid controversial issues and interpretations that could affect their campaigns.[252] The United States Supreme Court also makes the issue more salient by continuing to carve away at the floor of federal protections guaranteed to criminal defendants.[253] If advocates do not want their state's high court to follow these decisions, they need a better understanding of the reasons why so many state courts do. The effect of judicial elections is a logical place to start.

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252. *See supra* notes 247–249 and accompanying text.

253. For recent cases limiting the Fourth Amendment, *see, e.g.*, Herring v. United States, 555 U.S. 135, 144 (2009) (holding negligent mistakes by police officers do not trigger exclusionary rule); Samson v. California, 547 U.S. 843, 857 (2006) (holding warrantless, suspicionless searches of parolees constitutional); Hudson v. Michigan, 547 U.S. 586, 602 (2006) (holding exclusionary rule does not apply to violations of knock-and-announce requirement); Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) (holding that sniffs by drug-detecting dogs do not constitute searches for purposes of Fourth Amendment); Illinois v. Wardlow, 528 U.S. 119, 123–26 (2000) (holding that unprovoked flight in high crime neighborhood is sufficient to support patdown of suspect); Whren v. United States, 517 U.S. 806, 813 (1996) (holding that pretextual arrests do not violate Fourth Amendment). The state cases listed here are all from states with dependent interpretations.

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