

Symposium on The New Judicial Federalism: A New Generation

State Court Federalism

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Recommended Citation

Rex Armstrong, *State Court Federalism*, 30 Val. U. L. Rev. 493 (1996).
Available at: <https://scholar.valpo.edu/vulr/vol30/iss2/4>

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STATE COURT FEDERALISM

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Federalism is enjoying a renaissance. Although states never lost the ability to serve as laboratories for the development of social policy, the growth of the federal government served, over time, to reduce significantly the options available to states to do that. As federal law expanded in scope, it left states to work within increasingly narrow interstices of law and policy. No one would dispute that there is a sustained effort now under way to reduce the role of the federal government in public life, and thereby to give states greater freedom to develop and experiment with social policy.

Oregon has a long tradition of using its power to experiment with social policy. In the early twentieth century, it pioneered the "Oregon system" of initiative, referendum, and recall, and later coupled that with constitutional "home rule" for local governments.¹ In 1971, it enacted the country's first bottle bill to promote the recycling of beverage containers.² In 1973, it developed a comprehensive system of statewide land use controls.³ More recently, dissatisfied with the narrow scope left to the states by federal health and welfare policies, it obtained waivers of federal requirements to allow it to implement the Oregon Health Plan and an innovative welfare reform program.⁴ In the federalist tradition, those initiatives, as well as many others, have served, or may serve in the future, as models for other states.

Oregon's adherence to federalism also extends to independent interpretation of its state constitution. The Oregon tradition of independent constitutional interpretation is not new,⁵ but it has become a central feature of Oregon law over only the past twenty years. That Oregon courts invariably engage in independent analysis of the Oregon Constitution is attributable in large part to the work of Hans Linde, first as an Oregon law professor and then as a member

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1. See OR. CONST. art. II, § 18; *id.* art. IV, § 1; *id.* art. XI, § 2.

2. See Act of July 2, 1971, ch. 745, 1971 Or. Laws 2015 (codified at OR. REV. STAT. §§ 459A.700-.740 (1995)).

3. See, e.g., Act of May 29, 1973, ch. 80, 1973 Or. Laws 127 (codified in OR. REV. STAT. ch. 197 (1995)).

4. See Act of Sept. 14, 1993, ch. 815, 1993 Or. Laws 2558; Act of July 21, 1995, ch. 816, 1995 Or. Laws 2498.

5. See, e.g., *Deras v. Myers*, 535 P.2d 541 (Or. 1975) (campaign finance restrictions); *State v. Brown*, 497 P.2d 1191 (Or. 1972) (double jeopardy); *State v. Wederski*, 368 P.2d 393 (Or. 1962) (self-incrimination); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962) (financial support for religious institutions); *Cannon v. Gladden*, 281 P.2d 233 (Or. 1955) (proportional punishment).

of the Oregon Supreme Court from 1977 to 1990. The analytical foundation that he laid ensures that Oregon courts will not abandon their obligation to interpret their constitution. Moreover, it is conceivable that, in time, their commitment to fulfill that obligation could have an effect on other states as profound as that of some of the other initiatives for which Oregon is recognized.

Nevertheless, questions have been raised, most prominently by Professor James Gardner, about the legitimacy of federalism when applied to the interpretation of state constitutions.⁶ Gardner contends that independent interpretation of state constitutions is now illegitimate and that state courts should follow federal precedent in interpreting state constitutions in order to preserve national unity. In effect, he argues that the federal Supreme Court should be the sole official source of constitutional interpretation in this country, at least to the extent that the constitutional provisions at issue are found in both the federal and state constitutions.⁷

Federalism rejects the idea that all policy-making authority should reside with the federal government. It assumes that the diversity that results from decentralized decision making will lead to better policies at the state *and* federal levels. It is difficult to understand, then, why the federalist principle should not extend to the interpretation and, hence, the implementation of the policies that are embodied in the state and federal constitutions. Diversity in that sphere can be as valuable as in any other sphere of public policy development.

Fundamentally, Gardner's thesis embodies the principle that federalism is bad for the judicial branch of state government when applied to constitutional policies, whatever its merits for the legislative and executive branches. This Article will explain why Gardner is wrong.

As an initial matter, Gardner's thesis of federal supremacy in constitutional interpretation is logically flawed, whatever its merits as policy. That is because state judges are obliged to interpret their state constitutions independently, if they are to do the job that they have been given.

6. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) [hereinafter *Failed Discourse*].

7. See *id.* at 823-32; see also James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1051-54 (1993); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 928-33 (1993) [hereinafter *Comments on Gardner*]. For a response to Gardner based on an analysis of Oregon's experience with independent interpretation of its constitution, see David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992). Gardner continues his examination of state constitutionalism in an article in this Symposium entitled *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 Val. U. L. Rev. 475 (1996).

When I became a judge on the Oregon Court of Appeals, I took an oath to support the Oregon Constitution.⁸ That means, in a case before our court involving a challenge to the validity of a state statute under the Oregon Constitution, I am obliged to uphold the constitution. To do that, I have to decide what the constitution means. That is the task assigned to me as a state judge. I would act contrary to my oath if I turned that task over to someone else, yet that is precisely what Gardner would have me do. Under his thesis, I would cede to the federal Supreme Court the responsibility to decide what the Oregon Constitution means in the case before me, if the federal Constitution contains a provision comparable to the state provision at issue. But deciding what the Oregon Constitution means is my job, not that of the federal Supreme Court.

*Marbury v. Madison*⁹ provides a useful perspective on this issue. *Marbury* established that the Supreme Court would decide for itself what the federal Constitution means in cases presented to it, and would not be bound by the decisions of Congress or the President about the constitutionality of their actions.¹⁰ The choice that was made on that issue in *Marbury* was not the only defensible choice. The President and the Congress are obliged to uphold the Constitution in the course of discharging their governmental duties, so the Court, in principle, could have chosen to accept the President's and Congress' judgment about the constitutionality of their official acts. The reasoning used by Chief Justice Marshall to reject that choice is persuasive to me, but the issue was not beyond dispute.

What is beyond dispute, however, is that the Supreme Court could not choose then, or now, to cede to any person or institution *other* than the President or Congress, in appropriate cases, the responsibility to interpret the Constitution.¹¹ The principle is no different for state judges in cases involving the interpretation of their state constitution. Consequently, without an amendment to the relevant state constitutions or to the federal Constitution that assigns to the federal Supreme Court the task of giving meaning to state

8. See OR. CONST. art. XV, § 3. I also took an oath to support the federal Constitution, *see id.*, which means that I must adhere to federal Supreme Court decisions interpreting that Constitution. But that obligation does not extend to applying federal Supreme Court decisions to the interpretation of the Oregon Constitution.

9. 5 U.S. (1 Cranch) 137 (1803).

10. *Id.* at 176-79.

11. In other words, whatever the federal judicial power is, it has been entrusted to the judges of the federal Supreme Court and of the lower federal courts, and not to anyone else. As a corollary principle, if the judicial power imposes on federal courts the obligation to enforce the federal Constitution in cases in which the Constitution is implicated, then it is for the federal courts to decide what the Constitution means, again absent a principled basis to defer in that task to officials in the other branches of the federal government.

constitutions, I and all other state judges lack the authority to do what Gardner wants us to do. It would, in fact, be illegitimate for us to do that. Gardner and others may be justified in criticizing state courts for doing a poor job of interpreting their state constitutions, but it nevertheless is the job of state courts to interpret them.¹²

Leaving aside the logic of it, Gardner's thesis is flawed for a host of other, equally important reasons. Foremost among them is that acceptance of his thesis would deprive constitutional law development, both state and federal, of the very real benefits that flow from federalism.

Federalism posits that wisdom is neither exclusively found in Washington, D.C., nor, for our purposes, at the federal Supreme Court. State courts can serve as centers for constitutional interpretation that can help other state courts *and* the federal Supreme Court develop better insight into the state *and* federal Constitutions. That collaboration can lead, in turn, to the development of better constitutional law, which is a good thing, after all, because that law embodies our most important policy choices about governmental institutions and their relationship with the people they serve.

A related point is that the federal Supreme Court is not well suited to the role of defining the relationship between state governments and their citizens, which is the role that Gardner's thesis would assign to it. Historical developments have required the Supreme Court to assume a role in that process, but there is good reason not to give it a greater role than necessary. When the federal government was established, the federal Supreme Court was given a very

12. Of course, the obligation of state judges to interpret their state constitution independently does not depend on whether they take an oath to uphold their constitution. The obligation is inherent in the function that they perform. The traditional focus on the role of courts in developing constitutional law obscures the fact that the same obligation is imposed on lawmakers and executive officials as well. A state legislator who votes for a bill is required to decide for herself that the proposed law is constitutional under the state and federal constitutions before voting for it. She cannot cede to someone else the responsibility to make that decision any more than a state judge can do so in deciding a case before her. In that respect, the obligation owed by state and federal officials in each branch of government is symmetrical.

In theory, in discharging its responsibility to interpret its state constitution independently, a state court conceivably could decide that the state constitution was uniformly intended to be interpreted in a manner consistent with the interpretation given comparable provisions of the federal Constitution by the federal Supreme Court. I question, however, whether a state court could find principled support for that conclusion, absent an explicit provision in the state constitution to that effect. *See, e.g.*, CAL. CONST. art. I, § 24 (requiring state constitutional protections for criminal defendants to be interpreted by California courts in a manner consistent with the federal Constitution). At bottom, people formed separate states, rather than joining existing states or remaining in a federal territory, because they wanted to have their own state government. Implicit in that decision was the expectation that state officials would do their jobs and would not assign them to others.

limited role in regulating the relationship between state governments and the people they affect. Except for enforcing the few provisions in the original federal Constitution that impose limits on the states,¹³ the federal Supreme Court had no role in that process. The responsibility for that relationship was left to state institutions, including state courts.

The federal Supreme Court's role in that relationship changed in the twentieth century for a variety of reasons. The necessary effect of that change is that the Supreme Court now is required to decide the extent to which the federal Constitution constrains the actions of state governments toward the people they affect. In doing so, it establishes the minimum standard that state governments must observe in their conduct toward those people. Gardner would convert that role to one in which the Supreme Court's standard would become the maximum standard as well. Further, that change in the Supreme Court's role would replace diversity of constitutional interpretation with uniformity. It also would replace state institutions and constitutions, which are closer and more responsive to the people they affect, with a federal institution and constitution that are more distant and less responsive.

It is difficult to see the wisdom in such a change. People understandably value their ability to affect their government; otherwise, they would abolish state governments and give all governmental authority to the federal government. In Oregon, for example, judges are elected to six-year terms and are subject to recall from office during their term if the people they serve become dissatisfied with them.¹⁴ People can propose amendments to the Oregon Constitution by initiative without participation by the legislature, and can adopt constitutional amendments by a majority vote at a statewide election.¹⁵

That system of citizen participation, or some variation of it, is found in every state. It fosters, and was intended to foster, diversity among states. It also gives people significant control over their relationship with their state governments. It is not for academicians or state judges to give people a different system than the one they have chosen for themselves. Here again, it should be apparent that the change in that system that Gardner seeks would require amendment of the federal Constitution or of the state constitutions, because the role that Gardner posits for state courts is inconsistent with the role they currently occupy under the federal system established by those

13. See, e.g., U.S. CONST. art. I, § 10 (prohibiting states from enacting *ex post facto* laws, bills of attainder, and laws impairing contractual obligations). *But cf.* *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (guarantee of republican form of government in U.S. CONST. art. IV, § 4, not enforceable by federal courts).

14. OR. CONST. art. II, § 18; *id.* art. VII, § 1.

15. *Id.* art. IV, § 1(2).

constitutions.¹⁶

Some other reasons to reject Gardner's thesis are perhaps best explored through consideration of Holmes' famous aphorism that the "life of the law has not been logic [but] experience."¹⁷ The aphorism was stated in a book on common law, a subject which also provides a useful perspective on federalism and state constitutional interpretation.

In a recent article, Justice Linde posed the question whether state constitutions are common law.¹⁸ The answer to that question is that in one respect they are, but in another they are not. State constitutional interpretation is like common law to the extent that it involves state courts in a common enterprise of law development with other state and federal courts. It is unlike common law, however, in that the interpretive task must focus on the specific provisions of the state constitutions that are at issue. State courts can gain insight, but no more, from the decisions of state and federal courts interpreting comparable constitutional provisions, in much the same way that they gain insight from other courts into common-law issues.¹⁹ As with the common law, that process will dependably lead to diversity in constitutional interpretation, but there is no more reason to be concerned about diversity in the legal relationship between state governments and the people they serve than there is in the relationships regulated by the common law.

Holmes' aphorism embodies a belief that experience is more important than logic in the development of law. If that principle applies beyond the common law, and I believe that it does, then it has implications for constitutional interpretation. Gardner asserts that the federal constitutional "discourse" is

16. Gardner questions whether states are distinct polities, such that it makes any sense for them to have distinct constitutions that prescribe the relationship between the people in them and their state governments. See *Failed Discourse*, *supra* note 6, at 814-18. I have no doubt on that score. As a native Oregonian, I value the distinctive legal and political culture of our state, and I am not alone in the desire to preserve it. I am certain, however, that the ability to do that depends on people being close to the institutions that are important to that culture. It cannot be done if those institutions are in Washington, D.C. Oregonians should not have to adopt a new constitution to preserve their close relationship with their state government, which is what Gardner would have them do. That close relationship is secured by the state and federal constitutions that they already have.

17. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

18. Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

19. As with the common law, state courts are required to decide what the constitutional law is in their state; they cannot leave decisions on constitutional issues to the courts of other states or to the federal Supreme Court any more than they can leave decisions about their common law to other courts or to the American Law Institute. A state court can find the analysis developed by another court or institution to be persuasive on an issue, but the court must decide for itself whether that analysis is the correct one to apply under its state constitution.

“extraordinarily rich.”²⁰ I share Justice Linde’s view that the discourse of which Gardner speaks is decidedly one-sided;²¹ it may be rich on the academic side of the discourse, but not on the federal Supreme Court’s side.

Moreover, if Holmes is right, the academic discourse has little utility unless the ideas and insights that it offers are implemented, because experience with those ideas is more important than the abstract logic of them. That means, in practice, that the ideas must be implemented in real cases over an extended period of time to establish their merit. Without the opportunity to implement the ideas developed by academicians and others, the discourse of which Gardner speaks risks becoming sterile.²²

It should be obvious that opportunities to implement proposed constitutional analyses will be severely limited if there is only one court in the country that is in a position to implement them, especially one that may be as institutionally incapable of systematic constitutional-law development as the federal Supreme Court now appears to be. Conversely, the opportunity to use experience to test the merit of doctrinal ideas will be significantly greater if state courts discharge their obligation to interpret their state constitutions independently, because each state court will be free to join such an effort.

The experience with the common law again helps to put the issue in perspective. If adopted, Gardner’s approach would be equivalent to assigning to one court the responsibility of making all of the common law doctrinal decisions or, to put it another way, it would be equivalent to assigning to one court the task of writing the *Restatements* and to all others the task of following them.²³ I have little doubt that the common law would be less satisfactory as a body of law if the work to create it were parceled out in that way. I also am confident that the academic discourse about the common law would be less rich if implementation of the ideas presented in it depended on a single court.

Oregon’s experience with developing the modern analysis of its state constitutional guarantee of free expression is instructive. Oregon’s free-speech analysis is based on an analysis presented by then-Professor Linde in a 1970 article published in the *Stanford Law Review*.²⁴ As with many scholarly

20. *Failed Discourse*, *supra* note 6, at 770.

21. *See Comments on Gardner*, *supra* note 7, at 932.

22. Alternatively, it risks becoming remarkably narrow, confined as it would be, to consideration of constitutional doctrine developed by a single court.

23. The *Restatement* analogy is imperfect, because state courts do not “follow” the *Restatements*; they use them for whatever insight they can provide on the legal issues that they address. Nevertheless, the analogy is useful.

24. Hans A. Linde, “*Clear and Present Danger*” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 *STAN. L. REV.* 1163 (1970) [hereinafter “*Clear and Present Danger*”].

constitutional-law pieces of the period, the intended audience consisted of academicians and the federal Supreme Court. The analysis dealt with the First Amendment prohibition against the enactment of laws abridging freedom of speech. It was well developed and, in theory, was intended to be one that the Supreme Court might adopt.

I am sure that it came as no surprise to Linde that the Supreme Court did not adopt his proposed analysis. Fortunately, his appointment to the Oregon Supreme Court in 1977 gave him the opportunity to persuade that court to adopt his analysis as the analysis it uses to interpret Oregon's free-speech guarantee, which it did.²⁵ I have had extensive experience with that analysis as a lawyer, commentator, and judge. My latest effort to grapple with it is found in a concurring opinion that I wrote in *State v. Maynard*.²⁶ There are two conclusions that I draw from that experience.

First, although Linde's proposed analysis was thoroughly discussed in the *Stanford Law Review* article, it did not deal with a number of issues with which a comprehensive free-speech analysis must deal.²⁷ Consequently, adoption of the analysis in Oregon required significant adjustments to it.²⁸ Further, the use of the analysis over the past fourteen years has required additional adjustments to it, and there remain a number of issues to be addressed under it that may lead to more adjustments. I am convinced, however, that the experience Oregon courts have had with the analysis was essential to make it a workable analysis, and to establish it as a true alternative to current First Amendment analysis.²⁹ The Oregon analysis is much stronger as a result of that work, and it would be stronger still if other courts were to join the effort to develop it.

Second, Linde's analysis would have had no effect on First Amendment jurisprudence had it not been adopted in Oregon. The analysis was interesting

25. Compare *id.* at 1179-86 & nn.66 & 70 with *State v. Robertson*, 649 P.2d 569, 576, 578-79 (Or. 1982). See generally Rex Armstrong, *Free Speech Fundamentalism—Justice Linde's Lasting Legacy*, 70 OR. L. REV. 855, 859-67 (1991) [hereinafter *Free Speech Fundamentalism*].

26. 910 P.2d 1115, 1120 (Or. Ct. App. 1996) (Armstrong, J., concurring).

27. See *Free Speech Fundamentalism*, *supra* note 25, at 870-72.

28. See *id.*

29. Of course, the Holmes aphorism speaks to that point. It assumes, correctly, that logic can take you only so far when dealing with real people, institutions, or things, rather than with abstractions. You cannot address or even conceive of all of the issues implicated by a particular analysis until the analysis has been applied by courts over an extended period of time. Even then, the analysis will continue to evolve as the culture and institutions in which it functions evolve. My own experience with the Oregon free-speech analysis is illustrative. I have written three comprehensive discussions of the analysis, and each one has led to a significant change in my understanding of it. See, e.g., *Maynard*, 910 P.2d at 1128 n.14. Furthermore, comments that I already have received about my *Maynard* concurrence, including comments from Justice Linde, suggest that more work remains to be done with the analysis.

and well intended, but it, like most other academic offerings, would have had no real effect on constitutional law. It certainly would not have been part of free speech discourse over the past twenty-five years, as it has been in Oregon. And no group of academicians would have bothered to devote any time to criticize or refine it as people, in fact, have done as a result of its adoption in Oregon.³⁰ In summary, experience with the analysis has given it life, which is something it would not have had were state courts to accept Gardner's view of their role. Oregon constitutional law, and constitutional law in general, would have been less rich as a result.³¹

Paradoxically, experience, in the form of a body of case law, can reduce the richness of constitutional discourse because it prevents consideration of worthwhile alternative analyses. Again, the experience with Linde's free-speech analysis is illustrative.

As noted above, the analysis was written for the federal Supreme Court, but it would never have been adopted by that Court because the Court would have had to abandon a substantial body of its own case law to do it. Understandably, the Court rarely does that. It is even less likely to do that if the alternative analysis is an untried one, that is, if it is not one that has stood the test of experience. The Linde analysis has since stood that test, but there is no reason to expect the federal Supreme Court to adopt it, whatever its intrinsic merits, because of the principle of *stare decisis*.

Of course, state courts in states other than Oregon are not equally constrained from considering the analysis, because many of them do not have an independent body of cases decided under their state constitutional guarantees of free expression. The more interesting issue, however, is whether there is reason to value the opportunity to develop alternative constitutional analyses. I believe that there is, because there is value in diversity in that area of law and social policy as much as in many other areas of law, which diversity is something that federalism seeks to foster.

30. See, e.g., G. Edward White, *Hans Linde as Constitutional Theorist: Judicial Preservation of the Republic*, 70 OR. L. REV. 724-38 (1991); *Free Speech Fundamentalism*, supra note 25; Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081 (1983); Franklyn S. Haiman, *Comments on Kent Greenawalt's Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1125 (1983); Commentary, 78 NW. U. L. REV. 1129 (1983); George Pitcher, Note, *Moser v. Frohnmayer: Oregon's Dangerous Approach to Protecting Commercial Speech*, 31 WILLAMETTE L. REV. 685 (1995).

31. At bottom, Linde's analysis would not have been taken seriously had it not been adopted and refined by a court, that is, if its logic had not been tested through experience. That is consistent with one of the principles that I believe is embodied in the Holmes aphorism, which is that a legal principle or analysis will be better understood and accepted if people experience it rather than only read of it.

The value of diversity in constitutional law is perhaps best explored through consideration of biological diversity and evolutionary theory, as developed by Stephen Jay Gould in his book *Wonderful Life*.³² In *Wonderful Life*, Gould explains his theory of contingent history, in which current life forms are considered to be the products of historical accidents and not the inevitable result of evolutionary development. Those life forms are well-enough adapted to current environmental conditions to survive and reproduce, but their existence is completely fortuitous. If you replayed the tape of life on earth from its original starting point, you would end up with a very different group of life forms from those that now exist, yet the former would be as equally well adapted and successful as the latter.³³

Furthermore, the history of life on earth suggests that its diversity has been reduced by a series of mass extinctions. In a mass extinction, up to ninety-six percent of the existing species might be eliminated.³⁴ The selection of those that survive is largely fortuitous, in that the characteristics that allow a particular species to survive the event will have developed without regard to whether the event would occur, and those characteristics would not have been expected to give them any advantage in such an event. After such a mass extinction occurs, new species arise that fill newly available environmental niches, but their success implies nothing about their adaptive merit.³⁵

Finally, biological diversity may have value beyond the aesthetic, emotional, and economic value it has for people. Up to a point, it provides the means by which new species can arise, because a more complex ecosystem

32. STEPHEN JAY GOULD, *WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY* (1989) [hereinafter *WONDERFUL LIFE*]. In his tenth anniversary broadcast of *A Prairie Home Companion*, Garrison Keillor told a story in which he analogized that broadcast to an experience he had had as a young Midwesterner in New York City, the central feature of which was his spontaneous but unsuccessful effort to impress a beautiful woman. The analogy was humorous and affecting, but Keillor nevertheless expressed the opinion at the end of the story that "there's no such thing as a perfect analogy." GARRISON KEILLOR, *News from Lake Wobegon, on TEN YEARS ON THE PRAIRIE* (Minnesota Public Radio 1984). I disagree, because I think the analogy between federalism in constitutional law and Gould's view of evolution is such an analogy. I think it apt to mention Keillor's statement, because his show, itself, is instructive on the issue of federalism, involving, as it does, the presentation to a national audience of a decades-long monologue about characters in the mythical town of Lake Wobegon, Minnesota. The show's success exemplifies the value of regional diversity in a national culture. Finally, given the context of this discussion, which concerns the Holmes aphorism about "the life of the law," it seems appropriate to explore an analogy between biological evolution and federalism.

33. See *WONDERFUL LIFE*, *supra* note 32, at 277-323. For a thoughtful critique of the views expressed by Gould in *Wonderful Life*, see DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 262-312 (1995) [hereinafter *DARWIN'S DANGEROUS IDEA*].

34. See, e.g., *WONDERFUL LIFE*, *supra* note 32, at 306.

35. *Id.* at 305-08. But see *DARWIN'S DANGEROUS IDEA*, *supra* note 33, at 299-312.

provides more opportunities for different forms of life to flourish.³⁶

Against that background, we can explore the evolution of state and federal constitutional law. As with life on earth, the existing body of constitutional law is the product of contingent history, driven, as it was, by the vagaries of cases, judges, and assorted other influences on its development. That the current body of law exists says little about its intrinsic merit. The existing law simply represents the accumulated experience of the relevant institutions.³⁷

The development of that law in the twentieth century is similar to the process by which the dinosaurs became extinct at the end of the Cretaceous period, at least according to one possible scenario. In that scenario, dinosaur species were progressively decimated by increased volcanism and other gradual changes in the global environment until they were completely wiped out by the effects of a large comet or asteroid that struck the earth near the Yucatán Peninsula about sixty-five million years ago.³⁸

That is similar to what has happened to independent interpretation of state constitutions. The ascendance of federal constitutional law and doctrine in the twentieth century has progressively displaced independent state constitutional law, the same way that volcanism may have decimated the dinosaurs. Gardner's thesis of federal hegemony in constitutional law, in turn, is equivalent to a comet on a trajectory toward earth. If his thesis were accepted, it would wipe out all state constitutional law, leaving only federal law in its place. After that occurred, you would see a somewhat different body of law develop, reflecting the contribution of state courts to the existing body of federal law. The evolution of that law would be similar to the evolution that occurred with finches on the Galapagos Islands. The Galapagos Islands are populated by many species of finch. There is great variety among them because they arrived on barren,

36. The last point is perhaps the most complicated, and debatable, at least based on my rudimentary knowledge of the relevant, popular literature. This is not the place, however, to explore the degree to which my understanding accords with current scholarship. For a recent discussion of the evolution of complexity in nature, see MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR* 215-60 (1994).

37. Admittedly, the process by which that law came to exist is not as random as that which led to the current state of life on earth, because law is the product of intentional behavior and evolution is not. Species cannot choose to evolve to respond to changing environmental conditions, and the genetic changes that provide the material for evolution are completely fortuitous. Nevertheless, the process by which law evolves is sufficiently influenced by experience rather than logic, as the Holmes aphorism asserts, for the analogy to work. I have to admit, however, that the need to acknowledge the difference between constitutional and biological evolution in this footnote makes me think that Garrison Keillor may have been right when he said that there is no such thing as a perfect analogy. See *supra* note 32.

38. See generally STEPHEN JAY GOULD, *DINOSAUR IN A HAYSTACK* 151-52, 162-63 (1995); STEPHEN JAY GOULD, *EIGHT LITTLE PIGGIES* 306-07 (1993).

newly emerged, volcanic islands and evolved to fill environmental niches that are filled by very different bird species in other, less isolated, environments. The Galapagos finches are successful in their environment, but other bird species would have been equally successful if they had migrated to the islands before the finches came to dominate.³⁹

Gardner seeks to achieve in constitutional law that which the Galapagos finches achieved in their environment, with state courts simply refining the basic body of law developed by the federal Supreme Court. His approach would be even more restrictive in its effect, however, because state courts would be expected to continue to adjust the constitutional law in their states to follow the latest pronouncements of the federal Supreme Court, so that the constitutional law in any state would never become distinct or independent. In biological terms, state courts would never produce new species of constitutional law.

The analogy bears, as well, on Gardner's point about the rich discourse in federal constitutional law. The study of the Galapagos finches has produced a body of literature, but that literature is not nearly as rich as that dealing with the full variety of bird species.

To complete the analogy, the lack of biological diversity among Galapagos Island birds increases the risk of their extinction. For example, a virus specific to finches could decimate the bird population on the islands, but it would not have that effect in other, more diverse environments. Even if a comparable lack of diversity in constitutional law does not create a similar risk to survival of that law, the broader points about evolution that Gould has developed are relevant. The current body of federal constitutional law is not the best or only body of law that could address the relevant policy issues. It simply represents the one that we have.

Equally sound, if not better, alternative analyses reflecting different constitutional policies could be established. But, consistent with the Holmes aphorism, the only way to determine the merit of those analyses and their concomitant policies is by going through the experience of developing and applying them in a real legal environment. And that can happen only if states preserve their role in the federal system as independent sources of state constitutional law. Their role in that process is no different than their role in the development of social policy in any other area of law. The diversity that federalism fosters is a source of strength, not weakness, in constitutional law as much as in any other sphere of social activity.

39. See, e.g., STEPHEN JAY GOULD, *THE FLAMINGO'S SMILE* 347-59 (1985).

Returning again to the Holmes aphorism, there is a necessary tension between experience and logic in law development. Notwithstanding the value ascribed to experience, there is value to logic in the law as well. It is inevitable that coherence will suffer as law is developed on a case-by-case basis over a long period of time, as is the case with much constitutional law. It does not follow, however, that the resulting incoherence in the law is of unalloyed value.

As it turns out, the diminished state of state constitutional law may present a unique opportunity to promote greater coherence in constitutional law because there is not a body of state constitutional law in most states that constrains how courts must look at constitutional issues. To some extent, then, state courts are in a position to reflect more broadly on the analytical and doctrinal issues presented in constitutional interpretation as they embark on a renewed and, perhaps, reinvigorated role in developing their state law.

Again, Oregon's experience with its free-speech analysis is instructive. The lack of a developed body of law under the Oregon constitutional guarantee of free expression made it possible for the Oregon Supreme Court to adopt Hans Linde's proposed free-speech analysis as the analysis it uses under that guarantee. Even after the inevitable adjustments to that analysis occasioned by fourteen years of development through judicial interpretation, it remains a remarkably coherent and intelligible analysis. Unlike the current First Amendment analysis employed by the federal Supreme Court, it gives lawmakers real guidance about the laws affecting expression that they can enact, which is of distinct value to the law-making process.⁴⁰ The analysis has been remarkably successful, both because it is coherent and because it protects expression as the Oregon Constitution intended, while allowing the government to deal with the harmful effects of expression.⁴¹

There is no reason to think that Oregon's modern experience with state constitutional law is unique. If Gardner's thesis were accepted, however, the process of developing distinct state constitutional analyses would end. We would be the poorer for that.

Oregon's experience interpreting its state constitution provides a basis on which to explore a last point about richness. In areas ranging from free speech to equal treatment, Oregon courts have sought to develop constitutional analyses that reduce the policy-making role of courts. They do that by interpreting the relevant constitutional provisions to establish a standard that does not involve balancing of constitutional restrictions on government against other social

40. *Free Speech Fundamentalism*, *supra* note 25, at 878-81.

41. *See id.* at 878-79; *State v. Maynard*, 910 P.2d 1115, 1120-28 (Or. Ct. App. 1996) (Armstrong, J., concurring).

policies. The constitutional standard, itself, embodies the relevant policy choice, based on the court's understanding of the policy choice the people made by placing and keeping in their constitution a particular constraint on actions by their state government.

That approach to constitutional interpretation is best illustrated by comparing the federal balancing approach against the Oregon approach in the context of restrictions on the location of adult bookstores. In *Young v. American Mini-Theatres, Inc.*,⁴² the federal Supreme Court upheld under the First Amendment a Detroit, Michigan zoning ordinance that imposed various restrictions on the location of adult bookstores and theaters.⁴³ It did so based on its determination that the restrictions struck an appropriate balance between the importance of the governmental policies advanced by the restrictions and the degree to which the restrictions affected expression.⁴⁴ In essence, the Court determined that the policy choice made by the lawmakers was an appropriate choice in light of the policies that it determined were embodied in the First Amendment, based on *its* evaluation of the importance of the competing policies.

In contrast, in *City of Portland v. Tidyman*,⁴⁵ the Oregon Supreme Court struck down a comparable Portland, Oregon zoning ordinance.⁴⁶ It did so under Oregon's free-speech analysis, which does not involve balancing the policies advanced by a particular restriction of expression against the policies embodied in the state constitutional guarantee of free expression.⁴⁷ The analysis focuses, instead, on whether the restriction, by its terms, is addressed to the harmful effects of the targeted expression or to the expression itself. It does that by requiring lawmakers to make the harmful effects part of the operative terms of the restriction; thus, the restriction will apply only when the harmful effects against which it is addressed are shown to exist.⁴⁸

As the foregoing description indicates, the Oregon analysis does not involve Oregon courts in an on-going, ad hoc process of evaluating and balancing

42. 427 U.S. 50 (1976).

43. *Id.* at 72-73.

44. *Id.* at 75-83 (Powell, J., concurring).

45. 759 P.2d 242 (Or. 1988).

46. *Id.* at 251.

47. *Id.* at 249.

48. See *State v. Maynard*, 910 P.2d 1115, 1120-26 (Or. Ct. App. 1996) (Armstrong, J., concurring); *Free Speech Fundamentalism*, *supra* note 25, at 876-79. It is worth noting that, in principle, the Oregon and federal analyses can allow equivalent restrictions on expression to be imposed in many circumstances, including those involving the location of adult businesses, if the factual assumptions on which the federal Supreme Court has upheld such restrictions can be established to be true. For a more detailed discussion of this point, see *Maynard*, 910 P.2d at 1121-22 (Armstrong, J., concurring).

competing policies in the course of deciding whether a particular governmental action violates a constitutional constraint on government. Rather, it applies a standard that, itself, embodies the policy choice that the state constitution is determined to have made, and leaves it to policy makers to function within the constraints that the standard establishes. That analysis does not involve courts in on-going policy making; the federal analysis does.

This is not the place, and I am not the person, to compare in detail the Oregon approach to state constitutional decision making with the federal Supreme Court's use of interest balancing. The issue has been explored in some depth by Justice Linde and others in a symposium in the *Albany Law Review* on interest balancing as a mode of constitutional analysis⁴⁹ and more generally by Justice Linde in an earlier article in this law review.⁵⁰

I am confident, however, that the Oregon approach has promise and merits serious consideration. In accordance with the Holmes aphorism, however, seeing and making that approach work may be essential to establishing its viability as a mode of constitutional analysis. If the federal Supreme Court is the only source of original constitutional analysis, that will never happen and a very different, and perhaps better, model of the judicial role in constitutional interpretation will never emerge.

In summary, federalism can play an important role in the development of constitutional law in this country, as it was, and is, intended to do, but only if state courts continue to fulfill their constitutional obligation to interpret their

49. Compare Hans A. Linde, *The Shell Game of "Interest" Scrutiny: Who Must Know What, When, and How?*, 55 ALB. L. REV. 725 (1992) with, e.g., Sanford Levinson, *Tiers of Scrutiny—From Strict Through Rational Bases—And the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. REV. 745 (1992) and Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549 (1992) and Michael J. Perry, *Constitutional Indeterminacy: Judicial Specification and Moral Justification*, 55 ALB. L. REV. 561 (1992) and Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605 (1992).

50. See Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics*, 28 VAL. U. L. REV. 821 (1994); see also Robert F. Nagel, *Introduction to INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS A. LINDE TO AMERICAN CONSTITUTIONALISM I* (Robert F. Nagel ed., 1995); G. Edward White, *Hans Linde as Constitutional Theorist: Judicial Preservation of the Republic*, 70 OR. L. REV. 707 (1991). One point worth noting, however, is that the Oregon approach may better correlate the judicial role with judicial competence, by recognizing that courts are not well suited to make policy because they have limited means by which to obtain information on which to base policy choices. See *id.*; see also David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988) (discussing Oregon's analysis of the state constitutional guarantee of equal treatment, which analysis does not ask courts to evaluate the wisdom or necessity of a particular governmental decision to treat people differently).

state constitutions independently. I do not deny that that effort requires much of litigants and judges, but the rewards are worth it.