

# LEAKY FLOORS: STATE LAW BELOW FEDERAL CONSTITUTIONAL LIMITS

Marc L. Miller & Ronald F. Wright\*

*One of the most widely accepted notions in American constitutional law is that the federal constitution and interpretations of the federal constitution by the Supreme Court of the United States set a “floor” for personal liberties. State courts and legislatures cannot properly go below the federal floor. It is a position anchored to plain constitutional text in the form of the Supremacy Clause. In the area of criminal procedure, however, it is easy to find state positions both “above” and “below” the federal constitutional requirements. On closer inspection, this should not be a shock. The concept of a floor conflicts with our modern consensus about the nature of judicial opinions and the constraining power of language. It is also out of sync with theories about how legal institutions interact. The floor concept also ignores the capacity of legislatures and executive branch agencies to use their powers, including the power to establish and fund government entities and to set detailed policy and administrative rules, to work around even the most seemingly stringent federal limits. We expect that this insight is not peculiar to criminal procedure but something more general about the interaction between state and federal law.*

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\* Marc L. Miller is Ralph W. Bilby Professor, University of Arizona James E. Rogers College of Law. Ronald F. Wright is Professor of Law and the Associate Dean for Academic Affairs, Wake Forest University School of Law. This Article has emerged over an unusually long period of time. See Paul Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 443 n.246 (1999) (citing an earlier unpublished working draft of this Article). We appreciate the comments of various colleagues and students along the way, including faculty workshops at Duke, the University of North Carolina, the University of Minnesota, and the University of Iowa. We appreciate the comments of Larry Kramer, Barak Orbach, Robert Schapiro, and Bert Westbrook. Thank you to Jennifer Gibbons, Editor-in-Chief, and the members of the *Arizona Law Review* for their support and flexibility.

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Everyone says it and seems to believe it. One of the most widely accepted notions in American constitutional law is that the federal Constitution and interpretations of that Constitution by the Supreme Court of the United States set a “floor” for personal liberties. State courts and state legislatures cannot properly go below the federal floor. This is a proposition confidently stated by both proponents and skeptics of federal power, by justices and judges in the federal and state systems, and by scholars across the political spectrum. It is a position anchored not just to constitutional theory but to plain constitutional text, in the form of the Supremacy Clause, which provides that: “This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>1</sup>

With credentials like these, the notion of a federal constitutional floor hardly seems open to question.

The notion of a firm federal constitutional floor, however, runs contrary to some of our most basic theories about the nature of law. The concept of a floor conflicts with the dominant modern consensus about the nature of judicial opinions and the constraining power of language.<sup>2</sup> It is also out of sync with theories about how legal institutions interact.

A federal floor set and enforced by federal courts conflicts with the reality of limited—and increasingly more limited—review of state court rulings by

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1. U.S. CONST. art. VI, cl. 2.

2. JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 231–74 (1984); Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561 (1994) (book review).

federal courts, especially through federal collateral review.<sup>3</sup> The floor concept also ignores the capacity of legislatures and executive branch agencies to use their special powers, including the power to establish and fund government entities and to set detailed administrative rules, to work around even the most stringent federal constitutional limits.

The image of federal floors has been pivotal in the debate over the past thirty years about the “new judicial federalism.”<sup>4</sup> Both proponents and detractors of state court independence in the interpretation of *state* constitutions have assumed that state courts would act only in a more “liberal” direction (one that places more restrictions on government powers).<sup>5</sup> But developments on the ground have not followed this assumption.

In the area of criminal procedure there are myriad state court decisions, statutes, rules, and practices that are sometimes more restrictive and sometimes more generous with respect to civil liberties and government authority than their federal counterparts.<sup>6</sup> Surveying the full range of topics within the field of criminal procedure<sup>7</sup> it is common to find state positions both above and below the federal

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3. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Alen K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999); Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115 (1998).

4. For an overview of the movement, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997). The movement caught fire with the publication of articles by Justice William Brennan in 1977 and 1986. 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) [hereinafter Brennan, *Bill of Rights*]; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*].

5. See Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Ken Gormley, *Ten Adventures in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 29, 31 (1988); Paul W. Kahn, *Two Communities: Professional and Political*, 24 RUTGERS L.J. 957, 968 (1993); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434 (1988).

6. For a surprising number of areas there is little or no direct federal constitutional precedent to guide—or to attempt to restrict—state courts.

7. Between 1993 and 1997 we engaged in a very extensive survey of state supreme court decisions in the process of creating the first edition of our criminal procedure casebook. See MARC MILLER & RONALD WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* (1998). Among other things, our book takes seriously: (1) the central role of state and local systems in criminal justice (more than ninety-four percent of all felonies); (2) the central role of state courts and constitutions; (3) the central role of statutes in regulating the criminal process; and (4) the complex role of executive branch agencies in the criminal process. See *id.* at pp. xli–xlvi (preface); see also Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789 (2003) (book review); Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 BUFF. L. REV. 909 (2001) (book review). For all topics we

constitutional “floor.” We expect that this is not an insight peculiar to criminal procedure, but says something more general about the interaction between state and federal institutions.

Over the past several decades, state courts have wrestled with how to read their own state constitutions. At the same time, some state courts have also become more aggressive in their readings of the *federal* Constitution, and have placed fewer restrictions on government power than a straightforward reading of the federal cases would suggest.

There is, we believe, a connection between these two trends. The habits of independence nurtured in the setting of state constitutions are difficult to contain. They spill over into interpretations of the federal Constitution.

The independent readings of state constitutions, those that create greater restrictions on state power, are easier to see. The independent readings of the federal Constitution by state institutions—those interpretations “below the floor”—are more subtle. State actors might intentionally obscure these “leaky” readings, while at other times the leaks may be the product of the state legal cultures, and the judges may not be fully aware of the leak they have created.<sup>8</sup>

However, once the phenomenon of below-the-floor readings of the federal Constitution has been recognized, we believe keen observers will notice a wider range of independent readings of state constitutions. We think a sensitive reading of state decisions to account for “leaks” will expand our estimates of the amount of state court independence in the reading, understanding, and application of state constitutions and state law.<sup>9</sup>

As we have sampled state high court decisions across the full range of criminal procedure issues over the years, we have become convinced that states land both above and below the federal rules. We write here to share our exciting discovery—an unusual and heretofore unseen gem in the constitutional mines. What our survey does not allow us to say is how common such leaks are across

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reviewed at a minimum many dozens of cases, and typically hundreds of cases. We estimate that we read around 8,000–10,000 state decisions as part of producing the casebook. The book is now in its third edition. See MARC MILLER & RONALD WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* (3d ed. 2007).

8. We criticize the accuracy of the ubiquitous “floor” metaphor with our counter-image of “leaks.” But perhaps our effort to build on existing images will introduce its own confusion: by leaks we mean modest deviations—drips or puddles, but not floods. We do not mean to suggest with Benjamin Franklin (commenting on personal finance) that “[a] small leak will sink a great ship.” See BENJAMIN FRANKLIN, *THE WAY TO WEALTH* (1758). Perhaps we should instead refer to flexible floors or thick floors. We discuss the power of metaphor to limit (or enhance) understanding in this area at the end of this Article.

9. By most estimates, state courts have not often exercised their uncontested authority to read their state constitutions independently and to place greater restrictions on government than the federal Constitution requires. See BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 158 (1991); Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 *JUST. SYS. J.* 37, 39 (1992); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 *MICH. L. REV.* 761, 780–84 (1992); Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 *JUDICATURE* 190, 190 (1991); Tarr, *supra* note 4, at 1114–17.

jurisdictions, and across subject areas beyond criminal procedure. Our gem is colorful and intriguing, but whether it will lead to a mother lode we cannot say.

Our discovery raises difficult normative and theoretical questions, whether the phenomenon is occasional and area-specific, or frequent and pervasive. Is the state behavior we describe truly “law,” or is it cheating? In other words, are rules below the federal floor an illegitimate violation of the Supremacy Clause? Even if legitimate, are widespread state “leaks” a good thing? Is it a virtue or a vice that state institutions land on all sides of federal legal positions? Finally, how does this behavior by state institutions, and especially by state courts, fit within the broader framework of federalism?

This Article begins with a quick survey of the caselaw and literature to confirm the pervasiveness of the assumption that floors exist, and places the notion of a federal floor in the context of the debate over the new judicial federalism.

The second Part illuminates some of the ways that state institutions bypass federal law. The section examines what it means to be “above” or “below” a federal position. The illustrations emphasize that there are multiple decisional and structural paths that explain this legal phenomenon. As part of our examination of state cases, we note how the state courts differ from some federal interpretations of the same legal doctrine. This comparison strengthens the claim that leaks are a distinctive feature of state decision-making and not merely random variations to be expected when different judges decide cases.

In the final, brief Part we evaluate this leaky state of affairs. We explore whether these state declarations, apart from their constitutional and jurisprudential legitimacy, serve a positive function in our federal system.

We believe there are many virtues in aggressive state interpretation of federal law and U.S. Supreme Court precedents. Our federal system encompassed a distinct role for each state at the founding. The residual independence of law and culture in each state remains a powerful idea. A parsimonious reading of federal law by high state courts helps to make that idea a reality.

One vision of a healthy federalism focuses on a steady dialogue about shared legal concepts between state and federal institutions. The literature has referred to the exchange of doctrine and arguments as “interactive” federalism.<sup>10</sup>

One prominent illustration of interactive federalism was the dialogue between high state courts deciding issues of federal law and the review of those decisions by lower federal courts exercising habeas powers.<sup>11</sup> Since the 1989 U.S. Supreme Court decision in *Teague v. Lane* (and especially since federal statutory

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10. An even more recent theme, developed most prominently by Professor Robert Schapiro, emphasizes the overlapping and hence “polyphonic” nature of relations between the states and the federal government. See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: HOW A FEDERAL SYSTEM PROTECTS FUNDAMENTAL RIGHTS (forthcoming 2008).

11. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

amendments in 1996), the scope of federal habeas corpus review has withered.<sup>12</sup> Consequently, the opportunities for interactive federalism between high state and lower federal courts have substantially decreased. The state court decisions that embody the leaky floors of federal law may create a substitute dialogue.

### I. CONVENTIONAL WISDOM: FIRM FLOORS AND LOOSE CEILINGS

The Supremacy Clause of the federal Constitution<sup>13</sup> sends a powerful and clear message: State officials must not violate the minimum standards of federal law. The embrace of this simple principle is complete.

Chief Justice John Marshall gave us the standard reading of the Supremacy Clause. In *McCulloch v. Maryland*, Marshall declared that Congress had the power (under the necessary and proper clause) to create the Second Bank of the United States, and that the state of Maryland had no power to impose a tax on the Bank. He gave this straightforward reading to the Supremacy Clause:

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts. [The Constitution requires] that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.<sup>14</sup>

The Supreme Court has also reserved for itself a central place in the operation of the Supremacy Clause. Over the years, the Court has insisted ever more clearly that it is the primary (and perhaps even the final) interpreter of the federal Constitution. What started as an assertion in *Marbury v. Madison*<sup>15</sup> that the Court was competent to interpret the Constitution differently than other branches of the federal government has become a broader claim of ultimate authority on matters of constitutional truth. Shortly after *Marbury* the Court asserted that “the construction given by this Court to the Constitution and laws of the United States is received by all as the true construction.”<sup>16</sup> The Court asserts its binding power to

12. From 1963, when the Supreme Court decided *Fay v. Noia*, 372 U.S. 391 (1963), until the Court’s decision in *Teague v. Lane*, 489 U.S. 288 (1989), the habeas power of the federal courts to review state decisions led to an active dialogue between lower federal courts and high state courts, especially in capital cases. After *Teague*, and now especially with the codification of restrictive rules for federal review of state decisions in the Effective Death Penalty and Habeas Corpus Act of 1996, fewer state criminal convictions are subject to review in federal court. See Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual*, 51 VAND. L. REV. 103 (1998); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

13. U.S. CONST. art. VI, cl. 2.

14. 17 U.S. (4 Wheat.) 316, 405–06 (1819).

15. 5 U.S. (1 Cranch) 137 (1803).

16. *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825) (emphasis added). The Court used the language quoted above as a reason for its “disposition” to defer to state court readings of state law: “This course is founded on the principle, supposed to be

interpret the Constitution both for other federal officials and for state government officials.<sup>17</sup>

Granted, the Court has been surprisingly reluctant to go beyond the *descriptive* observation that it can review state court interpretations of the federal Constitution and to declare that state courts have an *obligation* to interpret the Constitution in conformity with Supreme Court decisions.<sup>18</sup> Nonetheless, the basic outlines of the Court's claim of authority over state courts is unambiguous.

State courts, too, readily acknowledge their subservient role when it comes to federal minimum requirements. The following language from a Tennessee case involving a juvenile conviction is typical:

The full, final, and authoritative responsibility for the interpretation of the federal constitution rests upon the Supreme Court of the United States. This is what the Supremacy Clause means. However, as to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution.<sup>19</sup>

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universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government." *Id.* at 159. In modern times the Court has slapped state courts that claimed a more restrictive reading (limiting the power of the government or granting civil liberties protections to citizens) of a federal right *as a matter of federal law*. See, e.g., *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

17. In *Cooper v. Aaron*, the Court stated emphatically the obligation of state officials to follow the federal Constitution as interpreted in the definitive rulings of the U.S. Supreme Court. 358 U.S. 1, 17 (1958). In the face of resistance by Arkansas officials to the implementation of the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court held that the Supremacy Clause bound state officers to support the Supreme Court's interpretation of the Fourteenth Amendment. 358 U.S. at 17; see also *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (referring to Supreme Court as "final arbiter" of the federal Constitution).

18. See *Arizona v. Evans*, 514 U.S. 1, 8–9 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court.").

19. *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 789 (Tenn. 1980); see also *Stallworth v. City of Evergreen*, 680 So. 2d 229, 234 (Ala. 1996) ("Alabama Courts must apply Federal constitutional law as enunciated by the United States Supreme Court . . ."); *People v. Barber*, 799 P.2d 936, 940 (Colo. 1990) (holding that Supreme Court "decisions on federal law bind all lower state and federal courts"); *State v. Intoxicating Liquors*, 49 A. 670, 671 (Me. 1901) ("[W]e must certainly recognize the authority of [the Supreme Court] in passing upon a provision of the federal constitution and upon congressional legislation thereunder, and be governed by the result."); *State v. Coleman*, 214 A.2d 393, 402 (N.J. 1965) ("We, of course, recognize that the United States Supreme Court is the final arbiter on all questions of federal constitutional law."); *Andrews v. State*, 652 S.W.2d 370, 382–83 (Tex. Crim. App. 1983); *State v. Mechtel*, 499 N.W.2d 662, 666 (Wis. 1993) ("Certainly, the United States Supreme Court's determinations on federal questions bind state courts.").

It is not the notion of floors, but the notion of ceilings—and the possibility of raising them—that has captured the attention of judges and scholars in recent decades. In the 1970s, when the Supreme Court slowed or reversed its willingness to expand the federal Constitution,<sup>20</sup> Justice William Brennan called on constitutional litigants to open a new front in the states.<sup>21</sup> Because state courts could interpret their state constitutions independently and move “above” the federal minimum, litigants disappointed by the narrow protections of the federal Constitution could turn to state courts for a second chance. Perhaps because of the makeup of the U.S. Supreme Court’s docket, this “new judicial federalism” has special relevance to the field of constitutional criminal procedure.

The literature on the new judicial federalism is full and various. Enthusiastic supporters of the prospect of state court “activism” include scholars such as Barry Latzer, Robert F. Williams, and Ronald K.L. Collins.<sup>22</sup> Distinguished state court jurists such as Shirley Abrahamson, Judith Kaye, Hans Linde, Stewart Pollack, and Robert Utter have exhorted their fellow judges in articles and in opinions to develop more of an independent voice through their state constitutions.<sup>23</sup>

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Lower federal courts make similar statements about the obligations of state courts interpreting the federal constitution. See *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–76 (7th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965).

20. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 185–87 (1983); George C. Thomas III, *Through A Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO STATE J. CRIM. L. 1, 1–2 (2005).

21. Brennan, *State Constitutions*, *supra* note 4, at 489–91; see also Brennan, *Bill of Rights*, *supra* note 4, at 549–50.

22. See Ronald K.L. Collins, *Foreword: The Once “New Judicial Federalism” & Its Critics*, 64 WASH. L. REV. 5 (1989); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63 (1996); 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 (1984); see also Donald E. Wilkes Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975).

23. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399 (1987); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983); 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, 46–47 (1989); see also Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 399 (1988); Frank G. Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge’s Thoughts*, 13 VT. L. REV. 145, 149 (1988); Stanley Mosk, *State Constitutionalism After Warren: Avoiding the Potomac’s Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 201 (Bradley D. McGraw ed., 1985); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986) (reviewing DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (1985)).

There have been efforts to track the prevalence of this new state court habit. Many of the enthusiasts have expressed disappointment over the years, suggesting that independent state law-making is happening far less than it should.<sup>24</sup> There have also been debates about the legitimacy of new judicial federalism. Most commentators have argued that the distinctive state court voice in constitutional matters is healthy and sustainable;<sup>25</sup> a smaller group express concern over independent state decision-making, arguing that it should not or cannot happen often.<sup>26</sup>

But for all the variety in this literature, these commentators share a defining image of the “new judicial federalism,” an image consistent with the hard line of John Marshall and of the U.S. Supreme Court in *Cooper v. Aaron*.<sup>27</sup> The image is spatial: there is one national floor set by the federal Constitution and its chief interpreter, the U.S. Supreme Court. Any legitimate creative lawmaking by state institutions can only increase the protections for liberty above what is available under the Constitution as interpreted in the federal courts. While state courts might declare that the state constitution provides less protection than the federal counterpart, that ruling would mean little in practical terms. It would only make a difference for litigants who fail to invoke the federal Constitution.<sup>28</sup>

Consider this statement by Justice Brennan, explaining his enthusiasm for the practice of independent state court interpretation of state constitutions:

I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor.<sup>29</sup>

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24. 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 (1986); Emmert & Traut, *supra* note 9; Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, 17 PUBLIUS 51, 66–67 (1987); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 465 (1996); Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17, 31–32 (1991); Daniel B. Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271 (1998).

25. See Daniel J. Elazar, *A Response to Professor Gardner's The Failed Discourse of State Constitutionalism*, 24 RUTGERS L.J. 975, 977 (1993); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 391–93 (1998); Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 660 (1986).

26. Gardner, *supra* note 9, at 762–66; Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1023 (1985).

27. 358 U.S. 1 (1958).

28. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998).

29. Brennan, *Bill of Rights*, *supra* note 4, at 550. Brennan went on to explain just how powerful and clear the federal lower limit must be:

Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted; a call for that brand of diversity is, in my view, antithetical to the requirements of the Fourteenth Amendment. While state experimentation may flourish in the

Or this from Barry Latzer, a leading scholar in the field, who generally encourages state courts to interpret their state constitutions independently of the parallel federal provisions:

[T]here is no danger . . . that state constitutionalism will subvert national constitutional values. . . . [A] person's federal constitutional rights—expanded considerably by the incorporation decisions of the 1960s—cannot be subverted by rights-narrowing state constitutional interpretations.<sup>30</sup>

Latzer calls the federal floor rule “unimpeachable.” There is a crucial distinction, he suggests, “between enforcement and interpretation.” State courts may interpret state law to mean something less than the federal Constitution, but they cannot enforce the state law if it provides less protection than federal law.<sup>31</sup>

The floor idea cuts across all the lines of controversy on these questions of federalism. Those who are far less enthused about the effects of state court independence when it comes to their own state constitutions still share this starting image of the federal Constitution as a floor. For instance, while James Gardner argues that state courts have not created a genuine and distinct constitutional law under their state constitutions, he treats the “federal floor” as uncontroversial throughout his work.<sup>32</sup> Earl Maltz, the leading critic of state court activism under

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space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment. This reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure.

*Id.*

30. Barry Latzer, *A Critique of Gardner's Failed Discourse*, 24 RUTGERS L.J. 1009, 1017 (1993).

31. Barry Latzer, *Four Half-Truths about State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1125 (1992). Paul Kahn puts the point this way:

The common object of state interpretive efforts is American constitutionalism. Each state court has the authority to put into place, within its community, its unique interpretation of that common object. Of course, state courts may not violate United States Supreme Court interpretations of federal law, but beyond this legal floor, federal courts have nothing to say about the way in which state courts exercise their authority to interpret state constitutionalism.

Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993).

32. Gardner, *supra* note 9, at 790 n.119 (“[T]he federal Constitution sets a mandatory floor by operation of the Fourteenth Amendment.”); James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS UNIV. L. REV. 109, 116 (1998) (“[F]ederal separation of powers doctrine, unlike the federal analysis of individual rights incorporated through the Fourteenth Amendment, provides no binding ‘floor’ to the distribution of powers under the state constitution.” (emphasis added)); James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 483 (1996) [hereinafter Gardner, *States-As-Laboratories*] (“[T]he Court set the federal constitutional ‘floor’ low enough to leave the states room to develop independently the kinds of policies to which Justice O’Connor

state constitutions, also accepts the basic idea behind the image. Maltz grumbles about the floor metaphor, but not because it overstates the obligation that the federal Constitution imposes.<sup>33</sup>

All seem to agree: whatever the scope of federal law, the Supremacy Clause makes that law the minimum standard which all states must enforce.<sup>34</sup> The problem with this image is that it assumes an odd and old-fashioned conception of “law” that is accepted by few lawyers or scholars.<sup>35</sup> Many and perhaps most lawyers and scholars recognize sufficient play in language and logic so that a range of outcomes to interesting questions of law (and application of facts to law) are both possible and legitimate. This play is one of the elements of the law that demands skilled lawyering, and makes being a lawyer so interesting.

Even more importantly—and perhaps of greater interest—the idea that federal constitutional law provides a firm floor does not fit the reality of what state institutions do all the time.

## II. REALITY: LEAKY FLOORS

Anyone who reads appellate judicial opinions in criminal procedure knows that state courts sometimes read U.S. Supreme Court cases grudgingly. We assume that most readers can point to their favorite examples.

We might treat reluctant state decisions as leaks below the minimum floor that federal law nominally sets. Leaks would include any decisions by state institutions that are more generous to government power, or more restrictive on individual rights or liberties, than the most plausible readings of federal

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referred. Thus, her invocation of the [laboratory] metaphor amounts to the tautological observation that the states are free to act in those areas in which they are free to act.”)

33. Maltz complains only because the image obscures the consequences of a ruling under a state constitution. He argues that federal law often establishes the distribution of rights *among* individuals rather than the granting of rights *to* individuals. For instance, limited free speech rights in shopping malls preserve the limited duties of landowners. A state constitutional ruling that adds to the “floor” of federal free speech rights for speakers will necessarily diminish the rights of the mall’s owners. Thus, Maltz does not question whether federal law establishes clear minimum requirements. Instead, he is concerned that talking about floors and ceilings for one party (the speaker) will obscure violations of the government’s obligations to another party (the landowner). Maltz, *supra* note 26, at 1007–09.

34. A notable exception to the narrow and positivist reading of federal floors comes not from the “new federalism” literature, but from a lovely legal history piece by Professor Carol Chomsky, *Progressive Judges in a Progressive Age: Regulatory Legislation in the Minnesota Supreme Court, 1880–1925*, 11 LAW & HIST. REV. 383 (1993) (exploring greater deference to social legislation by Minnesota Supreme Court with “below flood boards” interpretations of current United States Supreme Court precedent). The Chomsky article appears in only seven citations in the Westlaw journals database, a reminder of the modern perils of publishing in a journal that does not appear on Westlaw or Lexis.

35. Richard Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 360 (1975). *But see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 279–90 (1977) (claiming one right answer even to hard questions).

constitutional precedents. We believe that such leaks take many different forms and appear on most important issues of criminal procedure.

Some might take issue with this account of federal legal protections, concluding that these state court decisions tell us nothing about the meaning of *federal* law. To the extent that state courts read the precedents to offer less protection than one might find in the lower federal courts, they might say, the state courts are simply “cheating” and are not interpreting federal law in any meaningful sense. We believe, however, that there is significant legal space between cheating in the enforcement of federal law and meaningful leaks in the apparent minimum requirements of federal law.

Lawyers, teachers, and scholars who speak of the “meaning” of particular U.S. Supreme Court decisions have long recognized the pliability of both language and logic that leaves some “play” in almost any case. American law schools routinely teach students to ask about the “narrowest” or “broadest” plausible readings of a decision. To this extent, regardless of politics, we are all legal realists. Deconstructionists today wield the tools that make us doubt the meaning of any text.<sup>36</sup> Generations earlier, this same feature appeared in discussions of the traditional common law method. Karl Llewellyn, for example, argued that one case in isolation means little, and that only with a second case will the pattern of cases—and the meaning the original case—be revealed.<sup>37</sup>

While the reading of any given case might be contested, we believe there is meaningful force to language, logic, and the consensus of professionalized readers. Some cases will allow most readers to predict with confidence how later courts will apply the language of the initial case. We might label these as “90% readings,” suggesting (with admittedly false precision) a high level of confidence that courts in the future will adopt this reading of the original case.

Other decisions are plausible readings of the pliable language and logic of the opinion, but are much less likely to capture what the writers of the original opinion had in mind and are less likely to persuade many courts in the future. We might call these the 10% readings.

The most straightforward method for identifying leaks is to read a U.S. Supreme Court decision, identify the 90% reading, and then find state decisions that adopt unlikely but plausible readings—10% readings. If the state courts are

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36. See J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992); Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000).

37. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 48–53 (1951) (“[N]o case can have a meaning by itself! Standing alone it gives you no guidance. . . . What counts, what gives you leads, what gives you sureness, that is the background of the other cases in relation to which you must read the one. They . . . give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.”); see also FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 183–87 (1991) (describing analogical reasoning as a form of deduction from rules).

willing to roam into more unlikely or uncertain territory than the lower federal courts, we have identified a leak.

As we will see, the leaks in state court interpretations of federal law appear across many types of federal rules. They happen most obviously when the federal rule itself is stated loosely, more or less inviting a wider range of readings by later courts. But they also happen when the federal rule is stated in more sharply-defined terms. Even when the U.S. Supreme Court precedent makes the effort to rein in later interpreters, we find state courts roaming far afield.

#### *A. Loose Multi-Factor Rules*

U.S. Supreme Court opinions have shown a fondness for multi-factor rules in the area of constitutional criminal procedure. Sometimes the opinion states clearly, and sometimes strongly implies, that each of the highly specific, multi-step procedures present in the case at hand, and discussed in the current opinion, is necessary to justify government intrusions on individual liberty that would not otherwise be allowed.

One important illustration of this kind of rule is *Michigan Department of State Police v. Sitz*,<sup>38</sup> where the Court allowed sobriety checkpoints only if detailed procedures were followed. The Court described the approved sobriety checkpoint approved in *Sitz* as follows:

Petitioners, the Michigan Department of State Police and its director, established a sobriety checkpoint pilot program in early 1986. The director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Pursuant to its charge, the advisory committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.

Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.<sup>39</sup>

The Court held that these intricate procedures minimized and regularized the intrusion by government agents. Given the importance of the government objective, sobriety checkpoints following such procedures were valid under the Fourth Amendment. The Court decided that the procedures at work here made this

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38. 496 U.S. 444 (1990).

39. *Id.* at 447.

case more like its prior decision in *United States v. Martinez-Fuerte*<sup>40</sup> (which had upheld an immigration checkpoint stop) and less like its decision in *United States v. Ortiz*<sup>41</sup> (which had struck down roving immigration patrol stops) in the amount of “subjective intrusion” the seizure created:

Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.<sup>42</sup>

The Court also noted that higher justification might be necessary to support a seizure more intrusive than those carried out in the initial screening process.

We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.<sup>43</sup>

Although the Court had struck down suspicionless license checkpoints in *Delaware v. Prouse*,<sup>44</sup> this case was different because of the state’s effort to collect data on the likely effectiveness of the technique:

Unlike *Prouse*, this case involves neither a complete absence of empirical data nor a challenge to random highway stops. During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped.<sup>45</sup>

Of course states can, and do, reach more restrictive positions. Several states have banned suspicionless sobriety checkpoints altogether.<sup>46</sup> But can states drop components of this highly regularized structure and allow more aggressive

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40. 428 U.S. 543 (1976).

41. 422 U.S. 891 (1975).

42. 496 U.S. at 453.

43. *Id.* at 450–51.

44. 440 U.S. 648 (1979).

45. 496 U.S. at 454–55.

46. While most states declare that their state constitutions allow sobriety checkpoints on the same terms as the federal Constitution, *see, e.g.*, *State v. Mikolinski*, 775 A.2d 274, 283–84 (Conn. 2001), around ten states require individualized suspicion for sobriety stops under their state constitutions, *see, e.g.*, *Pimental v. Dep’t of Transp.*, 561 A.2d 1348, 1353 (R.I. 1989).

procedures? That is exactly what California did in *People v. Banks*,<sup>47</sup> ruling that the advance notice provisions were not an essential part of the constitutional framework articulated in *Sitz*.

Similarly, the West Virginia Supreme Court in *State v. Davis*<sup>48</sup> held that stops of motorists for license checks could include random examinations for drunk driving. This was true despite the fact that the Pocahontas County roadblock which detected the defendant's driving "was not conducted pursuant to Department of Public Safety guidelines and procedures."<sup>49</sup> The West Virginia Supreme Court found it sufficient that "all vehicles approaching the roadblock were stopped, [and] the flashing lights of the police vehicles and the directing of traffic by the officers alerted approaching drivers of the existence and location of the roadblock."<sup>50</sup> The court also found it relevant that there was "no evidence in the record to suggest that the roadblock was administered in a discriminatory manner" or "that the roadblock was conducted in an unsafe manner."<sup>51</sup> The court did note that while police were also looking for drunk drivers, that was not the purpose of the roadblock, and that "[h]ad this roadblock been a sobriety checkpoint roadblock, a more detailed scrutiny would be required."<sup>52</sup>

Are California and West Virginia reaching unconstitutional outcomes, or do the highly detailed list of features from *Sitz* allow substantial room for variation? Is it wrong for state courts to find that some but not all elements of a multi-part procedure approved by the Supreme Court of the United States are "essential?"<sup>53</sup>

### ***B. Loose "Totality" Rules***

Some federal rules are phrased in ways that invite fact-specific inquiry, making it difficult to compare the fidelity of different courts to the minimum standards of the original opinion. One important example is the standard for assessing probable cause based on information provided by informants. Before 1983, the U.S. Supreme Court had required a structured analysis for courts assessing probable cause on the basis of an informant's testimony. In what became known as the *Aguilar-Spinelli* test, magistrates and trial courts had to evaluate both

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47. 863 P.2d 769, 782 (Cal. 1993). It appears that in practice many states do not provide advance notice, or provide notice only in terms far more abstract than the kind of notice approved by the Court in *Sitz*. See, e.g., *State v. Mitchell*, 592 S.E.2d 543 (N.C. 2004) (approving checkpoints based on standing permission from supervisor to operate under unwritten guidelines).

48. 464 S.E.2d 598, 603-04 (W. Va. 1995).

49. *Id.* at 603.

50. *Id.*

51. *Id.*

52. *Id.*

53. Additional major illustrations of this kind of rule that specifies multiple factors that should carry weight in reviewing law enforcement activities can be found in the law of pretrial detention. The Supreme Court in *United States v. Salerno*, 481 U.S. 739, 754 (1987), seemed to place weight on the fact that the federal pretrial detention statute required an arrest for a "serious" felony. That same requirement, however, is not uniformly present in the state statutes and court rulings on the subject.

the “basis of knowledge” and the “veracity” or “reliability” of an informant upon whose information the police have relied.<sup>54</sup> In the 1983 decision in *Illinois v. Gates*<sup>55</sup> the Court shifted to a “totality of the circumstances” test. Under the *Gates* test, courts were still to be guided by the factors analyzed under the earlier standard, but in a less structured sense. A strong showing for one of those factors might make up for a weak (or nonexistent) showing for the other.

A few states have rejected the shift from the more structured *Aguilar-Spinelli* test to the totality assessment required under *Illinois v. Gates*.<sup>56</sup> Again, these are typical “new federalism” cases and jurisdictions. A majority of states, however, have declared that they will follow the U.S. Supreme Court’s lead by shifting to the looser *Gates* standard. But is this true compliance with a federal floor? How solid a minimum requirement for assessing probable cause does *Gates* offer? This is not a minor issue: probable cause remains the dominant and constitutionally mandated standard for assessing full searches and seizures.

To see the limited support that this federal floor offers, consider two cases that nominally apply the same *Gates* standard. In *State v. Barton*, the Connecticut Supreme Court referred to the following critical paragraph from the affidavit requesting a search warrant:

That the affiants state on Sunday, August 7, 1988 Sgt. Gerald O. Peters received information from a confidential informant at police headquarters pertaining to Tim Barton who resides at 232 Perch Rock Trail, Winsted, Connecticut, first floor that Barton has in his apartment a large quantity of marijuana in plastic garbage bags, which are kept in a closet. That the informant also provided Sergeant Peters of [sic] a sample of the marijuana that is in the bags. A field test of the marijuana substance that was provided to Sgt. Peters was field tested and the test results was [sic] positive for cannibas [sic] substance. The informant further stated that Tim Barton operates a Texas registered vehicle and after being away for approximately one week Barton returned home on Saturday, August 6, 1988 and unloaded several large plastic bags in the evening hours. The informant further stated that shortly after that four to five people arrived at the Barton apartment and stayed a short while and then left with plastic garbage bags.<sup>57</sup>

The lower appellate court, applying the old *Aguilar-Spinelli* standard, had found the warrant inadequate under the “basis of knowledge” prong. The appellate court had emphasized that the affidavit recounted some innocuous facts and did not assert that the informant had personal knowledge of the critical facts. The Connecticut Supreme Court, however, applied the newly selected *Gates* standard and reversed, holding that “the affidavit provided a substantial basis for the

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54. See *Spinelli v. United States*, 393 U.S. 410, 413–16 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114–15 (1964).

55. 462 U.S. 213, 238 (1983).

56. See *People v. Serrano*, 710 N.E.2d 655, 658 (N.Y. 1999).

57. 594 A.2d 917, 928 (Conn. 1991).

magistrate's inference that the informant was reporting events that he had personally observed."

Consider the very different outcome in *State v. Utterback*, where the Nebraska Supreme Court considered the following facts—again the critical provisions from the affidavit under review—in light of the *Gates* standard.

On February 28, 1990, your affiant was advised by an *individual who is neither a paid nor habitual informant* that a second individual named "Randy" was engaged in the distribution and sale of controlled substances at the residence [at 321 North K Street]. The informant advised that "Randy" lived at the above described residence with his wife. The informant gave a physical description of "Randy" which matches the physical description of Randy Utterback contained in Fremont Police Dept. files. *The informant advised your affiant that in the past six months (the informant) had purchased marijuana from "Randy" at the residence described above*, and had observed other sales of illegal drugs at said residence. The informant further advised your affiant that (the informant) had been inside said residence within the last five days, and had seen a large quantity of marijuana, and lesser quantities of hashish, cocaine, LSD, and PCP. The informant indicated to your affiant that (the informant) was very familiar with illegal drugs, and the information furnished to your affiant indicated such knowledge.

The informant further indicated to your affiant that (the informant) had observed what (the informant) believed to be an AK 47 assault rifle and an Uzi submachine gun in said residence, together with other weapons. The informant advised your affiant that (the informant) had personally inspected these weapons, and that they were loaded with ammunition. The informant gave a description of these weapons to your affiant, and that description is consistent with an AK 47 assault rifle and an Uzi submachine gun.

Your affiant personally drove by the above described residence and observed an older model blue station wagon parked in the driveway of said residence bearing Nebraska license plate No. 5-B8618. According to records of the Dodge County Treasurer said vehicle is registered to Randy and/or Marla Utterback. Your affiant personally checked the records of the Fremont Department of Utilities and determined that the utilities were registered to Marla Utterback.<sup>58</sup>

A county judge had found this affidavit sufficient to justify a search warrant. The Nebraska Supreme Court reversed, pointing out that nowhere in the affidavit did the detective assert that the informant had been reliable in the past, or was a citizen informant, or that the informant had made a sufficient statement against interest, as the act of purchasing marijuana was not against state law (though possession was). Nor was the corroboration sufficient for the Nebraska

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58. 485 N.W.2d 760, 767–68 (Neb. 1992) (emphasis in original), *overruled in part by* *State v. Johnson*, 589 N.W.2d 108 (Neb. 1999) (rejecting language in *Utterback* suggesting that a finding of reasonable suspicion can support issuance of a search warrant).

Supreme Court, since the detective had merely confirmed “innocent details” of the defendant’s life.

One way to read the *Barton* and *Utterback* cases is that one court is simply wrong in its understanding of *Gates*. But which court? Is the Connecticut court sloppy in its judgment, or the Nebraska court unduly harsh?

Another reading is possible. Perhaps both courts reached valid conclusions under *Gates*. One jurisdiction (Nebraska) rejected a higher level of justification while another (Connecticut) accepted a much lower level of justification. Nevertheless, both the Connecticut and Nebraska courts worked hard to assess probable cause in light of the flexible *Gates* requirements. *Gates* seems to leave substantial room for local legal culture to set different norms for assessing probable cause. The *Gates* standard for this central component of criminal procedure does not set a floor but instead offers linguistic building materials for each jurisdiction to use in constructing its own distinctive culture, each at its own chosen level of protectiveness.<sup>59</sup>

Put another way, the metaphor of a floor is strained from the get-go in any area (like criminal procedure) awash in weak rules and partial rules. At the extreme are “non-rules” where the Court says that no federal constitutional issues are present, or refuses to say anything at all. More commonly—or at least more visibly—many non-rules seem like rules at first glance. One common non-rule appears when the Court says that lower federal and state courts should consider the “totality of the circumstances” in making a determination. In effect, the Court says more about what is *not* required than what is required. On closer observation such formulations lack some “rule” quality since the Court tells states only what is *not* required or lists so many factors as to provide no guidance at all. It is hard to imagine any area so filled with non-rules offering a firm floor.

Generalized, multi-factor rules leave room for courts to move up or down in their demands on law enforcement. This room is not unidirectional. Courts can be more restrictive or less restrictive with respect to government powers or individual rights, and yet plausibly fall within the orbit of the binding precedent. It is not just that courts can, if they wish, find leaks in floors; rather, these illustrations also suggest that perhaps the metaphor of floors is not the correct image at all.

### ***C. Sharply Defined Rules***

There are surprisingly few firm rules in federal constitutional criminal procedure. To find rules with any real constraining force, it is often necessary to move down the doctrinal food chain, from broader issues like consent or the right to counsel, to particular applications of those doctrines.

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59. This analysis assumes consistency within states: it is also possible that the flexibility of the *Gates* decision allows a range of positions among magistrates and judges within a particular jurisdiction, or even inconsistency from an individual judge.

*1. Apparent Authority to Consent to Search*

A good illustration of a leaky federal constitutional floor comes from the issue of the “apparent authority” of third parties to consent to searches. Consent searches provide one of the most important exceptions to the general requirements of probable cause or reasonable suspicion that justify different kinds of searches. In most American jurisdictions, the police conduct far more consensual searches than searches justified only by probable cause or searches made after obtaining a search warrant.<sup>60</sup>

When the police (the “first” party) hope to conduct a search targeting a particular suspect (the “second” party), they can sometimes obtain consent to search from some third party with authority or control over the location or property to be searched. Most jurisdictions allow third parties to consent to searches so long as that person has “actual authority” over the place or object being searched. The third party’s authority to consent to a search of property “does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes.”<sup>61</sup>

A more difficult issue appears when the consent to search comes from a person with “apparent” authority but not actual authority. Before 1990, several state courts and lower federal courts addressing this question concluded that these searches were still constitutional, so long as the officer reasonably believed that the third party had authority to consent. The Supreme Court endorsed this “apparent authority” rule in 1990 in *Illinois v. Rodriguez*.<sup>62</sup> In that case, the police had searched an apartment based on the consent of a former lover of the tenant, who did not have actual authority to consent to the search. Justice Scalia’s opinion gave these reasons for adopting the rule:

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

....

[W]hat we hold today does not suggest that law enforcement officers may always accept a person’s invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard:

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60. Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 402 (2004).

61. *United States v. Matlock*, 415 U.S. 164, 169, 171 n.7 (1974).

62. 497 U.S. 177, 188 (1990).

would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?<sup>63</sup>

Of course *Rodriguez* binds the federal courts on this issue. As one might expect, the majority of states addressing the question of apparent authority after *Rodriguez* have reached the same conclusion when reading their state constitutions.<sup>64</sup>

But what disagreements lie beneath this surface of conformity? How do courts apply the *Rodriguez* rule when the officer could easily supplement the “facts available . . . at the moment” by asking a few simple questions about ownership or control of the property? What is the most reasonable reading (the 90% reading) of *Rodriguez* when an officer takes at face value a third party’s assertion of authority, and asks no questions to determine whether the person has actual authority to consent to a search?

Typical of the holding and tone of federal cases on the issue of apparent authority is the decision of the Tenth Circuit (a fairly conservative court on criminal procedure issues) in *United States v. Salinas-Cano*. Abel Salinas-Cano was arrested following a controlled drug buy. After his arrest, the police went to the apartment of his girlfriend, Shirley Garcia, and asked for permission to search the apartment, and in particular to search Salinas-Cano’s possessions. They opened an unlocked suitcase and found cocaine. On the issue of Garcia’s apparent authority, the court held:

In interpreting *Rodriguez*’s reasonableness requirement, we agree with the D.C. Circuit that the Supreme Court “held only that the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake of fact, as distinguished from a mistake of law.” *United States v. Whitfield*, 939 F.2d 1071, 1073–74 (D.C. Cir. 1991). In other words, “*Rodriguez* . . . applies to situations in which an officer would have had valid consent to search *if the facts were as he reasonably believed them to be*.” Here, to the contrary, the officer was not mistaken as to the facts; his error consisted of concluding that the facts authorized Ms. Garcia’s consent. His was a mistake of law rather than a mistake of fact, and *Rodriguez* therefore does not resolve the issue. . . . To hold that an officer may reasonably find authority to consent solely on the basis of the presence of a suitcase in the home of another would render meaningless the Fourth Amendment’s protection of such suitcases. We hold that the police “could not infer such authority merely from [the consenter’s] ownership of the house.”<sup>65</sup>

This is a solid 90% reading of *Rodriguez*. The officer did not have enough information to form the basis for a reasonable reliance on the consent of this

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63. *Id.* at 186, 188 (internal quotations omitted).

64. *See* *State v. McCaughey*, 904 P.2d 939, 943 (Idaho 1995). A few states, however, have disagreed. *See* *State v. Lopez*, 896 P.2d 889, 903 (Haw. 1995); *State v. McLees*, 994 P.2d 683, 691 (Mont. 2000).

65. *United States v. Salinas-Cano*, 959 F.2d 861, 865–66 (10th Cir. 1992).

person. A few simple questions could have established the authority of the consenting third party.

Consider the related case where there are two persons in a car, and the officers separate them, and ask each of them for consent to search the car and the contents of bags or suitcases in the trunk. If the police obtain consent from one of the persons to search the car and “all the bags,” is this sufficient? Do all passengers have sufficient “apparent authority” to justify the search? A much more questionable decision (a 10% decision) on this topic was decided by the New Jersey Supreme Court in *State v. Maristany*.<sup>66</sup> The facts follow:

State Troopers Frank Trifari and Thomas Colella were patrolling the southbound lane of Interstate 95 when they observed a 1988 Oldsmobile with out-of-state license plates proceeding in the left-hand lane for approximately one-half mile. The troopers stopped the car for failing to keep right . . . . The troopers approached the car and asked the driver, Gerald Green, for his license and registration. Both Green and the passenger, defendant Reinaldo Maristany, appeared nervous as they searched for the papers. When Green failed to produce credentials, Trifari asked him to step out of the car and walk to the rear of the vehicle. Defendant remained in the passenger seat.

Trifari questioned Green and defendant separately. Green explained that he was returning from a visit with his sick aunt in New York. However, defendant claimed that he and Green had been visiting defendant’s children in New York. Because of the inconsistent responses and apparent nervousness, Trifari requested Green’s consent to search the car and trunk. When asked if the trunk contained any luggage, Green indicated that a blue canvas bag and brown suitcase were inside.

. . . Trifari and Green were standing at the rear of the car; [Maristany] was sitting on the front hood. After Trifari advised Green of his right to refuse consent, Green acquiesced in the search and signed a consent-to-search form that authorized Trifari to “conduct a complete search of trunk portion of vehicle including blue canvas bag, brown suitcase, also includes interior portion of vehicle.” [Trifari found no contraband in the car’s interior. Green removed the keys from the ignition and opened the trunk for the trooper’s inspection.] In the blue canvas gym bag, Trifari found three kilograms of cocaine.<sup>67</sup>

After his arrest, Green claimed that the blue bag belonged to Maristany and that he had no knowledge of its contents. The question for the court was whether the state trooper was reasonable in relying upon Green’s apparent authority to consent. The New Jersey court said he was.

The validity of the search depends largely on whether Trooper Trifari, at the time of the search, had a reasonable basis for

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66. 627 A.2d 1066 (N.J. 1993).

67. *Id.* at 1067.

believing that Green had the authority to consent to a search of the blue gym bag. After reviewing the facts and circumstances known to Trooper Trifari, we are satisfied that the officer reasonably relied on Green's consent to search the car and its contents.

Absent evidence that the driver's control over the car is limited, a driver has the authority to consent to a complete search of the vehicle, including the trunk, glove compartment, and other areas. . . .

As the driver, Green had immediate possession of and control over the vehicle. By possessing the keys to the car and trunk, Green displayed sufficient control over all areas of the vehicle to enable him to consent to its search. Green exercised that control when he consented to a search of the car and voluntarily opened the trunk for the trooper's inspection. In addition, Green's knowledge of the contents of the trunk, prior to the search, further supported the belief that Green had apparent authority to consent.

Once the trunk had been opened, there was nothing to alert Trooper Trifari that both, none, or only one of the bags belonged to Green. Neither bag contained identification. Further, the type of luggage, a canvas gym bag and a suitcase, did not compel the conclusion that one bag belonged to each of the occupants. If, at the time of the search, Green had denied ownership of the gym bag, or defendant had claimed ownership of the bag, we might conclude that the officer's reliance on Green's consent was unreasonable. However, under these circumstances, for Trooper Trifari to believe that Green had apparent authority to consent to the search of both the gym bag and the brown suitcase was objectively reasonable.<sup>68</sup>

The federal courts of appeals generally find that a driver has presumptive authority to approve searches for all containers in the car they were driving.<sup>69</sup> But we do not believe federal courts would uphold as reasonable consent obtained from one party after two parties were separated and where there were two or more bags in the trunk, especially in the context of cars with a driver and at least one passenger.<sup>70</sup>

In our view, *Maristany* is a leak—a case with a 10% chance of being upheld by a federal court applying existing precedent. The leak in *Maristany* offers an especially pointed example, since many observers would characterize the New Jersey Supreme Court as a fairly liberal court, at least on criminal justice issues, and a court willing to engage in the new judicial federalism. Even here, one can find a state court willing and able to move lower down the scale of control over state agents than one can find in the federal courts.

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68. *Id.* at 1069–70.

69. See generally *Thirty-Fifth Annual Review of Criminal Procedure*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 92 n.258 (2006).

70. Our point is not weakened if a federal court also pushed on federal precedent in this fashion; a more significant problem for our thesis would arise if it were just as likely that federal or state courts treated the federal precedent in a “10 percent” manner.

## 2. Right to Self-Representation

One of the criminal procedure rights well-known among both lawyers and the general public is the right to self-representation, recognized in *Faretta v. California*.<sup>71</sup> In *Faretta*, the Court stated a bold and broad proposition: The Sixth Amendment made counsel “an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.”<sup>72</sup> As a result, the Court held that defendants have a federal constitutional right to represent themselves in criminal proceedings.<sup>73</sup>

The right to self-representation, however, is not absolute. Even when a defendant attempts to waive counsel, the trial court may appoint “standby counsel” to aid the defendant “if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.”<sup>74</sup> The trial judge must also be satisfied that the defendant’s waiver of counsel is truly knowing and voluntary,<sup>75</sup> and must carefully describe to the defendant the consequences of waiving counsel.<sup>76</sup>

*Faretta* rights have no natural constituency in the state courts. In this high-volume setting, prosecutors do not enthusiastically support defendants who want to proceed without counsel; similarly, trial judges would much rather deal with a represented defendant to assure procedural regularity and courtroom efficiency. So when a defendant in state court asserts a right to self-representation, reported caselaw reveals indifference and even downright hostility from trial judges. State appellate judges routinely approve of trial judge efforts to maneuver a defendant into accepting an attorney, even if the defendant persists in saying that he or she wants to represent himself.

A vivid example comes from Iowa, in *State v. Spencer*.<sup>77</sup> The defendant, a man with some college education who was charged with drug possession and unauthorized possession of firearms, initially retained a private attorney, Richard Mock. A few days before trial, the attorney moved to withdraw from representation, and Spencer told the judge that he wanted to represent himself. A lengthy discussion followed. The court ultimately allowed Mock to withdraw and appointed a new attorney to the case, over Spencer’s continued objections.

The Court: . . . Do you want to get another attorney or do you want to go to trial tomorrow with him?

The Defendant: I feel I would be better off defending myself, Your Honor. He doesn’t want to listen to what I’m telling him. . . . I’ll have to go pro—I’ll have to defend myself.

The Court: Before I would let you do that, I would appoint somebody. If your status is as it appears to be, that you have

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71. 422 U.S. 806 (1975).

72. *Id.* at 820.

73. *Id.* at 821–22.

74. *Id.* at 834 n.46; *see also* *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

75. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

76. *Faretta*, 422 U.S. at 835.

77. 519 N.W.2d 357 (Iowa 1994).

property, those will be assessed—the fees of whoever is appointed will be assessed against that.

The Defendant: I don't see how you can force me to do that, Your Honor.

The Court: Well, I don't think that you're in the position of being able to defend yourself. And the least I would do is have somebody appointed to sit and be available as your counsel. But, frankly, I'm not going to put the court in the position whereby you defend yourself and then it's reversed if there is a conviction, just because there was no attorney present. It's as simple as that. Now, do you have any other person in mind?

The Defendant: No, sir. . . .

The Court: Well, what familiarity do you have with the legal system?

The Defendant: I don't have any, Your Honor. Shouldn't make the legal system that way where I can't defend myself. I'm the one that's familiar with the case. I'm the one that's arrested. I know what my best interest is.

The Court: Well, if I understand your complaint, [Mr. Mock] wanted to plead it and you wanted to fight it. Now, the question is, how are you going to fight it in the courtroom? My problem with it is that I don't want you to sit in the courtroom not being prepared for the procedures and end up with a verdict against you because you weren't familiar with the procedures. Do you understand what I'm saying?

The Defendant: I understand what you're saying, but I don't understand why you make them that way.

The Court: Why do we make what that way?

The Defendant: Court procedures that way. Ordinary citizen can't come in and defend himself. . . .

The Court: Okay. During the interim, the court has attempted to contact an attorney to represent the defendant in this case. I have contacted Richard McCoy in Sioux City. He practices in criminal court and he's . . . tried a lot of cases and I feel that he's a good attorney. He's indicated that he would be willing to take your case . . . Does that meet with your approval?

The Defendant: Doesn't meet with my approval, Your Honor, but if you're going to force it on me, I'm going to have to take it. . . .

The Prosecutor: . . . The appointment of Mr. McCoy is pursuant to [section] 815.10(2) then? The Court: That's right. And I can appreciate that it says, ". . . if a person desires legal assistance and is not indigent." As far as I'm concerned, although he indicates he wants to do it himself, I don't see that he's competent and qualified

to do it himself. There should be somebody there. And on that basis, [the] court interprets that section to apply.<sup>78</sup>

The Iowa Supreme Court affirmed the trial court's rulings at the pre-trial hearing described in this transcript. Although the defendant expressed a desire to represent himself, the court described this as a statement made "merely out of brief frustration with the trial court's decision regarding counsel and not as a clear and unequivocal assertion of his constitutional rights."<sup>79</sup> The court also interpreted the trial judge's ruling as the appointment of a "standby counsel" rather than a replacement for the withdrawing attorney.<sup>80</sup> During the later trial (delayed by a year to allow the new attorney time to prepare), Spencer did not attempt to conduct the proceedings himself. Thus, the court concluded, he abandoned his assertion of the right to self-representation.<sup>81</sup>

The Iowa decision presses the boundaries of the relevant Supreme Court cases in several ways. First, the Iowa Supreme Court created a new test to judge the clarity of the defendant's waiver of counsel, distinguishing between a true waiver and a defendant's "brief frustration" with the existing attorney. This phrase appeared nowhere in the *Faretta* or *McKaskle* opinions, nor in the Fifth Circuit case that the Iowa Supreme Court cited as authority.<sup>82</sup> Moreover, none of the defendants in those federal cases engaged in the lengthy colloquy that we saw between Spencer and the trial judge.

The Iowa Supreme Court also created an expansive view of what a defendant might do to abandon a request for self-representation. The Court accepted the government's characterization of the new attorney as a "standby counsel" even though the trial court never gave him that label and never described the limits of standby counsel to the defendant, as *McKaskle* seems to require.<sup>83</sup> In all the federal appeals court cases that the Iowa Supreme Court cited as precedent, the defendant allowed standby counsel to take an active role in plea negotiations or at trial only after the court carefully informed the defendant about his power to limit the attorney's role in the case.<sup>84</sup>

Opinions such as these suggest that state trial judges can actively limit the right to self-representation without much fear of reversal. The distinctions between the Iowa opinion and the federal cases discussed in that case suggest a more supportive attitude toward self-representation in the federal courts. Perhaps the

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78. *Id.* at 362–63.

79. *Id.* at 359.

80. *Id.* at 361.

81. *Id.* at 360.

82. *Burton v. Collins*, 937 F.2d 131, 133–34 (5th Cir. 1991) (defendant's question "May I represent myself?" construed as inquiry into alternatives and an expression of frustration with current attorney, rather than an unequivocal assertion of right to self-representation).

83. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

84. *See United States v. Weisz*, 718 F.2d 413, 427 (D.C. Cir. 1983) (fact that defendant permitted standby counsel to conduct his entire defense suggested that "at some point [defendant] reconsidered his decision to proceed pro se and decided to avail himself of the assistance of counsel"); *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir. 1976).

lighter caseload burden in the federal courts allows more room for a scrupulous respect for *Faretta* rights.

Recent work by Professor Erica Hashimoto also suggests a vibrant practice of self-representation in the federal courts.<sup>85</sup> Her empirical study of self-representation in the federal courts found that the defendants who represented themselves were no more likely than other federal defendants to suffer from mental illness; they also appeared to achieve results at least as strong as the outcomes that lawyers obtained for their clients in federal court.<sup>86</sup>

#### **D. Legislative Leaks**

One other general type of leak worth highlighting is the variety of legislative positions that appear to leave a state system operating below the minimum requirements declared in federal judicial decisions. Legislatures create new institutions and provide funding for programs. Legislative power and language can provide such institutions with instances of policy-making far surpassing the policy-making capacity of any court. It is usually an easy exercise for a legislature to attain a particular policy objective (whether oriented towards government power or individual liberty) without violating apparent strictures of the U.S. Supreme Court or other federal law.<sup>87</sup>

As just one illustration of the range of legislative procedural workarounds, the U.S. Supreme Court held in *Wilson v. Arkansas*<sup>88</sup> that the federal Constitution embodies a requirement that police knock and announce their presence before forcibly entering a home. Two years later, in *Richards v. Wisconsin*,<sup>89</sup> the Court rejected a general exception to the knock and announce requirement for felony drug cases, while at the same time finding the decision not

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85. Erica Hashimoto, *In Defense of the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 425–29 (2007).

86. Even for simpler and seemingly more clear-cut rules, there are many examples of states undermining an older understanding once it becomes clear in later U.S. Supreme Court decisions that movement from the prior norm is to be expected. A host of illustrations arise regarding the intricate rules for invoking and waiving *Miranda* rights.

For example, state courts had taken a variety of positions on the clarity of language necessary to invoke *Miranda* before the Supreme Court decision in *Davis v. United States*, 512 U.S. 452 (1994). In *Davis* the Court held that officers could continue to question suspects unless they asserted their rights in an unambiguous and unequivocal manner. This was a minority position in the states before *Davis*—perhaps because most state courts viewed this position as inconsistent with prior law. Equally consistent with our general findings, state court law continued to evolve after *Davis*, with continued movement beyond the already strongly government-oriented position in that case.

87. One of the most prominent examples appears in the funding of defense counsel, where state legislatures have made funding decisions that render irrelevant and unenforceable the federal constitutional requirement of reasonably effective appointed defense counsel for the indigent. Many scholars have commented on this state of affairs. See, e.g., Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1782–95 (2003) (book review); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221–24 (2004).

88. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

89. *Richards v. Wisconsin*, 520 U.S. 385, 394–95 (1997).

to knock and announce reasonable on the particular facts of *Richards*. *Richards* would seem to have firmed up the knock and announce floorboard, creating a barrier against exceptions. Yet it would be child's play for a legislator in Wisconsin or elsewhere to conduct hearings and then draft a statute, with appropriate findings, showing a likelihood that drugs would be destroyed or violence used for particular drugs and circumstances, and that such a rule would be upheld by whatever courts were willing or able to review it.

### III. LEAKY VIRTUES, LEAKY VICES

It is fair to ask whether leaks—decisions by state courts that are less protective of individual rights than the federal “floor” or the reasonable reading of the federal precedent—are lawful or lawless. The view that leaks are lawless would cast state courts and other state institutions as the equivalent of speeding motorists: intentional lawbreakers who routinely get away with their violations of the law because there are far more speeders than highway patrol officers on the roads. From this perspective any holding that should be deemed a leak would be cheating on the Supremacy Clause. Certainly parts of American legal history would provide a foundation for such a view. For example, state courts and state systems sidestepped the mandates of the Civil War amendments and the mandates of the United States Supreme Court in its school desegregation decisions.

But a different view, and certainly the more realistic view, would draw a different analogy. Federal law should not be likened to traffic laws saying that speeders violate the law when they go 66 miles per hour, but instead to traffic laws (like those in Arizona) where the applicable statutory provision says that the State must prove that the driver's speed was unreasonable under the circumstances.<sup>90</sup> Speeds over presumptive limits are “evidence that the speed is too great and therefore unreasonable.”<sup>91</sup>

Our point is not that any and all readings of a U.S. Supreme Court decision or federal statute by state courts are legitimate. (Nor do we believe that Arizona drivers never speed). Surely some readings of U.S. Supreme Court holdings by state courts are not fair readings. We have in mind here a sense of predictability, based on a set of conventional lawyerly techniques for shifting (but not displacing) the meaning of precedent. Within this range, the illustrations we give qualify as legitimate expressions of law.

In this Part, we focus our attention on a second question: whether leaks are a good thing for our legal systems. Is it possible that what the state high courts, legislatures, and executive branch agencies are doing is not just legitimate, but desirable?<sup>92</sup>

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90. See ARIZ. REV. STAT. ANN. § 28-701 (2004).

91. *Id.* § 28-701(B).

92. We join several strands in recent constitutional scholarship that raise questions about the monolithic dominance of the United States Supreme Court (or a majority in any case) in having the decisive or final say in matters of federal constitutional interpretation. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (illuminating and celebrating political and popular responses to Supreme Court decisions); Heather Gerken, *Dissent by Deciding*,

*A. Constitutional Debate and Evolution*

State high courts must, of course, uphold federal law. Under the Supremacy Clause of Article VI,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Does this mean that state institutions must follow the U.S. Supreme Court's rulings and all the inferences one might draw from the opinions, including dicta? Or rather, could these state high courts follow the model of precedent from civil law systems, where the text remains primary and any judicial reading of the text remains secondary? Between these extremes, one might expect a state high court to adhere only to the "holdings" of the U.S. Supreme Court as a component of "federal law" which it must enforce under the Supremacy Clause, but allow the state high courts to discount dicta and play "precedent games" with those decisions.<sup>93</sup>

Lower federal courts might have more of an obligation to take seriously the dicta of U.S. Supreme Court rulings on constitutional questions, and to live within the implications of those decisions, until the U.S. Supreme Court says (or hints) otherwise. The obligation derives from their place within a unified judicial system. Article III, after all, speaks of "the" judicial power of the United States.

The state supreme courts, however, are not "lower courts," notwithstanding the frequent and improper reference to them as lower courts by scholars and federal judges. They do not have the same obligations as members of a unified judiciary. State high courts sit atop their own culture, with a different set of legal texts and principles to harmonize, and a different social reality that exerts some gravitational pull on the meaning of legal requirements. They are closely analogous to a panel of a court bound by its en banc opinions. The panel may not overrule any holdings, but aggressive reading of the cases is acceptable and even necessary to produce some harmony and consistency.

Shifting the kind and degree of deference in state courts is consistent with different expectations about the common law obligations of courts in different situations. Courts may properly deal differently with "binding" and "persuasive" authority, and may respond differently to various levels of "persuasive" authority. A court drawing on precedent from a jurisdiction with a similar legal culture and social structure has a stronger obligation (but not a duty) to follow that other jurisdiction than the legal decisions from a more distantly-removed jurisdiction. The same might be said of binding authority: there are degrees of "binding." What

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57 STAN. L. REV. 1745 (2005) (illuminating and celebrating radical actions inconsistent with governing law as a form of dissent).

93. Note the kinship between our account of state court independence and those constitutional theories which put executive and legislative interpreters of the Constitution on a par with judicial interpreters. The Supremacy Clause speaks to the supremacy of federal law, not federal courts.

might be strongly binding on one court (say, a federal court of appeals) may be binding in a weaker sense on another court (say, a state appellate court).

Recent theoretical writings on our federal system have emphasized the overlap and interrelationships between federal and state governments on many questions. More positivist and pristine conceptions of “dual” federalism have given way to concepts of dialogue, conversation, and interaction.<sup>94</sup> Among the leading scholars in this vein is Professor Robert Schapiro, who in a series of articles and a forthcoming book has developed a theory of “polyphonic federalism.”<sup>95</sup> Schapiro has discussed the application of federal law by state courts and the application of state law by federal courts. He has not commented directly on the issue we raise in this Article, but he has offered a series of observations and arguments about the different perspective of state courts on such fundamental issues of separation of powers. For example, Schapiro notes:

Current theories of coordinacy and deference in constitutional interpretation focus solely on the federal Constitution. Consideration of state court interpretation of state constitutions offers an important additional dimension. Unlike federal courts, state courts generally do defer to the constitutional judgments of other branches of government. The state experience thus stands in marked contrast to the federal experience and offers a valuable alternative perspective.<sup>96</sup>

The U.S. Supreme Court itself recognizes its fundamentally different relationship with state and lower federal courts in a variety of doctrinal contexts. It may do so as well in its exercise of certiorari, responding to “splits” among federal courts differently (and more quickly) than divisions in interpretation of federal law among the states. The U.S. Supreme Court also recognizes the distinction in the deference it shows in returning cases after the Court vacates a judgment. When it remands a case to the federal courts of appeal, it requires proceedings “consistent”

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94. Cover & Aleinikoff, *supra* note 11; Wright & Miller, *supra* note 25.

95. See ROBERT A. SCHAPIRO, *supra* note 10; Robert A. Schapiro, *From Dualism to Polyphony*, in PREEMPTIVE CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., forthcoming 2008); Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. (forthcoming 2008); Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115 (2007); Robert Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1 (2006); Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000) [hereinafter Schapiro, *Judicial Deference*]; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

96. Schapiro, *Judicial Deference*, *supra* note 95, at 659.

with the opinion, but when it remands the case to state court proceedings, it requires proceedings “not inconsistent” with the opinion.<sup>97</sup>

There are many theoretical reasons to respect the different perspective state courts bring not only to state law, but to federal law as well. We turn now to the case for a distinctive state contribution to the meaning of federal law.

### ***B. Interactive Federalism in a Post-Habeas Era***

State court independence on constitutional questions has developed at the same time that federal habeas corpus review has withered away to almost nothing. There may not be any causal connection between the two developments, but one does have a bearing on the other.

Under the Habeas Corpus Act of 1867, as interpreted since the middle of the twentieth century, federal courts could overturn the convictions of many state prisoners. There are a few competing justifications for this federal power. Robert Cover and Alex Aleinikoff envision federal habeas corpus as a structure for a dialogue among courts with different strengths and sympathies.<sup>98</sup> A competing account of habeas corpus emphasizes the special resources and perspectives available to federal judges, and aspires to have a “federal court for every federal claim.”<sup>99</sup>

Habeas corpus review has diminished dramatically over the past decade, first through aggressive judicial limitations of the habeas corpus statute, and then through congressional ratification of those limits. In this setting, the present-day reactions of state high courts to prior holdings of the U.S. Supreme Court may replace the habeas corpus “conversations” between state judicial systems and the lower federal courts as the time and place to exchange views on the meaning of the federal Constitution. State institutions that exercise more independence in reading constitutions and the decisions of the U.S. Supreme Court may have created a “habeas corpus for the 21st century.”

This present-day interaction between federal and state courts involves less frequent federal input into the conversation than was present under an active habeas corpus framework. “Precedent games” surely happened all along as state courts interpreted and applied U.S. Supreme Court decisions, but it is possible that such game-playing is happening more often and more aggressively as state courts develop habits of independence when it comes to constitutional questions. Whether or not state courts are expressing their views about federal law more often today, the legal environment may have changed enough to affect our evaluation. We may now be able to view more wide-ranging state readings of federal law as a legitimate form of dialogue, rather than the work of undisciplined underlings.

Aggressive state-court readings of federal precedent can only substitute for some of the virtues of active federal habeas corpus review. This present-day

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97. We are indebted to Robert Schapiro for this point.

98. Cover & Aleinikoff, *supra* note 11; *see also* Wright & Miller, *supra* note 25.

99. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prisoner Litigation Reform Act*, 47 DUKE L.J. 1, 1–86 (1997).

interaction between federal and state courts does not give federal courts much power to dispose of charges against particular defendants in the state system. For that reason, state court readings of federal constitutional rights on direct review will not provide a federal court for every federal claim. Nor will state court observations about federal law undermine the finality of judgments, a concern that so often figured in debates about habeas in past decades. A surge in state court independence only creates a forum for dialogue, the sort of dialogue that habeas corpus once made possible.

A real dialogue—a discussion and exchange in both directions—can occur in several ways. Federal courts addressing federal questions can read and cite state court decisions. The state court decisions would not, of course, bind federal courts. And given the different relationship we have noted between federal and state courts and federal precedents, federal courts might discount or distinguish state court readings of federal law even as persuasive authority.

Another obvious (if exceptional) course for direct dialogue from state to federal courts occurs when the U.S. Supreme Court grants certiorari in cases from the states. A heightened recognition of the distinctive role of state courts with respect to federal law might lead the U.S. Supreme Court to affirm some state decisions they would reject if the appeal came from the federal courts. Perhaps such an explicit disjunction in the impact of federal law between state and federal courts would be untenable, but the U.S. Supreme Court could still exercise its certiorari power to reflect just such a distinction. Thus a “split” between federal circuits might be reviewed where a similar “split” between federal courts and state courts, or among state courts, would not.

An excess of leaks in state courts may lead to federal countermeasures. The U.S. Supreme Court has shown a picayune insistence that state courts relying on independent state law do so with more than the utmost clarity.<sup>100</sup> A U.S. Supreme Court that wanted to make floors more leak-proof might strategically shift the underlying doctrine, or for a time grant review of more state cases to plug leaky habits.

### ***C. The Power of Metaphor to Enable and Obscure***

Among the most surprising things about the story of the impermeable federal constitutional floor is that the idea has lasted so long, and with so little critical commentary. The power of metaphor to help shape and transmit complex values and ideas is widely recognized. But it is worth noting that legal metaphors, including the idea of the federal “floor,” can also limit comprehension and debate.

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100. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938, 949–51 (1996) (reversing where state court cited two federal cases along with a multitude of state cases); cf. *Commonwealth v. Labron*, 690 A.2d 228 (Pa. 1998) (on remand from the U.S. Supreme Court, reinstating earlier decision and “explicitly noting that it was, in fact, decided upon independent state grounds”). States that do not like the U.S. Supreme Court’s decisions in cases coming from their own states can simply decide the same issue in the same case on remand on state grounds. See, e.g., *Sitz v. Dep’t of Police*, 506 N.W.2d 209 (Mich. 1993) (rejecting the U.S. Supreme Court decision in *Michigan v. Sitz*, 496 U.S. 444 (1990), on state law grounds).

Perhaps the lesson of this Article is to keep a skeptical eye on all legal metaphors. But perhaps a marriage of metaphors is in order. Another popular legal metaphor that has shaped our understanding of federalism is Justice Brandeis' image of the states as "laboratories."<sup>101</sup> Despite its frequent invocation in caselaw, and its even more frequent invocation among scholars, the meaning and implications of the laboratory metaphor have received little sustained attention.<sup>102</sup> We have previously noted the following, regarding the limited exchange of information about sentencing experiments by state legislatures and executive agencies:

The scarcity of visible exchange of sentencing reform information between the states raises a fundamental challenge to the idea of states as laboratories so eloquently illuminated by Justice Brandeis in *New State Ice Co. v. Liebmann*. Laboratories are not simply places where people conduct experiments for their own use. Instead, laboratories are where people conduct experiments and report on their findings. The goal is to produce information that others can then replicate, challenge, and build upon. The whole point of science is that results are shared, not kept quiet. States will only function like laboratories when they view their experiments as experiments—hypotheses about policy and social responses subject to testing, with successes and failures reported so that their findings can guide other states.<sup>103</sup>

Distinctive state court interpretation of federal constitutional precedent may provide another element to the laboratory concept. In effect, states are experimenting, within reason, with the meaning and scope of federal precedents. Active state interpretations and responses to federal constitutional decisions are a form of logical and institutional testing and experimentation. They are closer to the laboratory metaphor than many state initiatives that are not articulated, since these judicial experiments are published and subject to various forms of criticism and review, including potential review by federal courts.

### CONCLUSION

We have illustrated several ways in which state courts and other state institutions adopt positions below the apparent federal floors. Perhaps our findings simply imply that it may be difficult to find *any* rule that acts like a true, firm floor. We close, therefore, with a thought experiment that might help readers, as they survey the law in their own fields of expertise, to determine for themselves whether these leaky floors tell us something about federalism, and not just about indeterminate legal rules.

Create an array, for any issue in criminal procedure or in another field, of the range of positions taken across states. Instead of starting with the federal view,

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101. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

102. *See Gardner, States-As-Laboratories*, *supra* note 32.

103. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1393–94 (2005).

begin with the states. Having mapped the state views on the constitutional requirements for a particular topic, superimpose the federal view on the array. If the image of floors was correct, the federal view would sit at the bottom of whatever positions make up the array. It is our experience, however, that the federal position is almost never at the bottom of the array; it is, instead, typically on the side of the spectrum representing the most government power and least individual liberty, but with state positions above (no surprise) and *below* the federal view.

Despite the prevalence of the floor metaphor, it simply may not support the real structure of state law. One strategy might be to recognize a “thicker” floor—a wider range of positions that are consistent with federal law. Perhaps a more accurate metaphor is of a large body and the gravitational pull it exerts on other objects. One of the virtues of the gravitational metaphor is that it breaks the analysis of state positions from the often ill-fitting conception of positions that are “higher” or “lower” than the federal view.

A gravitational image would attach no normative content to any particular direction. Judgments about the validity of particular state positions would come from their relation to the large body. If a state position was sufficiently at odds with the federal view, the gravitational pull of the Supremacy Clause would indeed cause the state orb to crash. But a variety of positions might be staked out that would—in line with the many mechanisms we have illustrated in this section—keep the state planets in healthy alignment.